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THE
ATLANTIC REPORTER,
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CONTAINING ALL THE DECISIONS OF THE

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CONNECTICUT, and PENNSYLVANIA; Court of Errors and Appeals,
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THE
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MACAULEY et al. v. TIERNEY et al.
(Supreme Court of Rhode Island. Oct. 28,
1895.)

CONTRACT IN RESTRAINT OF TRADE—VALIDITY.

1. An agreement by the members of a national association of master plumbers to withdraw their patronage from any dealer selling supplies to others than master plumbers is not unlawful, even though "master plumbers" be construed to mean the members of said association.

2. An allegation that said association conspired to ruin complainants' business was not established by evidence of said agreement, as the object of the combination and the means employed were not unlawful.

Bill by Macauley Bros. against Patrick Tierney and others to enjoin respondents from doing certain acts to the detriment of complainants' business. Bill dismissed.

Edward L. Gannon, for complainants.
James, Wm. R. & Theodore F. Tillinghast, for respondents.

MATTESON, C. J. The complainants are master plumbers, engaged in the business of plumbing. In the transaction of their business, they have been accustomed, and are obliged, to purchase from time to time materials from wholesale dealers in Rhode Island and other parts of the United States, and, among others, from L. H. Tillinghast & Co., of Providence, who, with the New England Supply Company, are the only wholesale dealers in plumbing materials in this state. The respondents are also master plumbers, and officers and members of the Providence Master Plumbers' Association, a voluntary association, affiliated with the National Association of Master Plumbers of the United States of America. The latter association, on June 26, 1894, at Baltimore, in convention assembled, adopted resolutions that they would withdraw their patronage from any firm manufacturing or dealing in plumbing material selling to others than master plumbers; that the masters should demand of manufacturers and wholesale dealers in plumbing material to sell goods to none but master plumbers; that the association should keep a record of all journeymen and plumbers who place in buildings plumbing material bought

by consumers of manufacturers or dealers; that a committee be appointed by the association in every state and county for the purpose of reporting to the proper officers, at its head office in the state, any violations of these resolutions; that the convention urge upon the association to perfect and adopt a uniform system of protection for the trade over their entire jurisdiction. Subsequently, a resolution of amendment was adopted, at St. Louis, that the interpretation of the resolutions be left in the hands of the executive committee with power. Still later, a resolution was adopted, at Washington, "that it is the sense of this convention that in the future the interpretation of the term of 'master plumber,' as set forth in the above resolutions, to entitle him to purchase plumbing material, be construed to mean master plumbers that have qualified under state or local enactments where such exist."

It is alleged by the complainants that the interpretation put by the executive committee of the National Association on these resolutions is that those only are to be regarded as master plumbers who are members of the National Association, or members of the several local associations affiliated with the National Association; that the complainants have been informed by various wholesale dealers in plumbing materials in the United States outside of this state that they will not sell them supplies unless they shall join the Providence Master Plumbers' Association, and that these dealers are forced to refuse to sell them supplies because of the resolutions referred to and the interpretation put upon them by the executive committee of the National Association, and because of the action of the Providence Master Plumbers' Association in causing such dealers to be notified not to sell to the complainants, under the penalty, in case of their continuing to do so, of not selling to any member of the association; that the Providence Master Plumbers' Association, acting through the respondents, has issued notice to L. H. Tillinghast & Co. and the New England Supply Company to sell supplies to none but members of the association; and that, in consequence of these notices, these wholesale dealers have notified the complain-

ants and other master plumbers that they will not sell plumbing materials to plumbers not members of the Master Plumbers' Association in the places in which they do a plumbing business, or members of the National Association; and that, since the date limited in the notices, these dealers have refused to sell to the complainants; and that they have been unable to purchase supplies from them and from other wholesale dealers in the United States, because they are not members of the Providence Master Plumbers' Association. The bill charges that the Providence Master Plumbers' Association and the National Association have conspired together to prevent the complainants from buying supplies anywhere in the United States, and to utterly ruin their business, unless they will submit to the conditions of membership in and become members of the Providence Master Plumbers' Association; avers that the business of the complainants will be irremediably ruined unless the respondents are enjoined from further action, and are compelled to rescind the action which they have already taken; and prays that the respondents may be directed to rescind the notices given, and all orders and requests, both oral and written, to any and all dealers in plumbers' supplies, not to trade with such dealers, unless they shall refuse to sell supplies to any but members of such associations, and to rescind and withdraw any and all orders and requests to the National Association to prevent wholesale dealers outside of the state of Rhode Island from selling supplies to the complainants; and that the respondents may be enjoined from all further interference with the complainants by notifying such dealers not to sell to them, or by further requests to said National Association to prevent them from buying supplies anywhere in the United States. Testimony has been submitted by the complainants tending to prove the allegations of the bill.

Assuming that the allegations are fully sustained by the proof, have the complainants made a case entitling them to relief? We think not. The complainants proceed on the theory that they are entitled to protection in the legitimate exercise of their business; that the sending of the notices to wholesale dealers not to sell supplies to plumbers not members of the association, under the penalty, expressed in some instances and implied in others, of the withdrawal of the patronage of the members of the associations in case of a failure to comply, was unlawful, because it was intended to injuriously affect the plumbers not members of the association in the conduct of their business, and must necessarily have that effect. It is doubtless true, speaking generally, that no one has a right intentionally to do an act with the intent to injure another in his business. Injury, however, in its legal sense, means damage resulting from a violation of a legal right. It is this violation of a legal right which renders

the act wrongful in the eye of the law, and makes it actionable. If, therefore, there is a legal excuse for the act, it is not wrongful, even though damage may result from its performance. The cause and excuse for the sending of the notices, it is evident, was a selfish desire on the part of the members of the association to rid themselves of the competition of those not members, with a view to increasing the profits of their own business. The question, then, resolves itself into this: Was the desire to free themselves from competition a sufficient excuse, in legal contemplation, for the sending of the notices? We think the question must receive an affirmative answer. Competition, it has been said, is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival, and attracting it to himself, is an act intentionally done, and, in so far as it is successful, to the injury of the rival in his business, since to that extent it lessens his gains and profits. To hold such an act wrongful and illegal would be to stifle competition. Trade should be free and unrestricted; and hence every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of the class of which fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants or workmen, and the procurement of violation of contractual relations, are instances.

A leading and well-considered case on this subject was *Steamship Co. v. McGregor*, 23 Q. B. Div. 598 [1892] App. Cas. 25. In this case the defendants, who were shipowners, had formed a league for the purpose of keeping in their own hands the control of the tea-carrying trade between London and China, and for the purpose of driving the plaintiff and other competing shipowners from the field. The acts complained of as unlawful by which the defendants sought to accomplish their purpose were: (1) The offer to local shippers and other agents of a benefit by way of rebate if they would not deal with the plaintiff, which was to be lost if this condition was not fulfilled; (2) the sending of special ships to Hankow, in the hope by competition to deprive the plaintiff's vessels of profitable freight; (3) the offer at Hankow of freights at so low a rate as not to repay the shipowner for his adventure, in order to smash freights and frighten the plaintiff from the field; (4) pressure put on their own agents to induce them to ship only by the defendants' vessels, and not by the plaintiff's. The plaintiff alleged that the league was a conspiracy, and claimed damages and an injunction against a continuance of the alleged unlawful acts. It was held that since the acts of the defendants were not in themselves unlawful, and were done by them with the lawful object of protecting and extending their own trade and increasing their profits,

and as they had employed no unlawful means, the plaintiff had no cause of action. Bowen, L. J., remarks (page 614): "His [the trader's] right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is intentional procurement of the violation of individual rights, contractual or other, assuming, always, that there is no just cause for it. The intentional driving away of customers by show of violence (*Tarleton v. McGawley*, Peake, 270); the obstruction of actors on the stage by preconcerted hissing (*Clifford v. Brandon*, 2 Camp. 358; *Gregory v. Brunswick*, 6 Man. & G. 205); the disturbance of wild fowl in decoys by the firing of guns (*Carrington v. Taylor*, 11 East, 571; *Keeble v. Hickeringill*, Id. 574, note); the impeding or threatening of servants or workmen (*Garret v. Taylor*, Cro. Jac. 567); the inducing of persons under personal contracts to break their contracts (*Bowen v. Hall*, L. R. 6 Q. B. Div. 333; *Lumley v. Gye*, 2 El. & Bl. 218),—all are instances of such forbidden acts. But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than to pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that competition so pursued ceases to have a just cause or excuse when there is ill will or personal intention to do harm, it is sufficient to reply . . . that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of 'just cause or excuse' acts done in the course of trade which would be but for such motive justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection." The case at bar contains no element of the character of those enumerated by the lord justice which are forbidden by law, unless the threat of the withdrawal of patronage may be considered as amounting to coercion. We do not think, however, that such a threat can be regarded as coercive within a legal sense; for, though coercion may be exerted by the application of moral as well as physical force, the moral force

exerted by the threat was a lawful exercise by the members of the associations of their own rights, and not the exercise of a force violative of the rights of others, as in the cases cited by the lord justice. It was perfectly competent for the members of the association, in the legitimate exercise of their own business, to bestow their patronage on whomsoever they chose, and to annex any condition to the bestowal which they saw fit. The wholesale dealers were free to comply with the condition or not, as they saw fit. If they valued the patronage of the members of the associations more than that of the nonmembers, they would doubtless comply; otherwise, they would not.

Closely analogous to the case at bar was the recent case of *Manufacturing Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119. The plaintiff was a manufacturer and seller of lumber, having a large and profitable trade, both wholesale and retail, in Minnesota and the adjoining states. The defendants, comprising from 25 to 50 per cent. of the retail lumber dealers in the states referred to, many of whom were or had been customers of the plaintiff, formed an association, under the name of the Northwestern Lumbermen's Association, for the protection of its members against sales by wholesale dealers and manufacturers to contractors and consumers, by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers not dealers at any point where a member of the association was carrying on a retail yard. The by-laws provided that any member of the association doing business in the town to which lumber thus sold by a manufacturer or wholesale dealer had been shipped should notify the secretary of the association, within 30 days after the arrival of the shipment at its destination, who should thereupon notify the manufacturer or wholesale dealer by whom the shipment had been made that he had a claim against him for 10 per cent. of the value of such sale at the point of shipment; that, if the secretary should be unable to obtain payment, he should refer the matter to the directors, who should hear and determine the claim; that, if the manufacturer or dealer refused to abide by the decision of the directors, it should be the duty of the secretary to immediately notify the members of the association of the name of the manufacturer or dealer, and that he refused to comply with the rules of the association; that, if any member continued to deal with such manufacturer or wholesale dealer, he should be expelled from the association; that, whenever the secretary of the association should succeed in collecting any such claim, the sum collected should be paid to the member or members, in equal shares, doing business at the place of the sale. The plaintiff sold two bills of lumber directed to consumers or contractors at points where members of the as-

sociation were engaged in business. The secretary of the association, having been informed of the fact, notified the plaintiff, in pursuance of the provision of the by-laws, that he had a claim against him for 10 per cent. of the amount of the sales. Considerable correspondence with reference to the matter ensued, in which the plaintiff from time to time promised to adjust the claim, but procrastinated and avoided doing so until finally the secretary threatened, unless the claim was immediately settled, to send the notice provided by the by-laws to all the members of the association. Thereupon the plaintiff brought its suit for an injunction. An *ex parte* injunction having been granted, the defendants obtained an order for the complainants to show cause why it should not be dissolved. The court refused to dissolve the injunction, but on appeal the order continuing the injunction was reversed. The court says: "Now, when reduced to its ultimate analysis, all that the retail dealers have done is to form an association to protect themselves from sales, by wholesale dealers or manufacturers, directly to consumers or other nondealers, at points where a member of the association is engaged in the retail business. The means adopted to effect this object are simply these: They agree among themselves that they will not deal with any wholesale dealer or manufacturer who sells directly to customers not dealers at a point where a member of the association is doing business, and provide for notice being given to all their members whenever a wholesale dealer or manufacturer makes any such sale. That is the head and front of the defendants' offense. It will be observed that the defendants are not proposing to send notice to anybody but members of the association. There was no element of fraud, coercion, or intimidation, either towards the plaintiff or members of the association. True, the secretary, in accordance with section 3 of the by-laws, made a demand on the plaintiff for ten per cent. on the amount of the two sales. But this involved no element of coercion or intimidation, in the legal sense of those terms. It was entirely optional with the plaintiff whether it would pay or not. If it valued the trade of the members of the association higher than that of the nondealers at the same points, it would probably conclude to pay; otherwise, not. It cannot be claimed that making this demand was actionable; much less that it constituted any ground for an injunction; and hence this matter may be laid entirely out of view. Now, was any coercion proposed to be brought to bear on the members of the association to prevent them from trading with the plaintiff? After they received the notice, they would be at entire liberty to trade with the plaintiff or not, as they saw fit. By the provisions of the by-laws, if they traded with the plaintiff, they were liable to be 'expelled'; but this simply meant cease to be members. It was wholly a matter of their own free

choice which they preferred,—to trade with the plaintiff, or to continue members of the association." See, also, *Payne v. Railroad Co.*, 81 Tenn. 507, 514-519; *Cote v. Murphy*, 159 Pa. St. 420, 421, 23 Atl. 190; *Heywood v. Tillson*, 75 Me. 225, 233.

It only remains to notice the charge of conspiracy contained in the bill, upon which considerable stress has been laid, as though the fact that the action of the members of the associations was in pursuance of a combination entitled the complainants to relief. To maintain a bill on the ground of conspiracy, it is necessary that it should appear that the object relied on as the basis of the conspiracy, or the means used in accomplishing it, were unlawful. What a person may lawfully do, a number of persons may unite with him in doing, without rendering themselves liable to the charge of conspiracy, provided the means employed be not unlawful. The object of the members of the association was to free themselves from the competition of those not members, which, as we have seen, is not unlawful. The means taken to accomplish that object were the agreement among themselves not to deal with wholesale dealers who sold to those not members of the associations, and the sending of notices to that end to the wholesalers. This, as we have also seen, was not unlawful. Hence it follows that, as the object of the combination between the members of the associations was not unlawful, nor the means adopted for its accomplishment unlawful, there is no ground for the charge of conspiracy, and the fact of combination is wholly immaterial. *Com. v. Hunt*, 4 Metc. (Mass.) 111, 129; *Bowen v. Matheson*, 14 Allen, 499; *Wellington v. Small*, 3 Cush. 145, 150; *Carew v. Rutherford*, 106 Mass. 1, 14; *Payne v. Railroad Co.*, 81 Tenn. 507, 521; *Hunt v. Simonds*, 19 Mo. 583, 588; *Robertson v. Parks*, 76 Md. 118, 134, 135, 24 Atl. 411; *Steamship Co. v. McGregor*, 23 Q. B. Div. 598 [1802] App. Cas. 25; *Manufacturing Co. v. Hollis*, 54 Minn. 223, 234, 55 N. W. 1119; *Delz v. Wintfree*, 80 Tex. 400, 404, 16 S. W. 111. We are of the opinion that the bill should be dismissed.

WATSON et al. v. STEINAU et al.
(Supreme Court of Rhode Island. Oct. 24,
1895.)

JOINT JUDGMENT—FAILURE TO SERVE ONE PARTY
— ENFORCEMENT.

A judgment of a foreign state, against several defendants jointly, in an action in which one of them was not served with process, cannot, in Rhode Island, be enforced against one of such defendants who in the foreign action was served with process.

Action by Watson & Newell against Steinau Bros. on a judgment. On demurrer by plaintiffs to a plea by the only defendant served that one of the persons against whom the judgment was entered was not served with any process in the suit in which it was entered. Sustained.

Harry C. Curtis, for plaintiffs. Warren R. Perce, for defendants.

TILLINGHAST, J. This is an action of debt on judgment. The declaration sets out that the plaintiffs, on the 9th day of May, 1883, recovered a judgment of the superior court of the city of New York against the defendants, for the sum of \$2,506.89, debt and costs of suit, as by the record thereof now remaining in said court appears, which said judgment is in full force, and not reversed, annulled, or satisfied. Said declaration further sets out that the persons who composed said defendant firm at the time of the rendition of said judgment were Isaac Steinau, Jacob A. Steinau, and Samuel J. Steinau, and that the writ in the case at bar has only been served upon Jacob Steinau. In connection with said declaration, the plaintiff has filed a paper which is styled "a transcript of judgment," and which shows, among other things, that one of said defendants, viz. Samuel J. Steinau, was not summoned in the action upon which said judgment was rendered. To this declaration the said defendant Isaac Steinau has filed a special plea, in which he sets up the fact that said Samuel J. Steinau was not summoned or served with any process in the suit in New York upon which the judgment aforesaid was based; wherefore he prays judgment, etc. To this plea the plaintiffs demur.

The question presented, therefore, for our determination, is whether a judgment of a court of another state, rendered against several defendants jointly, in an action where one of them was not served with process, can be enforced in this state by an action of debt thereon against one of the defendants who in the foreign action was served with process. We think this question must be answered in the negative. From the pleadings in the case, as they now stand, it appears that the New York court rendered judgment against all of said defendants, when only two of them had been served with process; and this being so, and no statutory authority being shown for any such proceeding in that state, the record shows that said court was without jurisdiction as to said defendant Samuel J. Steinau, and that the judgment as to him was a mere nullity. The question, then, arises as to what effect this has on the other defendants who were served with process. While there is some conflict of authority upon this question, yet, we think, the rule which is established by the preponderance of authority is that the plaintiff who sues on a judgment must recover against all of the defendants or none; for, the judgment being an entirety, whatever constitutes a good defense for one of the defendants operates also for the benefit of the others. *Hall v. Williams*, 6 Pick. 232; *Oakley v. Aspinwall*, 4 N. Y. 514; *Richards v. Walton*, 12 Johns. 434; *Holbrook v. Murray*, 5 Wend. 161; *Rangely v. Webster*, 11 N. H. 299; *Knapp v. Abell*, 10 Allen, 485; *Buffum v. Ramsdell*, 55 Me. 252; *Hulme v. Janes*, 6 Tex. 242; *Brocknan v.*

McDonald, 16 Ill. 112; *Williams v. Chalfant*, 82 Ill. 218; *Winslow v. Lambard*, 57 Me. 356; *Burt v. Stevens*, 22 N. H. 229; *Donnelly v. Graham*, 77 Pa. St. 274; *St. Louis v. Gleason*, 15 Mo. App. 25; *Wright v. Andrews*, 130 Mass. 149; *Pratt v. Dow*, 56 Me. 88. See, also, *Frothingham v. Barnes*, 9 R. I. 474. The case of *Nathanson v. Spitz*, Index QQ, —, 31 Atl. 690, relied on by plaintiffs' counsel, does not affect the question here presented. In that case the action was based upon a joint contract; and we held that under section 18, c. 13, of the judiciary act, and also in view of the fact that the sheriff had made a non est return as to the defendant who was not served, which return practically operated as a proceeding of outlawry as to him, the action could be maintained against one of the joint contractors. This suit, however, is not based upon the joint contract of the three defendants above named, but upon a judgment rendered against them jointly, in an action where only two of them were served with process. The demurrer is overruled, and the plea sustained, and the case is remitted to the common pleas division for further proceedings.

McTWIGGAN et al. v. HUNTER et al.
(Supreme Court of Rhode Island. Oct. 28, 1895.)

ASSESSMENT OF TAXES—NOTICE—CONSTITUTIONAL LAW—EXEMPTIONS.

1. Pub. St. c. 43, § 6, requires assessors, "before assessing any tax," to give notice of the time and place of their meeting, which notice shall require all persons and corporations liable to taxation to present accounts of their estates and the value thereof, "at such time as they may prescribe." *Held* to provide for a notice of but one meeting, for the purpose both of presenting accounts and making assessments.

2. Pub. St. c. 43, §§ 6-8, requiring persons and corporations to furnish verified statements of their taxable property, and providing that whoever neglects to furnish such account, if overtaxed, shall have no remedy, and requiring assessors to make lists of taxable property, distinguishing those who have presented their account from those who have not, do not violate Const. U. S. art. 5, providing that no person shall be deprived of property without due process of law.

3. A town council, in consideration of a corporation presenting to it certain property, agreed to exempt other of its property from taxation for 10 years under any act of the general assembly which might be passed authorizing such exemption. Act May 21, 1892, authorized electors of a town qualified to impose a tax, or a city council, to exempt property from taxation for a period of 10 years. The city, after the act passed, neither by vote exempted or authorized its council to exempt the property from taxation. *Held*, that the property was not exempt from taxation.

4. Where a city council enters into a contract to exempt certain property of a corporation from taxation in consideration of the corporation transferring to it other property, the fact that the city has accepted the benefits of the contract will not estop it from avoiding the contract on the ground that the city council had no authority to enter into it.

5. The omission by assessors to include in

an assessment property which they believe is exempt by a valid contract with their city, will not render the assessment void, though such contract was in fact invalid.

Bill by William H. McTwiggan and others against George F. Hunter and others for an injunction to restrain the collection of taxes. Denied.

Bassett & Mitchell, for complainants. Cooke & Angell and E. P. Allen, for respondents.

MATTESON, C. J. This is a bill to enjoin the collection of a tax because, as alleged, its assessment was illegal. The first ground upon which it is claimed that the assessment was illegal is that the assessors gave no notice of the time and place of their meeting, as required by law. The provisions of the statutes relating to the assessment of taxes, so far as material to the present inquiry, are contained in Pub. St. R. I. c. 43, §§ 6-8, 18, and are as follows:

"Sec. 6. Before assessing any tax, the assessors shall post up printed notices of the time and place of their meeting, in three public places in the town, for three weeks next preceding the time of such meeting, and advertise in some newspaper published in the town, if any there be, for the same space of time. Such notices shall require every person and body corporate liable to taxation to bring in to the assessors a true and exact account of all his ratable estate, describing and specifying the value of every parcel of his real and personal estate, at such time as they may prescribe.

"Sec. 7. Every person bringing in any such account shall make oath before some one of the assessors that the account by him exhibited contains to the best of his knowledge and belief a true and full account and valuation of all his ratable estate; and whoever neglects or refuses to bring in such account if overtaxed shall have no remedy therefor.

"Sec. 8. The assessors shall make a list containing the true, full and fair cash value of all the ratable estate in the town, placing real and personal estate in separate columns, and distinguishing those who give in an account from those who do not, and shall apportion the tax accordingly."

"Sec. 18. The assessors, on completing the assessment as aforesaid, shall date and sign the same and deposit it in the office of the town clerk."

Before proceeding to the assessment, the assessors posted up printed notices in three or more public places in the town, for three weeks next preceding the time of their meeting, as specified in the notices, which were in the following form:

"Town of East Providence, 1894. Assessors' Notice. The undersigned, assessors of taxes of the town of East Providence, R. I., for the year 1894, hereby give notice that they will be in session at the town hall, East Providence Centre, Tuesday, August 21; at

Riverside, in the engine house, Wednesday, August 22; and at the town clerk's office, Thursday and Friday, August 24, from 2 to 4 o'clock, p. m., on each of said days, for the purpose of receiving from persons and bodies corporate liable to taxation in said town of East Providence true and exact accounts of their ratable estates." (Here follows in the notice Pub. St. R. I. c. 43, § 7, quoted above.) "Transfers of real estate from the records will close on Tuesday, July 31, 1894, and all real estate will be taxed to the persons or bodies corporate in whose name it stands at the close of the day. Joseph L. Luther, William L. Sunderland, Timothy L. Risley, Assessors. East Providence, June 26, 1894."

There was no newspaper published in East Providence during the three weeks next preceding the time of their meeting, as specified in the notices, and therefore the assessors, though not required by the statute, gave further notice of the time and place of their meeting by advertisement during that period in the Evening Bulletin and Evening Telegram, newspapers published in Providence. The theory of the complainants is that section 6 requires the giving of two notices,—(1) a notice to every person and body corporate liable to taxation to carry in a true account of his or its ratable estate; and (2) a notice of the time and place of the meeting of the assessors for the purpose of assessing the tax. Their contention is that the statute contemplates that, after having given notice to those liable to taxation to bring in their accounts within the time to be prescribed by the notice, and after having made up the list required by section 8, the assessors shall hold a final meeting, of which they shall give notice in the manner specified, so that the taxpayers shall have an opportunity to inspect the assessment roll, and if they consider themselves unfairly taxed, may object, and be heard by the assessors upon their objections, before the assessment has been signed and deposited by them in the town clerk's office, as provided in section 18. We do not think that this is the view to be taken of the statute. Section 6 is the only section relating to notice. It does not provide in terms for two distinct notices. It simply directs the assessors, before proceeding in the assessment, to give notice, in the manner specified, of the time and place of their meeting, and then goes on to provide that the notices posted up, besides specifying the time and place of meeting, shall require every person and body corporate liable to taxation to bring in to the assessors an account, etc. It is the evident purpose of the statute to compel every one liable to be taxed to personally carry in an account to the assessors, since the requirement is that he shall make oath to the account before one of the assessors. Upon the account so rendered he may be examined by the assessors. He at the same time will have an opportunity to be heard upon it, and a basis will be afforded the assessors on which to make the assess-

ment. If a person liable to taxation neglects or refuses to carry in his account, he waives his right to be heard, and, under section 8, if overtaxed is without a remedy. We do not see that such a procedure is in any way repugnant, as intimated by the complainants, to article 5 of the amendments to the constitution of the United States, that no person shall be deprived of life, liberty, or property without due process of law. We do not think that the assessment was invalid for want of notice.

The second ground upon which it is contended that the assessment was illegal is the alleged willful and intentional omission and exemption by the assessors of property of the Grosvenordale Company. The respondents, though conceding that property of the Grosvenordale Company was intentionally omitted from the assessment, deny that the omission was willful and intentional in the sense that it was fraudulent or corrupt, and seek to justify it by reference to certain records and deeds mentioned in (and copies of which are annexed to) the answer. From these it appears that the Grosvenordale Company made a proposition in writing, dated April 9, 1892, to the town, to convey or procure to be conveyed to it certain lands for highway purposes, and certain loam and gravel for making streets, and to erect a two-story brick building, 184 feet in length by 60 feet wide, for manufacturing purposes, on certain land in the town, being lots numbered 6, 7, 8, and 9 on the Grosvenor plat, in consideration that the town would exempt the improvements from taxation for 10 years and cause the land conveyed to it to be laid out as public highways, and the highways to be constructed in the manner and within the time specified in the proposition; that at the annual town meeting, on April 11, 1892, the electors of the town, qualified to vote on a proposition to impose a tax, accepted the proposition, and passed a resolution authorizing the town council to exempt from taxation the brick building proposed to be erected, and the machinery, stock, furniture, and fixtures to be kept therein, in accordance with the provisions of any acts of the general assembly that might be passed authorizing such exemption; that, at the same meeting, a further resolution was passed authorizing the town council, until the next annual election, to exempt from taxation, for a period not exceeding 10 years, manufacturing or other ratable property not already located in the town which might be located there in consequence of such exemption, in accordance with the provisions of any act of the general assembly which might be passed authorizing such exemption; that by deeds dated April 28, 1892, and recorded in the land records of the town May 14, 1892, the lands proposed to be conveyed to the town for highway purposes were conveyed to it by the owners of such lands, according to the terms of the proposition, which deeds were, by vote of the town coun-

cil on May 17, 1892, accepted and ordered to be recorded.

On May 21, 1892, the general assembly passed the following act (Pub. Laws R. I. c. 1088):

"Section 1. The electors of any town or city qualified to vote on a proposition to impose a tax, when legally assembled, may vote to exempt, or may authorize the town or city council of such town or city, for a period not exceeding one year, to exempt from taxation, for a period not exceeding ten years, such manufacturing property as may hereafter be located in said town or city in consequence of such exemption, and the land on which such property is located.

"Sec. 2. Property so exempted shall not during such period of exemption be liable to taxation while such property is used for the purposes for which it was so located.

"Sec. 3. All acts and parts of acts inconsistent herewith are hereby repealed.

"Sec. 4. This act shall take effect on and after its passage."

The power to exempt property from taxation is the converse of the power to determine what property shall be the subject of taxation; the selection of certain property for the purpose of taxation being the exclusion or exemption of that which is not selected. It is, therefore, included necessarily in the power to tax, which resides in the state alone, and consequently can be exercised only by the general assembly, representing the sovereign power of the state, acting within the limitation of the constitution, or by the several cities, towns, or other municipal bodies, in pursuance of lawful authority granted to them by the general assembly. Cooley, Tax'n (2d Ed.) 200. This was evidently the idea of the framer of the resolutions passed by the town, which do not purport to exempt any property from taxation, but simply confer on the town council authority to grant exemptions in accordance with the provisions of any act or acts of the general assembly which might be passed authorizing the exemption. Pub. Laws R. I. c. 1088, was doubtless passed for the purpose of enabling the making of the exemption. But it does not purport to be retroactive, and, conceding the competency of the general assembly to pass the act (which, in view of the limitation contained in article 1, § 2, of the constitution, that the public burdens ought to be fairly distributed, we think is at least susceptible of doubt), it does not appear that either the electors of the town qualified to vote on a proposition to impose a tax or the town council took any action, prior to the assessment, in pursuance of that statute. We are of the opinion, therefore, that the attempt to justify the omission of the property from the assessment, on the ground that its exemption was authorized and therefore legal, fails.

The respondents seek further to justify the omission of the property from assessment on the ground that the town, by the accepta-

of the proposition of the Grosvenordale Company and the benefits derived from it, became bound in good faith and equity to exempt the property from taxation, and contend that a court of equity will not disregard a subsisting contract and set it aside until one or the other of the parties to it has offered to rescind it and has restored or tendered back the consideration received from the other; that the complainants, and the other taxpayers of the town in whose behalf they file the bill, have derived the benefits arising from the conveyance of the streets to the town for highway purposes, and cannot ask a court sitting in equity to say that the assessors have so erred in recognizing the contract as to render the assessment null and void; that the complainants, representing the taxpayers generally, must, before asking the interposition of equity, do what is equitable,—or, in other words, before asking the court to pronounce the assessment invalid, must secure such action as will restore to the other party to the contract the consideration which the town has received. We do not think that the omission to include the property in the assessment can be justified on the ground of the contract. As we have already held, the exemption of the property from taxation, in the absence of constitutional legislative authority, was beyond the power of the town, and hence, in so far as such exemption entered into the contract, the contract was null and void. It did not bind the town, or the complainants as taxpayers, whose rights as such would be affected by carrying it into effect; and it made no difference that the Grosvenordale Company may have acted in the belief that the town could make the contract, since it was bound to know the extent of the town's authority. *Austin v. Coggeshall*, 12 R. I. 329, 331; *Farnsworth v. Town Council of Pawtucket*, 13 R. I. 82, 88; *Mathewson v. Hawkins*, Index Q. Q. 15, 31 Atl. 430. In the face of the fact, however, that the resolutions of the town do not purport to grant the exemption, but merely authorize the town council to make it, in accordance with the provisions of such act or acts of the general assembly as might be passed for the purpose, it seems scarcely probable that the Grosvenordale Company was not aware of the incapacity of the town to bind itself by so much of the contract as related to the exemption of the property from taxation.

Since the making of the agreement the assessors have recognized it as binding on the town, and have accordingly omitted to assess the property to which it relates. No question has been made as to the validity of such exemption, until the filing of the bill in this suit. The assessors who made the present assessment omitted to assess the property, in good faith, without any intention or purpose to enable the company to escape or be free from legal taxation, with the knowledge that it had been exempted by the previous

boards of assessors, and in full belief of the duty of the town to exempt the property from taxation and of the validity of the exemption. It is contended by the respondents that, as the omission to assess the property was because of the belief of the assessors that the agreement was binding upon the town, and that the exemption was valid on that account, and was, therefore, a mistake of law, it did not vitiate the assessment as a whole, and consequently that the bill should be dismissed. On the other hand, the complainants, though conceding that an accidental omission of property that should be taxed will not avoid an assessment, insist that such will be the effect when the omission, as in the present case, was intentional, and that it matters not what was the belief or motive of the assessors. We do not think that the fact that the omission of the property from assessment was intentional, in the sense merely that it was not accidental, is sufficient to avoid the assessment. To have that effect the omission must be a conscious disregard of law, in such manner as to impose illegal taxes on those who are assessed. It is the conscious intention to disregard the law to the injury of others, or, in other words, an intention to do a wrong or commit a fraud, which vitiates an assessment; and when this appears, it matters not that the motive for it would otherwise have been a worthy one. Accidental omissions, or omissions arising merely from mistakes of law or fact or errors of judgment, in an honest endeavor on the part of the assessors to perform their duty, though increasing somewhat the burdens of taxpayers, will not render the assessment void. In *Weeks v. City of Milwaukee*, 10 Wis. 264, it is said: "Omissions of this character, arising from mistakes of fact, erroneous computations, or errors of judgment on the part of those to whom the execution of the taxing laws is intrusted, do not necessarily vitiate the whole tax. But intentional disregard of those laws, in such manner as to impose illegal taxes upon those who are assessed, does. The first part of the rule is necessary to enable taxes to be collected at all. The execution of these laws is necessarily intrusted to men; and men are fallible, liable to frequent mistakes of fact and errors of judgment. If such errors on the part of those who are attempting in good faith to perform their duties should vitiate the whole tax, no tax could ever be collected. And, therefore, if they sometimes increase improperly the burdens of those paying taxes, that part of the rule which holds the tax not thereby avoided is absolutely essential to the continuance of the government. But it seems to me clear that the other part is equally essential to the just protection of the citizen. If those executing these laws may deliberately disregard them and assess the whole tax upon a part only of those who are liable to pay it, and have it still a legal tax, then the laws afford no protection, and the citizen is

at the mercy of those officers who, by being appointed to execute the laws, would seem to be thereby placed beyond legal control." And see *Wilson v. Wheeler*, 55 Vt. 446, 453, 454; *Henry v. Chester*, 15 Vt. 460, 467; *Spear v. Braintree*, 24 Vt. 414, 418; *Dillingham v. Snow*, 5 Mass. 547, 558, 559; *Van Deventer v. Long Island City*, 139 N. Y. 133, 138, 34 N. E. 774; *State v. Platt*, 24 N. J. Law, 108, 120, 121; *Bank v. Hines*, 3 Ohio St. 1; *Fifield v. Marinette Co.*, 62 Wis. 532, 541, 22 N. W. 705; *Railroad Co. v. Seward Co.*, 10 Neb. 211, 216, 4 N. W. 1016; *Railroad Co. v. Saline Co.*, 12 Neb. 396, 397, 11 N. W. 854; *People v. McCrery*, 34 Cal. 434, 458; *Cooley, Tax'n* (2d Ed.) 214, 217. The omission to include the property in the assessment having been occasioned solely by the mistake of the assessors as to the binding effect of the agreement on the town, and not by any intentional disregard of law or other wrongful or fraudulent purpose, we are of the opinion that the assessment was not thereby avoided, and hence that the injunction should be denied and the bill dismissed.

SICKRA v. SMALL et al.

(Supreme Judicial Court of Maine. May 4, 1895.)

LIBEL — EVIDENCE — DAMAGES — REPUTATION — SUSPICION.

1. In an action of libel or slander, the defendant may introduce evidence, in mitigation of damages, that the plaintiff's general reputation, as a man of moral worth, is bad, and may also show that his general reputation is bad with respect to that feature of character specially involved in the defamation published; for a man who is habitually addicted to every vice except the one with which he is charged is not entitled to as heavy damages as one possessing a fair moral character.

2. An instruction, in such action, that, if the plaintiff's conduct was such as to excite the defendant's suspicions, it should be considered in mitigation of damages, is erroneous. The damages in an action of libel or slander are to be measured by the injury caused by the words published, and not by the moral culpability of the writer or speaker. It is well settled that evidence of general report that the plaintiff is guilty of the imputed offense is not admissible for the purpose of reducing damages. A fortiori, evidence of the defendant's suspicions, however excited, cannot be received for such a purpose.

(Official.)

Exceptions from supreme judicial court, York county.

Action on the case for libel by Raymond Sickra against Josephine W. Small and another. Plaintiff had judgment for nominal damages only, and brings exceptions. Exceptions sustained.

G. F. Haley, for plaintiff. E. J. Cram, for defendants.

WHITEHOUSE, J. This was an action of libel for defamatory matter, published in a newspaper, representing that the plaintiff

and Mrs. Blake had "eloped," and were living together in adultery.

At the trial, evidence was offered by the defendant, and admitted by the court, subject to the plaintiff's right of exception, that the plaintiff's "general character" was bad in the community in which he lived.

1. It was not questioned by the plaintiff that, in actions for libel or slander, the character of the plaintiff may be in issue upon the question of damages; but it is contended that the inquiry should be restricted to the plaintiff's general reputation in respect to that trait of character involved in the defamatory charge.

While there has been some contrariety of opinion, or at least of expression, upon this question, it must now be regarded as settled, both upon principle and the great weight of authority, that, in this class of cases, the defendant may introduce evidence, in mitigation of damages, that the plaintiff's general reputation, as a man of moral worth, is bad, and may also show that his general reputation is bad with respect to that feature of character covered by the defamation in question; and, as to the admission of such evidence, it is immaterial whether the defendant has simply pleaded the general issue, or has pleaded a justification as well as the general issue. *Stone v. Varney*, 7 Metc. (Mass.) 86; *Leonard v. Allen*, 11 Cush. 241; *Bodwell v. Swan*, 3 Pick. 376; *Clark v. Brown*, 116 Mass. 505; *Root v. King*, 7 Cow. 613; *Lamos v. Snell*, 6 N. H. 413; *Bridgman v. Hopkins*, 34 Vt. 533; *Eastland v. Caldwell*, 2 Bibb, 21; *Powers v. Cary*, 64 Me. 1; *Odgers, Sland. & L.* 304; *Suth. Dam.* 679; *Best, Ev.* 256; 1 *Whart. Ev.* 53; 2 *Starkie, Sland.* 87; 1 *Greenl. Ev.* § 55; 2 *Greenl. Ev.* § 275.

In *Stone v. Varney*, supra, the libel imputed to the plaintiff "heartless cruelty toward his child," and it was held competent for the defendant to introduce evidence, in mitigation of damages, that "the general reputation of the plaintiff in the community, as a man of moral worth," was bad. After a careful examination of the authorities touching the question, the court say, in the opinion: "This review of the adjudicated cases, and particularly the decisions in this commonwealth and in the state of New York, seems necessarily to lead to the conclusion that evidence of general bad character is admissible in mitigation of damages. * * * It cannot be just that a man of infamous character should, for the same libelous matter, be entitled to equal damages with the man of unblemished reputation; yet such must be the result, unless character be a proper subject of evidence before a jury. Lord Ellenborough, in 1 Maule & S. 286, says, 'Certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and it is competent to show that by evidence.'"

In *Leonard v. Allen*, supra, the plaintiff was charged with maliciously burning

schoolhouse, and it was held that, in the introduction of evidence to impeach the character of the plaintiff, in mitigation of damages, the inquiries should relate either to the general character of the plaintiff for integrity and moral worth, or to his reputation in regard to conduct similar in character to the offense with which the defendant had charged him.

In the recent case of *Clark v. Brown*, 116 Mass. 505, the plaintiff was charged with larceny. The trial court admitted evidence that the plaintiff's reputation for honesty and integrity was bad, and excluded evidence that his reputation in respect to thieving was bad. But the full court held the exclusion of the latter evidence to be error, and reaffirmed the rule, laid down in *Stone v. Varney* and *Leonard v. Allen*, supra, that it was competent for the defendant to prove, in mitigation of damages, that the plaintiff's general reputation was bad, and that it was also bad in respect to the charges involved in the alleged slander.

In *Lamos v. Snell*, 6 N. H. 413, the defendant's right to inquire into the plaintiff's "general character as a virtuous and honest man, or otherwise," was brought directly in question; and it was determined that the defendant was "not confined to evidence of character founded upon matters of the same nature as that specified in the charge, but may give in evidence the general bad character of the plaintiff * * * in mitigation of damages, and for this inquiry the plaintiff must stand prepared."

In *Eastland v. Caldwell*, supra, the court say, in the opinion: "In the estimation of damages the jury must take into consideration the general character of the plaintiff. * * * In this case, the defendant's counsel was permitted by the court to inquire into the plaintiff's general character in relation to the facts in issue; but we are of opinion he ought to have been permitted to inquire into his general moral character, without relation to any particular species of immorality; for a man who is habitually addicted to every vice, except the one with which he is charged, is not entitled to as heavy damages as one possessing a fair moral character. The jury, who possess a large and almost unbounded discretion upon subjects of this kind, could have but very inadequate data for the quantum of damages if they are permitted only to know the plaintiff's general character in relation to the facts put in issue."

With respect to the form of the inquiry, it is said to be an inflexible rule of law that the only admissible evidence of a man's character, or actual nature and disposition, is his general reputation in the community where he resides. *Chamb. Best*, Ev. 256, note. It would seem, therefore, that, in order to avoid eliciting an expression of the witness' opinion respecting the plaintiff's character, the appropriate form of interrogatory would be an inquiry calling directly for his knowledge

of the plaintiff's general reputation in the community, either as a man of moral worth, without restriction, or in the particular relation covered by the libel or slander.

2. But the plaintiff also has exceptions to the following instruction in the charge of the presiding justice: "I am requested by the counsel for the defendant to instruct you that, if the plaintiff's conduct was such as to excite the defendant's suspicions, it should be considered in mitigation of damages, the plaintiff alleging that he had never been suspected of the crime alleged. I give you that instruction."

This request was doubtless suggested by the note to section 275, 2 Greenl. Ev., which appears to be based on the old case of *Earl of Leicester v. Walter*, 2 Camp. 251. But that case has long ceased to be recognized as authority for anything more than the admission of evidence of the plaintiff's general reputation. A similar intimation is found in *Larned v. Buffinton*, 3 Mass. 353, but in *Aldermen v. French*, 1 Pick. 18, this dictum is declared to be unsupported by any authority. Again, in the later case of *Watson v. Moore*, 2 Cush. 134, it was held incompetent for the defendant, in an action of slander, to prove, in mitigation of damages, "circumstances which excited his suspicion, and furnished reasonable cause for belief on his part, that the words spoken were true." The obvious objection to it is that the damages in an action of slander are to be "measured by the injury caused by the words spoken, and not by the moral culpability of the speaker." We have seen that the defendant is permitted to prove that the plaintiff's general reputation is bad, because this evidence has a legitimate tendency to show that the injury is small; but the evidence of general report that the plaintiff is guilty of the imputed offense is inadmissible for the purpose of reducing damages. *Powers v. Cary*, supra; *Mapes v. Weeks*, 4 Wend. 659; *Stone v. Varney*, supra. A fortiori, evidence of the defendant's suspicions, however excited, cannot be received for such a purpose. *Watson v. Moore*, supra.

This instruction to the jury must, therefore, be held erroneous; and for this reason the entry must be:

Exceptions sustained.

HASKELL, J., concurred in the result.

STATE v. LEWIS.

(Supreme Judicial Court of Maine. May 7, 1895.)

FISHERIES—TROUT.

The word "trout," as used in Rev. St. c. 40, § 49, which prohibits the sale of "any land-locked salmon, trout or togue" between certain days of each year, means a fresh-water fish; a fish which at least breeds, and ordinarily lives, in fresh water.

(Official.)

Report from supreme judicial court, Penobscot county.

This case came up to the February term, 1894, of the court below on appeal by the defendant, Luther W. Lewis, from the Bangor municipal court, where he was convicted on complaint, December 30, 1893, upon a plea of not guilty, for that the defendant on said day, at Bangor, did have in possession 50 trout, with intent then and there to sell the same, and did then and there sell said trout, said 30th day of December, being then and there close time on said trout.

The defendant was accordingly fined \$10 and costs of prosecution, and from said sentence he appealed. Complaint dismissed.

When the cause was brought to trial, it appeared that the fish which the defendant stood charged with having in his possession and selling were salt-water fish, imported from Halifax, in the dominion of Canada, into the United States, September, 1893, by one Treat, a wholesale dealer in Boston, and by him sold to the defendant in Bangor, who claimed in defense that their sale was not prohibited by the laws of Maine, and that any statute forbidding the sale, etc., of such fish would be a violation of the defendant's rights under the constitution of the United States. These fish are trout, and resemble the fresh-water trout of the waters of Maine, and sell at about one-half their price.

They are sold in fairly large quantities in the form of pickled fish, and are known to the trade as "Labrador Trout."

Upon the foregoing facts and the request of the parties, the question of law thereon arising was reserved for the opinion of the law court, and the case was reported by the chief justice presiding under Rev. St. c. 134, § 26. It was stipulated in the report that, if the complaint was maintainable, the defendant should be defaulted; otherwise the complaint to be dismissed.

C. A. Bailey, Co. Atty., for the State.
Charles Hamlin and Charles J. Hutchings,
for defendant.

WISWELL, J. Complaint for having in possession trout with intent to sell the same, in violation of Rev. St. c. 40, § 49, which reads as follows: "No person shall sell, expose for sale or have in possession with intent to sell, or transport from place to place any land-locked salmon, trout or togue, between the first days of October and the following May; or any black bass, Oswego bass or white perch, between the first days of April and July, under a penalty of not less than ten nor more than fifty dollars for each offense."

The case comes to the law court upon an agreed statement of facts in which it is said that the fish which the defendant had in his possession for sale "were salt-water fish," and that they were known to the trade as "Labrador Trout."

The prohibition of the statute relates to

land-locked salmon, trout, or togue. The common and ordinary meaning of the word "trout" is a fresh-water fish; a fish which at least breeds, and ordinarily lives, in the fresh water, even if it may sometimes escape to the salt water when it has an opportunity; and although zoologically the term may be more inclusive, we think that the legislature used the word in this section in its more limited, but common and ordinary, sense. Words of common use in a statute are to be taken in their ordinary signification. Suth. St. Const. § 229.

We are confirmed in the belief that the legislature intended to make this section apply to fresh-water fish only, from the fact that all other kinds of fish referred to are exclusively fresh-water fish, except salmon, and the meaning of that word is expressly limited by the word "land-locked."

It being admitted that the fish in the possession of the defendant for the purpose of sale were salt-water fish, the statute does not apply.

Complaint dismissed.

STATE v. BROWNRIGG.

(Supreme Judicial Court of Maine. May 7, 1895.)

CRIMINAL NUISANCE — FORMER CONVICTION — INDICTMENT.

1. At the April term, 1894, of this court for Waldo county, the defendant was indicted for keeping a common nuisance, on the 17th day of October, 1893, and on divers other days and times between that day and the day of the finding of the indictment. He seasonably pleaded in bar a previous conviction of the same offense, and offered in evidence the records of the court, showing that at the October term, 1893, of the court for the same county, he was indicted for keeping a common nuisance at the same place on the 1st day of May, 1893, and on divers other days and times between that day and the finding of that indictment, and a conviction, judgment, and sentence under this last indictment. The October term, 1893, of the court commenced upon the 17th day of October. The indictment found at that term was reported to the court upon the 31st day of October.

Held, that the day of the finding of an indictment by a grand jury is the day when the indictment is returned and presented to the court.

2. The test is not what facts were offered in evidence in the trial upon the first indictment, but, from the record, what facts might have been proved under that indictment, and whether the same facts, if proved under the last indictment, would warrant a conviction.

3. In a trial upon the indictment found at the October term, 1893, the state might have proved that the defendant kept and maintained a common nuisance between the 17th and the 31st days of October, 1893. In a trial upon the present indictment, the same evidence, confined to the same period of time, would warrant a conviction for the same offense.

Held, that the records of the court, introduced by the defendant, under his plea in bar, show that he had previously been convicted of the same offense.

(Official.)

Exceptions from supreme judicial court, Waldo county.

Robert Brownrigg was indicted for maintaining a common nuisance, and his plea in bar, of a former conviction, being overruled, he brings exceptions. Exceptions sustained.

W. T. C. Runnells, Co. Atty., for the State.
Joseph Williamson, Jr., for defendant.

WISWELL, J. At the April term, 1894, of this court for Waldo county, the defendant was indicted for keeping a common nuisance "on the 17th day of October, in the year of our Lord 1893, and on divers other days and times between that day and the day of the finding of this indictment."

The defendant seasonably pleaded in bar a previous conviction of the same offense, and offered in evidence the records of the court, showing that at the October term, 1893, of the court, for the same county, he was indicted for keeping a common nuisance at the same place "on the 1st day of May, in the year of our Lord 1893, and on divers other days and times between that day and the finding of this indictment." And a conviction, judgment, and sentence under this indictment.

The October term, 1893, for Waldo county, commenced on the 3d Tuesday (the 17th day) of October. It was further shown by a certificate of the clerk that this indictment was reported to the court by the grand jury on the 31st day of October. The justice presiding ruled, *pro forma*, that these facts did not sustain the plea.

The indictment relied upon by the defendant alleges the commission of the offense upon a particular day, and on divers other days and times between that day and the day of the finding of the indictment.

The first question, therefore, is, what is the day of the finding of an indictment? Although it is usual to entitle the caption of an indictment as of the first day of the term, this day cannot be regarded as of the day of the finding, because, among other reasons, it is well settled that a grand jury may consider and find an indictment for an offense committed after that date, but before the finding of the indictment. *Com. v. Hines*, 101 Mass. 33.

If the first day of a term should be considered as the day of the finding, there would be presented the inconsistency of a finding by a grand jury of the commission of an offense subsequent to the time of the finding.

The date of the finding of an indictment should be one that is capable of being definitely ascertained. The present case is an illustration of the necessity of this. We have already seen that that cannot be the first day of the term, although that is ordinarily the date of the caption. The only other day that can at all times be definitely and accurately ascertained is the date of the return and presentment of the particular indictment to the court. We are satisfied, therefore, that the day of the finding must be the day when the indictment is returned and presented to the court.

This being so, the allegation in the October

term indictment is, in effect, the commission of a continuing offense on the 1st day of May, 1893, and on various other days and times between that day and the 31st day of October, 1893. The indictment in this case covers the period between the 17th day of October and the 31st day of October, 1893, as well as the time after the last date up to the finding of the present indictment, at the April term, 1894; and the question is whether a conviction under the first is a bar to the second.

We think it unquestionably is, both upon principle and authority. The test is, not what facts were offered in evidence in the trial upon the first indictment, but, from the record, what facts might have been proved under that indictment, and whether the same facts, if proved under this indictment, would warrant a conviction. In a trial upon the first indictment the state might have proved that the respondent kept a common nuisance between the 17th and the 31st days of October, 1893. In a trial upon the present indictment the same evidence, confined to the same period of time, would warrant a conviction for the same offense.

The plea in bar, therefore, was good, and the facts therein set out were proved by the records of this court. The Massachusetts court has come to the same conclusion in *Com. v. Robinson*, 126 Mass. 259, and *Com. v. Dunster*, 145 Mass. 101, 13 N. E. 350.

There are two other cases against the same defendant, in which precisely the same question is presented, and in each of the cases the entry will be,

Exceptions sustained.

ADAMS et al. v. PISCATAQUIS COUNTY et al.

(Supreme Judicial Court of Maine. May 7, 1895.)

TAXATION—TOWNS—INCORPORATION—ANNEXATION—REPEAL OF CHARTER.

The town of Ellitsville, in Piscataquis county, was incorporated by an act of the legislature approved February 19, 1835. In 1848 the legislature annexed to Ellitsville a portion of the town of Wilson. In 1858 the act incorporating the town of Ellitsville was repealed. The county commissioners for Piscataquis county, at their December term, 1891, made an assessment upon all the lands within the territory which formerly constituted the town of Ellitsville, for the repair of roads within said territory, in accordance with the provisions of Rev. St. c. 6, § 80.

Had that, when the act incorporating the town of Ellitsville was repealed, the whole territory, which up to that time had been the town of Ellitsville, including the portion of the town of Wilson previously annexed to it, become one unincorporated township; and that the assessment of taxes by the county commissioners in the whole territory of the former town of Ellitsville, for the repair of the roads in that unincorporated township, was proper and in accordance with the provisions of the statutes

(Official.)

Report from supreme judicial court, Piscataquis county.

Bill by Sprague Adams and others against the county of Piscataquis and Frank E. Guernsey, treasurer. Heard on report. Bill dismissed.

Bill in equity, to determine the validity of an assessment for taxes made in 1891 by the commissioners of Piscataquis county upon the unincorporated lands comprising what was formerly the town of Ellitsville, its charter having been repealed in 1858. At the time of the repeal of the town charter, its territory included a part of what was formerly the town of Wilson, and in which the plaintiff's lands were situated.

H. Hudson and J. S. Williams, for plaintiffs. W. E. Parsons and F. E. Guernsey, for defendants.

WISWELL, J. Township 8, range 9, in Piscataquis county, was incorporated as the town of Ellitsville, by an act of the legislature approved February 19, 1835. In 1848 the legislature annexed to Ellitsville, a portion of the town of Wilson, which town was originally township 9 in the same range. By the same act of the legislature, another portion of the town of Wilson was annexed to Greenville, and the remainder to Shirley, so that nothing remained of the town of Wilson. By an act of the legislature passed in 1858, the act of 1835, incorporating the town of Ellitsville, was repealed.

The county commissioners for Piscataquis county, at their December term, 1891, made an assessment upon all the lands within the territory which formerly constituted the town of Ellitsville, for the repair of roads within said territory, in accordance with the provisions of Rev. St. c. 6, § 80.

The complainants contend that this assessment was invalid, because the county commissioners treated the whole of the original township, No. 9, and that part of original township No. 8 which had been annexed to Ellitsville by the act of 1848, as one "unincorporated township," and made an assessment upon the lands in both original townships for the repair of the roads in the whole territory. For this reason they seek an injunction against the county treasurer from further proceedings to enforce the collection of the tax.

No other objection is raised to the validity of the tax. The contention of the complainants' counsel is that upon the passage of the act of 1858, repealing the act incorporating the town of Ellitsville, the territory of that town became divided into the original townships of which it had been composed. If this were true, the assessment of the taxes would have been illegal and invalid, because, as contended by the complainants' counsel, county commissioners have no power to assess a tax in one township, under the section referred to, for the repair of roads in another.

But we think there is no merit in the complainants' contention. The town of Ellits-

ville, after the act of annexation, consisted of the whole of one original township and a part of another. When the repealing act went into effect, the whole territory, which up to that time had been the town of Ellitsville, became an unincorporated township.

The act of 1848, dividing the town of Wilson, and annexing that portion in which the complainants' lands are situated to the then town of Ellitsville, has never been repealed, and certainly the act repealing the act of incorporation did not have that effect. It is a familiar principle that the legislature has the exclusive power to create counties and towns; and, to establish the boundaries thereof, it may add to or take from the territory of towns.

By the original act of incorporation and the subsequent act of annexation, the town of Ellitsville consisted of certain territory with established boundaries. How that territory was made up is a matter of no consequence. When the act of incorporation was repealed, the territory of the former town remained unchanged in its boundaries, and the inhabitants of such territory simply lost their rights under the former municipal charter.

The assessment of taxes by the county commissioners in the whole territory of the former town of Ellitsville, for the repair of the roads in that unincorporated township, was proper and in accordance with the provisions of the statutes.

Bill dismissed, with costs.

PROPRIETORS OF MACHIAS BOOM v. SULLIVAN et al.

(Supreme Judicial Court of Maine. May 7, 1895.)

LOGS AND LOGGING—DUTIES OF BOOMING COMPANY.

1. The charter of the plaintiff corporation, granted by the legislature of Massachusetts in 1808, authorized it to maintain a boom, and established the tolls it should be entitled to receive for rafting and securing logs and lumber, subject to revision or alteration by the legislature.

2. By a special act of the legislature of this state passed in 1891 (chapter 174, Laws 1891), the fees and tolls were changed, and a rule established by which to fix the price for "sorting and rafting" logs and timber so rafted and secured at said boom.

3. The defendants claimed that it was the duty of the plaintiff, since the act of 1891, to sort and raft their logs by marks as well as by ownership.

Held, that no additional duty had been imposed upon the corporation by the use of the words "sorting and rafting," in the amendatory act, and that these words meant no more than the word "rafting," in the original charter.

4. The plaintiff has performed its whole duty when it has secured the logs which come into its boom, and sorted, rafted, and delivered them according to ownership.

See 85 Me. 343, 27 Atl. 189.

(Official.)

Exceptions from supreme judicial court, Washington county.

Action by the Proprietors of Machias Boom against Cornelius Sullivan and others. There

was judgment for plaintiff, and defendants move for a new trial, and bring exceptions. Exceptions overruled. Motion granted.

Besides the general motion for a new trial, the defendants took exceptions, which arose in the following manner:

This was an action on the case to recover tolls accruing under chapter 174 of the Private and Special Laws of 1891, earned during the seasons of 1891 and 1892, for booming and rafting logs at the plaintiff's boom in Machias, and also for special services rendered in rafting and sorting logs of the defendants by kinds. The plea was the general issue.

The plaintiff's claim for tolls for boomage and rafting, exclusive of the special services aforesaid, amounted to \$644.00, with interest from March 3, 1893, which the defendants admitted to be due, less damages sustained by reason of the plaintiff's having refused to sort and raft the defendants' logs, in 1891 and 1892, into lots, by marks.

During these seasons the defendants had logs in the plaintiff's boom marked by many separate and distinct marks, and demanded that the plaintiff should raft and sort the logs, and deliver the same to them in lots, each bearing the same mark, which the plaintiff declined to do, and, upon the trial to the jury, offered evidence tending to show such facts; but the court excluded the same, and ruled and charged the jury that the plaintiff was not bound to so raft and sort the logs of the defendants, and deliver the same to them in lots bearing the same mark, even if there were but two different marks upon the defendants' logs, but that it was only bound to deliver the defendants' logs in one lot, irrespective of marks.

The plaintiff also claimed to recover for extra services in delivering to the defendants their logs rafted and sorted by kinds, to wit, the pine, hemlock, spruce, and cedar, each in lots by themselves, as requested by the defendants, and the defendants admitted their liability to pay a reasonable compensation for the same. That question was submitted to the jury, under proper instructions from the court, to which no exceptions were taken; and the jury assessed the damages for such extra services in the sum of \$559.22, with interest from the date that payment for the same was demanded, to wit, March 3, 1893, and returned a general verdict for the plaintiff in the sum of \$1,204.52.

To the ruling of the court that the plaintiff was not bound to raft and sort the defendants' logs, and deliver the same to them in lots, each containing the same mark, defendants took exceptions.

Charles Sargent, for plaintiff. H. M. Heath and O. A. Tuell, for defendants.

WISWELL, J. The plaintiff, a corporation created by an act of the legislature of Massachusetts in 1808, brings this action to

recover for booming, sorting, and rafting defendants' logs during the seasons of 1891 and 1892, in accordance with the rule for fixing the maximum tolls for such services, established by chapter 174, Priv. Laws 1891, entitled "An act to regulate the tolls of the Machias boom." The case comes to the law court upon both exceptions and motion.

Exceptions: The only question presented by the exceptions is this: During the seasons named the defendants had in the plaintiff's boom logs of "many separate and distinct marks." They claimed that it was the duty of the plaintiff corporation to sort and raft these logs by marks, as well as by ownership,—that is, that all of the logs of each mark, belonging to each owner, should be sorted and rafted separately, the logs of each mark by themselves,—and that, although this was demanded, the plaintiff refused to do so whereby the defendants sustained damage. The court excluded all evidence of such demand, and of the damage resulting from the plaintiff's refusal, and instructed the jury that the plaintiff was not bound to so raft and sort the logs of the defendants in lots bearing the same mark, but that it was only bound to deliver the defendants' logs in one lot, irrespective of marks.

It is the opinion of the court that the ruling and instruction were correct. The original charter authorized the corporation to maintain a boom, and established the tolls it should receive for rafting and securing logs. The act of 1891 changed the tolls for "sorting and rafting logs and lumber." In *Proprietors v. Sullivan*, 85 Me. 343, 27 Atl. 171,—an action between the same parties,—this court held that no new or additional duty had been imposed upon the corporation by the use of the words "sorting and rafting"; that these words, in the amendatory act, meant no more than the word "rafting," in the original charter, as the logs must necessarily first be sorted before they could be rafted. In that case the defendants contended that it was the duty of the plaintiff to sort and raft their logs, not only by ownership, but also by kinds of lumber. Judge Foster, in the opinion in that case, says, referring to this contention: "However convenient this might be for the owners, there is nothing in the case, or in the signification of the words, that requires such a construction to be given."

We think this holds equally good as to the claim now made. To sort and raft the logs of different owners by marks, as well as by ownership, would probably be as burdensome, at least, as to do so by kinds. It is a burden not imposed by the use of the word "rafting," in the original charter, and, as has already been decided, no additional duty was imposed by the act of 1891. The plaintiff has performed its whole duty when it has secured the logs which come into its boom, and sorted, rafted, and delivered them according to ownership.

Motion: Included in the account annexed were two items for sorting 111,854 logs, by kinds, during the two seasons, for which three-fourths of a cent per log was charged. These services were rendered under an agreement upon the part of the defendants to pay therefor what the services were reasonably worth.

The plaintiff was entitled to five-eighths of a cent per log for booming, seven-eighths of a cent for sorting and rafting according to ownership, and to such additional sum as the service was reasonably worth for sorting by kind. The jury, by a special verdict, found that this extra service was worth \$559.22,—one-half of a cent for each log.

After a careful examination of the testimony, an analysis of which in this opinion would not be profitable, we are satisfied that the amount allowed for the extra work is clearly excessive and that the jury must have acted under some bias or prejudice. It is true that some of the plaintiff's witnesses testified that in their opinion one-half of a cent per log was a fair compensation for the extra labor, but they gave no satisfactory reason for this statement; and from the cross-examination of these same witnesses, in connection with all the other evidence upon the question, it is clearly shown, we think, that one-half of the amount allowed by the jury for this extra labor would be sufficient to amply compensate the plaintiff for the same. Something should also be allowed for the use of the boom occasioned by this extra service. We think that the plaintiff should not have recovered for these two items referred to more than \$300. The motion for a new trial will therefore be granted, unless the plaintiff, within 30 days after notice that the rescript has been received by the clerk of courts for Washington county, consents to remit all of the amount recovered by the special verdict over the sum of \$300, as of the date of such verdict.

Exceptions overruled. Motion granted. New trial ordered, unless the plaintiff enters a remittitur as above.

MORRIS v. PORTER.

(Supreme Judicial Court of Maine. May 7, 1895.)

ADMINISTRATION—OVERPAYMENT TO CREDITOR—ACTION TO RECOVER EXCESS—EVIDENCE.

1. An administrator who, within the year allowed by statute, pays a creditor's claim in full, acting upon the honest belief that the estate is solvent, may, upon the estate's proving actually insolvent, recover back the difference between the amount so paid and that pro rata share which the creditor would have been entitled to in common with all other general creditors. But the creditor who, in good faith, has received payment in full of his claim against an estate, should not be placed in a worse position, by reason of such payment, than those whose claims have not been paid, and who have had an opportunity to present and prove the same before the commissioner.

2. In a suit by an administrator to recover back the difference between the amount so paid by him and the amount that the creditor would be entitled to as a dividend upon his claim, the burden is upon the administrator to show what that difference is. He can do this by introducing the decree of the judge of probate ordering a dividend to be paid to creditors, and especially that to be paid upon the claim of the creditor from whom the excess of payment is sought to be recovered. It is incumbent upon an administrator, at his peril, to have this dividend upon such creditor's claim determined by decree of the judge of probate. For this purpose he may prove any claim so paid in his own name, being subrogated to the rights of the creditor whose claim has been fully paid.

3. Such an action by an administrator cannot be maintained until the amount of such dividend has been ascertained, and all matters pertaining thereto fully and finally adjudicated in the probate court.

(Official.)

Report from supreme judicial court, Penobscot county.

Action by Mary E. Morris, administratrix, against Joseph W. Porter. Heard on report of pleadings and stipulation.

This was an action of assumpsit, to which the defendant pleaded the general issue, and also filed a brief statement of further defense.

Upon the opening of the case, and after the reading of the pleadings, it was agreed that the case should be reported to the law court upon the writ and pleadings, and if the case stated in the defendant's brief statement would constitute a defense, in whole or in part, to the plaintiff's claim, the case should stand for trial; if the facts stated, if true, constitute no defense to plaintiff's claim, judgment to be rendered for plaintiff.

The brief statement of the defendant is as follows: That on the 25th day of September, 1889, the plaintiff's intestate, Isalah Morris, held a permit and was preparing for a lumbering operation, to be carried on during the then next ensuing logging season. And on said 25th day of September, 1889, the said Isalah Morris came to him, the said defendant, and made a contract with him, under and by which the said defendant was to supply the said Morris in said lumbering operation. That the said defendant had known the said Morris for many years, had previously repeatedly supplied him in lumbering operations, and knew that he was the owner of real estate of the value of at least \$1,500; and on said 25th day of September, 1889, the records in the registry of deeds for county of Penobscot showed the title to said real estate still to be in said Isalah Morris.

On said 25th day of September, 1889, the defendant, having made said contract with said Morris, began to furnish said Morris with supplies for said lumbering operation; and thereafter up to the time of said Morris' death, on the 18th of May, 1890, defendant continued to furnish said Morris with supplies and money for said operation, to the amount of \$7,825.21, on which amount defendant was entitled, under the terms of said contract with said Morris, to a commission of 6 per cent., amounting

to \$469.51, so that there was due to defendant from said Morris, on the day of his death, the sum of \$8,294.72.

Defendant entered into said contract with said Morris, and supplied him with goods and money to the amount aforesaid, solely upon said Morris' personal credit, and did not take an assignment of the permit of said Morris, for the reason that said Morris, at the time of making said contract with the defendant, did not have his permit with him.

At the time of said Morris' death said logs were being driven to market, and it was absolutely necessary, to save the property represented by the said logs, that they should be driven to market, and the stumpage and lien claims thereon be paid, as the logs, if left where they were at the time of said Morris' death, and exposed to the claims of stumpage owners and laborers having liens, would have been sacrificed; while, if driven to market, they were worth substantially all they had cost said Morris, which was practically what the defendant had advanced him in money and supplies, and, in addition, what it would cost to get said logs to market.

In said condition caused by the death of said Morris, under such circumstances, it seemed necessary that somebody should assume the responsibility of doing what was necessary to get said logs to market, and to sell the same; and the defendant, after consultation with the judge of probate in and for said county, and negotiation and agreement with the plaintiff, then the widow of said Morris, and Charles Morris, son of the said plaintiff and her said intestate, who was engaged with his father in said operation, went on and did what was necessary to get said logs to market, becoming responsible to the men engaged in driving the logs for their pay, and paid all the claims upon said logs, including the stumpage and the cost and expenses of getting said logs to market.

The amount paid by said defendant after the death of said Morris, under the said agreement with the plaintiff and her son, amounted to \$3,622.97, being the amount credited by the plaintiff in her writ against the said defendant; and, in addition thereto, the sum of \$9 paid to one W. H. Littlefield for labor on the logs.

The defendant sold said logs, with the consent of the plaintiff and her said son, for the sum of \$11,726.76, as alleged by said plaintiff in her said writ, and at the time of said sale there was due to defendant the amount advanced by him to said Isalah Morris in his lifetime, with 6 per cent. commission thereon, and the amount paid by him to free said logs from liens and to get them to market, the sum of \$11,911.97; and it was agreed between the plaintiff and her said son and the defendant that the defendant should be entitled to take in payment of what was due him the amount received from the logs.

During the summer of 1890 the plaintiff petitioned to be appointed administratrix upon

the estate of her deceased husband, but the judge of probate within and for said county of Penobscot stated that he did not regard her as a fit person to administer upon said estate, unless all matters connected with said lumbering operation and the debt to defendant could be settled and adjusted, and said lumbering operation to be so eliminated, and not included in the settlement of the estate.

Whereupon the defendant and the plaintiff, in the presence of the judge of probate,—she being assisted by counsel,—went over all the accounts, and agreed upon a settlement; and then, on the 6th day of August, 1890, at an adjournment of the July term, 1890, of the probate court in and for said county, the plaintiff was appointed administratrix of the estate of Isalah Morris, and subsequently, in the presence of the judge of probate, and with his approval, settled with the defendant, and gave him a receipt for the \$11,726.76 received by him for the logs, and he gave her a receipt for \$11,911.97 due him; and all matters between the said plaintiff, in her said capacity, and the said defendant, were then so settled and adjusted, and defendant claims that said settlement is final and conclusive between the parties, and constitutes a full defense to this suit.

But, if said settlement is to be disturbed, defendant claims that, in addition to the amounts credited to him by the plaintiff in her said writ, he should be allowed the amount due him from the said Morris at the time of his decease, and the further sum of nine dollars paid to said Littlefield for labor on said logs, and that when said claims are allowed there is no balance due to said plaintiff in this suit.

And the defendant further says that according to the papers filed in the probate court by the plaintiff in her said capacity, the estate of said Isalah Morris was not and is not, as a matter of fact, insolvent, as she represented that there existed, and charged herself with, goods and chattels, independently of said logs sold by the defendant, and rights and credits of the aggregate value of \$1,099.97, while all the claims which have been proved against the estate (the time for proving claims having expired) amount, in the aggregate, to only \$796.97, leaving the balance of assets in her hands, over and above the amount of claims proved, of \$303; so that all the creditors can be paid in full, and there is no reason, in justice or equity, for disturbing the settlement made between the plaintiff, in her said capacity, and the said defendant.

Defendant further says that plaintiff claims that the said Isalah Morris, in his lifetime, to wit, on the 23d of September, 1889, made a gift of and conveyed to her all his real estate, and the records in the registry of deeds for said county show that such a deed was entered for record on the 27th day of September, 1889, and the plaintiff further claims that her said husband, in his lifetime, gave her the most valuable part of his goods and chattels; and defendant says that the plaintiff did not include in her inventory either said real estate,

or the goods and chattels which she claimed to have been given her.

Defendant claims that the said gift of real estate and goods and chattels cannot be held by the plaintiff, as against him, a creditor, or as against other creditors whose claims existed before said alleged gifts were made, and that said real estate should be applied in payment of the defendant's claims and all pre-existing indebtedness, and the application of said property, so alleged to have been given, to the payment of such debts, would leave the assets of said estate far in excess of the claims of all other creditors.

A. W. Weatherbee, for plaintiff. F. A. Wilson and C. F. Woodard, for defendant.

WISWELL, J. This case comes to the law court upon a report of the writ and the defendant's pleadings, with the stipulation that if the facts set up in the brief statement would constitute a defense, in whole or in part, the case is to stand for trial; if not, judgment is to be rendered for the plaintiff.

These facts appear from the brief statement: Isaiah Morris, the plaintiff's intestate, died on the 18th of May, 1890. At the time of his death he was indebted to the defendant, in the sum of \$8,294.72, for supplies—and commissions—furnished him by the defendant during the preceding fall and winter, while said intestate was carrying on a lumbering operation. At the time of Morris' death the logs were being driven to market, and in order to protect and save the property, to get the logs to market, and to prevent the enforcement of lien claims by stumpage owners and laborers, with the consent of the widow (now the administratrix) and a son who was engaged with his father in the operation, the defendant made further advances to the amount of \$3,631.97, which paid all claims upon the logs, and the expense of driving the same.

Subsequently, with the consent of the widow and son, before her appointment as administratrix, the defendant sold these logs, realizing from such sale the sum of \$11,726.76. It further appears from the brief statement that after her appointment as administratrix the plaintiff and the defendant had a full settlement of all matters between him and the estate, in the presence and with the approval of the judge of probate, and after a full examination of the accounts by the plaintiff, aided by her counsel. At this time there was in the hands of the defendant the sum of \$11,726.76, the proceeds of the sale of the logs,—and there was due him the sum of \$11,926.69 for advances, supplies, and commissions, as above stated. By the terms of this settlement, these two amounts were offset against each other, and each of the parties gave the other a receipt in full. In other words, the administratrix paid the defendant's claim, substantially in full, by the application to that purpose of the proceeds of the logs in the defend-

ant's hands, which was accepted by the defendant in full satisfaction of the amount due him.

The plaintiff now seeks to recover back the amount so paid or applied, less the advances made by the defendant after the intestate's death.

It may be admitted that an administrator who, within the year allowed by statute, pays a creditor's claim in full, acting upon the honest belief that the estate is solvent, may, upon the estate's proving actually insolvent, recover back the difference between the amount so paid and that pro rata share which the creditor would have been entitled to in common with all other general creditors. But this right of action is based upon the equitable doctrine that such creditor has received money which in equity and in good conscience belongs to the estate, for the purpose of making a just and equal distribution among all the general creditors, which is the cardinal principle of the laws relating to the administration and settlement of decedents' estates.

The creditor who, in good faith, has received payment in full of his claim against an estate, should certainly not be placed in a worse position, by reason of such payment, than those whose claims have not been paid, and who have had an opportunity to present and prove the same before the commissioners. If an administrator could recover back the full amount paid, under the above circumstances, it would leave the creditor, whose claim had once been paid in full, after the expiration of the time allowed to prove claims, entirely without remedy. This would not be just and equitable, but quite the reverse, and to a very marked degree.

This question arose in *Walker v. Hill*, 17 Mass. 390, in which, after a full discussion of the principles involved, the court said: "The plaintiff will take judgment for the difference between the amount paid by him to the defendant, and the amount that would have been payable to him on the decree of the judge of probate for the distribution among the creditors whose debts were allowed by the commissioners, with interest on the amount of their difference." To the same effect is *Heard v. Drake*, 4 Gray, 514.

An administrator cannot recover back the whole amount so paid, but only the amount of the overpayment. The burden is upon the administrator to show what that difference is. He can do this by introducing the decree of the judge of probate ordering the dividend to be paid to creditors, and especially that to be paid upon the claim originally of the creditor from whom the excess of payment is sought to be recovered. It is incumbent upon an administrator, at his peril, to have this dividend upon such creditor's claim determined by decree of the judge of probate. It is a matter exclusively within the original jurisdiction of the probate court, and cannot be determined in a common-law court.

This is no great hardship upon an adminis-

trator who seeks to be relieved from his own mistake. He may prove any claim so paid in his own name, being subrogated to the rights of the creditor whose claim has been fully paid.

This course was adopted by the administrators in the two Massachusetts cases above cited, and either this, or some other course, must be pursued, which will result in a decree of the probate court of the amount of the dividend on the claim that has been paid.

It is not the representation of insolvency which entitles an administrator to disturb a previously made settlement, and to recover any portion of the amount paid, but actual insolvency, as shown after the commissioners have passed upon the claims presented, the acceptance of such report by the probate court, the settlement of the administrator's account, showing the amount in his hands available for the payment of debts, and the decree ordering the payment of a dividend.

The defendant sets up in his brief statement that the estate is not actually insolvent, that the account of the administratrix shows that she charges herself with the sum of \$1,000.97, and that all of the claims allowed aggregate only \$796.97. If the estate is not actually insolvent, the plaintiff is not entitled to recover anything. It is further claimed in defense that the defendant's original claim has not been passed upon by the commissioners, and that the time for presenting the same has expired. We have already seen that unless this has been done the action cannot be maintained.

What has already been said applies to the further contention of the defendant, set up in his brief statement, that the intestate, in his lifetime, made a conveyance and transfer of real and personal property to his wife, the present administratrix, which was without consideration, and void both as to then existing and subsequent creditors. This may be a pertinent inquiry upon the question of the amount of the estate in an administrator's hands available for the payment of debts. But it is only after all such matters have been fully and finally adjudicated, and the amount of dividend that the creditor would be entitled to accurately ascertained, that such an action as this can be maintained.

In accordance with the terms of the report, the action is to stand for trial.

PETERS, C. J., did not sit.

KNOWLTON v. DOHERTY.

(Supreme Judicial Court of Maine. May 7, 1895.)

INTOXICATING LIQUORS — UNLAWFUL SALES — INTERSTATE COMMERCE.

1. Where intoxicating liquors are bought in another state, with the intention of selling them in this state in violation of law, the vendor cannot maintain an action to recover the pur-

chase price in any of the courts of this state, by reason of Rev. St. c. 27, § 56. And it is immaterial whether or not such vendor knew of the illegal intention upon the part of the purchaser, or in any way participated in the same.

2. The statute is not in violation of that clause of the federal constitution which gives congress the power to regulate commerce between the states, and was not prior to the act of congress approved August 8, 1890, making interstate commerce relating to intoxicating liquors subject to the police powers of the several states.

3. If liquors were bought in another state, prior to the act of August 8, 1890, with intent to sell them in this state in the original packages, it would not, at that time, have been any violation of the law. But the court finds that the purchaser of these liquors, bought before August 8, 1890, did not intend to sell them in the original packages, but did intend to sell them at retail and in violation of law.

Meservey v. Gray, 55 Me. 540, affirmed.

McGlinchey v. Winchell, 63 Me. 31, affirmed. (Official.)

Report from supreme judicial court, Waldo county.

Action in assumpsit by Joseph E. Doherty against Clarence M. Knowlton, on account, to recover the price of intoxicating liquors. There was judgment for plaintiff by default, and defendant was granted a review on petition. Heard on report. Judgment for plaintiff in review.

W. P. Thompson, for plaintiff. R. W. Rogers, for defendant.

WISWELL, J. This case comes to the law court upon report, the court to render such judgment as the legal rights of the parties may require. The plaintiff in the original action recovered judgment upon default for \$382.37, debt and costs. The action was upon an account annexed, amounting to \$330.38 for intoxicating liquors sold by the original plaintiff to the defendant, and \$3 for packing.

The plaintiff in review relies upon Rev. St. c. 27, § 56, which, so far as it is material, is as follows: "No action shall be maintained upon any claim or demand, promissory note, or other security contracted or given for intoxicating liquors sold in violation of this chapter, or for any such liquors purchased out of the state with intention to sell the same or any part thereof in violation thereof."

In answer to which the defendant in review says that the sale of intoxicating liquors was not made in this state, and that consequently the statute does not apply. It may be conceded that the sale was made in Massachusetts. An agent of the vendor took the purchaser's order in Belfast, but there was no payment, no memorandum in writing, and the order was filled in Boston, where the liquors were separated from the general stock, packed, marked, and delivered to a steamboat company, in accordance with the purchaser's instructions, directed to him.

We find from the evidence that the liquors were bought with an intention upon the part of the purchaser to sell them in this state

in violation of law, and that the vendor, through his agent, had actual knowledge of such intention, but that he had no participation in the same, and did nothing, beyond the mere sale, to assist or facilitate the illegal act. The question, then, is presented, whether, under the statutes in this state, a vendor who makes a sale of intoxicating liquors in another state, where such sale is not prohibited, under the circumstances above stated, can recover the purchase price therefor in the courts of our state.

It is a general principle of law that the validity of a contract must be tested by the law of the place where the sale is made. Were it not for the statute, which expressly forbids the maintenance of such an action, the price could be recovered, such a sale not being invalid, even if the vendor knew that the purchaser intended to put the things sold to an illegal use, unless he participated in that intention, or in some way, beyond the mere sale, did something to assist or facilitate the violation of law, or, at least, in the language of some of the cases, made the sale with the knowledge that the thing sold was to be resold by the purchaser in another state, contrary to its laws, and with a view to such resale. *Webster v. Munger*, 8 Gray, 584; *Graves v. Johnson*, 156 Mass. 211, 30 N. E. 818.

The distinction between selling a thing with the mere knowledge that it is to be resold in violation of law, and in any way aiding in such illegal act, is sound and well recognized. Upon this principle were decided the cases in this state relied upon by the counsel for the defendant in review. *Torrey v. Corliss*, 33 Me. 333, and *Bancher v. Cilley*, 38 Me. 553. But when *Torrey v. Corliss* was decided, there was no such statute as is now in force. The act of June 2, 1851, which was somewhat similar to our present statute, was passed while that action was pending, and the court expressly held that it did not apply; and *Bancher v. Cilley* was decided under the statute of 1846, which did not refer at all to sales made in other states. Some remarks made in the recent case of *Wasserboehr v. Boulter*, 84 Me. 165, 24 Atl. 808, are also relied upon, but that case was decided upon the ground that the sale was made in Maine, and therefore illegal.

This very question was decided in *Meservrey v. Gray*, 55 Me. 540, in which Mr. Justice Walton says: "It will be noticed that our present statute makes the fact that the liquors were purchased with intention of selling them in violation of law, and not the seller's knowledge of the fact, the criterion by which to determine whether the contract will support an action in this state or not. . . . If, therefore, the sale was made in New York, and the plaintiffs had no knowledge of the illegal purpose of the defendant to sell the liquors in this state, in violation of law, yet, inasmuch as the evidence satisfies us, as a matter of fact, that they were

intended for such illegal sale, the plaintiffs cannot recover for them."

In *McGlinchey v. Winchell*, 63 Me. 31, it is decided that it matters not that the liquors are purchased out of the state; if purchased with intent to sell the same in violation of law within the state, an action for the price cannot be maintained. These cases are decisive of the question at issue. There is no question of their correctness. The statute is explicit, and it is one which it was entirely competent for the legislature to enact.

The further contention is made that this statute is unconstitutional, or was prior to the act of congress approved August 8, 1890, making interstate commerce relating to intoxicating liquors subject to the police powers of the several states, because in violation of that clause of the federal constitution which gives congress the power to regulate commerce between the states. The case of *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, is relied upon in support of this proposition. We think that there is no principle decided in that case which has any bearing upon the question under consideration. If the purchaser had bought the liquors with the intention of selling them in this state in the original packages, it would not, at that time, have been an intention to violate the law (*Leisy v. Hardin*, *supra*; *State v. Burns*, 82 Me. 558, 19 Atl. 913), and consequently not within the terms of the statute; but in this case, as we have before said, we find that the liquors were bought with the intention of reselling them in this state in violation of law.

In accordance with the terms of the report, therefore, the entry should be:

Judgment for the plaintiff in review for the amount of the former judgment for debt and costs, with interest thereon from the time of rendition of said judgment. Costs in the review will follow.

MATHIAS v. KIRSCH.

(Supreme Judicial Court of Maine. May 10, 1895.)

PROMISSORY NOTE—CONSIDERATION—ACCOMMODATION PAPER—INDORSEMENT.

1. A. made a loan to B., taking a note for the amount loaned, secured by a chattel mortgage upon B.'s stock of goods, and, as additional security, a note of the defendant for \$500, payable to B., and by him indorsed. As between the defendant, the maker of the note, and the payee there was no consideration. It was given for the accommodation of the payee, but it was indorsed by the payee, and delivered to A., before its maturity, and as collateral security for a debt created contemporaneously with such indorsement and delivery.

2. At the maturity of this note it was renewed by another of like tenor, given by the defendant, payable to B., and was taken by A. in place of the first note. Again, upon the maturity of the second note, a third—the one in suit—was given under like circumstances. Both of the last two notes were delivered to A., and each was taken by A. in the place of the preceding one; but neither of these two was

indorsed by the payee, and there was no consideration for either as between the maker and the payee.

3. This suit is brought by the executrix of the payee upon the last of the three notes, for the benefit of A., the owner and holder thereof. *Held*: That under these circumstances the defendant cannot set up the want of consideration.

4. That the rights of the parties were established by the first note, which the plaintiff in interest took at the time of the creation of the indebtedness from B. to her. The subsequent notes were mere renewals, extensions of credit.

5. That, the note first given being valid and enforceable by the person for whose benefit this action was brought, the surrender of that note was a good consideration for the second; and that this is equally true as to the substitution of the note in suit for the second.

(Official.)

Exceptions from superior court, Cumberland county.

Action by Dorothea Mathias, executrix, against Wendall Kirsch, on an unindorsed note. Defendant had judgment, and plaintiff brings exceptions. Exceptions sustained.

L. B. Dennett, for plaintiff. C. F. Libby, for defendant.

WISWELL, J. In November, 1892, one Emma Shine loaned to Solomon Mathias \$3,000, taking from him a note for that amount, secured by a chattel mortgage upon a stock of goods, and, as further security, the promissory note of the defendant for \$500, payable to Mathias, and by him indorsed.

As between the defendant, the maker of this note, and Mathias, the payee, there was no consideration. It was given for the accommodation of Mathias, but it was indorsed by the payee, and delivered to Mrs. Shine before its maturity, and as collateral security for a debt created contemporaneously with such indorsement and delivery.

At the maturity of this note it was renewed by another of like tenor, given by the defendant, payable to Mathias, and taken by Mrs. Shine in the place of the first note. Again, upon the maturity of the second note, a third—the one in suit—was given under like circumstances. Both of the last two notes were delivered to Mrs. Shine, and each was taken by her in the place of the preceding one, but neither of these two was indorsed by Mathias, and there was no consideration for either as between the maker and the payee.

The plaintiff, as executrix of the payee, brings this suit upon the last of the three notes for the benefit of Emma Shine, the owner and holder thereof.

The only question presented by the exceptions is whether, under these circumstances, the defendant can avail himself of the fact that the note was wholly without consideration as between the maker and the payee, and was given for the accommodation of the latter. The judge, who tried the case without the intervention of the jury, ruled as a matter of law "that the note in suit not be-

ing indorsed by Mathias, and being without consideration, the defendant can set it up in defense of this suit."

The defendant's counsel relies upon the well-settled principle that the assignment and delivery of a negotiable promissory note before maturity, without the indorsement of the payee, gives to the assignee only the rights of the payee. *Haskell v. Mitchell*, 53 Me. 468; *Allum v. Perry*, 68 Me. 232.

This contention would unquestionably be correct if it were not for the transactions between the parties previous to the giving of the note in suit. But we think that the rights of the parties were established by the first note, which the plaintiff in interest took at the time of the creation of the indebtedness from Mathias to her. The subsequent notes were mere renewals, extensions of credit. Before she surrendered the first note she held a valid obligation of the defendant, which she might have enforced at any time after maturity. Each of the subsequent notes was given by the defendant and taken by the plaintiff in interest for the purpose of replacing the prior note. It was merely a substitution of a new note for one that had matured. As between the defendant and the person for whose benefit the action is brought, there was a good and sufficient consideration for the last two notes. The note first given being valid and enforceable in her hands, the surrender of that note was a good consideration for the second, and this is equally true as to the substitution of the note in suit for the second. *Dockray v. Dunn*, 37 Me. 442; *Dunn v. Weston*, 71 Me. 270.

We think, therefore, that the ruling excepted to was incorrect, and that it was not competent for the defendant to show that, as between him and the payee, there was no consideration.

Exceptions sustained.

KAHERL v. INHABITANTS OF ROCKPORT.

(Supreme Judicial Court of Maine. May 10, 1895.)

DEFECTIVE STREET—ACTION FOR INJURY—NOTICE OF DEFECT.

1. A notice which sufficiently and definitely describes the location of an alleged defect, but does not describe the location of the defect that caused the injury, is not in compliance with the statute. *Rev. St. c. 18, § 80.*

2. The written notice in this case specified the location of the defect, in effect, as follows: "In the sidewalk of the highway known as 'Commercial Street,' at the termination of the planking on that evening, nearly abreast the steam gristmill and lumber factory." At the time of the accident the town was rebuilding the sidewalk along Commercial street, and had completed it to a point 210 feet beyond the mill mentioned in the plaintiff's notice. For a portion of the way the sidewalk consisted of wood plank, which terminated at a driveway nearly abreast the mill, and for the remaining distance it consisted of a concrete of limestone chips and gravel. The defect which caused the injury was not "nearly abreast the mill," but 210 feet

distant therefrom. It was not at the termination of the planking, but about 200 feet from the end of the planking.

3. The location of the defect might have been accurately specified by reference to a dwelling house in its immediate proximity.

(Official.)

Action by Orrville M. Kaherl against the inhabitants of Rockport for personal injuries. Heard on report. Judgment of nonsuit.

J. H. & C. O. Montgomery, for plaintiff.
C. E. & A. S. Littlefield, for defendants.

WISWELL, J. The only question is whether, in an action against a town to recover for injuries caused by an alleged defect in the sidewalk of a street, the notice, required by statute to be given within 14 days after the accident, sufficiently specifies the location of the alleged defect.

The statute (Rev. St. c. 18, § 80) requires the person injured to give written notice, "setting forth his claim for damages and specifying the nature of his injuries and the nature and location of the defect which caused such injury."

The written notice, in this case, describes the location as "a defect and want of repair in the sidewalk of a highway known as 'Commercial Street,' at a point in said highway nearly abreast the steam gristmill and lumber factory." Further on in the same notice, the nature and location of the defect are described as follows: "The defect and want of repair through which said injuries were occasioned consisted of deep depression of the sidewalk at the termination of the planking on that evening."

Fairly interpreted, the whole notice, in regard to the location of the defect, would read, "In the sidewalk of the highway known as 'Commercial Street,' at the termination of the planking on that evening, nearly abreast the steam gristmill and lumber factory."

At the time of the accident, the town was rebuilding the sidewalk along Commercial street, and had completed it to a point 210 feet beyond the mill mentioned in the plaintiff's notice. For a portion of the way the sidewalk consisted of wood plank, which terminated at a driveway nearly abreast the mill, and for the remaining distance it consisted of a concrete of limestone chips and gravel. The defect which caused the injury was a hole at the end of the concrete walk, and 210 feet distant from the mill referred to in the plaintiff's notice.

The question here is not whether a notice in general terms is sufficient to lead the municipal officers, "acting reasonably, into such inquiry and investigation as would result in their acquiring a full knowledge of the facts of the case," as in *Blackington v. Rockland*, 65 Me. 332. The notice in this case is precise and definite. It describes the location as "at the end of the planking, nearly abreast the mill," while the defect which caused the injury was at an entirely different place. It

was not nearly abreast the mill, but 210 feet distant therefrom; and it was not at the end of the planking, but about 200 feet, as shown by the plan, from the termination of the planking. This word "planking" must be taken in its common and ordinary meaning, "planks collectively," "a series of planks in place," and not in the unusual and extraordinary sense claimed by plaintiff's counsel.

The object of this statute requirement as to the subsequent notice is apparent. It is that the municipal officers may be speedily informed of the nature and extent of a person's injuries who claims to have sustained them by reason of a defective way, and that they may have an opportunity to examine into the facts, especially the alleged defective condition of the way, before changes have occurred, with a view, either of procuring testimony to contest the claim, or to settle it if, after investigation, they deem a course advisable. *Blackington v. Rockland*, supra. The municipal officers in this case, in making an investigation of the facts, based upon the information contained in the notice, would naturally have gone to the precise spot referred to in the notice. That place was at the end of the planking on the evening of the accident, nearly abreast the mill. There was nothing in the notice to call their attention to another place 200 feet distant from the one referred to, and which might have been accurately described by reference to a dwelling house upon the street, and only a few feet from the defect which is claimed to have caused the injury.

The notice sufficiently and definitely describes the location of an alleged defect. It does not describe the location of the defect which caused the injury. In accordance with the terms of the report the entry will be:

Plaintiff nonsuit.

PENLEY v. BESSEY.

(Supreme Judicial Court of Maine. May 10, 1895.)

SALES—DELIVERY—PASSING OF TITLE.

1. In the sale of chattels, the property passes at once on the sale, if such is the intent, although the seller is afterwards to make delivery of the goods.

2. Such intent may be expressly declared, or may be inferred from the circumstances. In the absence of an express agreement, the intent that title should pass at the time of the contract, although the seller is to subsequently deliver, is inferred, where payment in full is made.

3. The plaintiff bought of the defendant a yoke of oxen. The price was agreed upon, and fully paid in money. The plaintiff had no previous acquaintance with the defendant, and had no knowledge as to his pecuniary responsibility. The oxen were left with the defendant, to be driven by him, the next day but one thereafter, to a designated place, and there to be delivered to the plaintiff. Before the time agreed upon for delivery, without any fault of the defendant, one of the oxen was cast in the stall, and died. There was no express agreement as to when the title should pass. The plaintiff

sued to recover back the purchase price, and the jury found for him. On a motion for a new trial, it is considered by the court, under the circumstances of the case, that the fact of the payment of the full purchase price should have very great—and almost controlling—influence in determining the intention of the parties, and that a new trial should be ordered.

(Official.)

Action by Ferdinand Penley against Charles F. Bessey. There was a verdict for plaintiff, and defendant moves for a new trial. Motion granted.

This was an action of assumpsit to recover the purchase price of a pair of oxen sold by the defendant to the plaintiff, and which the plaintiff claimed were not delivered in accordance with the terms of the sale.

N. & J. A. Morrill, for plaintiff. F. L. Noble and R. W. Crockett, for defendant.

WISWELL, J. The plaintiff's agent, acting for his principal, bought of the defendant a pair of oxen. The oxen were examined by the agent at the defendant's farm; the price agreed upon, and fully paid in money. They were left in the defendant's possession; the plaintiff claiming that, by the terms of the contract, they were to be driven by the defendant, on the next day but one after, to a designated place, there to be delivered to the purchaser.

Before the time of such delivery, and without the fault of the defendant, one of the oxen was cast in a stall, and died. This action was brought to recover back the purchase price, paid as above. The plaintiff's contention at the trial was that the contract of sale was made with the defendant's wife at the time the money was paid; that the agent first offered a smaller sum, then proposed to divide the difference, and finally accepted the offer made by the wife, to sell for \$120, but upon the condition that the oxen were to be driven to another place, and there delivered. We quote from the agent's testimony: "I stepped to the sleigh, and then went back again, and knocked at the door, and she came to the door; and I told her I would take them, at one hundred and twenty dollars, if she would have them driven to Parkhurst Corner next Saturday noon. She said she would take that, and stepped back into the house."

The defendant claimed that the terms of the contract of sale had been previously agreed upon between him and the plaintiff's agent; that the wife only received the money in his absence, and neither had, nor attempted to exercise, the authority of incorporating into the contract any agreement to deliver the property sold at another place.

Whether, if the contract was begun and completed with the wife, she agreed that the oxen should be driven to another place, and there delivered, as claimed by the plaintiff, or not, there is much doubt; but we should not feel authorized to set the verdict aside

upon this question, as the evidence was so very conflicting that a jury would be authorized to find either way. But, for another reason, we think that this motion should be granted.

Assuming, as the jury has found, that the plaintiff's version of the transaction is correct, we are forced to the conclusion that it must have been the intention of the parties, so far as they gave the matter any thought, that the property passed upon the payment of the full purchase price. We can conceive of no reason why this should not have been so. If the agent had simply wanted to bind the bargain, he would have paid some small sum in earnest, or would have made a memorandum in writing. When he fully paid the agreed purchase price to a person with whom he had no previous acquaintance, or as to whose pecuniary responsibility he had no knowledge, he must have intended and supposed that the money then belonged to the vendor, and that the oxen became the property of his principal. It would have been very different if the contract had provided for the payment upon the subsequent delivery of the oxen.

This is always a question of intention. It is undoubtedly true, as stated in 1 Benj. Sales, § 325, that "the effect of an agreement in the contract of sale that the seller shall deliver the property sold, at some particular place, is, sometimes, to postpone the vesting of title in the buyer until such delivery is made," and that, if payment is not to be made until such subsequent delivery, the title will not ordinarily pass until such delivery. But the property passes at once on the sale, if such is the intent, though the seller is afterwards to make a delivery of the goods. *Id.* § 329. "Such intent may be expressly declared, or may be inferred from the circumstances. * * * In the absence of an express agreement, the intent that title shall pass at once by the contract, although the seller is to deliver, is inferred where the buyer is to give notice of time or place of delivery, where payment in full is made, where the buyer employs the seller to remove the property, or where there is other evidence that the continued possession of the seller is merely for the convenience of the buyer, or that the removal of the goods is made by the seller as agent for the buyer." *Id.* § 330.

We think that the foregoing is a correct statement of the rule. In *Mill Co. v. Brown*, 57 Me. 2, the plaintiffs made a contract for the purchase of a large quantity of spruce logs. The logs were to be marked with the plaintiffs' mark, and were to be driven by the vendor many miles down the Androscoggin river, and there delivered. It was held that a survey of the logs on the landing place, and the putting thereon of the vendee's mark, constituted a sufficient delivery, even as against subsequent purchasers, although, by the terms of the contract of sale, the vendor

was bound to deliver the logs at a specified place, many miles below the landing. And in *Dyer v. Libby*, 61 Me. 45, it was decided that if, by the contract, goods sold are to be hauled by the vender to a place specified, it does not necessarily follow that the title thereto does not pass till they reach the place designated.

In our opinion, the fact of the full payment of the purchase price should have very great weight, and, under the circumstances of this case, almost controlling influence in determining the question of intention.

It is true that this is a question of fact in any case, and one for the jury to pass upon. As no exceptions are presented, it must be presumed that the instructions to the jury were sufficient and proper; but the circumstances point so strongly to an intention upon the part of the parties that the property should pass, we believe that the jury must have misunderstood the instructions, or erred from some other cause.

Motion granted. Verdict set aside.

BEAUDETTE v. GAGNE.

(Supreme Judicial Court of Maine. May 10, 1895.)

SEDUCTION — EVIDENCE — OFFERS OF COMPROMISE — LOSS OF SERVICE.

1. In the trial of an action on the case by a father for the seduction of his daughter, where the plea was the general issue, and the seduction was denied, evidence was properly admitted, tending to show that, about three months after the date of the alleged seduction, the defendant accompanied the daughter to a city other than that in which they lived, where an abortion was performed upon her, and that upon her return home she at once became sick, and so continued for some three weeks.

2. In an action of this nature, for the seduction of a minor daughter, the relation of master and servant between her and her father is presumed to exist; and no acts of service need be proved, unless he has divested himself of the right to control her person or to require her services.

3. When the daughter is of age, it must appear that she resided in her father's family, and performed some acts of service, however slight. It is not necessary that the services of an adult daughter should be such as the father can command. It is sufficient if, by mutual assent, the relation of master and servant did in fact exist.

4. The law very wisely excludes testimony of mere offers of compromise. But if, during the negotiations, either party makes an admission of a fact material to the issue, because it is a fact, such admission, both upon principle and authority, may be offered in evidence, the same as if made elsewhere and under different circumstances.

5. If, when testimony is offered, it appears to be clearly admissible, but subsequently it is ascertained that the testimony was inadmissible, because of reasons not known or not stated at the time it was offered, counsel should ask to have it stricken out, and for appropriate instructions and, having failed to do this, he cannot later take exception to its admission.

Emery v. Gowen, 4 Greenl. 33, affirmed.

Cole v. Cole, 33 Me. 542, affirmed.

(Official.)

Exceptions from supreme judicial court, Androscoggin county.

Action by Victor Beaudette against Narcisse Gagne for the seduction of plaintiff's daughter. Plaintiff had judgment, and a verdict for \$1,000, and defendant brings exceptions. Exceptions overruled.

This was an action brought to recover damages for the seduction of the plaintiff's daughter. Plea, general issue. The jury returned a verdict of \$1,000 for the plaintiff.

The defendant took exceptions to the admission of testimony, and the refusal of the presiding justice to give requested instructions, as appears in the opinion.

W. H. Judkins, W. H. Newell, and W. B. Skelton, for plaintiff. F. L. Noble and R. W. Crockett, for defendant.

WISWELL, J. Action on the case by a father for the seduction of his adult daughter. The defendant alleges exceptions for the following causes:

1. Because evidence was admitted tending to show that, on or about the 1st of April, 1892, the defendant accompanied the daughter to Portland, when and where an abortion was performed upon her, and that upon her return home she at once became sick, and so continued for some three weeks. The admission of this evidence was perfectly proper. It was material, and tended to prove the gist of the action, loss of the service of the daughter by reason of her sickness, following the alleged seduction, pregnancy, and abortion. The plea was the general issue. The seduction was denied. If the defendant accompanied the daughter, when she went to another city, for the above-stated purpose, it was a pertinent fact bearing upon the issue of seduction by him.

The defendant's counsel, at the trial, stated as his grounds of objection to the admissibility of this evidence that there was no allegation of intercourse in April, or near that time. This is not necessary. The specification of the times and places when and where criminal intercourse took place alleged the first time as on or about the 1st day of January, 1892, about three months prior to the time when it was claimed that the defendant accompanied the daughter to Portland.

2. The defendant next takes exception because witnesses were allowed to testify as to certain statements made by the defendant, when, as claimed by his counsel, the defendant was trying to effect a compromise of this suit.

The law very wisely excludes the testimony of mere offers of compromise. When one against whom a claim is made denies his liability, or the extent of it, but for the purpose of buying his peace, makes an offer of concession or compromise, this should have no effect whatever against him, and therefore ordinarily should not be admitted in evidence. The same is, of course, true, if a person making a claim against another, for the

purpose of preventing litigation, offers to settle for a less sum than he claims to be entitled to. But if, during the negotiations, either makes an admission of a fact material to the issue, because it is a fact, such admission, both upon principle and authority, may be put in evidence the same as if made elsewhere and under different circumstances.

This important distinction was early recognized in this state in the case of *Cole v. Cole*, 33 Me. 542, as it has been by all other courts where the question has arisen.

In this case the evidence was admitted for this purpose only. The presiding justice, when the evidence was offered, said: "Mere offers to compromise a suit I shall exclude, but any admissions of matters of fact in relation to his connection with plaintiff's daughter I shall admit." And in his charge he very clearly explained to the jury that the offer of compromise made should have no bearing upon the case, and that testimony of the conversation was only material so far as it showed any admissions of material facts.

It may often happen that such admissions of facts are so connected with negotiations of compromise that the whole conversation must be admitted in evidence, in which case care should be taken, as it was in this case, to explain to the jury the purpose of the testimony, and to draw their attention to the distinction between that portion which is pertinent and proper for them to consider, and that which is not.

3. The next exception is to the admission of the testimony of a jurymen at a prior term of the court, who was allowed to testify to a conversation had with him by the defendant, wherein the defendant asked him "to hang out for him." The defendant's counsel now claim that this conversation was with reference to another case,—an indictment then pending against him and about to be tried. Before this testimony was admitted, the justice presiding inquired if the conversation was about this case, and, upon being answered in the affirmative, said: "I do not see any grounds for excluding any of your client's admissions." The record does not disclose that the counsel raised the objection that the conversation was not about the case on trial. As it appeared when the testimony was offered, it was clearly admissible. If it was ascertained subsequently that the conversation was about another trial, the counsel should have asked to have had it stricken out, and for appropriate instructions.

4. Lastly, exception is taken to the refusal of the court to instruct the jury that, unless the services rendered by the daughter were such as the plaintiff could command, and were not voluntary on her part, the plaintiff could not recover.

This form of action is based upon the legal fiction of loss of service, and the relation of master and servant must exist. In the case of a minor daughter, such relation is presumed to exist between her and her fa-

ther, and no acts of service need be proved, unless he has divested himself of the right to control her person or to require her services. When the daughter is of age, it must appear that she resided in her father's family, and performed some acts of service, however slight. This was decided to be the law in this state in the case of *Emery v. Gowen*, 4 Greenl. 33, a case which has been frequently cited and followed by the courts of other states.

The learned justice who presided, in his charge to the jury, fully and clearly explained the somewhat peculiar rules of law which are applicable to an action of this kind, in the course of which he said: "But if, at the time of the seduction, she is of age,—that is, more than 21 years of age,—then it must appear that the family relations continued to exist, that she was at least a resident of her father's family, and performed some service. But it is held that the most trifling services, under those circumstances, are sufficient to create the relation." This instruction was all that the defendant was entitled to, and was in accordance with the weight of authority. See *Emery v. Gowen*, supra; *Mercer v. Walmsley*, 5 Har. & J. 27; *Vossell v. Cole*, 19 Mo. 634; *Davidson v. Abbot*, 52 Vt. 570; *Martin v. Payne*, 9 Johns. 388, and cases collected in the *American & English Encyclopedia of Law* (volume 21, pp. 1009 to 1017) under title of "Seduction."

It is not necessary that the services of an adult daughter should be such as the father can command. Ordinarily, a father cannot command the service of a daughter of age. He cannot compel the service of his child over 21, as he can that of his minor child. It is sufficient if, by mutual assent, the relation of master and servant did in fact exist.

Exceptions overruled.

ROMEO v. BOSTON & M. R. R.

(Supreme Judicial Court of Maine. May 10, 1895.)

ACCIDENT AT RAILROAD CROSSING—CONTRIBUTORY NEGLIGENCE—NONSUIT.

1. The plaintiff, a young woman 19 years of age, in the full possession of her senses of sight and hearing, while walking on Main street in the city of Biddeford, across the track of the defendant corporation, was struck by the locomotive attached to a regular train on the defendant's road, and sustained certain injuries. Gates were maintained at the crossing in question, but at the time of the accident they were in disuse, because of alterations being made at that place, and were left open. A flagman was also stationed at the crossing, but a jury might be authorized from the evidence to believe that, at the time and just before the train passed, he was not in a position to do the duty required of him in warning travelers of an approaching train. Plaintiff's witnesses estimated the rate of speed of the train, as it crossed Main street, at from 30 to 35 miles an hour. The plan, made a part of the case, shows that, while the plaintiff was walking along Main street towards the track, for a distance of at least 80 feet before coming to the track upon which this train was

running, she had a plain view of the track in the direction from which it was coming for a great distance, obstructed only by a small gate-house, which could only have shut off the view of a small portion of the track at any one time. She testified that, before attempting to cross the track, she neither looked nor listened for an approaching train. *Held*, that a jury would only be authorized, from evidence of these facts, to come to the conclusion that the plaintiff contributed to the accident by her own want of due care.

2. While the fact of open gates is a circumstance which a traveler may properly take into consideration, and upon which he may place some reliance, this does not relieve him of all care. This rule is especially applicable to the facts of this case, where the plaintiff was walking, with a generally unobstructed view of the track, and the slightest exercise of care upon her part would have prevented the accident.

3. Ordinarily the question of due care and of negligence is for a jury. This is necessarily so when the facts bearing upon these questions are in dispute, or even when the facts are undisputed, and intelligent and fair-minded men may reasonably differ in their conclusions; but it is not true where the facts are undisputed, and there is no evidence, or the evidence is too slight and trifling, to be considered by the jury.

(Official.)

Report from supreme judicial court, York county.

Action by Marjorie Romeo, by her next friend, against the Boston & Maine Railroad. Heard on report of testimony and stipulation. Judgment of nonsuit.

This was an action on the case by the minor plaintiff, a girl 19 years old, to recover damages for injuries received by being struck by an east bound train while passing, about 9 o'clock p. m., July 17, 1893, along Main street, in Biddeford, where it crosses the defendant's railroad at grade.

The acts of negligence alleged in the declaration were the running of the train at a rate of speed in excess of that allowed by law, in the compact part of a city, where gates or flagmen are not provided; also, a failure to lower the arms of the gates which stood on both sides of the track, and the want of signals by the flagman stationed at the place.

The plaintiff testified that she, with another girl about her own age, had been visiting a merry go round, located northerly of defendant's tracks and easterly of Main street, and was returning southerly across the tracks. It appeared that there were then two tracks in use across the street, and another in course of construction; and the gates, which for some years had been in use there, were not then in operation because of the removal of the posts, to be reset to cover the spur track then being constructed, and which occupied the ground where one of the posts had stood. Those upon the northerly side were detached from their posts, while the arm of those upon the southerly side remained erect upon the post and unused, that particular post not requiring resetting. They reached Main street from the lot where the merry go round was located, at a point about 100 feet northerly of the tracks, and

were walking slowly, side by side, the plaintiff upon the westerly side of her friend, towards the tracks.

The plaintiff appeared to have been familiar with the crossing, having lived in Biddeford most of her life, and crossed it many times. She said: "Just as we got on the sidewalk," she saw "gates up in the air. I did not pay much attention to it, and couldn't tell which side it was on." Her friend testified: "I saw one gate, and it was up." Neither heard whistle or bell, or saw headlight or train, until, as the plaintiff said: "It was on us. I lost my senses." Her friend said: "Almost on us. I screamed and started to run. Don't remember what I did." The friend was seized by a person present, who pulled her in front of the train across the track to the southerly side. Plaintiff did not get over, but was struck.

It appeared, from a plan admitted in the case, that the coming train, which was on the southernmost track, was visible from any point in most or all of the way from the point where the plaintiff entered upon the street to the crossing, about 2,420 feet.

Several witnesses saw the headlight burning, and heard the whistle—the usual crossing whistle—of the coming train, and saw the flagman, with flag or lantern, in the street near his house, upon the northerly side of the crossing; and one heard him cry out a warning. One saw the train about 150 yards distant; another saw it about 250 yards away.

The other material facts appear in the opinion.

B. F. Hamilton and B. F. Cleaves, for plaintiff. G. C. Yeaton, for defendant.

WISWELL, J. This case comes to the law court upon a report of the plaintiff's testimony, with the stipulation that, if upon this testimony the action can be maintained, it shall be sent back for trial; otherwise, a nonsuit is to be ordered.

About 9 o'clock on the evening of July 17th, last, the plaintiff, a young woman 19 years of age, while walking on Main street, in the city of Biddeford, across the railroad tracks of the defendant corporation, was struck by a locomotive attached to a regular train on that road, and sustained certain injuries.

In order for her to recover for these injuries, it is incumbent upon her to prove negligence upon the part of the defendant corporation, and that no negligence upon her part contributed to the accident.

It is admitted that this crossing was near the compact part of the city of Biddeford. Consequently, the running of the train across this street at a greater speed than six miles an hour, unless there was either a gate or a flagman at the crossing, would be in violation of chapter 377, Laws 1885, and in and of itself negligence. Although gates were maintained at this crossing, upon the night

of the accident they were in temporary disuse, because of work being done at that particular place, and were left open. And although a flagman was stationed at the crossing, a jury might be authorized to come to the conclusion, from the evidence before us, that, at the time and just before this train passed, he was not in a position to do the duty required and expected of him in warning travelers of an approaching train. Witnesses for the plaintiff have estimated the speed at which this train was running at from 30 to 35 miles an hour. So that, as to the first proposition which it is necessary for the plaintiff to prove, we think there was sufficient evidence to entitle her to go to the jury.

But it is equally as important and necessary that the plaintiff should prove that there was no negligence upon her part which contributed to the result. In our opinion, she has not only failed to do this, but has shown an entire absence of all care.

A railroad track across a street or highway is a recognized place of danger. No person should cross it without taking such precautions as experience has shown are necessary in order to do so with safety. The standard of care required is such as ordinarily careful and prudent persons would exercise, having in view all the known dangers of the situation. This court, as well as the courts of most other states, has gone further than to establish a general standard of care required of a traveler in crossing a railroad track, and has laid down the rule that it is negligence per se for a person to cross a railroad track without first looking and listening for a coming train. *Chase v. Railroad Co.* 78 Me. 346, 5 Atl. 771.

The plaintiff was in the full possession of her senses of sight and hearing, and yet she says herself that she neither looked nor listened for an approaching train. If she had exercised the slightest care, and had listened for a single moment, the noise of the rapidly approaching train would have given her ample warning; or, if she had looked before she had arrived at the track, she could have seen the train for a great distance, as she testifies upon cross-examination.

While the testimony gives no distances, the plan, which is made a part of the case, shows that, while the plaintiff was walking along Main street towards the track, for a distance of at least 80 feet before coming to the track upon which this train was running, she had a plain view of the track in the direction from which it was coming for a great distance, obstructed only by a small gatehouse, which could only have shut off the view of a small portion of the track at any one time.

But the plaintiff's counsel, while admitting the general and well-established rule as to the amount of care required of a traveler in crossing a railroad track, and the particular duty in such a case of looking and listening, contends that the open gates at this crossing,

where gates had long been maintained, relieved the plaintiff from the exercise of the care which would otherwise have been required. *State v. Boston & M. R. Co.*, 80 Me. 430, 15 Atl. 36, and *Hooper v. Railroad Co.*, 81 Me. 260, 17 Atl. 64, are relied upon in support of this proposition.

It is undoubtedly true that the fact of open gates is a circumstance which the traveler may very properly take into consideration. A person of ordinary care would do so to some extent, but it does not relieve the traveler from all care. As was said by Chief Justice Peters, in *State v. Boston & M. R. Co.*, supra: "While the neglect of the company to perform its duties does not excuse the traveler in a neglect of the duties and degree of care which the law imposes on him, still, in making his calculations for crossing a railroad track safely, he is often justified in placing some reliance on a supposition that the company will perform the obligation resting on it, where there is no indication that it will do the contrary."

Again, it is said, in that opinion: "Of course, full reliance cannot always be placed on an expectation that a railroad company will perform its duties, when there is any temptation to neglect them, because experience teaches us that it would not be practicable to do so. But such an expectation has some weight in the calculation of chances, greater or less according to the circumstances."

In both of the cases cited, the travelers were driving in a carriage, the view of the track was obstructed, and the court held that a jury might be authorized in finding that the person injured, in each case, did look and listen. Here the plaintiff was walking, the view of the track was generally unobstructed, and the plaintiff testifies that she neither looked nor listened.

The weight that should be given to the negligence of a railroad company, in not properly operating its gates, depends to a very marked degree upon the circumstances of each case. A person approaching a railroad crossing, in a carriage, with a view of the track obstructed, might, in the exercise of ordinary care, be led to rely upon the upright arms of a gate until it was too late to control his horse or to turn him aside; but it is difficult to see how a person walking, with a sufficiently plain view of the track, could be thus misled to such an extent as to come into collision with a rapidly moving train.

It is further contended, in behalf of the plaintiff, that this is a question which should be passed upon by a jury. Ordinarily, the questions of due care and of negligence are for the jury. This is necessarily so when the facts bearing upon these questions are in dispute, or even when the facts are undisputed, and intelligent and fair-minded men may reasonably differ in their conclusions. But it is not true where the facts are undisputed, and there is no evidence, or the evidence is too slight or trifling, to be considered by a jury.

In such cases, it is not only proper, but it is the duty of the court, to order a nonsuit. *Elwell v. Hacker*, 86 Me. 416, 30 Atl. 64; *Railroad Co. v. Hefferan* (N. J. Err. & App.) 30 Atl. 578.

In this case a jury would be authorized to come to only one conclusion,—that the plaintiff was guilty of negligence which contributed to the accident.

Plaintiff nonsuit.

STEVENS v. GORDON.

(Supreme Judicial Court of Maine. May 10, 1895.)

CONVERSION—TRESPASS—CUTTING GRASS ON HIGHWAY—TITLE TO ADJUTING LAND—NEW TRIAL.

1. In an action of trover for the value of grass cut from that side of a highway next to plaintiff's farm, the question does not necessarily involve the legal title to the land, but only the possession.

2. Mere possession of land is sufficient to sustain an action of trespass quare clausum against a person having neither title nor possession. So of trover for the value of grass cut from such land.

3. The possession of personal property carries with it the presumption of title, and enables the possessor to maintain trover against any person except the rightful owner.

4. And it is no defense, in such action, to set up title to the land in some third person, unless the defendant can justify his acts by authority from such party.

5. A motion for a new trial cannot be considered when there is not a full report of the evidence.

(Official.)

Exceptions from superior court, Kennebec county.

Action by Mary E. Stevens against Jonathan B. Gordon. To the judgment rendered, defendant brings exceptions, and moves for new trial. Motion and exceptions overruled.

A. M. Goddard, for plaintiff. Loring Farr, for defendant.

FOSTER, J. This is an action of trover for the value of a small quantity of grass grown on the side of the road running between the farms of plaintiff and defendant, and which was cut and hauled away by the defendant. The title to the grass is the question in controversy.

The case comes before us on exceptions, and motion for a new trial.

The motion cannot properly be considered, inasmuch as, from an inspection of the evidence as reported, it is not full and complete, and the certificate of the stenographer shows that it is only a portion of that given at the trial.

The exceptions relate to the admissibility of certain evidence, and to statements of the presiding judge in his charge. As bearing upon these exceptions, the case shows that a range way, eight rods wide, running east and west and laid out on the plan of the original proprietors of the Kennebec Purchase, at one

time separated the respective farms now owned by plaintiff and defendant.

The road which now divides these farms was laid out four rods wide, taking the north half of the range way.

The plaintiff introduced in evidence a warranty deed which bounded her land "on the south by the road" in question. By the terms of this deed, the grant extended to the center of the road. *Oxton v. Groves*, 68 Me. 371; *Low v. Tibbetts*, 72 Me. 92. Being a warranty deed, the plaintiff's title, in the absence of evidence to the contrary, is presumed to be coextensive with the grant, or to the center of the road.

The grass sued for was cut on the northerly side of this road, and upon land to which the plaintiff had prima facie title by deed.

But the defendant contends that the plaintiff's grantor owned only to the north line of the road, and could not give title to the center of it, and, in support of this contention, puts in evidence two deeds in the chain of plaintiff's title, running to previous owners of the plaintiff's lot, wherein the road was excluded.

The mere exclusion of the road in these deeds does not, of itself, rebut the plaintiff's prima facie title, so as to defeat this action, for the plaintiff claims title to the land over which this road was laid by adverse possession acquired by the plaintiff's predecessor in title long prior to the laying out of the road.

The evidence shows that one Swanton, who was a predecessor in title, before the road was laid out or built, had occupied and cultivated the entire width of the present road, and that what is now the road was included in his field, and that the dividing line between him and the defendant's grantor was where the south side of the road now is, and that the wall along the north line of the road was built by Swanton after the road was constructed.

Such being the position of the plaintiff, it was allowable for her to show that Swanton, and all his successors in title, had openly, notoriously, and peaceably possessed, cultivated, and enjoyed the produce of the north side of this road—not, however, interfering with the general rights of the public—until the occurrence in 1892, which is the subject of this suit.

The plaintiff had the right to show possession, which is some evidence of title, and, in the absence of all other, is evidence enough of title. *Brookings v. Woodin*, 74 Me. 222.

This evidence of uninterrupted and undisputed possession, cultivation, and improvement for so long a period of years had an important bearing, from the fact that the locus is directly in front and in plain view of defendant's house. He admits knowledge of these acts of the plaintiff and her predecessors in title, and that until 1892 he neither questioned their right, nor asserted any in himself.

This action of trover does not necessarily involve the legal title to the land, but only the possession. Mere possession of land is sufficient to sustain an action of trespass *quare clausum* against a person having neither title nor possession. *Brookings v. Woodin*, supra. The plaintiff, being in possession of the land, as the evidence shows, could have maintained trespass against any person who could not show a better title. So the possession of personal property carries with it the presumption of title, and enables the possessor to maintain trover against any person except the rightful owner. *James v. Wood*, 82 Me. 173, 177, 19 Atl. 160, and cases cited.

The plaintiff was in possession of the land, and had the choice of actions.—trespass *quare clausum*, or trover for the value of the grass severed from it.

Nor could it have availed the defendant to set up title to the land in some third person, unless he could justify his acts by authority from such party. *Fiske v. Small*, 25 Me. 453. This he did not attempt to do.

Therefore, as all the excluded deeds were offered, not for the purpose of proving title in the defendant, or in any person under whom defendant claimed to justify his acts, but for the purpose of showing title in a stranger, they were properly excluded.

The answer to the question propounded to Joseph H. Williams as to what land passed under the description "rest and residue," in some of the above-named deeds, was rightly excluded. It was in relation to deeds that were irrelevant to the case. If the deeds were not admissible, the question was of no importance. Moreover, there being no latent ambiguity in the deeds, they were not subject to explanation by parol testimony. If there was any ambiguity, it was patent, and an examination of the deed to which the question related shows that it could have been readily removed by an examination of the other deeds referred to therein. They should have been produced or accounted for before any oral testimony would have been admissible.

There are numerous exceptions taken to certain detached portions and sentences from the charge of the presiding judge. It is unnecessary to consider each one separately. A part of them relate to the question of title by adverse possession,—a title acquired prior to the location of the road in question,—and, taken in the connection in which they stand, there does not appear to be anything objectionable in them. These instructions were as favorable to the defendant as he could expect. The defense was allowed great latitude in the introduction of evidence tending to show title to the land in a stranger, and under whom there was no pretense that the defendant could justify. Upon this point the judge said: "The introduction of a deed which would simply negative the fact that she or her immediate predecessor in title owned to the

center of the road—or, in other words, proving negatively by a single deed that she did not by that deed get the title—would not be sufficient to dispossess her of the title. But it must be by clear and absolute proof of title in another party." This certainly was more favorable to the defendant than he was entitled to, especially when not justifying or claiming under such other party. Again, the exception to the remark of the court, that "both counsel in argument claimed that the road was laid out upon the northern side of the range way," cannot be sustained. If the position of counsel was not correctly stated by the court, attention should have been called to it at the time, that the court might have corrected it.

Nor is there anything in the other exceptions which requires any extended consideration. We see nothing in them that requires any revision at the hands of this court.

Motion and exceptions overruled.

TURNER v. HOUPPT et al.

(Court of Chancery of New Jersey. Sept. 27 1895.)

RECISSION OF CONTRACT—FALSE REPRESENTATIONS— —MENTAL CAPACITY—*LIS PENDENS*— —AMENDING PLEADINGS—ESTOPPEL.

1. False representations, knowingly made by a vendor to a vendee previous to the sale, as to the character, condition, and value of the property, are presumed to have influenced the mind of the purchaser, even though he had full opportunity to observe and know the actual truth, and the burden is on the vendor to prove clearly that such false representations did not influence the vendee in making the sale.

2. The true test of mental capacity, whether to make a will or to transact business, is the ability "clearly to discern and discreetly to judge" of the matter in hand.

3. A higher degree of mental capacity is required to transact the business of an exchange of lands than to attend to the ordinary affairs of everyday life or to make a valid will.

4. The essence of the continuance of a *lis pendens* is that the object, subject-matter, ground of relief, and parties should remain unchanged, except upon a devolution of the title from the complainant. An amendment which does not change either of these, but is a mere specification of additional matters of proof of the ground of recovery, i. e. fraud, does not make a new suit, even though the matter so set up becomes in the end the ground of recovery.

5. Complainant, by his bill, asked to recover in equity a piece of land from defendant, upon the ground that title thereto had been obtained from complainant by fraud practiced by defendant, specifying the fraud. The defendant made a conveyance, pending the suit, to a third party, who had full notice of it. After conveyance, complainant amended his bill by adding other specifications of fraud of the same character, and upon proof of these latter specifications obtained a decree. *Hdd*, that the maxim, "*Pendente lite nihil innovetur*," applies.

6. Complainant, at a time when his mental faculties were weakened by disease, was induced, by false and fraudulent representations made by defendant, to convey to defendant a piece of land. Shortly afterwards, and after complainant had become mentally unfit to attend to business, his wife discovered what she supposed to be evidence of false and fraud-

ulent representations made by defendant to her husband, and commenced a suit in chancery in his name to recover the land so conveyed, on the ground of fraud, specifying the matter which she discovered. A would-be purchaser from the fraudulent grantee of the land so conveyed, having notice of the suit, inquired into the specifications of fraud contained in the bill, and satisfied himself that they were untrue, and, among others, inquired of the wife, and learned from her only what was contained in the bill, and also of the incapacity of her husband, and purchased the land. Subsequently, the wife discovered, among her husband's papers, evidence of other fraudulent representations, and caused the bill to be amended accordingly, and finally succeeded in setting aside the conveyance upon proof of the specifications of fraud contained in the amendment. *Held*, that the complainant was not estopped by the answers made by the wife to the inquiries made by the expectant purchaser.

(Syllabus by the Court.)

Bill by Lillian M. Turner against Henry J. Hout and others to set aside an exchange of real properties. Heard on bill, amended bill, bill of revivor, and answers. Decree for complainant.

Frank McDermott, Robert S. Clymer, and Mr. Kuhlemeier, for complainant. Lindley M. Garrison, for defendants.

PITNEY, V. C. The object of the bill is to set aside an exchange of real properties made between Albert L. Turner, the original complainant, and the defendant on the last days of May, 1891. By deed dated May 29, 1891, Dr. Turner and his wife, the now complainant, Lillian M. Turner, conveyed to Henry J. Hout an hotel, called the "Norwood Inn," and some vacant building lots at Avon by the Sea, Monmouth county; and by deed of the same date the defendants conveyed to Mrs. Turner a farm and woolen-mill property in Maryland, called the "Mallalieu Mill," the one conveyance being the consideration for the other. The general allegation of the amended bill is that the defendant Hout made false and fraudulent representations to Dr. Turner as to the quality, condition, and quantity of land in the Maryland property, and that the doctor was at the time suffering from mental disease to such an extent as to render him liable to be imposed upon by such false and fraudulent representations, and that he was imposed upon thereby. The circumstances are peculiar and complicated, and the case will be best understood by stating them somewhat in extenso, and in the regular order of time.

Dr. Turner was a physician, and practiced his profession up to the year 1888. At that time he was, and had been for several years, living in the city of New York. He had a fancy for real-estate operations, and was the owner of considerable real estate, among others the hotel and vacant lots in question at Avon by the Sea, formerly known as "Key East." He gave up the practice of his profession in 1888, and also his permanent residence in New York. At that time he spent his summers at Avon by the Sea, and

his winters in Florida. He spent the winter of 1890-91 in Florida, with his wife. In March of that year he went North alone on business, and visited his sister in Connecticut. While there he suffered a very severe attack of the grippe, which affected his mind to some degree. He returned to Florida the latter part of March, and remained there with his wife till the latter part of April. His physical health improved, but the disturbance of his mind was noticeable by his wife and relatives, though not to persons who were not acquainted with him, or were not brought in close contact with him. He returned to the North with his wife in the latter days of April, 1891, stayed a few days in New York City, and then took up his residence in Philadelphia. He owned some real estate in the neighborhood of Philadelphia, and employed, as real-estate brokers, a firm of Barrows & Bliss in that city. Mr. Barrows is an elderly gentleman, past 80 years old; Mr. Bliss is a younger man. He placed in their hands for sale or exchange the Norwood Inn at Avon by the Sea. At that time the defendant was the owner of the mill property in question in Maryland, and had lived on it for at least a year. He placed that property in the hands of a real-estate broker in Philadelphia, by the name of Warbasse, for sale or exchange, with a description of the property. About the middle of May Mr. Warbasse met Mr. Barrows in the latter's office, and inquiries passed between them as to what either had for sale or exchange, and Mr. Warbasse mentioned to Mr. Barrows this Mallalieu property, and at Mr. Barrows' request wrote a description of it, in these words: "Farm of 400 acres, and a two-set woolen mill at Millington, Md., 69 miles from Philadelphia,—15 looms and 648 spindles, and full set of the best machinery to correspond. Building, 50x120; annex, 20x40. Dyehouse and engine room attached. Farm of 400 acres, divided into fields of 40 acres each by hedge, wire, and post fences. Land, fine land, said to be as good a farm as there is in the state. Has 8,000 full-bearing peach trees, 9 tenant houses, store, 17-room mansion, farmer house, and barn, stable, and all necessary outbuildings in good order. The whole property is in good farming condition, and is valued at \$40,000. Less mortgage of \$12,000 and one of \$5,000, at 6 per cent." This paper was shown to Dr. Turner by Mr. Barrows, and the result was an interview between Hout and Dr. Turner at Barrows' office, at which Mr. Hout made further representations as to his property and its qualities,—as to the cost, to wit, that the machinery in the mill had cost \$30,000, that the property was rentable at a large rent, and that there was valuable iron ore and valuable marl upon it; and, with regard to the incumbrances, that the first mortgage was for \$12,000 or \$12,500, and the second one was for \$5,000, and given to secure a note which could remain and be renewed as

long as \$200 was paid at each renewal at the end of three months.

In pursuance of these representations, on the 21st of May the parties entered into a written agreement in duplicate, in these words: "Philadelphia, May 21, 1891. This agreement, made in the city of Philadelphia the day and year above written, by and between H. J. Houpt of the city of Philadelphia, of the one part, and Dr. A. L. Turner of the city of Philadelphia, of the other part, witnesseth: That the said party of the one part agrees to convey by deed unto the said party of the other part all that certain farm and mill property known as the 'Mallalieu Mill Property,' and situate on the road leading from Millington to Church Hill, about one mile from Millington, in Queen Anne county, state of Maryland, said property containing in all about 400 acres, and more fully described in attached memorandum, together with all the mill machinery, etc., now on the place and belonging to the said party of the one part, said property to be free and clear from any and all incumbrances except the mortgages, amounting in total to sixteen thousand and nine hundred dollars (\$16,900), and title to be marketable. And the said party of the one part agrees to take from the said party of the other part, in full and complete payment for the above property the hereinafter described property, which the said party of the other part agrees to give, i. e. all that certain property, situate in Avon by the Sea, county of Monmouth, and state of New Jersey, known as the 'Norwood Inn,' and consisting of two lots of ground, each 50 feet by 140 feet, to a 10-foot alley, and located at the southeast corner of Second and Norwood avenues, together with all the buildings and improvements thereon, and all the personal property connected therewith owned by the said party of the other part; also, all those nine (9) certain lots of ground, situate in the said town of Avon by the Sea, each 50 feet by 140 feet to a 10-foot alley, and located as follows: Five on the south side of Norwood avenue, between First and Second avenues, and numbered 112, 113, 115, 116, 117, on map of Key East, or Avon by the Sea, surveyed by E. G. Harrison & Son in 1883; and four (4) on the north side of Garfield avenue, between First and Second avenues, and numbered on said map 396, 397, 398, 400, —all this property consisting of the 'Norwood Inn' and the two lots on which it stands, and the other nine (9) lots above-mentioned, to be free and clear from any and all incumbrance except a first mortgage of nine thousand dollars (\$9,000), covering the whole, and title to be marketable. This agreement to be binding if each property is found to be on examination as described herein, and if the second mortgage on the farm and mill property can be arranged satisfactorily to the party of the other part. At time of settlement, interest, taxes, and insurance to be adjusted by each party. This agreement is binding upon the

heirs and executors of each party. H. J. Houpt. [Seal.] Barrows & Bliss, for Dr. A. L. Turner. [Seal.] Witnesses: E. H. Warbasse, E. H. Warbasse." Annexed to it, at the time it was executed, was the written description previously given by Mr. Warbasse to Mr. Barrows above set out. Dr. Turner was present, although his name was signed by Barrows & Bliss, and Mr. Warbasse was the witness. Within a very few days Mr. Houpt, Dr. Turner, and Mr. Barrows visited the premises in Maryland and were on the ground between an hour and an hour and a half. Dr. Turner made a cursory examination of them. They then returned to Philadelphia and signed the following addition to the agreement of May 21st: "The above-described properties have been accepted by both the parties named in this agreement. H. J. Houpt. [Seal.] Barrows & Bliss, for A. L. Turner. [Seal.] Witnesses: E. H. Warbasse, E. H. Warbasse." And on the 29th the deeds were made and executed. No examination of the title or for incumbrances was made by Dr. Turner. Instead thereof, he took an affidavit, made by Mr. Houpt, that the same was free and clear of incumbrances except \$16,700. That affidavit was made on the 30th of May, and the deeds were presumably delivered on or about that day.

Between the execution of the agreement and the execution of the deeds, Mr. Houpt had renewed the note secured by the second mortgage, and paid \$200 upon it, thereby reducing the incumbrance that much. Dr. Turner does not appear to have observed that the deed which he accepted, while not describing the farm by metes and bounds, did refer to the conveyances under which his grantors claimed, and that those conveyances called, respectively, for 264 and a fraction acres and 6 and a fraction acres, in all 270 and a fraction acres; but, upon subsequent visits to the farm he did discover that the representation with regard to the peach trees and the iron ore and the marl and the quantity of land was untrue, and he complained of it to Mr. Barrows. Subsequently, it was ascertained that a mistake had been made in the conveyance of the Avon property by Dr. Turner and wife to Mr. Houpt, and a reconveyance was made on the 30th of July from Houpt and wife to Dr. and Mrs. Turner, and a further reconveyance by Dr. Turner and wife to Mrs. Houpt, whereby the error was corrected. Each party took possession of the premises, and retained it. Dr. Turner continued to fall in health. Early in September he made a payment on Houpt's note secured by the second mortgage, and gave his note for the balance, upwards of \$3,000, which fell due in December. On the 22d of September Dr. Turner was stricken with paralysis and was entirely unconscious for six weeks. After that he partially regained his consciousness, and was able to answer a few questions about business affairs, but not

to attend to any business of consequence, or to see any person on business, and in February, 1892, had a second stroke, and died on the 27th of April, 1892.

While lying in this condition his wife looked after his business as well as she could, and in December heard of the maturity of the renewal note which her husband had given to the holder of the second mortgage, and was obliged to make another payment and renew it. She also examined into the condition of the Maryland property, and for that purpose came into contact with Messrs. Barrows & Bliss. She then learned that in May, prior to the execution of the deeds, a judgment for upwards of \$3,000 had been rendered against Mr. Houpt in the Maryland courts, which was a lien upon the premises, and she supposed that it was a lien in addition to the amount provided for in the contract and mentioned in Mr. Houpt's affidavit above referred to. In point of fact, the judgment was not an additional lien upon the premises, but was rendered against Mr. Houpt as a garnishee debtor to the holders of the first mortgage, and it added nothing to the incumbrance on the premises, because a payment of it would be a payment on account of the first mortgage. She found the affidavit of Mr. Houpt among Dr. Turner's papers some time in December, but did not find the original contract of conveyance, with the written description of the property annexed to it, until long afterwards, nor did she know of it. She, in December, 1891, laid the case before Mr. McDermott, who had been the counsel of Dr. Turner, and he filed the bill in this cause December 31, 1891, which attacked the conveyances on the ground of the fraudulent representations as to the amount of the incumbrances, setting out the judgment of \$3,000, alleging the insolvency of Houpt and wife, and praying that the conveyances might be set aside. A *lis pendens* was filed under this bill.

Shortly after that, early in January, 1892, Mr. Houpt negotiated an exchange of the Norwood Inn property with Mr. John P. Brinton of Philadelphia for a farm that gentleman owned in Virginia. In the examination of the title which Mr. Brinton caused to be made he encountered the *lis pendens* filed by Mr. McDermott in the Monmouth county records. He immediately called on Dr. Turner; he was not able to see him, but saw Mrs. Turner, and she stated to him generally what the ground of complaint was, and referred him to Messrs. Barrows & Bliss. He went to them and learned nothing further, and went again to Mrs. Turner, and was by her referred to her counsel. But the result of the interviews, and a view of a copy of the bill, was that he understood that the only ground of complaint was the judgment above referred to. He then completed his contract with Mr. Houpt in this wise: He accepted the title to the Norwood Inn property, which was conveyed to him by Houpt and wife by deed dated the 15th of February, and he put Mr.

Houpt in possession of the Virginia farm at the same time, and executed to him a conveyance of it which he lodged, undelivered, in escrow, with a title company in Philadelphia. On the 16th of March, 1892, the defendants Houpt and wife answered the original bill, in which they showed that the judgment against Mr. Houpt in the Maryland court was of the character hereinbefore stated. In the meantime Mrs. Turner, upon further search among the papers of her husband, found the original agreement of May 21, 1891. Whereupon she immediately communicated with Messrs. Barrows & Bliss, and with her counsel, Mr. McDermott, and he filed the amended bill in this cause on the 9th of March, 1892, in which he set up the judgment mentioned in the original bill, and also the misrepresentations hereinbefore mentioned in full, did not notice the conveyance to Mr. Brinton, nor make him a party, and on the 6th of April, 1892, obtained an order upon the defendants to answer within 30 days after service of a copy of the order upon them. They did not answer. On March 26th a deed was tendered to Houpt. On April 27th Dr. Turner died testate of a will made in 1889, by which he gave all his property to his wife, Lillian M. Turner, and appointed her executrix. That will was duly proven in the city of Philadelphia. On the 22d of July Mrs. Turner filed her bill of revivor against Houpt and wife, which resulted in an answer by them to the amended bill and bill of revivor on the 23d of August, 1892. That answer set up that the Maryland property had been sold under foreclosure, and the title passed out of complainants, so that they could not rescind by a reconveyance. The facts of that foreclosure are that on the 6th of June, 1892, Mrs. Taylor, who was the mortgagee of the first mortgage on the Maryland property, assigned the same to a Mr. Milliken, who lived in Maryland, and that he advertised the same for sale on the 5th of July, by virtue of a power contained in the mortgage, and at that time he put it up for sale, first in parcels, and it was so bid off, the whole aggregating \$10,925. He then put it up as a whole, and it was sold to Mrs. Taylor, the mortgagee, for \$12,055. An order to show cause why this sale should not be confirmed was made by the district court sitting as a court of equity, and duly published, and the sale was confirmed on the 28th of December, 1892. Neither Dr. nor Mrs. Turner, nor Mr. and Mrs. Houpt, were made parties to that proceeding, or had any other notice of it, except that of publication in the newspaper, the only parties mentioned being the mortgagors, Mr. and Mrs. Adams, and the mortgagees, Mr. and Mrs. Taylor. The defendants, however, did have actual notice and knowledge of the sale (as shown by their answer filed August 23, 1893), before it had been confirmed by the court.

Let us now inquire as to the merits of the case between the parties hereto. And, first, my conclusion from the evidence is that the

descriptive statements, written and oral, made by Hought to Dr. Turner, as to the acreage, condition, and value of this property were essentially and materially untrue. The total acreage of the farm, exclusive of the pondage of the mill, was 267 acres and a fraction, by actual survey. By the two deeds of conveyance which were the sources of the title, it amounted to about 271 acres, exclusive of the pondage. The machinery in the mill was old-fashioned, worn, and of trifling value. There were not 8,000 full-bearing peach trees upon it, and very few over 1,000, if any. The others were old, worn-out, dying, and dead trees. There were not nine tenant houses, and, as I recollect the evidence, not more than four or five. The buildings were generally in a dilapidated condition. The property was not rentable as a woolen mill, and was, in my judgment, of no value as such. It was not worth \$40,000, nor \$20,000. Mallalieu, who owned it for many years, failed in 1887, and let his son-in-law, Adams, have the property for the amount of the mortgage, which was \$17,500 and was held by Mallalieu's niece, who was pressing him for the money. Adams borrowed \$5,000 on his personal credit of Mr. Todd of Wilmington, with which he reduced the first mortgage to \$12,500, and thereby induced the holder to wait on him. Afterwards Todd, needing the money, and being afraid of Adams' responsibility, took a second mortgage to secure the note, and had it renewed and discounted in a Wilmington bank. During Adams' ownership, the property depreciated in condition, and probably in value. It does not appear what, if anything, Hought paid Adams for it; but he gave his own note to Todd, in place of that of Adams. Afterwards, and pending the suit, it was sold at auction under foreclosure for \$12,000. There was no iron ore or marl upon it. The second mortgage was given to secure a note running in the bank, which had to be renewed every three months, and which Mr. Hought had succeeded in renewing, on personal application, at each maturity, by paying \$200, but which the bank and indorser declined further to renew without the payment of a larger sum, which Dr. Turner was later on obliged to pay, and gave his own note in the place of the old one. Dr. Turner lost, not only the whole property conveyed to Hought, but the amount which he paid and became liable to pay on the second mortgage. The doctor's property at Avon was fairly worth \$12,000 to \$15,000, over the incumbrance of \$9,000.

I further conclude that the representations were fraudulently made; that is to say, that they were made for the purpose of misleading Dr. Turner, so far as it was practicable, under the circumstances, to mislead him. I can conceive of no other purpose or motive for which they could have been made, and such object and purpose rendered them fraudulent. It is said that the written statement prepared by Warbasse in Barrows' office, and

afterwards annexed to the contract of May 21st, was made hastily, and under pressure by Mr. Barrows, and that Hought ought not to be held to its contents. But Barrows denies that there was any undue haste or pressure, and I believe him. Besides, an examination of the paper itself shows that it must have been made from a written memorandum or statement, which must have been furnished by Hought to Warbasse; for there is no proof or indication in the case that Warbasse ever saw the property, or had any personal knowledge of it, and he could hardly have invented the details set out in the paper on the spur of the moment, or have given them from bare memory. An examination of the paper itself satisfies me on that point, and I have no doubt it was made from a written description given to Warbasse by Hought. Besides, there was ample time and opportunity to correct any misstatement in it before and at the time the contract was signed. Hought, I repeat, must have known these statements, written and oral, to be false. He had been in the possession and actual occupancy of the premises for about a year, and knew all about the fruit trees and the premises generally. He bought them from Adams, who had occupied them and had operated the mill, for several years, on a lease. Adams had bought them from his father-in-law, Mallalieu, who had occupied them and operated the mill for many years, and after varying fortunes finally failed in business. Mallalieu continued to live in the neighborhood of the mill. Hought had been unable, so far as appears, to operate the mill to advantage. Its condition was such that it could not compete with mills of large capacity and modern equipment. Hought was familiar with the lands and buildings, and his deed told him that there were not 400 acres of land. This part of the case was attempted to be met by taking into account the pondage, estimated at 90 acres. But, at that estimate, it is insufficient to make up the acreage to the amount stated in the description. Besides, the language of the written statement does not admit of that explanation. It is: "Farm of 400 acres, divided into fields of 40 acres each by hedge, wire, and post fences." Now, clearly, that language did not apply to the mill and land covered by it, and the mill buildings and the pondage. It clearly means that there were 400 acres in fields. So far as the evidence shows, the only foundation for the allegation that there was iron ore on the farm was that, in one portion of it, the earth had a reddish tint variant from the general coloring of the land. As to the marl, I find no foundation for the statement in that respect, unless it be found in some ordinary black muck. The evidence of Mallalieu, the former owner, is decidedly against the existence of either ore or marl.

In further answer to this written statement, both Warbasse and Hought swear that it was not affixed to the complainant's copy of the agreement at the time of its execution.

On the contrary, both Barrows and Bliss swear that it was there attached, and they are supported by the significant circumstance that it, or some such paper, is called for by the agreement itself, in this language, inserted after a general description of the Mallalieu property, "more fully described in attached memorandum." And there was no pretense that there was another memorandum actually attached, which was subsequently removed, and the one in question substituted for it. The fact that no copy of it was annexed to the defendant's copy of the agreement has no significance. But, in my judgment, it matters little whether the statement was so attached or not at the moment of the execution of the agreement, since it was actually made before the contract, and shown to Dr. Turner by Mr. Barrows; and it was made, as I have found, for the purpose of influencing Dr. Turner's mind in the affair. And this statement was not only shown to Dr. Turner before he signed the contract, but other untrue statements were made verbally by Houpt to the doctor personally. It seems too clear for argument that, if the exchange had been made on the strength of these statements, without any inspection of the premises, it would not stand in equity, but would be set aside.

This brings us to the serious question in this cause, viz. how is the case varied by the fact that, not only was the contract made subject to inspection and subsequent approval but that such inspection did actually take place, and, after it was made, an approval in writing was signed? In considering this question, it is to be observed that the untrue representations in this case cannot be classed as mere commendations, or as the ordinary praise which the seller bestows upon his wares; nor, again, were they mere expressions of opinion or judgment; or of hope or expectation. On the contrary, they were precise statements of alleged facts within the actual knowledge of the defendant. Now, I think that certain principles governing transactions of this kind are clearly deducible from the numerous judicial utterances and decisions on the subject. No man is justified, either in morals or in law, in knowingly making a false descriptive statement about the subject-matter of a proposed contract which may influence the mind of the other party in the transaction. No party has any right, either in law or in morals, to rely upon either the ability or the opportunity of the other party to discover the falsehood of his representations, and thus avoid injury from it. And in actual practice no party does make such false statements in the expectation that they will certainly be discovered, and will have no influence. For, with such certain discovery in prospect, why make them? In short, nobody has the right to set a trap for his neighbor, even in a place where it is so exposed to view as to render it highly improbable he shall step into it; and if, perad-

venture, he does step into it, the trap setter has no right to say to him, "You ought not to have been so careless and negligent as to step into a trap exposed to full view." The willful wrongdoer is not entitled to the benefit of the defense of contributory negligence. Hence, the practical rule seems thoroughly established that, where false representations of the character here in question have been made previous to a sale, the presumption is that they did influence the mind of the other party, and helped to produce the sale, and the burden is on the fraud doer to prove clearly that they did not influence the sale. Says Mr. Kerr, in his book on Fraud and Mistake (Am. Ed. p. 75): "If any one of several statements, all in their nature more or less capable of leading the party to whom they are addressed to adopt a particular line of conduct, be untrue, the whole transaction is considered as having been fraudulently obtained, for it is impossible to say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed. A man who has made a false representation in respect of a material matter must, in order to be able to rely on the defense that the transaction was not entered into on the faith of the representation, be able to prove to demonstration that it was not relied on. It is not enough for him to say that there were other representations by which the transaction may have been induced, nor can he be heard to say what the other party would have done had no misrepresentation been made." And again, on page 79: "A man who, by misrepresentation or concealment, has misled another, cannot be heard to say that he might have known the truth by proper inquiry; but must, in order to be able to rely on the defense that he knew the representation to be untrue, be able to establish the fact upon incontestable evidence, and beyond the possibility of a doubt." And again, at page 81: "No man can complain that another has relied too implicitly on the truth of what he himself stated. If a vendor has stated in his proposals the value of the property, he cannot, except under special circumstances, complain that a purchaser has taken the value of the property to be such as he represented it to be." Lord Cranworth, in *Reynell v. Sprye*, 1 De Gex, M. & G. 660, at page 710, says: "In such a case, it is no answer to the charge of imputed fraud to say that the party alleged to be guilty of it recommended the other to take advice, or even put into his hands the means of discovering the truth. However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defense to the other. No man can complain when another has too implicitly relied on the truth of what he has himself stated." Lord Justice Knight Bruce, in *Price v. Macauley*, 2 De Gex, M. & G. 339, at page 346, says: "Supposing, however,

that the defendant had actually known, at the time of the purchase, what were the real state and condition of the subject-matter of the contract, it may be that he would not be entitled to complain. But, in order to enable a vendor to avail himself of that defense in such a case, he must show very clearly that the purchaser knew that to be untrue which was represented to him as true; for no man can be heard to say that he is to be assumed not to have spoken the truth. * * *

It is said that subsequently he had such notice as might have led him to ascertain how the facts stood. That, however, is not sufficient in a case of misrepresentation. He must be shown clearly to have had information of the real state of the facts communicated to his mind." Lord Justice Turner, in *Kisch v. Railway Co.*, 3 De Gex, J. & S. 122, at page 134, says: "When persons undertake to make statements as to the contents of documents, they cannot, in my opinion, be heard to say that the statements which they have made were known to be untrue, unless, indeed, they can show by incontestable evidence that this was the case, and that the business in hand proceeded on that footing. It is not, in my opinion, competent to them to say to the persons to whom the statements have been made, 'You had notice of the documents, and might have seen them, and ascertained whether the statements were true or not.'" Sir George Jessel, in the later case of *Redgrave v. Hurd* (1881) 20 Ch. Div. 1, at pages 13, 14, says: "If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them.' I take it to be a settled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer, unless there is such delay as constitutes a defense under the statute of limitation. * * *

Nothing can be plainer, I take it, on the authorities in equity than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence. * * *

It is not sufficient, therefore, to say that the purchaser had the opportunity of investigating the real state of the case, but did not avail himself of that opportunity." Further on in his judgment he proceeds to make a critical examination of the judgments of the house of lords in the great case of *Small v. Attwood*, *Younge*, 407, 6 Clark & F. 232, and concludes (page 17) as follows: "In no way, as it appears to me, does the decision, or any of the grounds of decision, in *Small v. Attwood* support the proposition that it is a good defense to an action for rescission of a contract on the ground of fraud that the man who comes to set aside the contract inquired to a certain extent, but did it carelessly and inefficiently,

and would, if he had used reasonable diligence, have discovered the fraud." Lord Justice Baggallay, in the same case, says, a page 22: "The mere fact that a party has the opportunity of investigating and ascertaining whether a representation is true or false is not sufficient to deprive him of his right to rely on a misrepresentation as a defense to an action for specific performance. The person who has made the misrepresentation cannot be heard to say to the party to whom he has made that representation, 'You chose to believe me when you might have doubted me, and gone further.' The representation, once made, relieves the party from an investigation, even if the opportunity is afforded." And adds, page 23: "It is true that, in the present case, there was some investigation; but it was an investigation of a most cursory character, which could not have enabled the defendant to ascertain the truth or the falsity of the representation that had been made." Prof. Pomeroy, in a note to section 805, in the second edition of his treatise on Equity Jurisprudence (page 1201) after citing from the opinion in *Redgrave v. Hurd*, supra, says: "The question is, did the party rely on the representation, or on his own knowledge? To obviate the effect of the representation, it must be clearly and conclusively shown that he relied on his own knowledge. This the general doctrine and the qualification both demand."

There may be, and undoubtedly are, decisions and dicta which seem in some degree to conflict with these views, but an examination of them shows, as I think, that most of them vary from the case in hand in some particular,—as, for example, that the representation was ignorantly and innocently made without intention to defraud, or was in its nature mere commendation, or the expression of opinion, or hope, or expectation. I think the true rule to be deduced from the cases is that, where a positively false and fraudulent descriptive statement has been made by the vendor, and an examination of the premises has been made by the purchaser before the contract was entered into, such examination by the purchaser can only avail the vendor as evidence more or less cogent according to the circumstances, that the purchaser did not, in fact, rely in any material degree upon such false representation, but not conclusive on that point.

Let us now inquire—First, as to the mental capacity of Dr. Turner to make an examination and appreciate its results; and, second, as to the opportunity for and thoroughness of the examination which he did make. I have said that he was spending the previous winter with his wife in Florida, and that he went North about the 1st of March. He was attacked with the grippe in New York City, and as soon as he was physically able he went to the house of his sister, Mrs. Schuyler, at Waterbury, Conn., and stayed there for 10 or 12 days, until he was suf-

ciently convalescent to return, by slow stages, to Florida. This attack of the grippe seriously affected his mind. Mrs. Schuyler swears that "his mind was very weak," and he was "far from being what he had previously been," and that his mind was "weak and somewhat unbalanced," that he was childish, "and asked the same things over, asking for a story like a child. Q. What? A. A story; asking stories of my husband in regard to the war,—the same thing over and over, day after day, and evening after evening, till my husband got very tired of it. Q. The same story do you mean? A. The same story. Wanted to know the same story about this certain battle. Q. Can you recall other circumstances? A. Why, there were a number of little things, of course, that I saw that made me think that he was not quite right, but I don't know that I can think of any one particular thing just now." This witness proves that his father and grandfather and great-grandmother had been insane. She also swears that the doctor had previously had attacks of melancholy of short duration. He returned to Florida about April 1st. His wife at once noticed a decided change in his mind. He was suffering from mental depression and forgetfulness. Mrs. Turner swears: "A. The first thing that I noticed about him was his depression. It was just the opposite of his natural disposition, and was so marked that we all noticed it. His mother was with me at the time, and all those of his friends there, and we did everything to try and get him out of that condition. Q. State such further matters as you observed. A. Then the forgetfulness I noticed. Q. Was there any difference in that particular from his previous condition? A. Yes, sir; I never had noticed it in him before. Then in his not being able to talk clearly. He could not express himself clearly. He would hesitate, stop, and say 'Well, I have forgotten what I was going to say.' Then, too, the fact that as been referred to before,—his wanting to play cards continuously; sometimes nearly all day. Morning, noon, or night he would come in and want to play cards. I objected first, but I found that the objection only irritated him. So I yielded, and we played whenever he wished to. Q. How long did you keep up this card playing? A. All the time we were down South; almost continuously. Q. Did you notice anything as to his record of the games? A. He kept the record of every game that was played. Q. For how long? A. During the time that we played. Q. (by the Court). What were you playing? A. We were playing euchre. Q. (by Mr. McDermott). Can you tell us the extent that that card playing was kept up? A. The last counting I remember was up in the fourteen hundreds. Q. And had the doctor been addicted to this game before this attack of the grippe? A. No, sir." His sister, Mrs. Schuyler, says that, during all this period, he wrote her daily, and sometimes several times in one

day, letters and postals giving the records, and nothing more, of these games of which his wife swears.

Dr. and Mrs. Turner returned North the last of April. Of his condition after his return North, Mrs. Turner testifies thus: "Q. What did you observe in May, June, and July? A. I noticed a gradual failing, and a growing tendency, whenever he was crossed in anything, to an excitability that he never had before. Q. What else did you notice? A. I don't know that there was anything else. Q. How was his judgment on any little matters that arose,—the ordinary routine matters of life? A. I don't think that it was as good as formerly; but the moment that I approached him on that he became so excited that I was obliged to stop. * * * Q. So far as you could observe was there any improvement during the summer in his condition mentally—in his mental condition—during the summer? A. No, sir; nor physical either. Q. (by the Court). What change was there, if anything? A. It was that he gradually grew worse." Dr. Gulick, a practicing physician of New York City, who had paid some little extra attention to mental diseases, had been Dr. Turner's family physician for two years in New York City. He saw him on his return from Florida about May 1, 1891, about six weeks after his attack of the grippe in March, and saw him again at Avon about June 1st, and again at various times during the summer. He was asked this question: "What was his condition when he first came back from the South the last of April or the first of May? A. I noticed a very decided change, and I asked him what had been the matter, and he said, 'the grippe.' He was troubled with congestion of the brain. There are two kinds, active and passive. His mind didn't seem clear to me; and after seeing him at Avon,—I hadn't seen him then for perhaps a month,—and I noticed a decided change at that time, so much so that I mentioned it to my mother. Q. During the time you saw him the last of April or the first of May, and when you saw him at Avon, you saw a decided change? A. Yes, sir. I saw him at Avon in July, I think it was; and the date I can't tell. Q. Did you notice anything which indicated the progress of the disease between these two different times that you have mentioned,—in the spring and in the summer of 1891? A. I did, sir. The last time was the time just before I left the shore to come home. He came to my house. Q. (by the Court). What time was that? A. That was the last of August. And I then had a long talk with him concerning his condition and concerning his business, and went so far as to say to him that I thought he was making a mistake to branch out into business. Q. What did you find the condition of his mind to be? A. Greatly excited. His business transactions led me to believe that he was doing more than he ought to, and I said to him, 'A man at your time of life ought to draw his lines together rather than put them out.' At that time I observed that

he complained a great deal of his head, and I told him that he ought to live differently,—that he should not smoke at all. He had smoked cigars. But that would not explain his condition, because he had always smoked. I told him that I thought he should not smoke. He was also suffering with gravel in the bladder, which was very materially aggravated at that time, and for which I had prescribed numerous medicines, and that was materially aggravated at that time; and in about a month or six weeks I was telegraphed to come to Philadelphia to see him, when he had this stroke of paralysis.

Q. Have you any theory, from your knowledge of the case, what caused the paralysis? A. I don't say from the gripe. Very clearly laid down by Professor —. Q. I don't care for your authorities. A. I will give you my own learning. Q. Was it your opinion that the effect of the gripe was working on him, so to speak? A. Yes, sir; had assumed a chronic form. He never was free from it. Q. How far, in your judgment, if at all, was his mental balance disturbed, his judgment, and his capacity to do business, between the time he had the gripe and the time he had paralysis? A. It seemed to be impaired more each time I saw him. Just how much it is difficult to measure. Q. (by Mr. McDermott). Dr. Turner died from this stroke of paralysis, did he not? A. Yes, sir; from hemorrhage of the brain." Louis L. Davis, who kept the hotel at Avon where Dr. Turner spent the summer of 1891, and who had known him previously, swore as follows: "Q. Did you notice any change in the condition of the doctor bodily and mentally from his condition when he went there? A. I noticed considerable change from the season of 1890. Q. What was the character of the change? A. I noticed he was very derelict in his mind, in his memory, and he wandered around helplessly, and didn't seem to be his natural self. He was always of a jocular disposition before, and at that time he didn't seem to be his natural self, as I had formerly known him. Q. Did you notice anything else that you can recollect? Give any instances. A. I can't recall any particular date. I can recall some instances where he would relate a joke, and a few hours later relate the same joke afterwards; and he had a mania for going into law business or something of that kind, that there was no necessity for going into. Q. Mania? You mean stirring up law suits? A. Not stirring them, but trading, and doing that also. He always wanted to be trading property. * * * Q. (by the Court). What did you mean by saying that he was trying to get up a trade? A. Well, he was always looking out for a bargain in property, and anxious to make a trade if he found out or thought that he could make anything by it, like everybody else in business; but he appeared to have a mania in that way."

These witnesses were examined in my presence, and their manner on the stand was such as to give me confidence in the reliability of their evidence. Opposed to this is the evidence

of several witnesses who saw and conversed with Dr. Turner during the period in question, and who observed nothing unusual about him. On the contrary, they thought he was unusually bright and smart in a trade. The evidence shows that he was continually seeking an opportunity to deal in real estate, and that he spoke in a boasting strain of his ability in that direction. The effect of this evidence on my mind is that I am convinced that Dr. Turner, during the whole period in question, was suffering from disease of the brain, in the form of congestion of that organ, and that it affected his mind and reduced his mental capacity, and especially his judgment; that it was progressive in its character, so that the mental disability increased in degree continually until it culminated in paralysis in September. One of the manifestations of this disorder was a disposition to make deals in real estate. I think Mr. Davis' description is quite accurate when he says that he had a "mania" in that direction.

This brings me to the question of the degree of this mental disability. Now, it is a mere truism to say that a man may have sufficient mental capacity to attend to the ordinary affairs of life, such as collecting his interest and rents, and paying his house bills, making ordinary purchases for his current wants and those of his family, or renting a house to live in, or engaging lodgings, or traveling from place to place, and transacting a multitude of ordinary routine business transactions, which require a small degree of mental capacity, who would be entirely unfit to take care of himself in a transaction requiring discernment and judgment. By "judgment" I mean the capacity to examine two subjects, and to understand and appreciate their several characteristics, and to compare them. A farmer may, by nature or through mental disease, be so far demented as to be quite unable to act with intelligence and judgment in the matter of an exchange of his farm, who is able to carry it on to a fair advantage, raise good crops, and make a fair sale of them in the markets. It is not an uncommon thing to see a man who is, notoriously, somewhat disturbed in his mind,—partially insane, who goes about attending to the ordinary routine of his everyday life and affairs, and who is equally and notoriously unfit to enter upon and carry through any extraordinary affair requiring reflection, discrimination, and judgment. I have two such in my mind at this moment.

In this connection, it is proper to remark that the standard of testamentary capacity—which, I venture to suggest, is, in this state, sufficiently low—is not the standard of business capacity, and that wills have been and will hereafter be sustained, made by persons whose minds are so enfeebled that the courts would unhesitatingly set aside business contracts entered into by them to their loss. In fact, it is familiar law that a higher degree of intellect is necessary to sustain a contract than a will. *Sloan v. Maxwell*, 3 N. J. Eq.

563, and the quotations there made from previous opinions found on pages 568 to 570. The learned judges there quote with approval the language of Judge Washington in *Harrison v. Rowan*, 3 Wash. C. C. 580, at page 566, Fed. Cas. No. 6,141, where he says: "His capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property." And again, from the opinion of the same learned judge, in *Stevens v. Vanderve*, 4 Wash. C. C. 262, at page 266, Fed. Cas. No. 13,412, where he says: "But his memory may be very imperfect. It may be greatly impaired by age or disease. He may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted,—may at times ask idle questions, and repeat those which had before been asked and answered,—and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigor of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will." The same distinction was made in *Converse v. Converse*, 21 Vt. 168; *Ewell*, Lead. Cas. p. 62. Upon this part of the case I desire to refer to, without repeating, what I had occasion to say in *Kastell v. Hillman*, 30 Atl. 535, at page 540, 53 N. J. Eq., at page 49, a case in some respects like the present. I there adopted Chief Justice Kirkpatrick's test of testamentary capacity as being the ability "clearly to discern and discreetly to judge."

But the question here is, not whether Dr. Turner had mental capacity sufficient "clearly to discern and discreetly to judge" of his affairs so as to make a valid will, but whether he had such capacity as would enable him to properly examine the property in question and fully discover the falsity of the statements made by Mr. Houpt both as to its quality and as to its value. Let us answer this question with a consideration of what he actually did in the way of investigation. He visited the mill and farm May 25, 1891, in company with Mr. Houpt and Mr. Barrows, and spent from one hour to one hour and a half upon the premises. Dr. Turner went into the mill, and talked with the loom boss who had been in charge when it was in operation. He crossed the farm in company with Mr. Houpt, who showed him what he claimed to be the iron-ore bed and also the marl. He looked at the dwellings and buildings. Mr. Barrows took no part in the examination, if it may be properly so termed, and made no suggestions,—was a mere passive observer. No expert was employed to examine the mill and machinery, or the so-called ore bed or marl pit. The peach trees were not counted or examined. No means were taken to ascertain the acreage. In short, the examination, like that in *Redgrave v. Hurd*, *supra*, was of

the most hasty and cursory character. Now, Dr. Turner had had no experience in either woolen manufacture, iron ore, marl, peach growing, or farming generally, and if he had enjoyed his faculties in their perfection would have been quite incapable of estimating the qualities and value of this property; and it does seem to me that he would have been conscious of his incapacity in that respect, and would not have entered into this contract without seeking the aid of competent experts in the affair. In short, the very fact that he did not seek such aid is a strong indication to my mind of the low degree of his mental capacity, and indicates strongly that he was carried away by a mania for trading, the result of a diseased brain and a morbid judgment. The result of the evidence is that Dr. Turner did not make such an examination of the property as to overcome the burden cast upon Houpt to show and prove clearly that he relied altogether on his own knowledge of the property, and not on the statements and representations of Houpt. This is especially true as to value. Houpt's representation was that it was worth \$40,000. Now Dr. Turner estimated his property—the "Norwood"—at \$30,000, subject to \$9,000 incumbrance. It was well worth from \$20,000 to \$25,000, or \$12,000 or \$15,000 over the mortgage. The Maryland property was mortgaged for nearly \$17,000, \$8,000 more than the Norwood. To make it worth as much for purchase or exchange it should have reached the full value of \$30,000. At the represented value of \$40,000 it would have had an equity of \$23,000 as against an equity of \$21,000 in the Jersey property at an estimated value of \$30,000. Now, it is plain that Dr. Turner must have relied more or less upon this representation of value, and was misled by it, as well as the other false representations. His capacity for discernment and judgment was destroyed. It is said that he was assisted by Mr. Barrows. But it does not appear that that gentleman rendered the least assistance, or had the disposition or capacity to do so. He certainly had no interest to say or do anything to discourage the exchange. His commissions depended upon its going through, and he actually received \$750 as compensation for standing quietly by and seeing his client traded out of \$12,000 or \$15,000. I am not surprised that the counsel of complainant, acting upon the instructions and information of the helpless wife, charged in his bill that Mr. Barrows had conspired with Houpt to defraud the husband. If, then, Dr. Turner had promptly, after the exchange, asked the aid of this court to be relieved from it, I think it clear enough he would have been entitled to it.

Let us now inquire as to the effect upon his rights of the delay which occurred, and of his acts of ratification. The general rule that persons having equitable rights shall come promptly to the court for their enforcement applies with especial aptness and force

to cases of this character. A party holding a title which he has the right to rescind, or a contract for a title from which he has the right to recede, cannot be permitted to speculate upon the situation with a full knowledge of his rights, and wait until he can ascertain whether it is to his advantage to affirm or disaffirm; and even if his delay be not the result of a desire to speculate but be the result of mere indecision, he will not be permitted to rescind or recede if the circumstances are so changed that the other party cannot be restored to his former position. The party clothed with the right of rescission may also, during the delay, do acts which are distinct affirmations of the transaction; and the other party may have so far acted upon the acquiescence and affirmative conduct as to raise an estoppel against the other party, and render it inequitable to permit him to recede. In these, as in all other cases of conflicting equities, it is the duty of the court to carefully consider and weigh the conflicting rights, and so to decide between them as to do the greatest justice. Affirmation and acquiescence, in order to work a bar to relief, must, in the absence of the element of estoppel, be accompanied with an intelligent appreciation by the party of his rights. In a case where he has been led into a contract by false and fraudulent representations as to both the character and value of the subject of the contract, he must be fully aware of the falsity of the representations, and also of his right to rescind, and his conduct must show that he determined to abide by the contract. Here, again, the fraud doer is at a disadvantage. He has no right to rely upon the intelligent action of the victim of his fraud to discover it and repudiate the contract. The same considerations which apply to the entering into the contract apply to acquiescence in it and affirmation of it. This principle was announced and applied in *Rawlins v. Wickham*, decided first by Vice Chancellor Sir John Stuart, as reported in a note to the case on appeal in 28 Law J. Eq. (1859) 188, and was affirmed by the lords justices of appeal (3 De Gex & J. 304). There the delay was four years, and was strongly urged as a defense, but was disallowed by all the judges. Now, the evidence of Mr. Barrows shows that Dr. Turner did ascertain the falsity of Houpt's representation as to the quantity of land and the number of peach trees, and some other matters not mentioned. Houpt had also represented to the doctor that the note to secure which the second mortgage had been given, could be renewed every three months by paying \$200 upon principal, besides the discount. This note was held by a Wilmington bank and was indorsed by Todd, the second mortgagee, and was renewed by Houpt between the 21st and the 30th of May, so that it matured in the latter part of August. At its maturity Dr. Turner was obliged to give his own note in its place,

and to pay \$500, instead of \$200, in order to procure its renewal. Of this he complained to Mr. Barrows. It does not appear that he discovered the falsity of the statement about the iron ore or marl, or that the machinery in the mill was not the best; nor does it appear that he ever knew that the property was not worth the incumbrances. On the contrary, it appears that, at his interview with Mr. Todd, the holder of the second mortgage, he spoke of the property as valuable and solicited Mr. Todd to join him in a scheme to market it. Now, the important matter with Dr. Turner was, not so much whether the property was in all respects just what Houpt represented it to be, but whether it was worth what he told him it was worth, or so near the amount as to save him from loss. On this score, there is no evidence that he ever appreciated the real truth. And I do not believe that he was capable of so doing at the time he discovered the facts. No doubt, Mrs. Turner did, when she came to look into the affair; and she acted as promptly and intelligently as a helpless woman could well do under the circumstances. Now, it is to be observed that Dr. Turner did nothing to injure or to alter the property. He simply let out the farm on shares in the usual way. He made no other use of it. He kept the old loom boss on the premises to take care of the premises generally, and machinery in particular, by oiling it and setting it in motion from time to time. Here, again, the condition of his mind is an important factor. Dr. Gulick swears, as we have seen, that he was failing, both mentally and physically, and one of defendant's witnesses swears that, on the occasion of a visit he made to the premises as late as August,—after two other previous visits,—he, on his arrival at the village of Millington, inquired the way to the farm, indicating that he could not remember the way after traveling it two or three times. I infer from Mr. Barrows' evidence that the doctor's complaints as to the falsity of Houpt's representations were made after his interview with Mr. Todd, which was on the 10th of September and only 12 days before the first paralytic seizure. I am satisfied that Dr. Turner's mental faculties were so far disturbed, and his powers and judgment warped, that he was unable to comprehend the actual value of the property which he had got, or to know and appreciate the extent to which he had been defrauded; and I see no reason to suppose that he ever knew, previous to the intervention of his wife, that he ever had any right of action against Mr. Houpt. Upon the whole case I am unable to find that Dr. Turner deliberately and intelligently affirmed this contract after he had become aware of the true condition and value of the property and his rights in the premises.

Shortly after the amended bill was filed, and apparently as soon as the doctor had

sufficiently recovered from his second paralytic seizure, which occurred in February, to see a stranger, a deed of conveyance from him and his wife to Houpt for the Maryland premises was executed and duly acknowledged by them, and tendered to and left with Houpt. This was March 26th. Houpt subsequently returned it to the Philadelphia counsel of complainant. It thus appears that it was in the power of Houpt to have recovered the property in substantially the same plight it was in at the time of the exchange. I am satisfied that complainant is entitled to relief as against Houpt and wife, and shall so advise.

This brings us to another branch of the case. After the case had been closed and submitted, as against Houpt and wife, but before decision, complainant obtained leave to amend by making Mr. Brinton a party, and the bill was amended accordingly. He was brought in, answered, and was heard by witnesses and by counsel in argument. No objection was made on his part to the procedure against him by amendment of the bill, instead of by supplement; nor was any point made as to the time of the service upon Houpt and wife of the notice of the order of publication made against them as absent defendants upon the return of the subpoena not served. The files of the court show that the subpoena to Houpt and wife was issued on the day the bill was filed,—December 31, 1891,—returnable January 12, 1892; that the order of publication was taken on the 15th of January, 1892, returnable March 7th, and that it provided for service personally upon Houpt and wife of a notice of the order within 20 days, and that such a notice was served upon both Houpt and wife on the 28th of January. Nor was any point made as to the contents of the lis pendens that was filed in the Monmouth county clerk's office immediately after the filing of the bill. It was conceded that it contained the statutory requisite of the names of the parties, a description of the premises, and a statement of the object of the bill. By the strictest rule respecting constructive notice of a pending suit, this suit was commenced on the 28th of January, 1891, the date of the service of the notice of the order of publication. The deed from Houpt to Brinton was dated and delivered February 18, 1892. There was a preliminary agreement between Houpt and Brinton, but no payment was made under it or any consideration parted with until February 15, 1892. But I understand that the strict rule, that the effect of the suit as against purchasers commences with the service of a subpoena, applies only to cases where the purchaser has no actual notice of the suit. Here Mr. Brinton did have actual notice, as he states by his answer and in his evidence, by an examination of the record of the lis pendens in Monmouth county, and of a copy of the bill. He puts his case, not on the ground that he did not have

full notice of the suit and its object, nor that those objects have been in any wise changed by subsequent amendments, nor that the suit was not commenced at the time he took title, but on the single and sole ground that he made diligent inquiry as to the truth of the facts as displayed by the bill on February 18, 1892, which facts were relied upon as constituting the fraud which was the basis of complainant's right, and satisfied himself that those facts did not constitute any fraud, and hence, that the complainant must fail in his suit,—that he had no notice of the matters afterwards inserted in the bill by amendment, and is not chargeable in equity with notice thereof. In short, his position is that the bill is a lis pendens as against him as to those new matters only from the date of the amendment, and that he is a bona fide purchaser without notice of them.

As there is some appearance of authority for this position, it becomes necessary to examine it on principle, although the amount in controversy, as we shall see, is very small. I stop here to say that I do not see that his position as above stated is helped by the inquiry which he made of the present complainant while her husband was disabled by paralysis. She was not the duly-authorized agent of her husband, but acted in what she did as a volunteer, from necessity. She told Mr. Brinton all that she then knew. Her silence as to what she afterwards learned was innocent, and cannot bind her husband, because he was mentally incapable of making any statement or representation, and Mr. Brinton was so informed. It is difficult to see how any estoppel can arise in favor of Mr. Brinton as against Dr. Turner. So far as the evidence shows, Messrs. Barrows & Bliss were mere brokers, and not confidential agents, of Dr. Turner, and whatever of agency there may have been was ended by his total incapacity. Mr. Brinton can claim to be a bona fide purchaser only so far as he has actually parted with value on the strength of the apparent title in Houpt and wife. The case shows that the deed of conveyance from Brinton to Houpt was delivered in escrow, the terms of which are witnessed by a writing as follows: "The accompanying deed from Joseph P. Brinton and wife to Henry J. Houpt dated February 19, 1892, for 300 acres of land near Leesburg, Va., is deposited with the Land Title & Trust Company, to be held in escrow until all incumbrances, except a certain mortgage of \$9,000 recited in the deed hereinafter mentioned, are removed from the title to lots Nos. 110, 111, 112, 113, 114, 116, 117, 396, 397, 398, and 400, in Key East, Monmouth Co., N. J., which have been conveyed to said Brinton by said Houpt and wife by deed dated February 18, 1892, and intended to be forthwith recorded. In case by any possibility judgment should be recovered in the suit now pending against said Houpt and wife which may bind or affect the title to said lots and property in

Key East, then the deed now deposited may, upon request of said Brinton, be delivered to said Houpt, who shall immediately execute to said Brinton a deed of trust on the said 300-acre farm near Leesburg in sufficient amount to secure and indemnify said Brinton against said judgment and all costs and charges on account of the same. In witness whereof we have hereunto set our hands and seals this 20th day of February, A. D. 1892. J. P. Brinton. [Seal.] Henry J. Houpt. [Seal.] Certain personal property was delivered to Houpt with the possession of the premises, and, in addition, Mr. Brinton incurred the expense of building a certain fence and the commissions of the real-estate agent who negotiated the exchange. There is, besides, the matter of the rents of the Virginia property. These small matters constitute all that Mr. Brinton has lost by the transaction. But these being insisted upon, it becomes necessary to examine the position taken by him.

In considering the question thus presented, it must be borne in mind—First, that the new matters of fact set out in the amendment all existed prior to the filing of the original bill; second, that the subject-matter and ground of the suit, viz. fraud, the prayer and the frame of the bill, have not been altered in substance; third, no new parties have been added who were necessary or proper at the time the bill was filed. The bill of revivor was promptly filed, and made no break in the *lis pendens*. The ground of the bill is that complainant was led, by false and fraudulent representations, constituting fraud, to make the exchange. The effect of the amendment is simply to add another specification of fraud, which existed and might have been inserted in the bill at first, and upon which relief was finally had. Its omission was due to the mental incapacity of the complainant. The question as to the effect of this amendment depends, as it seems to me, upon the question whether the doctrine, or rather maxim, "*Pendente lite nihil innovetur*" is based upon the notion that the commencement of a suit affecting lands, whether in a court of law or in equity, is implied notice to all the world of the facts which constitute the grounds of the suitor's claim, so as to affect the conscience of would-be purchasers, or is only notice that such a suit is pending, and that all persons dealing with the defendant as to the land involved must do so at their peril as to the result of the suit. If the latter is the true ground of the maxim, then I do not see upon what ground a mere amendment of the character of that now in hand can affect its application. The doctrine is thus stated by Justice Depue, in speaking of *lis pendens* in *Haughwout v. Murphy*, 22 N. J. Eq. 531, at page 544: "It is a doctrine of courts of equity [with great deference I suggest that he should have added, 'and of courts of law,' since the doctrine applies with equal rigor to both] of ancient origin, and rests, not upon the principles of

the court with regard to notice, but on the ground that it is necessary to the administration of justice, that the decision of the court in a suit should be binding, not only on the litigant parties, but also upon those who acquire title from them during the pendency of the suit." The cases which he cites more than sustain his position. To the same effect is Mr. Wade in his book on Notice (sections 337 et seq.); and the learned writer of the article on *Lis Pendens* in 13 Am. & Eng. Enc. Law, p. 869. Lord Cranworth, in *Bellamy v. Sabine*, 1 De Gex & J. 566, at page 578, says: "It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the courts often so describe its operation. It affects him, not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, right to the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant, as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end." And again, on page 580: "The language of the court in these cases, as well as in *Worsley v. Earl of Scarborough*, 3 Atk. 392, certainly is to the effect that *lis pendens* is implied notice to all the world. I confess, I think that is not a perfectly correct mode of stating the doctrine. What ought to be said is that, *pendente lite*, neither party to the litigation can alienate the property in dispute so as to affect his opponent. The doctrine is not peculiar to courts of equity. In the old real actions, the judgment bound the lands, notwithstanding any alienation by the defendant *pendente lite*, and certainly that did not depend upon any principle arising from implied notice." To the same effect is the language of Lord Justice Turner, at page 584: "The doctrine of *lis pendens* is not, as I conceive, founded upon any of the peculiar tenets of a court of equity as to implied or constructive notice. It is, as I think, a doctrine common to the courts both of law and of equity, and rests, as I apprehend, upon this foundation, that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding." And he cites Lord Coke to show that the doctrine obtains at law as well as in equity. Chancellor Kent, in *Murray v. Ballou*, 1 Johns. Ch. 566, and *Murray v. Lylburn*, 2

Johns. Ch. 441, examined all the authorities to that date, and puts the foundation of the maxim on necessity, whether it be applied at law or in equity. He does, indeed, in order to meet the manifest hardship of the rule in many cases (before statutory provision was made for recording notice of the *lis pendens*), resort to the doctrine of constructive notice, viz. that all citizens are chargeable with notice of what is going on in the courts. Prof. Pomeroy (2 Eq. Jur. §§ 632a, 633) adopts the view of the English judges in *Bellamy v. Sabine*, repudiates the notion of constructive notice, and states the rule thus: "During the pendency of an equitable suit, neither party to the litigation can alienate the property in dispute so as to affect the rights of his opponent." And he cites (section 633) a long list of American authorities in its support, among which I cite, particularly, *Dovey's Appeal*, 97 Pa. St. 153. Mr. Maddock (2 Madd. Ch. Prac. 189) says: "It is certainly a maxim, '*Pendente lite nihil innovetur*' (Co. Litt. 344b); but the true interpretation of that rule is that a conveyance does not vary the rights of the parties in a suit; for (otherwise) suits would be interminable," etc. The language of a judge of the Virginia court of appeals in *Newman v. Chapman* (1823) 2 Rand. 93, is to the same effect. After stating that the rule was founded in necessity, he says: "The rule, as to the effect of a *lis pendens*, is one of mere policy, confined in its operation strictly to the purpose for which it was adopted,—that is, to give effect to the judgments and decrees of courts of justice,—and that it is not properly a notice to any parties whatsoever. The English judges and elementary writers have carelessly called it a notice, because, in one single case, that of a suit prosecuted to decree or judgment, it had the same effect upon the interests of the purchaser as a notice had, though for a different reason. But the courts have not, in any case, given it the real force and effect of a notice." And he points out that, if the suit operated as a notice of the facts which formed the basis of plaintiff's claim, it ought to operate against a purchaser who buys after one suit is bought and discontinued, and before another is brought and pursued to a successful issue, while the fact is that it does not so operate. Thus, in the case in hand, if the bill, as first filed, had contained all that is found in the amended bill, and afterwards Mr. Brinton had purchased without inquiring into the merits of the complainant's demand, and then the bill had been dismissed by consent without prejudice, and a new bill had been filed and successfully prosecuted, all the authorities agree that, in the absence of actual knowledge by Mr. Brinton of the facts upon which complainant's equity rests, he would not be affected by the second suit. This result must, of course, be based upon the ground that the suit, even with the aid of the statutory notice, operates only as a notice that a suit is pending affect-

ing the property, and not of the facts out of which the complainant's right arose.

The manifest hardship of applying this necessary maxim in cases of conveyances in good faith to parties without notice led to the statutory provision for a public registry of a notice, and the terms of this statute are significant. It simply requires (Revision, p. 114, § 57) the filing and registry of a notice containing the title of the cause,—that is, the names of the parties complainant and defendant,—a description of the land to be affected, and the "general object" of the suit. Nothing more. It does not provide for any notice of the facts out of which complainant's right arose, or even of the equitable ground—fraud, accident, mistake, or the like—upon which it rests. All that the legislature deemed necessary that an expectant purchaser should know is that a suit is pending against a certain party affecting certain lands in a certain way. These considerations seem to lead to the conclusion that the question of the continued pendency of the suit is one of actual and substantial identity. Are the parties the same, the property to be affected the same, and the general purpose and object of the suit the same? If so, then I am unable to understand upon what ground the making of amendments not affecting either of these characteristics can interfere with the application of the maxim in question. For example: If a plaintiff in ejectment should, upon demand, furnish particulars of his title, containing a statement of a deed of conveyance from A. to B., and should afterwards discover that this was a mistake, and that there was no such deed, but that the title had passed from A. to B. by means of a judgment against A. and a sale by sheriff thereunder to B., and should amend his specifications of title accordingly, would such amendment destroy the continuity of his *lis pendens* and make a new suit, so that a purchaser from the defendant, after the commencement of the suit and before the amendment, who had not notice of the sheriff's deed, would get a good title? I think there can be but one answer to that question. It would not, and for the simple reason that the question was whether the title did, in fact, pass from A. to B., and not how it passed.

Now, what has been done in the case in hand seems to me to be of the same character as that of the case just supposed. Here the ground of relief stated in the bill as originally filed was fraud practiced in procuring the exchange. The supposed misrepresentation as to the incumbrance was but a mere specification of that fraud. Afterwards other fraudulent misrepresentations of the same character are discovered and inserted by way of amendment. How can it be said that their insertion changes the identity of the suit as to its parties, subject-matter, or purpose? If not, then why does not the maxim, "*Pendente lite nihil innovetur*," apply? Two adjudged cases in this country support this view. *Stoddard v. Myers* (1837) 8 Ohio, 203; *Gibbon v. Dougher-*

ty (1859) 10 Ohio St. 365. The first was an ejectment, in which plaintiff relied upon a purchase at a judicial sale in an equity suit of *Beitz v. Wolf*, which was founded upon a common-law judgment recovered by *Beitz* against *Wolf*, and which attacked a voluntary conveyance made by *Wolf* to his children prior to the recovery of the judgment. Pending this equity suit, *Wolf* succeeded in reversing the judgment on a writ of error, and then his children conveyed for value to the defendant in ejectment. Upon a new trial of the action at law of *Beitz v. Wolf*, *Beitz* again recovered, and then filed a supplemental bill, founded upon his second judgment, and procured a decree setting aside the conveyance from *Wolf* to his children, a sale of the premises to pay his judgment, and under that sale plaintiff in ejectment claimed. On the argument of the ejectment, the question of *lis pendens* was elaborately discussed, and the court held "that by the institution of a suit the subject of litigation is placed beyond the power of the parties to it; that while the suit continues in court it holds the property to respond to the final judgment or decree." In the second case, complainant had entered judgment prematurely upon a valid award of arbitrators, and then filed a bill against the defendant and one of his debtors to appropriate the debt to the payment of his judgment. After bill filed, defendant succeeded in vacating the judgment on the award, as prematurely entered, and induced the debtor to pay him his debt. Complainant again entered judgment on his award, but not until after the payment by the debtor to the defendant, and filed a supplemental bill setting up the second judgment. The debtor defended, on the ground that the force of the *lis pendens* was broken by the setting aside of the judgment; but the court held, on the authority of *Stoddard v. Myers*, that the same suit was pending, and the debtor was not justified in paying the defendant, saying (page 371): "We think the construction thus early given to this provision, as expressed in the act of 1831 [which authorized a creditors' bill only after judgment recovered], supported by principles of law as well as sound reason. The subject-matter of the suit and the parties in the action, as well as the object of the suit, all continued to be before the court. The substantial object was the payment of the debt of the judgment debtor; and the reversal of that judgment for an irregularity was in no sense an intimation of its payment, or a relinquishment of the claim of the plaintiff to enforce its payment in the manner and by means expressed in the petition."

I will now consider what I have mentioned as the appearance of authority the other way. In *Long v. Burton*, 2 Atk. 218, after the answer to the original bill had been reported insufficient, the defendant filed a cross bill. The plaintiff in the original suit obtained an order that the original bill should be answered before he answered the cross bill, and on the answer being reported insuf-

ficient, he obtained an order to amend his bill, and that the defendants might answer the amendment and exceptions together. It was held that the order to amend was a waiver of the priority of right to an answer. In delivering judgment, Lord Hardwicke said: "By the course [practice] of the court, the plaintiff, in the cross cause, cannot have an answer till he has himself answered the original bill; but this is a privilege the plaintiff in the original bill has in right of his original bill. For if, after the cross bill is filed, he will amend the original bill in material parts, I do not think he is entitled to have an answer to the amendments. For as the bill may be amended both in discovery and relief, the pendency of suit, as to those parts which are amended, is only from the time of the amendment." And this dictum is the foundation of whatever of authority can be found for the notion that a simple amendment breaks the continuity of the suit, and destroys the effect of the *lis pendens* as against third parties. The character of the amendment in that case is not given, except as it may be inferred from the words, "amended both in discovery and relief." So that it is probable that the learned chancellor had in mind a complete change in the object and purpose of the bill. Certain it is that it by no means appears that he did have in mind the maxim, "*Pendente lite nihil innovetur*," for it was in no wise involved. Upon the authority of this dictum Lord Redesdale, speaking of amendments (*Mitt. Eq. Pl.* 330), says: "When injury may arise to others, the indulgence has been more rarely granted; and so far as the pendency of a suit can affect either the parties to it or strangers, matter brought into a bill by amendment will not have relation to the time of filing the original bill, but the suit will so far be considered as pendent only from the time of the amendment, except that where a bill seeks a discovery from a defendant, and having obtained that discovery, the bill is amended by stating the result, it should seem that the suit may, according to circumstances, be considered as pendent from the filing of the original bill, at least as to that defendant, and perhaps as to the other parties, if any, and to strangers also, so far as the original bill may have stated matter which might include in general terms the subject of the amendment."—citing only *Long v. Burton*, *supra*. This passage is appropriated by Mr. Daniell (1 Daniell, Ch. Prac. p. 402, bottom) citing only *Long v. Burton* and Lord Redesdale's treatise. The American editor cites two cases from Tennessee, which I will notice directly. Justice Story (*Story, Eq. Pl.* § 904) also adopts Lord Redesdale's language upon the same authority. An examination of the English authorities discloses but one case since *Long v. Burton* in which the question has been stated, viz. *Landon v. Morris*, 5 Sim. 247. There the bill was filed in January, 1816, claiming against the defendant an equitable estate in

certain houses. The defendant answered. In 1818, and again in 1819, the defendant mortgaged the houses, and in the same year sold and conveyed them in fee for value subject to the mortgages. Neither of the mortgagees nor the grantee had any actual notice of the suit, and at that time there was no provision in the English statutes for registry of a *lis pendens*. In 1820 the bill was amended, and the amendment taken as confessed as against the defendant, who had no further interest in the subject-matter, and the suit went to a final decree in favor of complainant. In 1831 complainant filed a bill against the purchaser *pendente lite* to obtain the benefit of his decree, and moved for a receiver. In arguing for the defendant, Mr. Pepys (afterwards Lord Cottenham) took the point that the suit was pending as against a purchaser only from the date of the amendment. Vice Chancellor Shadwell remarked that he did not understand that a new case was introduced by the amendment; and Mr. Knight (afterwards Lord Justice Knight Bruce), for the complainant, remarked that the prayer remained the same. The argument proceeded, and the vice chancellor granted the motion without opinion, and the order was affirmed on appeal by Lord Brougham, who dealt at length with the question of *lis pendens*, but took no notice of the amendment.

I will now refer to a few cases in this country relied upon for the contrary doctrine. *Miller v. Sherry*, 2 Wall. 237, was a conflict between purchasers under decrees in two separate equitable suits by two separate judgment creditors of the same debtor. The first in point of time had filed a general creditors' bill, without specifying any particular property or any specific alienation in fraud of creditors. The second in point of time had set forth a fraudulent alienation by the judgment debtor of certain described lands to one Williams, who held the legal title, and who was made a party. The suit founded on the second bill was prosecuted successfully to a decree and sale, after which the complainant in the first bill amended by setting out the fraudulent conveyance to Williams, and making him a party. Process, however, was not served upon him, and he did not answer. It was held that the title obtained under the second bill must prevail, and that the first bill did not operate as a *lis pendens*, because it did not specify and describe the property, and did not make the holder of the legal title a party, and that before the amendment of the first bill the legal title had passed from Williams, the fraudulent grantee, to the purchaser under the decree in the second suit. In this connection it was that the learned judge (page 250, bottom) says: "Where the question of a *lis pendens* arises upon an amended bill it is regarded as an original bill for that purpose," citing *Clarkson v. Morgan*, 6 B. Mon. 441. These words must be confined in their scope to the case in hand. The bill which was first in point of time was, as first filed, radically

defective as a *lis pendens* for want of a description of the particular property, and in not making the fraudulent grantee and holder of the legal title a party. All the authorities require these two elements to be present in order to make a valid *lis pendens*. The amendment changed the character of the suit, and made it essentially a different one. It was not the same suit. The case reported in 6 B. Mon. 441 (1846), is long and complicated in its facts, and space forbids a complete recital of them. The bill was filed in September, 1810, against one Parker, as the holder of the legal title, who answered that in the previous March he had sold the premises to one Fowler, and had no further interest in them. Fowler was never brought in as a party, but the suit was prosecuted, with varying fortunes, for about 20 years against Parker and his heirs. In its course it was found that the original parties complainant had no interest, and new parties were added. There was great delay and laches in prosecuting the suit. It was directed against the legal title only, and brought in a county and jurisdiction other than that in which the land was situated. It was found, as a fact, that Fowler and his successors obtained the equitable title before the suit was brought, and took and held adverse possession during the whole time. All these matters were relied on in refusing to give effect to the right established by the suit of 1810. I can find nothing in the report to sustain defendant's position herein. The two cases cited by the American annotator of *Daniell's Chancery Practice* are as follows: *Lillard v. Porter*, 2 Head, 177, was a contest between two attaching creditors of an incorporated bank. Porter's bill was filed and his attachment (under a local statute of Tennessee) issued two days before Lillard's, but Porter's bill made parties defendant only certain of the stockholders and owners of the bank who had actual custody of its assets, ignoring the corporate existence of the bank. Lillard proceeded directly against the corporation, and it was held that Porter acquired no lien by his attachment upon the assets, because it was issued against the individuals. Subsequently, he amended his bill, making the bank a party, and in the meantime Lillard had perfected his lien. Though the proceedings were by a bill in chancery, the question was one of actual lien acquired by attachment. The doctrine of *lis pendens* was in no wise involved. *Miller v. Taylor*, 6 Helsk. 405, was not a case of *lis pendens*, but of the statute of limitations. In *Pearson v. Keedy*, 6 B. Mon. 128, the bill was filed by a simple contract creditor of a partnership firm against the surviving partner, asking to have his debt paid out of the partnership assets, which consisted of choses in action. It did not allege insolvency or fraud. Pending the bill, the surviving partner settled with his other creditors and divided the assets in question among them. Subsequently, the complainant obtained a judgment up-

on his debt against the surviving partner, and filed a supplemental bill setting up his judgment, and attacked, but not on the ground of fraud, the distribution of the choses in action among the other creditors. And it was held that his original bill showed no equity, that the supplemental bill made a different case and asked a different relief, and that the original bill could not be held to have force as a *lis pendens*. This statement shows that the case has no application here, and I may add that it was rightly decided, on the ground, as the better opinion appears to be, that the doctrine of "*Pendente lite nihil innovetur*" does not apply to choses in action. *Dudley v. Price*, 10 B. Mon. 84, was a case of the statute of limitations, as applied to an amendment introducing a new and distinct cause of action. In *Stone v. Connelly*, 1 Metc. (Ky.) 652, a simple contract creditor filed a petition against his debtor, setting out the debt, and that the defendant owned a house and lot, which he was about to convey away for the purpose of defrauding creditors, and asked an injunction and attachment, which were granted. Shortly afterwards, defendant made a bona fide sale and conveyance of the house and lot, and applied the proceeds to pay the mortgage upon it and an unsecured indebtedness, receiving a small balance in cash. Subsequently, plaintiff sued and recovered judgment at law on his debt, and had an execution issued and returned unsatisfied, and then filed a supplemental petition setting forth such facts. The defendant answered, and at the hearing the plaintiff failed, on the issue of fraudulent intent in the conveyance *pendente lite*. In disposing of the case the court said: "The jurisdiction of the court to furnish the relief sought for was based and depended upon the allegation that the debtor intended to make a fraudulent disposition of the attached property. As that allegation was not sustained by proof, the court had no power, on that ground, to order a sale of the property, nor were the plaintiffs entitled to any relief on their original petition. * * * An entirely new *lis pendens* was created by this amendment. By it the plaintiffs' right to come into a court of equity was placed upon a different and distinct ground. It did not operate as a continuation of the original equity, which had been relied on, but asserted an additional and independent ground of equitable relief. It presented an entirely different state of the case, and amounted, substantially, to a new cause of action. The *lis pendens* which it created cannot be permitted to relate back to the commencement of the action, so as to affect intervening rights." This language shows the contrast between that case and this, where the equity is the same after amendment as before, viz. fraud practiced by the defendant in procuring the conveyance. *Wortham v. Boyd*, 68 Tex. 401, 1 S. W. 109, was this: A., being indebted, made a fraudulent conveyance of land without consideration to B. B. made a bona fide

sale and conveyance for a valuable consideration to C., who had no notice of the fraud, and who paid all the purchase money except \$50. In this situation of affairs, a creditor of A. filed a petition in equity against A., B., and C., charging fraud in the conveyance from A. to B., and that C. purchased with notice of it. C. answered that petition, setting up that he had bought in good faith and without notice of the fraud, and had paid all the consideration money except \$50, which he was ready to pay to whomsoever the court should direct. Before C. answered the petition he conveyed the premises for a full consideration to D., who had no notice of the petitioner's equity, and was a bona fide purchaser unless affected by the *lis pendens*. The original petitioner, after the answer of C. denying the fraud, filed a supplemental petition admitting the truth of C.'s answer, and prayed that a vendor's lien retained in the deed from B. to C. for the \$50 be foreclosed, and the proceeds of the foreclosure applied to the payment of his judgment. D. was not made a party. Under this amendment decree was made in favor of the plaintiff, setting aside the deed from A. to B., adjudging that C. was a purchaser in good faith as to the purchase money paid, foreclosing the vendor's lien for \$50 and interest, which at that time brought it up to \$79.40, and ordering that the lands purchased by C. be sold to pay the same for the benefit of the plaintiff. The land thereunder was sold and bought in by the plaintiff, and her grantee brought an action of ejectment against D. It was held that the plaintiff could not recover. A statement of the case shows at once that it has no application here. There was an abandonment of the original cause of action, and the adoption of a new one founded upon a different theory of the facts and rights of the plaintiff, and asking an entirely different relief, and the court rightly held that it was, in effect, the commencement of a new suit, saying: "The abandonment of one cause of action and the adoption of a new one by amendment is in effect the dismissal of the former suit and the commencement of a new one upon a different cause of action." The opinion is elaborate, and goes wholly upon that ground. In *Davis v. Christian*, 5 Grat. (Va.) 12, a testator, who was a partner in a business firm, authorized and directed his executor to continue the business as long as his wife and his surviving partner should consent. There was a power of sale of real estate, with a provision that if either of his daughters, upon coming of age or being married, so desired, her interest in the business might be ascertained, and the business closed as to her, but continued as to the others. One of the daughters married, and a suit was instituted asking for her share of the assets. No charge of waste or mismanagement, or prayer against the continuance of the business as to the other parties interested, was made. Subsequently, and pending the suit, the partnership became embarrassed, and conveyance

was made under the power in the will to a third party, for full consideration, of a portion of the real estate belonging to the partnership, and the proceeds taken to pay a partnership debt. Held, that the suit was not a lis pendens which prevented the sale of the real estate.

I have chosen the foregoing cases, out of those cited by Mr. Brinton's counsel, as being the strongest in his favor, and I think, for the reasons already stated, they fail to support his position. There is no hardship in applying the maxim in question to Mr. Brinton in this instance. He had complete notice of the pendency of the suit, and that it was founded upon an allegation of fraud in the exchange between Dr. Turner and Hought. He also had notice of the incapacity of Dr. Turner at and after the suit was commenced. He made the mistake of supposing that Dr. Turner's right to recover was limited to the particular specification of fraud found in his bill, and overlooked the circumstance that he might add other specifications, and finally succeed in establishing the fraud. He had no right, as I have observed, to rely on inquiries made of anybody but Dr. Turner himself; and there is nothing in what was said by Mrs. Turner or Barrows & Bliss to work an estoppel.

I shall advise a decree that Mr. Brinton convey the premises to the complainant, and account for the rents and profits, if any, in the meantime.

PRINCETON SAV. BANK v. MARTIN.

(Court of Chancery of New Jersey. Sept. 10, 1895.)

MORTGAGES—SUIT FOR DEFICIENCY—JURISDICTION IN EQUITY.

According to the unquestioned practice in this state, a mortgagee may proceed in equity against the maker of the bond secured by such mortgage for deficiency, notwithstanding the lien of the mortgage given to secure such bond remains unaffected for 20 years.

(Syllabus by the Court.)

Bill by the Princeton Savings Bank against Alfred W. Martin. Demurrer to bill sustained.

P. A. V. Van Doren and G. D. W. Vroom, for plaintiff. Wm. M. Lanning, for defendant.

BIRD, V. C. On the 1st day of April, 1867, Augustus L. Martin and Alfred W. Martin made their joint and several bond for the sum of \$1,800, payable in one year, and delivered the same to Augustus S. Case. To secure this bond they executed and delivered to Case a mortgage upon a tract of land owned by them as tenants in common. On April 1, 1868, A. L. Martin sold and conveyed his interest in the mortgage premises to his brother A. W. Martin. Subsequently there were several conveyances of the fee, the last one being to one Charles S. Bradfield. Case assigned the bond and mortgage to one Van Deventer, who assigned them to the com-

plainant, the Princeton Savings Bank, on the 12th day of February, 1885. On the 25th day of February, 1892, the complainant filed a bill to foreclose the mortgage, without making A. W. Martin, this defendant, a party, and such proceedings were had that a sale was effected by virtue thereof. The bill filed in this case is for the deficiency remaining after that sale. This bill shows that the amount of the decree was \$2,020.50, besides \$145.09 of costs. The premises sold for \$400, the purchaser being the present complainant. After the payment of sheriff's fees and the costs, there remained \$212.51 to be credited upon the decree.

The demurrant insists that the complainant has a complete and adequate remedy at law. While that may be, the practice of proceeding by bill in equity for deficiency arising upon the sale of mortgaged premises has been so long recognized by courts of equity, and, so far as I know, never questioned in this state, that I do not feel at liberty in this case to say that the complainant has mistaken its forum. There is no single fact in this case to deprive the complainant of this method, or to relieve the defendant from answering in this court. As between the complainant and the defendant, if any one be, he of all others is, liable. It nowhere appears that the grantees, or any of them, assumed the payment of the money secured by this mortgage. Consequently, the only person liable, if any one be, on the bond in question, is the defendant. *Pruden v. Williams*, 26 N. J. Eq. 210, and cases cited.

But another objection by way of demurrer is assigned, i. e. that the debt is barred by the statute of limitations. It appears that the debt was evidenced by the bond of Augustus and Alfred Martin. It bore date April 1, 1867, and was payable in one year. April 1, 1868, Augustus conveyed his interest to Alfred, and on March 24, 1869, Alfred conveyed his interest in the premises. There is nothing whatever to show that either of these obligors in any manner recognized or acknowledged his liability after the dates last given. The only proof of the validity of the mortgage itself as a lien is the foreclosure, which is stated in the bill to have gone to a decree and a sale. The claim that, because the amount found to be due, as expressed in the decree, was greatly below the amount that would have been due at that time if there had been no payments, raises the clear presumption that there must have been payments, cannot in any sense avail the complainant in this proceeding. The rule that allegations must be taken most strongly against the pleader cannot be overcome by such an alleged presumption. Besides, in order that such presumption should prevail in this case, as against this defendant, the court would be obliged to presume that, as the mortgage continued to be a lien upon the premises, the obligor would not make payments upon his bond after he had parted with

his title to the premises, given as security for such bond. I think, if payments were made by any of the subsequent grantees, by which the lien of the mortgage was preserved as against the land, such payments would not bind the obligees on the bond. It is not shown that such grantees and obligees were under the slightest liability to each other. It is true that, under the law, as it has been declared in this state (*Van Dike v. Van Dike*, 15 N. J. Law, 289), any acknowledgment of the liability upon such an instrument, either before the statute begins to run or afterwards, by one, or two, or more joint obligors, will not only bind the one making the acknowledgment, but also all others, so as to prevent the operation of the statute,—which principle, however, seems to have been settled adversely in New York. *Van Keuren v. Parmelee*, 2 N. Y. 523. But, as already intimated, there is no such binding relation between the grantees named in the bill of complaint and the makers of the bond in question as will put in operation any such principle. This view seems to have controlled the court in the case of *Trustees v. Smith*, 52 Conn. 434. Nor does the fact that the lien of the mortgage has been established by decree remove the bar of the statute as to the remedy for the debt. It seems that, where statutes do not prevail to the contrary, it is held that the remedy for the debt may be barred while the lien of the mortgage continues to subsist. *Jones, Mortg.* §§ 1203, 1204; *Waltermire v. Westover*, 14 N. Y. 16; *Heyer v. Pruyn*, 7 Paige, 465; *Jackson v. Sackett*, 7 Wend. 94; *Ball v. Wyeth*, 8 Allen, 275; 2 Wood, Lim. Act. 545. From these authorities it would seem to follow that, if these obligors had been made parties to the bill to foreclose, and a decree for deficiency, if any, had been prayed for against them, it could not have been granted. without proof that one of them, at least, had acknowledged his obligation within 16 years prior to the time of filing the bill, notwithstanding the complainant's lien upon the premises by virtue of its mortgage was still binding.

In brief of counsel for complainant, it is urged that the questions raised in this case should be presented by plea, and not by demurrer. I think that, if the defendant has mistaken his mode of relief, the other side could only take advantage of it by notice of motion to strike out his demurrer. Submitting to a hearing as introduced by the adverse party ought to bind his antagonist. I think the demurrer should be sustained, with costs.

IN RE HEATH'S ESTATE.

(Prerogative Court of New Jersey. May Term, 1894.)

EXECUTORS' ACCOUNTS—AUDITING FEES—RES JUDICATA.

1. The mere transfer of the balance shown by an executor's account to a subsequent ac-

count is not an "auditing and reporting" of that part of the estate represented by such balance, within Laws 1890, p. 250, as supplemented by P. L. 1891, p. 512, allowing the register of the prerogative court one-tenth of 1 per cent. for auditing and reporting executor's accounts on estates exceeding \$50,000 in value.

2. In the absence of fraud or mistake, an order confirming the auditing of an executor's accounts is a conclusive settlement of such accounts.

Application by the register of the prerogative court to fix fees for auditing and reporting the accounts of the executors of the estate of Stafford R. W. Heath, deceased. Decree for applicant for part of fees claimed.

William Y. Johnson, for register. John R. Emery, for executors.

THE VICE ORDINARY. The question to be decided in this case arises under a statute passed in 1890 and another passed in 1891. By the first it is enacted, in substance, that the fees of surrogates for auditing and reporting accounts shall, on estates exceeding \$50,000, be at the rate of one-tenth of 1 per cent., provided, however, that such further fees may be allowed in any case as the court shall think reasonable. P. L. 1890, p. 250. The second provides that the register of the prerogative court, for all official services, shall be entitled to charge and receive the same fees as are now allowed by law to the surrogates of the several counties of this state for like services. P. L. 1891, p. 512. The will of Stafford R. W. Heath, deceased, was proved before the ordinary, and his executors have, in consequence, had their accounts audited by the register of the prerogative court, and allowed and confirmed by the ordinary. Their first account was filed in March, 1890. The amount of the estate, as shown by that account, exceeded \$688,000, and the account also showed that, after crediting the executors with all proper allowances, there remained a balance in their hands slightly in excess of \$297,000. Since then four other accounts have been allowed and confirmed,—one in December, 1890, another in December, 1891, another in January, 1893, and the last in April, 1894. The balance, of over \$297,000, shown by the first account, has been carried into each of the subsequent accounts. This balance, when added to the moneys received subsequent to the filing of the first account, made the executors chargeable, when they exhibited their last account, in April, 1894, with a sum a little in excess of \$368,000. This \$368,000, less \$43,594.54, is a mere aggregation of the balances shown by the four previous accounts. Now, on this state of facts it is claimed on behalf of the register that he is entitled, under the statutes above referred to, for auditing and reporting the last account, the one-tenth of 1 per cent. on \$368,000, or the sum of \$368; while the executors insist that the balance carried from the preceding account into the last account constituted no part of the estate accounted

for by the last account, but represented that part of the estate which had been accounted for in the previous accounts; that such balance had been ascertained by the auditing of the previous accounts, and that the register did not, and could not, when he came to deal with the last account, do any work in the way of auditing that part of the estate, but that all he did respecting it was simply to add it to the debit side of the last account, so that that account should show, not only what the executors had received and paid out since their last previous accounting, but also the total amount of the estate remaining in their hands. The rule regulating payment, prescribed by the statute of 1890, is a purely arbitrary exaction. It is not compensation according to the value of the work, but the one-tenth of 1 per cent. must be allowed whether the work occupies 10 days or 10 minutes, and whether the work is fairly worth the sum which must be allowed, or only an infinitesimal part of it. For auditing and reporting the account of an estate of \$500,000, consisting of 20 items or less, the surrogate is entitled to \$500, though the actual value of the skill and labor bestowed is worth less than \$5. It is obvious that the effect of a statute which imposes burdens in this arbitrary manner, and without the slightest regard to benefit, should not be enlarged by construction. As the legislature cannot compel one citizen to give his property to another, it would seem logically to follow that it is not within its power to ordain that the estates of decedents shall be required to pay a particular class of public officers \$50 for a service which is not reasonably worth \$1. To earn the fees given by the statute, a surrogate must both audit and report. The words of the statute are "for auditing and reporting." Nothing is given for merely reporting, but, to be entitled to the fees allowed, it must appear that the surrogate has not only reported the account, but also audited it. To audit an account is to examine and digest it, or examine and verify it, or examine and adjust it. In actual practice, to audit an account is to see that the accountant is charged with everything with which he is justly chargeable, and that nothing is placed on the credit side of the account for which he is not justly entitled to credit; and then, after the debit and credit are thus made up, to ascertain the balance remaining in his hands. Adopting either of these definitions as a correct exposition of what is meant by the word "auditing" in the statute under consideration, it would seem to be perfectly clear that the register did not and could not audit that part of the last account which is made up of the balances shown to be in the hands of the executors by their previous accounts. The work of auditing in respect to that part of the estate has been previously and finally done, and the balances ascertained by such auditing were, by the decrees of allowances and confirmation, conclusively settled and adjudged against the

executors. Such adjudications constitute judgments which, so long as they remain in force, must be treated as absolute verities. And it is also true that those parts of the testator's estate which are embraced in and covered by the accounts which have already been allowed and confirmed must be considered, except in an appropriate proceeding, founded on fraud or mistake, as finally and conclusively settled. The accounts respecting them have been finally audited, and the accuracy, honestly, and fairness of the accounts established by the judgments of a competent court. So long as those judgments stand, neither the accounts nor any item in them can be audited by anybody. The accounts must be treated and considered everywhere as finally and conclusively settled. If simply transferring the balance shown by a first account to a second should be held to be auditing of that part of the estate represented by such balance, this result would follow: that part of a testator's estate represented by the balances thus transferred, instead of being required to pay fees for auditing once, might be required to pay them 20 times or more. For example, in this case the balance carried from the first account to the second was over \$297,000. The same sum constituted a part, and much the larger part, of each subsequent balance; so that, if merely transferring these balances constituted an auditing of that part of the estate, then this part of the estate has been audited five times, and the fees payable thereon would amount to nearly \$1,500. No argument is required to prove that there is nothing whatever, either in the language or purpose of the statute of 1890, giving the slightest support to a construction of it which would lead to a result so unjust and oppressive. The register is entitled to fees for auditing and reporting the accounts filed in December, 1891, January, 1893, and April, 1894, but the amount of his fees must be calculated on the amount of the estate charged for the first time against the executors in each of these accounts. That amount appears to be \$153,450. The fees of the register must, therefore, be reduced from \$368 to \$153.

WHITE v. TIDE WATER OIL CO.

SAME v. TIDE WATER PIPE CO.

(Court of Chancery of New Jersey. Sept. 13, 1895.)

DEDICATION OF STREET—PRESUMPTION—ABANDONMENT—ESTOPPEL.

1. Where land is conveyed as bounded by a street, the presumption of a dedication is conclusive so long as the deed stands unreformed.
2. Where adjoining landowners, in order to give each other frontage on a street, execute conveyances to each other, describing the property conveyed as bounded by a certain street, the fact that one builds a fence across the street does not estop him to claim an easement in the whole street as against another who erects a wall in the center of the street, such wall being

merely a part of improvements commenced by the latter before the erection of the fence by the former.

3. Nor does such fact show an abandonment of the easement in the street.

Suits by Thomas White against the Tide Water Oil Company and against the Tide Water Pipe Company for mandatory injunctions to compel the removal of a wall and a fence from a street. Heard on bill, answer, and proofs on final hearing. Injunction made perpetual.

For prior opinion, see 50 N. J. Eq. 1, 25 Atl. 199.

Van Buskirk & Parker, for complainant. Alvah A. Clark, for defendant.

REED, V. C. These two cases involve the same questions, and were by consent tried together. The facts which underlie the questions involved are set out in the opinion of the chancellor upon a demurrer to the bill filed in the first named of the two causes. His opinion is reported in 50 N. J. Eq. 1, 25 Atl. 199. The facts set out in the bill are these: Thomas White, the present complainant in both bills, together with his brother, Samuel C. White, were owners as tenants in common of a tract of land in Bayonne. The Central Railroad Company owned an adjoining tract. The line which divided these respective tracts ran diagonally across Twenty-First street. The Whites and the railroad company interchanged deeds so as to make Twenty-First street the dividing line between their respective properties. The Whites conveyed to the railroad company that portion of their tract which lay south of Twenty-First street; and the railroad company conveyed to the Whites that portion of its tract which lay north of Twenty-First street. In the description in the Whites' deed the north line of the tract conveyed ran along the southerly side of Twenty-First street, and conveyed the land south of that line. In the description in the railroad company's deed the southerly line of the land conveyed ran along the center line of Twenty-First street, and conveyed that portion of their land which lay north of said line. Twenty-First street became the dividing line of the two properties. These deeds were interchanged in December, 1878. Samuel C. White died November 26, A. D. 1886. On February 18, 1887, Thomas White, the present complainant, bought from the executors of his brother, Samuel C. White, all of the latter's former interest in the premises. Subsequently the defendant the Tide Water Oil Company erected in the middle of Twenty-First street, opposite to the said property of complainant, a fence, and the defendant the Tide Water Pipe Company a wall and fence. The bills in these cases were filed to obtain a mandatory injunction to compel the removal of the fence and wall from the said street.

The questions already settled by the decision of the chancellor are the following: (1) That the recognition of Twenty-First street in the respective deeds interchanged between the Whites and the railroad company, amounted to

a dedication of such street by the respective grantors. (2) Although such dedication is still unaccepted by the city of Bayonne, and so the public right in said street is still inchoate, yet, that the grantees under the said deeds acquired a right to the use of the said street as a means of passing to and from their premises as appurtenant thereto. (3) That the grantees were entitled to the unobstructed use of the whole way. (4) That this court has jurisdiction to order the removal of these permanent obstructions to the use of the street, to its entire width.

Upon the trial the defense interposed was that the Whites, by their acts, had abandoned their right to the easement within the lines of Twenty-First street, or that by their acts they had estopped themselves from invoking the power of this court to compel the removal of the present obstruction. It was, indeed, suggested, rather than argued, in addition to these points, that the facts shown upon the trial negatived any intention on the part of the Whites and the railroad company to originally dedicate the street. But it is perceived that, so long as the deeds stand unreformed, the implication of dedication is conclusive, and no previous or concurrent acts or words of the parties to those deeds can in any way affect the dedicatory force of those conveyances. So the defense stands upon the idea of an estoppel against or an abandonment by the complainant. Both of these defenses rest upon two circumstances, which the defendants insist are established by the testimony in the cause. The first of these is that, some time previous to 1885, Mr. Samuel C. White, in a conversation with a Mr. Parker, who was the agent of the Kalbfleisch estate, having charge of some property owned by that estate adjoining Twenty-First street on its south side, complained to Mr. Parker about the wagons of the Tide Water Pipe Company's employés passing along Twenty-First street. The second is that in 1885 all travel over Twenty-First street by the wagons of the Tide Water Pipe Company was arrested by a fence erected across said street by the direction of Mr. White. Now, in respect to the estoppel, there is nothing to show that either of these facts induced any course of conduct by the defendant. This conversation with Mr. Parker, so far as appears, never came to the attention of the defendants or their agents till long after the fence and walls were commenced, so it could not have induced them to make such erections. Nor could the fact of the closure of Twenty-First street by the complainant in the least degree have changed the policy of the defendants in dealing with their property. Although the fence was erected in 1885, and the wall was built in 1890, yet it is entirely clear that the wall would have been erected without regard to the circumstance that the street had been so obstructed by the erection of the fence; for it appears conclusively that the erection of the wall was a sequence of the erection of a series of tanks for the reception of

oil, built upon the property of the defendants. These tanks, to accomplish their purpose, had to be built each apart from any other, at least a certain number of feet, so that in case one becomes ignited, as sometimes happens, from lightning attracted by its ascending vapors, it will not endanger its neighboring tank. Each tank is also protected from overflowing oil from a burning tank by an embankment, and around the entire plant either an earth embankment or a wall is constructed for the purpose of protecting adjoining property from the dangers of overflowing burning oil. The wall in the middle of Twenty-First street was constructed for that purpose, and it is claimed by the defendant that it is constructed as close to the nearest tier of tanks as is possible, if it is to be of efficient service as a shield against the danger mentioned. Now, it appears that the tanks upon the property of the defendants were constructed at different times running over a period of five years. The first was built in 1879 and the last in 1884. The first was constructed upon that portion of defendants' property the most remote from Twenty-First street, and the last three were those nearest to Twenty-First street, and within 40 feet of the wall. They were, however, all built in accordance with a plan adopted before the commencement of the work in 1879. At that early date the location of each tank was fixed, and the work was afterwards carried on, up to the time of its completion, without deviation from the plan then adopted. There is not the slightest evidence that any act or word of the complainant, or any one representing him, induced the defendants to adopt the plan, or to continue the work in accordance with its requirements. Nor is there any evidence of such acquiescence by the Whites in the appropriation by the defendants of the southerly half of the streets as will raise an estoppel. The fence was erected by the latter in 1881, near the line where the wall was erected in 1890. But at that time Twenty-First street was not physically marked upon the ground. Its boundaries were not apparent. No houses fronted upon it. The Whites had no occasion to use the right of way created by the deeds. Mr. Thomas White says that he did not know that the fence encroached upon the street. The defendants had the same source of information in respect to the location of the street as had the complainant, and much more interest in accurately ascertaining its limits. The fact of the previous existence of this fence did not, under the circumstances, estop complainant from objecting to the permanent structure erected in 1890.

Nor do I find any substance in the point that the Whites had abandoned this right of way. Mere nonuser, while an element from which an intention to abandon may be ascertained, is not in itself evidence of the abandonment of an easement. *Water-Power Co. v. Veghte*, 21 N. J. Eq. 463. The fact that a fence was erected in 1889 across Twenty-First street, which fence

prevented the teams that were carting material for the building of the tanks from turning from the Old Hook road on the east, and from passing along a track which is claimed to have been within the limits of Twenty-First street, is insufficient to prove such intention. The fence was built by Mr. Bradford, who had the use of a building upon the Whites' property, and the privilege of cultivating the adjoining land. His only power to act for the Whites was confined to an authority to collect rent for their houses. He was not sworn as a witness, and it does not appear from any other source that he had authority to obstruct the street. Nor does the remark which Mr. Parker attributes to the deceased former owner of the undivided interest in the Whites' property prove such authority. If Mr. Parker's testimony is accurate, Mr. White complained that the teams of the defendants were passing over lands of White and the Kalbfleisch estate. Now, the evidence is conflicting in respect to the location of the line of the passage of these teams. It is quite as persuasive that the teams passed from the Old Hook road at a point on the Whites' land north of the line of Twenty-First street as it is that they passed directly along Twenty-First street. But, if Mr. White had directed the erection of the fence across the street, I do not think that that act would prove an intention to abandon his right of way. It is to be kept in mind that we are now considering the effect of such act, not in the light of an estoppel, but we are regarding it as an act which proved an intention to relinquish all rights in the street as a way. Now, it seems entirely clear that the object of the cross conveyances between the Whites and the railroad company, was solely for the purpose of securing for the Whites' lands a frontage on Twenty-First street, which would result in making the land available for building lots in the future. Now, it is incredible that the Whites, after the trouble of this arrangement, and with no change in the condition of affairs to induce a change of intention, should form a design to forego all the advantages arising from this arrangement. It is quite probable that they did not intend to presently make use of the street, for in the condition of their abutting lands, there was no occasion for such use. It may also be that they misconceived the legal rights of the abutting landowners to a passage over the said street before it was accepted by the public authorities. It is not unlikely that they thought that until the occurrence of that event they had still a right to use that part of their lands which was included in such street. Such an understanding might have led to the inclosure of the street; but that they intended to abridge any right which accrued to them from the deeds of dedication by such act is not credible. My conclusion is that in no aspect of the testimony can either an estoppel or an intention to abandon the easement which they had acquired be imputed to the complainant. The injunctions will be made perpetual.

HESTON v. BECKETT.

(Court of Errors and Appeals of New Jersey.
June Term, 1894.)

Appeal from court of chancery.

Bill by Anna P. Beckett against Isaiah M. Heston to cancel a deed. There was a decree for complainant in the chancery court (23 Atl. 1014), and defendant appeals. Affirmed.

John W. Wartman, for appellant. Allen B. Endicott, for respondent.

PER CURIAM. Decree unanimously affirmed, for the reasons given in the court of chancery.

**BOOKWALTER STEEL & IRON CO. v.
STOCKTON, Attorney General.**

(Court of Errors and Appeals of New Jersey.
June Term, 1894.)

Appeal from court of chancery.

Petition by John P. Stockton, as attorney general, against the Bookwalter Steel & Iron Company, to restrain defendant from exercising its franchise without paying certain taxes. There was a decree for complainant in the chancery court (26 Atl. 463), and defendant appeals. Affirmed.

Horatio N. Barton, for appellant. William Y. Johnson, for respondent.

PER CURIAM. Order affirmed, for the reasons given in the court of chancery. Decree unanimously affirmed.

**ELECTRO-PNEUMATIC TRANSIT CO. v.
STOCKTON, Attorney General.**

(Court of Errors and Appeals of New Jersey.
June Term, 1894.)

Appeal from court of chancery.

Petition by John P. Stockton, as attorney general, against the Electro-Pneumatic Transit Company, to restrain defendant from exercising its franchise without payment of certain taxes. There was a decree for complainant in the chancery court (26 Atl. 463), and defendant appeals. Affirmed.

Horatio N. Barton, for appellant. William Y. Johnson, for respondent.

PER CURIAM. Order unanimously affirmed, for the reasons given in the court of chancery.

HARTSHORNE et al. v. BOORUM.

(Court of Errors and Appeals of New Jersey.
June Term, 1894.)

Appeal from court of chancery.

Petition by George C. Boorum against Edgar Tucker, Acton C. Hartshorne, and Charles E. Hill, praying that defendants, as purchasers at a sheriff's sale, be compelled to complete their purchase. There was a decree for complainant in the chancery court (26 Atl. 456), and defendants Hartshorne and Hill appeal. Affirmed.

Charles E. Hill, for appellants. James Fleming, for respondent.

PER CURIAM. Order unanimously affirmed, for the reasons given in the court of chancery.

EARL et ux. v. WINTERS.

(Court of Errors and Appeals of New Jersey
June Term, 1894.)

Appeal from court of chancery.

Bill by Collins Winters against William H. Earl and wife, to have a deed absolute in form declared a mortgage. There was a decree for complainant in the chancery court (28 Atl. 15), and defendants appeal. Affirmed.

Charles M. Woodruff, for appellants. Edward M. Colie, for respondent.

PER CURIAM. Decree unanimously affirmed, for the reasons given in the court of chancery.

**COOGAN et al. v. AMOS H. VAN HORN,
Limited.**

(Court of Errors and Appeals of New Jersey.
May Term, 1894.)

Appeal from court of chancery.

Bill by Amos H. Van Horn, Limited, against Dominic Coogan and another for an injunction. From a decree of the chancery court (28 Atl. 788) granting the writ, defendants appeal. Affirmed.

Abner Kalisch, for appellants. Robert H. McCarter, for respondent.

PER CURIAM. Order unanimously affirmed, for the reasons given in the court of chancery.

WILSON et al. v. ALPAUGH.

(Court of Errors and Appeals of New Jersey.
June Term, 1894.)

Appeal from court of chancery.

Bill by Elizabeth C. Wilson against Richard H. Wilson and another on a promissory note. Plaintiff died pending suit, and Charles Alpaugh, as executor, was substituted as plaintiff. From a decree of the chancery court (28 Atl. 722) in favor of complainant, defendants appeal. Affirmed.

Charles A. Skillman, for appellants. Richard S. Kuhl, for respondent.

PER CURIAM. Decree unanimously affirmed, for the reasons given in the court of chancery.

**PENNSYLVANIA R. CO. et al. v. NATIONAL
DOCKS & N. J. C. RY. CO.**

(Court of Errors and Appeals of New Jersey.
June Term, 1894.)

Appeal from court of chancery.

Bill by the National Docks & New Jersey Junction Connecting Railway Company against the Pennsylvania Railroad Company and another. From an order of the chancery court (28 Atl. 71) denying an application by defendants for removal of the cause, they appeal. Affirmed.

James B. Vredenburgh and Joseph D. Bedle, for appellants. Charles L. Corbin and John R. Emery, for respondent.

PER CURIAM. Order unanimously affirmed, for the reasons given in the court of chancery.

PATTERSON v. MADDEN.

Court of Chancery of New Jersey. Sept. 13, 1895.)

WILLS—NATURE OF ESTATE DEVISED.

1. Testator devised land to a person, with limitation over if the devisee died "without leaving issue." *Held*, that the first devise, which, under the statute, would have been a fee simple, was, by the limitation over, cut down to a fee tail, which, by the statute of descent (section 11), was transmuted into a life estate in the devisee, as the presumption is that testator meant, by the words "without leaving issue," an indefinite failure of issue.

2. If the will had shown that testator, by the words "without leaving issue," meant issue at death, the devise would not have created an indefeasible fee simple, but a fee subject to be defeated by the limitation over by way of an executory devise.

Bill by John H. Patterson against Thomas B. Madden to compel specific performance of an agreement to purchase lands. Decree for defendant.

On January 1, 1895, John H. Patterson, the complainant, contracted to convey to Thomas B. Madden, the defendant, by deed of general warranty, free from incumbrances, a certain tract of land in Monmouth county. Madden agreed to pay, upon delivery of a deed for the said property, the sum of \$4,000. A deed was duly executed by the complainant, and with it, he attended at the time and place at which it was to be delivered; but the defendant did not then and there appear, and, although since requested to perform his part of the agreement, has refused to do so. The defendant sets up, as an answer to complainant's bill, that the complainant is not seised of a title in fee simple, and therefore is unable to convey to the defendant the title for which the defendant promised to pay the \$4,000.

G. D. W. Vroom, for complainant. Edwin Robert Walker, for defendant.

REED, V. C. (after stating the facts). It is not questioned that the locus in quo is a part of a tract of land which was devised to the complainant by his father, James Patterson. Nor is it questioned that the father had a title in fee simple in the said land. The single question presented is, what interest devolved upon the complainant by force of the devise contained in the will of his father? If such interest is a fee simple, then the complainant is entitled to a decree; but, if less than a fee simple, he is without equity. As already remarked, to discover of what title the complainant is seised, we must recur to the will of James Patterson. The first clause of that will is couched in the following language: "I give and bequeath unto my son John H. Patterson, on the following conditions, as follows, the following described part of land [describing the farm and one-third of a tract of woodland]." By the same language he gave Samuel H., another son, another farm, and one-third of the same wood

lot. By the same language he gave to Henry Patterson, still another son, a third farm, with the remaining third part of said wood lot, subject to the use of the tenant thereon for one year from the 1st of April next after his decease. He gave to his wife the use of the homestead farm and the big meadow adjoining, and of another farm adjoining the homestead farm, during her natural life. After her death, he gave to his son Ewing Patterson one of these farms, and to his son Joseph C. Patterson the other of these farms, and divided the big meadow between these two sons. He gave certain legacies to his daughters, one of which was charged upon the farms devised to James H. and Henry Patterson. This legacy has been paid. He then ordered that none of the farms should be sold by any of the sons during the life of the testator's wife. Then follows this clause: "I order and direct that if any of my said sons, John H., Samuel, Henry, Ewing, and Joseph, should die without leaving issue, and leaving a widow, then the widow of such son so becoming deceased may have the use of the farm which is herein given to such son so long as such widow of such deceased son remains unmarried; and, on the event of the marriage or decease of said widow of such son so becoming deceased, I give and bequeath unto such persons as may then be my lawful heirs, forever."

The question is whether the first devise, which, under our statute, is one in fee simple, is cut down by the subsequent clause limiting over the estate in case the devisee should die without leaving issue. It was entirely settled at common law that the phrase "leaving no issue," or "without leaving issue," when applied to a devise of land, meant an indefinite failure of issue; but, when applied to a bequest of personalty, it imported failure of issue at the time of the death of the first legatee. 3 Jarm. Wills (Rand. & T. Ed.) p. 298. The effect of a limitation over in the event of the devisee dying leaving no issue, or without leaving issue, upon a preceding devise of land to a person indefinitely, or to a person for life, or to a person and his heirs, was also entirely settled. If a devise was to a devisee and his heirs, the limitation over imported that the testator used the word "heirs" in the qualified sense of "heirs of his body." If the gift was to the devisee expressly for life, or was to him without words of inheritance, the limitation over implied that the testator intended that the estate to be taken by the first devisee should be of such duration as to fill up the chasm in the disposition, to prevent the failure of the ulterior devise, which would otherwise be bad for remoteness. 2 Jarm. Wills, pp. 130, 137. The gift to the first devisee was in both instances, by implication, a devise to him and the heirs of his body; and so his estate, if given for life, was enlarged, and, if given in fee simple, was cut down to a fee tail. In the case of Chetwood

v. Winston, 40 N. J. Law, 337, the limitation over after a devise in fee was in substantially the same words as appear in the present will. Chief Justice Beasley, for the court of errors, remarked that the legal effect of this language, by an almost unbroken line of authorities, was to create, by the rules of the common law, an estate tail. This being the effect of the language employed in the present devise, the estate of the devisee is seized by the eleventh section of our statute of descent, and transmuted into an estate for life. *Redstrake v. Townsend*, 39 N. J. Law, 372. It is to be remarked that an implied estate in fee tail rests upon the presumption that the testator meant, by the words "without leaving issue," an indefinite failure of issue. This, however, is not a conclusive presumption; for if it clearly appears, from other language employed in the will, that issue at death was meant, such language will change the time of the failure from an indefinite to a definite date. I fail to discover such intention clearly manifested by the testator in the present will. But if it appeared, in the most convincing shape, that the testator meant, by the phrase "dying without leaving issue," that the limitation over was to occur only in the event of the absence of issue at the time of the death of the first devisee, it would not, in the least, help the complainant. It would not clothe him with the estate which he bargained to convey. Instead of an indefeasible fee simple,—which estate he required, to fill his contract,—he would then be seised of an estate in fee simple with a limitation over by way of executory devise. His estate would be defeasible upon his dying without leaving issue, and leaving a widow. *Kennedy v. Kennedy*, 20 N. J. Law, 185; *Groves v. Cox*, 40 N. J. Law, 40. In respect to the insistence of counsel for the complainant that the words "dying without leaving issue" refer to the death of the first devisee before the death of testator, I can draw no such intention from the other language used by the testator. Nor do I regard any one of the cases cited in support of this position as pertinent to the specific devise found in the present instance. There must be a decree for the defendant.

WALTON v. RORKE

(Supreme Court of New Jersey. Aug. 8, 1895.)

VACATION OF JUDGMENT—LACHES.

R., the plaintiff, recovered a judgment against W., the defendant, upon which a *fieri facias* was issued and returned unsatisfied. Some time after the judgment was recovered, R. entered into an agreement with W. to extend the time for payment of the claim, by installments. But, before the period for the payment of any installment had elapsed, R. issued an alias *fieri facias*, upon which a sale of some of the personal property of W. was had, and the judgment thereby partially satisfied, and, as to the balance due thereon, the *f. fa.* was returned unsatisfied. Afterwards supplementary proceedings for discovery in aid of ex-

ecution were taken by R. against W., under which W. was examined under oath. Upon these proceedings and the evidence thereunder, a receiver was appointed, who realized the balance of the judgment, and, by order of the court, paid the same to R. W., during the pendency of all these proceedings, entirely failed and omitted to set up, take advantage of, or enforce his agreement for the extension of time of payment. After the money had been paid by the receiver, W. endeavored to enforce his agreement by proceedings on rule to show cause why the judgment of R. should not be vacated and the supplementary proceedings set aside. Held, on the hearing of this rule, that W. was in laches by his conduct, and disentitled to the aid of the court; and that, if any right of enforcement by W. of his agreement existed, he must be left to his action for a breach of the agreement.

(Syllabus by the Court.)

Action by Allen B. Rorke against F. Theodore Walton. Heard on rule to show cause why judgment for plaintiff should not be vacated, and supplemental proceedings thereon set aside. Rule discharged.

Argued February term, 1895, before DIXON and LIPPINCOTT, JJ.

Lindley M. Garrison, for plaintiff. E. A. Armstrong, for defendant.

LIPPINCOTT, J. On January 4, 1894, the plaintiff in this action, Allen B. Rorke, recovered a judgment in this court against the defendant, F. Theodore Walton, and an execution was issued thereon, and returned unsatisfied. On August 27, 1894, an alias *fieri facias* was sued out, and, as the facts appear to be, a sale of some portion of the personal property of Rorke made in part satisfaction thereof, and as to the balance it was returned unsatisfied. After its return, supplementary proceedings were taken by the plaintiff against the defendant for discovery in aid of execution. The order for discovery was made on November 24, 1894. Under this order, the defendant was examined and depositions taken; and on January 3, 1895, the evidence was filed in this court, and a receiver appointed according to the statute. The receiver, in the exercise of his powers, realized the balance of the judgment, and in accordance with an order of this court made on January 7, 1895, paid the same to the plaintiff, in satisfaction of his judgment against the defendant, and on the same day filed a report of his proceedings as receiver. On January 9, 1895, the defendant, Walton, applied for and obtained a rule to show cause why the judgment should not be vacated and the supplementary proceedings set aside. Evidence has been taken on this rule, and it appears that the basis of the claim of the defendant for relief is that on January 30, 1894, the plaintiff, with other creditors, Walton, agreed with him that they would extend the time of the payment of their respective claims against him, so that the whole amount thereof should be paid in installments, with interest at 6 per centum annum; that is, 20 per cent. on January

1935, and 20 per cent. in each of the four years thereafter at the same date. An agreement of this character in writing was executed by the plaintiff, and some others, if not all, of the creditors of the defendant. The formal execution of this agreement is admitted by the plaintiff, and it, and the circumstances surrounding its execution, and the relations in respect to this matter of the plaintiff and defendant, constitute the evidence before the court upon this rule. Treating this agreement as valid and binding, the defendant insists that, by the force of its terms, it applies to and renders the judgment invalid and inoperative; that, by reason of this agreement, a new relation was established between the parties; and that, by force of the agreement, nothing remained due upon the judgment; and that, at least, no proceedings by way of execution or supplementary proceedings were maintainable to enforce it. On the part of the plaintiff, the validity of this agreement is attacked, on the ground that the plaintiff was induced to execute it upon the representation that all the creditors of the defendant were to be parties to it, and that in fact a large number of the creditors did not become parties to it; that, therefore, whatever its effect may be, its execution by the plaintiff was induced by fraud and false representations, and for these reasons it never became operative, nor was it ever intended to be of any force or effect.

It has not been found at all necessary in this case to discuss or decide the question whether, under the circumstances developed in the evidence, this agreement is valid and binding upon the parties, and no opinion is expressed upon this point. It may, for the purposes of the determination of this rule, be assumed to have been an effective and binding contract between the parties, and operative according to the terms incorporated herein. But it is in no sense an agreement on the part of the plaintiff to waive his judgment or to discharge it, but only to give time, and accept its payment in stated installments. It is no more a waiver or discharge of the judgment of the plaintiff than it is a waiver or satisfaction of his original debt due him from the defendant. The claim of the plaintiff remained incorporated in his judgment against the defendant, and the inherent force and efficacy of the judgment still subsisted, and its validity and regularity were in no wise affected. It still stood uncontested, with no part thereof relinquished or remitted; and, if it was not paid within the time and according to the mode provided in the agreement, the plaintiff was at liberty to enforce it by the orderly and regular course of procedure to enforce judgments. This being the purport and effect of this agreement, the plaintiff, treating it as in-

valid and inoperative, proceeded to enforce his judgment in the usual manner. It was then the privilege of the defendant to enforce his agreement, if he considered it valid and binding, and bar the further procedure upon the judgment. This he failed to do, but permitted an alias execution to issue against him, upon which a levy and sale of his personal property were made in part satisfaction. The execution in part remaining unsatisfied, supplementary proceedings under the statute, to which he was a party, were taken for discovery of his property and effects, for the purpose of subjecting them to the further satisfaction of the judgment. Under these proceedings he was examined without protest, because of his agreement with the plaintiff, and without referring to it or setting it up in any wise in bar of the proceedings. After the evidence was taken and filed, a receiver was appointed, who, in due course, from the assets of the defendant coming to his hands, realized, and, by order of the court, paid to the plaintiff, the balance of the judgment. At no time during the pendency of these proceedings did the defendant ever assert the efficacy of the alleged agreement, nor in the slightest attempt to invoke its protection. Time and again he permitted the process of the court to be directed against him without asserting a single antagonistic right by virtue of his agreement or otherwise. He was in entire laches in this respect. If this agreement possessed any validity at all in this respect, this was the time it should have been asserted and enforced. He was then obliged to assert it, or lose the benefit of it, because the position of the plaintiff was at all times changing. It is impossible to regard his conduct in any other light than as entirely acquiescent, and thereby disentitling himself to the aid of the court. The enforcement of his rights in this matter and in regard to these proceedings has been barred by his laches, and the court cannot now aid him. He was fully aware of the character of his legal rights under this agreement, and of the infringement upon them. With this knowledge, he entirely failed and omitted to assert those legal rights, or even to protest against their infringement. By his laches, he lost his right to take advantage of his agreement in these proceedings. The court should not now interfere with the status which he has thus assisted in creating, or which at least has been created with his acquiescence, or neglect and failure to assert those rights which would have prevented the situation now found by the court as existing. For any enforcement of this agreement deemed by him desirable, he must be left to his action for a breach of it. Whether such right of action exists, no opinion is expressed. The rule must be discharged, with costs.

**STATE (BOICE, Prosecutor) v. BOARD OF
CHOSEN FREEHOLDERS OF ES-
SEX COUNTY.**

(Supreme Court of New Jersey. Aug. 8, 1895.)

COUNTIES—POWERS OF BOARD.

Under the act entitled "An act to authorize the burial of the bodies of any honorably discharged soldier, sailor or marine, who shall die without leaving means sufficient to defray funeral expenses," approved February 13, 1884 (P. L. 1884, p. 17) the boards of chosen freeholders in the respective counties of this state have no legal power or authority to create the independent office, position, or employment of "superintendent of soldiers' burials," or any like office, position, or employment, and affix an annual or other salary thereto. The power and authority of the board of chosen freeholders under this act are by the plain provision thereof limited and restricted to the designation of some county official, already created and in existence, and not having by law the care of paupers and the custody of criminals, to perform the duties provided to be performed under the provisions of this act; and the county official so designated must be one whose accounts are in other respects audited and paid by the board of chosen freeholders.

(Syllabus by the Court.)

Application in the name of the state at the suit of James T. Boice for certiorari to the board of chosen freeholders of the county of Essex. Denied.

Argued June term, 1895, before VAN SYCKEL and LIPPINCOTT, JJ.

Joseph A. Beecher, for prosecutor. Joseph L. Munn, for defendants.

LIPPINCOTT, J. The application for this writ was made upon affidavit and notice. The affidavit presented the facts fully, and the matter was fully argued on both sides. The prosecutor is a resident of the county of Essex, and was on the 10th day of May, 1893, at a regular meeting of the board of chosen freeholders of that county, elected or appointed to the position, office, or employment of "superintendent of soldiers' burials," at a salary of \$500 per annum, payable in monthly installments. This appointment was made by virtue of the provisions of an act of the legislature entitled "An act to authorize the burial of the bodies of any honorably discharged soldier, sailor or marine, who shall hereafter die without leaving means sufficient to defray funeral expenses," approved February 13, 1884 (P. L. 1884, p. 17). On May 9, 1894, the prosecutor was reappointed at the same salary for one year, and under this appointment he continued to perform the duties required by the act until May 8, 1895, at which latter date the board of chosen freeholders by resolution appointed one Henry H. Smith to this position or employment in his place and stead at a salary of \$400 per annum. The prosecutor, upon this application, seeks a writ of certiorari to review the resolution and proceedings appointing Smith to this position, for the purpose of having the same declared illegal and invalid and set

aside, standing, as they do, as a bar to the further continuance of his employment. The prosecutor contends for his right to continue in this position on the ground that the statute of 1884, to which reference has been made, does not fix the term for which he holds, and that, being an honorably discharged soldier of the United States, holding an office or position the term of which is not fixed by law, under the provisions of the seventh section of an act entitled "An act to re-organize the boards of chosen freeholders in counties of the first class in this state," approved May 16, 1894 (P. L. 1894, p. 358), he is protected from removal or displacement. This section declares in one of its provisos that any honorably discharged soldier or sailor of the United States shall continue and remain in their respective offices or positions the same as if the act had not been passed, and shall only be removed for cause. The act is one which, among other things, provides for the termination of certain offices and employments under the boards of chosen freeholders in the counties of the first class in this state, but provides against the removal of honorably discharged soldiers or sailors of the United States. Without at all discussing the assumptions upon which this contention of the prosecutor proceeds, it seems clear to us that the power of the boards of chosen freeholders in the respective counties is limited and restricted by the act of 1884, for its purposes, to the designation of some county official not designated by law for the care of paupers or the custody of criminals, whose accounts in other respects are audited and paid by the board. The first section of the act provides that it shall be the duty of the board of freeholders in each of the counties of this state to designate for the purposes of the act "some proper authority, other than that designated by law for the care of paupers and the custody of criminals." By a reasonable construction this language can only refer to some "proper authority" already in existence. The provision that it shall be "some proper authority" other than that designated by law for the care of paupers and the custody of criminals, renders it clear that it was intended that this proper authority was one already created. Besides, the second section, among other things, provides that "the board of freeholders of such county is hereby authorized and directed to audit the accounts and to pay the expense of such burial in the same manner in which the accounts of such officer as shall be charged with the performance of such duty as above provided, shall be audited and paid." It is clear, upon a proper construction of this act, that the boards of chosen freeholders have no power under it to create any office, position, or employment whatever. The act simply confers upon the boards the power to impose upon some competent proper county official or authority already in existence, the accounts of whom are audited and paid by the board, the performance of the

duties required by the act, and to audit and pay the expenses incurred under the act in the same manner in which the other accounts of such authority or of such official are audited and paid. With the power of the boards thus defined and restricted, it will be seen, so far as the facts appear in the affidavits before us, neither the prosecutor nor Mr. Smith are entitled to hold the so-called "positions," or exercise the employments to which they have been appointed. The creation of this position or employment was by law unauthorized. The prosecutor therefore has no legal standing in his application for the writ of certiorari, and it must be denied.

STATE (WEST JERSEY TRACTION CO.,
Prosecutor) v. SHIVERS et al.
(Supreme Court of New Jersey. Sept. 16,
1895.)

**STREET RAILROADS—GRANTING OF RIGHT TO
CONSTRUCT.**

A consent by the board of public works of the city of Camden that a street railway may lay and construct its tracks therein is a street regulation, which, under the city charter and the act creating said board, must be by ordinance.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of the West Jersey Traction Company, against Bowman H. Shivers and others, to review a resolution of the board of public works of Camden. Judgment for prosecutor.

Argued June term, 1895, before VAN DYCKEL, MAGIE, and GARRISON, JJ.

T. E. French and L. M. Garrison, for prosecutor. E. A. Armstrong and D. J. Pancoast, for defendants.

GARRISON, J. This is a certiorari bringing up a resolution of the board of public works of the city of Camden, passed May 4, 1893, in these words:

"Resolved, that permission be, and the same is hereby, given to the Camden Horse Railroad Company to lay and construct its railroad in accordance with its charter in the city of Camden."

This consent was obtained in compliance with the provisions of an act entitled "An act to prohibit the laying or construction of any street or horse railroad along the streets of any municipality of this state without the consent of the governing body having control of the streets of such municipality." P. L. 1893, p. 144.

By virtue of the act of 1892 (P. L. p. 215), "The Board of Public Works of the City of Camden" became the governing body having control of the streets of that municipality, being substituted in that respect for the common council thereof, and was vested with all of the functions previously exercised by the council, to be performed "in the same manner and with like power and authority as the same" had been vested in the common

council. To this was added the express injunction that "this act shall be so construed."

The power of the common council under the charter of the city of Camden (P. L. 1871, p. 210) is to make and establish "ordinances, rules, regulations and by-laws" to regulate highways, and "to prescribe the manner in which corporations or persons shall exercise any privilege granted to them in the use of any street, avenue, highway or alley in said city, or in digging up any street, avenue, highway or alley for the purpose of laying pipes or any other purpose whatever."

The legislative language thus used occurs likewise in the charters of the cities of Newark and Lambertville, and has received judicial construction in the case of consents given by those cities to corporations and individuals for the use of the streets therein. *Halsey v. City of Newark*, 54 N. J. Law, 102, 23 Atl. 284; *State v. Lambertville*, 45 N. J. Law, 279.

In each of these cases it was held by this court that such consent must be by formal ordinance, and that a simple resolution to that end was ineffectual.

Applying that construction to the board of public works of the city of Camden in its performance of the functions of the common council, to which it succeeded, the resolution before us must be held to be inefficacious to confer upon the horse railroad company the requisite permission to use the streets of the municipality.

The question of the interest of the prosecutor in the subject-matter brought up by this writ is not before us on this return. *Avon by the Sea Land & Imp. Co. v. Mayor, etc., of Neptune City* (N. J. Err. & App.) 32 Atl. 220.

Let the resolution be set aside, with costs.

STATE v. DAVIS.

(Court of Oyer and Terminer of Delaware.
November, 1885.)

HOMICIDE—MALICE—INTOXICATION.

1. Malice is implied by law from a killing with a deadly weapon, and the burden is upon the accused to prove that the killing was excusable.

2. Malice aforethought exists if the fatal shot was the result of a purpose, although conceived but a moment before the killing.

3. Intoxication is no defense unless the murder was committed under the influence of alcoholic insanity, and will not reduce the grade of the offense below murder in the first degree unless the accused was in such condition of mind that he did not know what he was doing.

Indictment against Lewis E. Davis for murder. Conviction of murder in the second degree.

John H. Paynter, Atty. Gen., for the State. Levi C. Bird, for defendant.

COMEGYS, C. J. (charging jury). This case is admitted by the prisoner's counsel to be one of murder, and therefore it is necessary

that I should say to you that by our law there are two degrees of that crime, murder of the first and murder of the second degree. The first is where one purposely kills another with a deadly weapon, without excuse or justification, or being under the influence of a provocation proportioned to the act committed, which created a feeling of resentment he was powerless to resist. The second is where life is taken in committing or attempting to commit a felonious act, or by conduct so reckless as to show that the actor has a heart regardless of social duty, and fatally bent on mischief. Many examples of this might be given, but I will cite but two to you, as they will be sufficient. It is where one recklessly shoots or rides into a crowd, and some one is killed, or resists and kills a public officer acting at the time in the discharge of his duty. These several murders are, in law, murders with malice aforethought. Malice is not grudge or resentment or vindictiveness against another alone, but is also the manifestation of a wicked, evil spirit, evoked upon the occasion of the act done; and, in the absence of other proof of malice, it will be sufficient to establish it that the party killing the other did it with a deadly instrument, or by the use of other deadly means. In such case, the law implies malice,—that is, the wickedness and depravity of heart spoken of,—and no other proof of any need be given by the state. There is, then, devolved on the prisoner the duty and burden of showing either that he was excusable in self-defense, or defense of his habitation, or that he had what in law is allowed to mitigate the crime; that is, outrageous provocation, which overcame his feelings so completely that he could not avoid the act. This shows the absence of malice,—wickedness,—and, though surely punishable, is not murder of either degree. In deciding upon the case as one of murder of the first or second degree (for that, as I have said, is the question before you), you must not suppose, although malice must by law be coexistent with the fact of killing, which is what is meant by malice aforethought, that a feeling of enmity or revenge against the victim shall be shown to have existed before the fatal occasion, but only that the act done was prompted by it. Anything which shows that the shot fired in this case was the result of a purpose, conceived, though it may have been but a moment before, satisfies the requirement of the law. For instance, when the defense of manslaughter is made for one indicted for murder, on the ground that the slaying was while the parties were fighting, this court charged the jury that, as the accused had selected as the weapon that he used that one among several then at hand which suited his purpose, such choice was evidence from which the jury were warranted in finding deliberation, and therefore malice aforethought. The law is that, though no malice or wickedness of heart exists be-

fore the time of the fatal stroke or shot, and yet it then arose prompting the act of homicide, it is as much malice aforethought, premeditated slaying, as if it were done under the influence of an old ermy.

Having disposed of the subject of malice, I will now deliver the mind of the court to you upon the subject of the defense set up for the prisoner that there could have been no malice in fact in this case, because the prisoner was so under the influence of liquor that he was incapable of understanding the nature and consequences of the act he did. We say to you, therefore, generally, that drunkenness is no excuse for crime, whether the subject of it knew what he was doing at the time or not. Why? Because the state of public intoxication alleged to exist here is itself a legal offense and is the act of the party setting up the defense; and it is a rule of law that a party shall not be allowed to take advantage of his own wrong. But where the disease of mania a potu has supervened from long-continued intemperance, and a party charged with crime can show that it was committed when under the influence of that disease, he is entitled to be acquitted the same as any other insane man. This is where drunkenness is, in a sense, an excuse for crime,—where mania a potu has resulted, which is alcoholic insanity. It is not pretended by the prisoner's counsel that he was in any sense a victim of the insanity known as mania from drink when he did the fatal act; but he contends that the prisoner cannot be convicted of murder in the first degree if he was too drunk at the time to know what he was about, because, he argues, that one in such condition is incapable of intending or premeditating anything; and as there must be evidence of such premeditation to make murder of the first degree, the prisoner must be acquitted of that charge, as his offense is only that of murder of the second degree. We say to you, gentlemen, that, in order to find him not guilty of murder in the first degree, which involves a condition of the mind capable of conceiving a purpose, you must be satisfied, as there was no provocation whatever for the prisoner's conduct, and the weapon used by him was a deadly one, that by reason of drunkenness then existing he was not in a condition to know, and in fact did not know, what he was about when he shot the deceased. The fact that the prisoner was actually drunk at the time, if that is satisfactorily proved to you, will not reduce the offense from murder of the first to murder of the second degree, unless you should be satisfied that he was, from that cause, unable to know what he was about. As the law presumes every one to be sane until the contrary appears, it devolved in this case upon the prisoner to satisfy your minds that when he shot his victim he was too drunk to know what he was doing. Has he done that? If not, he is guilty in manner and form as he stands indicted. If he has

done so, then he is guilty of murder of the second degree. Of one or the other of these crimes he is, admittedly, guilty.

Verdict, murder, second degree.

STATE v. ROBINSON.

(Court of Oyer and Terminer of Delaware.
Nov., 1885.)

CRIMINAL LAW—NEW TRIAL—COMPETENCY OF JUROR.

The mere fact that a juror expressed an opinion as to defendant's guilt, hostile to him, is not ground for a new trial where the juror, who was not questioned on voir dire examination, testified on the motion for new trial that he merely expressed such an opinion to escape jury duty, but had not in fact formed an opinion, and was not influenced in his verdict,—especially without evidence that the juror was influenced, or without dissatisfaction on the part of the court with the verdict.

Charles Robinson was convicted of rape and moves for a new trial. Denied.

Walter Bacon, for the prisoner. John Biggs, Atty. Gen., for the State.

COMEGYS, C. J. In the argument of the prisoner's counsel in support of his reasons for a new trial, he stated that his chief reliance was upon the validity of the first of them. In fact, the whole scope of it was confined almost entirely to the consideration of it. Before treating of the reasons, I think it proper to remark that the books from which we derive our knowledge of the unwritten law governing new trials before courts and juries—I mean the English treatises and reports with respect to common-law proceedings—not only contain no example of a new trial in a capital case, but they are emphatic that none can be granted. The practice in England is now, as it always has been, when the prisoner is wrongfully convicted, in the opinion of the court, by reason of some fact or circumstance which, if the trial had been a civil one, would have been ground for a new trial, to respite the sentence, in order to give time for application for pardon, which the court, under such a state of things, always recommends. As the usage of the crown is to act favorably on such recommendation, pardon may be said to follow thereon, of course. In cases called criminal in some of the authorities, new trials are granted, as in civil cases, but such so-called criminal cases are cases not capital. This distinction will be found expressed in 1 Lev. p. 9. And an examination of this authority, and that of Sir Thomas Jones' Reports (page 153), will also show that the remark of the learned Justice Blackstone in the fourth volume of his Commentaries, at page 361, when treating of the subject of verdicts by juries,—that "in many instances where, contrary to evidence, the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted, by the court of king's bench,"—applies to cases alone criminal in the sense I

have mentioned; that is, not capital. The evidence of this is that this citation in support of his language is the very case referred to in Leving and Jones.

The subject of granting a new trial in a capital case was much discussed by counsel and court in the case of *Com. v. Green*, 17 Mass. 515 et seq. It was admitted in that case, on all hands, that in England there was no warrant for a new trial in a capital case; but the court felt itself warranted in deciding for one in that case, relying for authority upon two decisions,—one the case of *U. S. v. Fries*, in 3 Dall. 515, Fed. Cas. No. 5,126, and the other that of *State v. Hopkins*, 1 Bay, 372. The first of these was undoubtedly a capital case, and was tried in the circuit court of the United States for the Pennsylvania district before Justice Iredell and Judge Peters. The court were divided upon the question; the former judge being in favor of the motion for new trial, and the latter against it; he, however, yielded to avoid a division. The court were, perhaps influenced somewhat in granting the motion for a new trial by the concession of Rawle, the district attorney, who evidently was misled by the supposition, as a subsequent paragraph of his argument shows, that what was ground for a new trial in an ordinary jury case was ground in a capital case. The case from Bay was a conviction on a count in an indictment for knowingly uttering a forged paper. This would seem not to have been a capital case, and the report is silent whether it was or not. It is, however, treated as capital in the case under consideration. The other cases which I have examined—those submitted in the briefs of counsel—have either the authority of a statute warranting a new trial, or some practice which has prevailed to authorize the grant of a motion. All, I think, but one, are supported by statutory authority, the grant of which is at least negative testimony that it was necessary, to give the court power.

A search among our own records has been made for a precedent for the present motion. There is no sign of any proceeding like the present until the year 1857, in the case of the State, an indictment for murder, against Patrick Shay. At a session of the court in November, 1859, a motion for new trial was made in *State v. Turner*, 1 Houst. 76,—an indictment for rape; also, at the same term, in the case against John Bowen (Id. 91) for murder. At the November session, 1862, similar motion was made in the indictment for rape against Abel Riggs (Id. 120). Fifteen years afterwards in a like indictment against Samuel Chambers and George Collins, and in May, 1880, in the case of *State v. Wm. Neal*, for rape. In September, 1881, in the indictment for murder against Jeremiah Harrigan, 31 Atl. 1052; and two years afterwards in the case against List,—an indictment for murder. In all, there are eight cases, two of which are reported, and all of them arose in New Castle county. In the reported cases—those against Bowen and Riggs—no argument was made with reference to the

power of the court to grant a new trial in a capital case. There is a total absence of any evidence that a motion for a new trial in a capital case was ever made in Kent or Sussex, except in one case in Kent in 1800. In none of the above cases did the motion prevail. But, for the sake of the discussion, treating the question of the power of the court to grant a new trial in a capital case as one not to stand in the way of the motion we are considering, is there any ground shown that would justify this court in setting aside the verdict of the jury, and granting the prisoner a new trial? In considering that question, we should remember the language of Chief Justice Wilmot in the case of *Leeman v. Allen*, 2 Wils. 160, "Courts should be very cautious how they overthrow verdicts that have been given by twelve men on their oaths."

The first ground, and that upon which the counsel said he chiefly relied, is that John T. Alfree, one of the jurors who composed the panel that tried the prisoner, had formed and expressed an opinion against him before the trial came on; and an affidavit of the person with whom he spoke is shown in support of it. It might be sufficient to answer to this reason that the prisoner had the right, by law, to put the witness upon his voir dire, and ask him whether he had formed and expressed any opinion of his guilt or innocence, but he waived it expressly. There is abundant authority that, where a prisoner waives such a test, he cannot afterwards make use of the fact that the juror had formed and expressed an opinion against him as a ground for new trial. But allowing that he could, for the sake of the discussion, the evidence given by the juror, when examined upon the matter, does not support the reason in question. He stated upon his oath, that what was sworn to as having been said by him was substantially correct; but he declared that, though he expressed the hostile opinion alleged, he had not in fact formed any opinion whatever of the prisoner's guilt or innocence, and that the expression he made was with a view to being challenged by the prisoner's counsel, if called, and stated that upon the trial of Davis for murder, where he was a juror, he and several others resolved upon the plan of expressing themselves hostile to the prisoner in this case, for the same purpose. He was then asked by a member of the court whether he was influenced, in uniting with the others in a verdict of guilty by what he had said, and he replied that he was not. If the juror had been asked whether he had formed and expressed an opinion with reference to the guilt or innocence of the prisoner, and had answered as he did, at the time he was examined before the court upon the motion for a new trial, he would not have been put aside; so that, if he had not then been challenged by the prisoner, there would, upon conviction, have been quite as good a reason for the motion as there is now. There was a waiver of the question

allowed by law with a view of testing the indifference, or absence of prejudgment on the part, of the juror; and if we were to open the case again, to enable the prisoner to repair his omission, we should be going further than we believe any court has gone under like or analogous circumstances. What, acting upon feelings of pure humanity, a court might do, if, in case of waiver of the usual question, the prisoner afterwards ascertained, and was ready to prove, that one of the jurors who convicted him had, previous to the trial, formed and expressed an opinion hostile to his innocence, I cannot, of course, say; but I do not think any tribunal, having in view the rules governing the selection of jurors in capital cases, would grant a motion for a new trial upon such facts as exist in this case, with reference to the expression by Alfree, and the declaration he made on oath with respect to it. What this court might have done if the facts had been shown upon his voir dire, it is not for me to conjecture; but as he was allowed to be sworn, without the usual question which the law has wisely authorized a prisoner's counsel to put, I do not see how we would be, in any respect, or by any precedent, justified in granting a new trial, and especially without evidence that the finding of the juror, or of his associates, was influenced by such expression, or without dissatisfaction on the part of the court with the verdict itself. The sentiment of the bench of this country is against new trials founded upon objection that might have been developed if the question allowed for that purpose had not been waived. When they have been granted notwithstanding such waiver, it has been where there was dissatisfaction by the court with the verdict, or ground for belief that the objectionable juror was influenced by what he had said before the trial. There is no proof of any kind here that Alfree was influenced in his verdict by the opinion he expressed to Schurz. In fact, he asserted, when the question was put to him, that it had no effect whatever upon his mind. In the case of *Mitchum v. State*, 11 Ga. 615,—an application for a new trial,—where it appeared to the court below, and is mentioned at the foot of the reasons, that the foreman had said to the defendant's counsel, before the trial, that "he had better not take him as a juror, as he would hang the prisoner," the supreme court treated the statement as a device to avoid service on the jury.

No evidence was given with respect to the second and third assigned reasons. All that is alleged afterwards—that is, in reason 4 and its subdivisions—was matter for the jurors, and not matter for the court, and therefore is not to be considered as in any sense relevant to the application for a new trial. It was their duty to consider and pass upon the evidence before them; the statements of the witnesses; their value, when discrepant; their credibility; and the weight to be given to their testimony under all the circum-

stances.* The character of none of them, for veracity, was directly impeached, though that for chastity, of the alleged victim of the prisoner's assault, was impugned by two witnesses. In answer, however, to them, many more, having apparently equal means of information, testified that they had never heard anything affecting her reputation for virtue which, in view of the law that every one is presumed, *prima facie*, to have a good character, was sufficient to justify the jury in giving credit to her testimony. The motion for a new trial is therefore refused.

**MARYLAND LAND & PERMANENT
HOMESTEAD ASS'N OF BALTIMORE
COUNTY v. MOORE et al.**

(Court of Appeals of Maryland. April 4, 1895.)

NOTICE TO AGENT—SUFFICIENCY OF EVIDENCE.

In an action to establish a vendor's lien on land, it appeared that one whom plaintiff succeeded as trustee conveyed the land to a company by deed reciting that the full purchase price was paid, whereas notes for part of the purchase price had been accepted by him; that his grantee, 20 years before, conveyed to defendant company. The agent acting for the grantor in the sale testified that neither defendant nor its attorney knew that a vendor's lien was reserved by plaintiff's predecessor for part of the purchase price. At time of the suit both plaintiffs' predecessor and defendant's attorney were dead. There was some evidence from which it might be conjectured that the attorney knew of the lien. *Held* insufficient to show that defendant's attorney had notice, as agent, of the unpaid purchase price.

On motion for rehearing. Denied.

For former opinion, see 30 Atl. 605.

ROBINSON, C. J. In the motion for reargument in this case the counsel for the appellee says: "It is plain, therefore, that the decision rests on the ground of the interval between the two conveyances from the trustee to the Woodberry Land Company and from the latter to the appellant." In this the counsel is mistaken. We rested the decision on the ground that the Maryland Land & Permanent Homestead Association, the appellant, was a bona fide purchaser of the land in question from the Woodberry Land Company, holding the title under a deed from Reese, trustee, in which he acknowledged that the entire purchase money had been paid, and that there was no sufficient proof to show that the Maryland Land & Permanent Homestead Association had notice that part of the purchase money was in fact unpaid and due by the Woodberry Company to Reese, trustee. We further said there was proof to show that Mr. Newman, the appellant's solicitor, had such knowledge, but that Mr. Newman was dead, and it did not appear that such knowledge was made known to the appellant. We did not mean to decide, as a matter of fact, that Newman himself had such knowledge, but merely that there was proof tending to prove knowledge on

his part. Much less did we mean to say that such knowledge, if any he had, was acquired by him while he was acting as attorney for the appellant in regard to the sale and purchase of the property out of which this controversy has arisen. We agree with the counsel for the appellee that, if Mr. Newman acquired the information, or had notice that part of the purchase money was unpaid, and such information was acquired by him while acting as attorney for the appellant in regard to the transaction, such information would be notice to the appellant, and for the reason that, so far as it related to the same transaction, the attorney represents his client, and knowledge on the part of the former will be imputed to the latter. Upon motion for reargument we have carefully examined the testimony in the record on this point, and have failed to find any proof which satisfactorily establishes the fact that Newman had notice that part of the purchase money was unpaid by the Woodberry Company. Now, what is the proof? It shows that the negotiations in regard to the sale and purchase of the property between the Woodberry Company and the Maryland Land & Permanent Homestead Association were conducted by Mr. Frank Morling, representing the Woodberry Company, and Messrs. Hooper, Hammond, and Newman, representing the homestead association. It shows that the Woodberry Company sold to the association the property against which the vendor's lien is now claimed, and that the entire purchase money was paid by the association to the Woodberry Company, and thereupon the latter company, having an absolute paper title, conveyed the property to the association. It further shows that, although the company had the legal title under a conveyance from Reese, trustee, part of the purchase money remained unpaid. Now we come to the proof as to Newman's knowledge of this fact. Morling testifies that he conducted the negotiations in regard to the sale of the property by Reese, trustee, and the Woodberry Company, and that he himself made the arrangement with Reese as to the payment of the purchase money. And in answer to the thirteenth cross interrogatory he says the fact that the Woodberry Company had given to Reese, trustee, its notes, amounting to over \$7,000, on account of the purchase money, was never, to his knowledge, communicated to the Maryland Association, or to any one representing it. It thus appears from the testimony of Morling, the appellee's own witness, that he conducted the negotiations for the sale of the property by the Woodberry Company to the Maryland Association, and the arrangements in regard to the payment of the purchase money due by said company to Reese, trustee, and that neither the association nor Mr. Newman, the attorney of the association, knew anything about these arrangements; that is to say, they knew nothing about the \$7,000

due by the Woodberry Company to Reese, for which the company gave its notes. And this is the unpaid purchase money of which it is contended that Newman had notice. There are, we admit, some circumstances arising from the relations of Newman to the parties from which it may be conjectured that he must have known that the Woodberry Company had given its notes to Reese for the balance of the purchase money; but the proof is altogether insufficient, in our judgment, to prove such knowledge. In the determination of the question we are deprived of the benefit of the testimony of Reese, trustee, and Newman, both of whom are dead. And, besides, we are dealing with transactions which occurred 20 years ago, and in regard to which the recollection of the witnesses, with the exception of Morling, is imperfect and obscure; and there is nothing in his testimony which tends to show that Newman had notice. The counsel for the appellee is mistaken in saying that Newman was one of the directors of the Maryland Association at the time it bought the property in question from the Woodberry Company. Mr. Hooper testifies that the directors at that time were Messrs. Hooper, Numsen, Sauerberg, and Hammond. For the reasons we have stated, the motion for reargument will be overruled. Motion overruled.

GISH v. BROWN.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

DEED—DELIVERY—CONDITIONS.

1. Where a deed is delivered to a person to hold till the grantor's death, and then to deliver to the grantee, a delivery so made by such person relates back to the date of execution, and it is equivalent to a delivery at that time by the grantor.

2. Where a deed is delivered to a third person to deliver to the grantee after the grantor's death, the delivery to the grantee passes title, though by agreement of the grantor and grantee delivery was conditioned on payment of a certain bond by the grantee, such bond having been indorsed by the grantor as canceled for a valuable consideration.

Appeal from court of common pleas, Lancaster county; Livingston, Judge.

Ejectment by Henry B. Gish against Jacob M. Brown for land claimed by both parties under John S. Gish, plaintiff claiming through a deed, defendant claiming that John S. Gish died owning the land, and that it descended to his heirs. Judgment for plaintiff. Defendant appeals. Affirmed.

Defendant's fifth, sixth, and seventh specifications of error were as follows:

"Fifth. The court erred in its answers to defendant's third point (a), and in not affirming said part of said point, which point and answer were as follows: Point: '(3) If the jury believe, from all the evidence in this case, that the delivery of the deed was conditioned upon the payment by Henry B. Gish of the fifteen thousand dollars (\$15,000) judgment

and the charges mentioned in the agreement or reservation, and the said judgment was never paid or canceled, then, if the jury also find that there was a delivery of the deed, there can only be a verdict for plaintiff conditioned upon his paying: (a) Fifteen thousand dollars (\$15,000), with interest at five per cent. from April 1, 1882, to this date to the administrator of John S. Gish, deceased; (b) one thousand dollars (\$1,000) to the said administrator for funeral expenses, tombstone, and the further payment of two thousand dollars (\$2,000) to Catherine Boyer on or before March 15, 1897, and twenty-one hundred dollars (\$2,100) unto the seven children of Anna Breneman, deceased, and of three hundred dollars (\$300) unto Catherine Wagner, and of three hundred dollars (\$300) to Adaline Wagner on or before March 15, 1897.' Answer: 'The part marked "(a)" we refuse for the reason that the bond given for the payment of the \$15,000, named in the paragraph, dated as of even date, and although with the deed and agreement, March 4, 1882, delivered to Christian Rutt, and delivered to Christian Rutt with the other papers and left in his possession until after the death of John S. Gish, has this written upon the back of it: "This obligation is hereby canceled, and made null and void, for valuable consideration, to me in hand, paid by the said within named Henry B. Gish, this first day of April, 1882. [Signed] John S. Gish." And the testimony shows that the signature was the authentic signature of John S. Gish. So that portion of it we will have to refuse.'

"Sixth. The court erred in not affirming (a) and (b) of defendant's point 3.

"Seventh. The court erred in its charge in the following paragraph therefrom: 'So that, if the jury believe there was a delivery of the deed by John S. Gish to Christian Rutt, with absolute direction to hold until his death, and then to be delivered to his son, Henry B. Gish, in such a case a delivery actually made, as we have said, by Christian Rutt to Henry B. Gish, would relate back to its date of execution and make it equivalent to a delivery by John S. Gish at that time for ordinary purposes.'

Brown & Hensel, for appellant. C. I. Landis and H. M. North, for appellee.

PER CURIAM. If the deed of March 4, 1882, from John S. Gish to his son, Henry B. Gish, the plaintiff, for the land in controversy, had been admitted without competent evidence of its execution and delivery, there would be some merit in the first specification of error; but such was not the fact. The execution of the deed was not seriously questioned, and the testimony as to its delivery, as claimed by the plaintiff, was quite sufficient to justify the submission of that question to the jury. There was, therefore, no error in admitting the deed in connection with the testimony as to those facts. Nor was

there any error in admitting the testimony complained of in the second to fourth specifications, inclusive. It requires no argument to show that it was both competent and relevant to the issue. It tended to show title in the plaintiff. Without reciting or summarizing the testimony referred to, it is sufficient to say that it was fairly submitted to the jury, with full, correct, and adequate instructions as to its effect, etc., and the verdict has, by necessary implication, established the facts that the deed in question was duly executed and properly delivered. There is no error in the learned judge's answer to defendant's third point for charge, referred to in the fifth and sixth specifications; nor in that part of his charge recited in the seventh specification. The eighth specification is not according to rule, and is therefore dismissed. We find nothing in either of the assignments of error that requires extended comment. Judgment affirmed.

GONDER v. BERLIN BRANCH R. CO.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

CONSTRUCTION CONTRACTS—ESTIMATES OF ENGINEER.

1. Under a construction contract providing for payments on monthly estimates of the engineer, 15 per cent. to be retained till completion, when on acceptance of the work the engineer was to make a final estimate, the estimates to be conclusive on both parties, subject to the right of the president of the company for which the work was done to revise them, an estimate of the engineer, made after the completion of the work, but in the form of the preceding monthly estimates, and intended to show only the work done during the preceding month, since the last estimate, is not the final estimate, unless so made by agreement of the parties.

2. Under a construction contract providing for payments on estimates of the engineer, the estimates to be conclusive on both parties, subject to the right of the president of the company for which the work was done to revise them, the estimates are not binding on the company where, at the instance of the contractor, the engineer had increased them above the amounts justly due, and it is immaterial that the engineer was in the company's employ.

3. Under a construction contract providing for payments on estimates of the engineer, the estimates to be final and conclusive on both parties, subject to the right of the president of the company for which the work was done to revise and alter them, he not having exercised his right to revise and alter them, his approval or disapproval of an estimate submitted did not affect its character as a final award of the engineer.

Appeal from court of common pleas, York county.

Action by Benjamin B. Gonder, Jr., surviving partner of the firm of Benjamin B. Gonder & Sons, against the Berlin Branch Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

Wm. P. Quimby, George J. Benner, and N. M. Wanner, for appellant. H. M. North, Brown & Hensel, and Stewart, Niles & Neff, for appellee.

FELL, J. The action was upon a written contract to recover a balance claimed to be due for work done in constructing a section of the defendant's roadbed. By the provisions of the contract, payments were to be made, during the progress of the work, on monthly estimates furnished by the engineer, 15 per cent. being retained by the company until the completion. Upon the completion of the work, and its acceptance by the engineer, he was to make a final estimate of its quantity, character, and value, and the amount ascertained by him to be due was to be paid to the plaintiffs. The estimates thus made by the engineer were to be final and conclusive as to both parties, subject to the right of the president to revise and alter them. As the work progressed, estimates were furnished monthly by the engineer, and the amounts appearing by them to be due were paid, except the amount of the last estimate. This estimate, like the preceding one, showed the total allowances and payments, and the principal question at the trial was whether it was a final estimate, and fixed the rights of the parties. The plaintiff's contention was that, as it had been furnished after the completion of the work, and not revised or altered by the president, it was a final estimate, and conclusive upon the defendant company, and that it was incompetent for the engineer afterwards to submit a revised or second final estimate. It is true that there could be but one final estimate made by the arbiter chosen by the parties, and that such an estimate, in the absence of fraud or collusion, was binding, and fixed their rights and liabilities. Whether, however, the estimate furnished was a final estimate, was an open question at the trial. In form it was not a final estimate, nor such an estimate as was contemplated by the agreement. It was not intended to show the balance due under the completed contract, but the work done during the preceding month, and the amount due for it, less the retained percentage. It was similar in form to the preceding monthly estimates, and was made, as they had been, at the end of the month, to show the amount of work done since the last estimate. It was but one of the series of monthly statements for which the agreement called, and was final only in the sense that it was the last in date, and was made after the completion of the work. By agreement of the parties, expressed or implied from their acts, this estimate might have become a final one, but neither party could arbitrarily make it such. It was competent for the defendant to show that a final estimate had been made by the engineer, fixing the quantity, character, and value of the work, and the amount due therefor, and testimony tending to prove this should have been admitted. The defendant should have been allowed to prove, also, that the engineer, at the instance of the plaintiffs, in order to enable them to meet their payments, had increased the amounts of the monthly esti-

mates beyond what was justly due, with the understanding that, in the final estimate, a reduction of the proper amount should be made. The fact that the engineer was in the employ of the defendant did not commit it to the consequences of his misconduct while acting as an arbiter for both parties, and an award which was the result of collusion with the plaintiff was not binding upon it. The proof of the offer would have shown that the award upon which the plaintiff relied was not only an unjust award, obtained by unfair means, and the result of misconduct and collusion, but that it was not intended as a final award. The deposition of the president of the company is not before us, and the record does not disclose the ground for its rejection. He was not incompetent generally, and whether so as to the particular offer we are unable to judge. He could not, however, have testified to sustain the offer made. The testimony was incompetent, whether the witness was or not. It was his right, under the agreement, to revise and alter the estimates made. This right he did not exercise, and his approval or disapproval of an estimate submitted did not affect its character as a final award of the engineer. The third, eleventh, twelfth, and thirteenth assignments of error are sustained, and the judgment is reversed, with a venire de novo.

LADD et ux. v. CITY OF PHILADELPHIA.
(Supreme Court of Pennsylvania. Oct. 7, 1895.)

MUNICIPAL CORPORATIONS—CONSTRUCTION OF
SEWER—DAMAGE TO PROPERTY.

Under the constitutional provision requiring municipal corporations to make compensation for property injured or destroyed by construction or enlargement of their works, highways, or improvements, a city is liable for injuries to a house from the excavation of a sewer in front of it.

Appeal from court of common pleas, Philadelphia county.

Action by Daniel P. Ladd and wife, in right of the wife, against the city of Philadelphia, for injuries to a house from the construction of a sewer. Judgment for plaintiffs. Defendant appeals. Affirmed.

E. Spencer Miller, Asst. City Sol., and Charles F. Warwick, City Sol., for appellant. Charles H. Edmunds and Henry F. Walton, for appellees.

STERRETT, C. J. The beneficial plaintiff, Mrs. Ladd, owns a three-story brick dwelling, erected in 1890, at No. 2243 North Nineteenth street, Philadelphia. Her house, and the street in front thereof, were on what is known as "made ground," filled in from time to time to the depth of about 20 feet. In 1893, under an ordinance authorizing the improvement, the city dug a trench 25 or 30 feet deep in Nineteenth street, in front of the house, and within four or five feet of the eastern curb line, and constructed therein a

main public sewer, about five feet in diameter. This sewer was not intended to drain plaintiff's premises, which, for all sewerage and drainage purposes, were connected with a local sewer on the westerly side of same street. In view of the instructions under which the case was submitted to the jury, their verdict in favor of the plaintiff necessarily implies the finding of certain facts, among which are that plaintiff's house was well built, on a sufficiently safe and solid foundation, and was in good condition when the construction of the sewer was commenced, but during the progress of that improvement the foundation wall of her house cracked; the front wall settled away from the side walls, and became out of plumb; the back building partially separated from the front building, and an opening or crack appeared at that point, extending from the foundation to the third story; the front pavement and steps thereon became detached from the front wall; the water pipes were displaced; and the house settled, and leaned towards the street. Plaintiff, alleging that these and other injuries to her property were caused by the excavation, etc., in constructing said public sewer, brought this action to recover compensation for the damages thus sustained. An agreement of counsel was filed, that the case should be considered as if arising on an appeal from the award of viewers, under the act of May 26, 1891, or, on the election of the plaintiff, as an ordinary action of trespass.

The case was carefully and fairly submitted to the jury. The learned trial judge instructed them that if plaintiff's house was injured, "not by the construction of the sewer, but by the faulty foundation,—the foundation of made ground on which it was built,—and that the injury was caused by the settling of the house upon its own foundation," the plaintiff could not recover. In affirming defendant's fourth point for charge, he also instructed them, in the language thereof, thus: "If the jury find that the ground where the house in question was erected was so deficient—from whatever cause—in firmness and solidity as to be inadequate to sustain a building under the conditions which are usual in the conduct of necessary public works upon the highway, they must find for the defendant, so far, at least, as the injury to the house is concerned." He further instructed the jury, in substance, that, if they found the injuries to plaintiff's house were caused by the excavation and construction of the sewer in front thereof, they should award damages to compensate her for the injury. Their verdict, awarding damages to plaintiff, necessarily implies that the jury found as a fact that the injuries complained of were the direct and proximate result of the excavation and construction of the sewer, and, further, that they were not caused by the alleged insecure and defective character of the made ground on which her house was

erected. It having been thus clearly established by the verdict that the work of constructing the sewer, and not the character of the made ground on which the house was erected, was the cause of the injury, the case is within the very letter, as well as the spirit, of the constitutional mandate which requires municipal and other corporations, etc., to "make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements." Article 16, § 8. To hold otherwise would defeat one of the main objects of that provision. In its controlling principles, this case does not materially differ from *O'Brien v. Philadelphia*, 150 Pa. St. 539, 24 Atl. 1047, *Mellor v. City of Philadelphia*, 160 Pa. St. 620, 28 Atl. 991, and other cases in the same line, and is virtually ruled by them.

Neither of the assignments of error is sustained. Judgment affirmed.

MOORE et al. v. WOOD et al.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

PARTNERSHIP—LANDS.

Land which is partnership property is, as between partners and those dealing with them with knowledge of the facts, personal estate.

Appeal from court of common pleas, Fayette county; Ewing, Judge.

Suit by George L. Moore and others, executors, devisees, and legatees of Elisha P. Gibbons, against Samuel A. Wood and others. Decree for plaintiffs. Defendants appeal. Affirmed.

The complaint alleged: That said Elisha P. Gibbons and defendants Samuel A. Wood and James A. Cromlow were partners for the purpose of carrying on a sawmill business. That part of the property of the partnership consisted of land, the title to which stood in the names of the partners as tenants in common. That they dissolved June 20, 1885, by agreement under seal, recorded in the office of the register of deeds, providing as follows: "Whereas, by agreement made the 15th day of May, 1871, E. P. Gibbons, Samuel A. Wood, and James A. Cromlow, doing business under the firm name of Gibbons, Wood & Cromlow, of Brownsville, Pa., did enter into copartnership for the purpose of carrying on the business of saw and planing mill for an unlimited term of years; and whereas, the said Samuel A. Wood and Jas. A. Cromlow, wishing to discontinue and decline the said joint partnership so entered into, they, the said Samuel A. Wood and Jas. A. Cromlow, hath proposed to their said partner E. P. Gibbons a dissolution, to which proposition the said E. P. Gibbons hath assented,—the parties therefore mutually consent and agree by these presents that the said partnership heretofore existing between them be this day dis-

solved, and it is accordingly dissolved. And it is further stipulated and agreed mutually between them that E. P. Gibbons do take and have exclusive control of the entire property, real and personal, known as the 'Phoenix Saw and Planing Mills,' with lots adjoining, and all other lots belonging to the Co., all personal property, all assets, book accounts, notes, etc., now on hand and belonging to the partnership, on the following conditions: That the said E. P. Gibbons, after having possession of all assets of the Co., will pay off the partnership indebtedness to the amount of thirteen thousand dollars, provided they reach that sum. If the debts of the Co. exceed thirteen thousand dollars, then said E. P. Gibbons pay one-third of all excess over thirteen thousand of indebtedness and said Samuel A. Wood and Jas. A. Cromlow the other two-thirds of such excess; and if said E. P. Gibbons can realize more out of the entire property by judicious management than thirteen thousand dollars, and the indebtedness of the Co. more than that sum, then he is to apply it to the payment of the debts of the Co. If there is anything remaining after all indebtedness of the Co. is paid, and his own expenses for settling the business of the Co., such proceeds is to be divided equally between the three partners. And it is further agreed that the said E. P. Gibbons also have the power to collect the debts now due to the partnership, and to receive all or any part of the same in the name of the firm, by suits at law or otherwise. And it is further agreed that the said Samuel A. Wood and Jas. A. Cromlow agree to aid gratuitously until the first day of July next in speedily closing up the business of the firm to the best interest of all concerned. And it is also agreed that in the final disposition of the property the said Samuel A. Wood and Jas. A. Cromlow shall be consulted, and a majority of the parties shall be sufficient to make disposition of same, and, in case a majority cannot agree, then it is to be left to three disinterested men to determine the best disposition to make of same, and their decision to be final. And it is further agreed that the said Samuel A. Wood and Jas. A. Cromlow will convey by deed their interest in said real estate unto the said E. P. Gibbons, or to whomsoever the said E. P. Gibbons may direct. And it is further agreed that the said Jas. A. Cromlow shall assist in closing up the business of the firm." The complaint then alleged: "That in pursuance of said agreement the said Elisha P. Gibbons took possession of said real and personal property, and proceeded to wind up the business of said partnership. That all of the personal property of said partnership was by him converted into money, producing the said sum of \$2,934.90, and was applied to the payment of the debts of said partnership. That the whole indebtedness of said partnership was, at the date of said

dissolution, the sum of \$18,971.15, for the payment of which each of said partners was liable, and, as between themselves, each of said partners was liable for one-third thereof. (4) That the said Elisha P. Gibbons, in his lifetime, and his said executors since his death, have, in pursuance of the legal liability of the said Elisha P. Gibbons, paid to creditors of said partnership the whole amount of said indebtedness in excess of the said sum of \$2,934.90, leaving a balance of \$16,036.25, which has been so advanced and paid; and that the said Samuel A. Wood and James A. Cromlow have wholly failed to repay and contribute to the said Elisha P. Gibbons or his said executors any part of said indebtedness. (5) That the said Elisha P. Gibbons went into possession of said real estate in pursuance of said agreement, and held possession thereof during his lifetime, and his said executors have held possession thereof since his death, and are now in possession thereof; and that no deed was ever executed for the same to the said Elisha P. Gibbons by the said Samuel A. Wood and James A. Cromlow, and said real estate has never been sold or otherwise disposed of, as provided in said agreement. (6) That the said Elisha P. Gibbons died on the 4th day of May, 1886, having first made his last will and testament, bearing date the 20th day of April, 1886, which was duly probated and recorded in the office of the register of wills in and for said county in Will Book No. 6, page 293, and appointed the said George L. Moore and Nathan E. Porter his executors, to whom letters testamentary were granted by the register of wills of said county on the 10th day of May, 1886; and the said testator devised and bequeathed his residuary estate, of which his interest in the said described real estate is a part, to his four daughters, the said Emma Moore, wife of the said George L. Moore, Mary A. Porter, wife of the said Nathan E. Porter, Harriet J. Henshaw, wife of the said Frank P. Henshaw, and Carrie J. Minehart, wife of the said Frank A. Minehart, subject to a charge for the maintenance of his widow, the said Louisa Gibbons. (7) That since the death of the said Elisha P. Gibbons, to wit, on the 1st day of September, 1890, the interest of said Samuel A. Wood in said real estate was sold by the sheriff of said county upon a judgment the lien of which attached after the execution and delivery of the agreement aforesaid; and at the sale made by said sheriff the said Louis M. Wood, Charles B. Wood, and Thomas S. Wood became the purchasers of said interest with actual notice, as well as the notice given by the record and the possession of the said executors, of said agreement, and of the rights of your orators in the premises, and the said sheriff duly acknowledged and delivered to the said Louis M. Wood, Charles B. Wood, and Thomas S. Wood a deed poll for said interest."

The prayer was: (1) For a decree that said described real estate be sold by a master, and converted into money for the repayment to the said executors of the said sum of \$16,036.25, with interest thereon from the 1st day of April, 1886, and that the balance, if any, of the purchase money for said real estate may be distributed first to expenses of settling said partnership business and second to the parties legally entitled to the same under said agreement. (2) That if the sale so to be decreed should fail to produce a sufficient sum of money to fully pay off and discharge the said sum of \$16,036.25, with interest as aforesaid, then that it be decreed that the said Samuel A. Wood and James A. Cromlow shall each pay to the said executors one-third of any balance of said sum of \$16,036.25 and interest which may remain unpaid.

The decree recited that it appeared that there was due complainants \$16,627.82, with interest from March 9, 1894, on account of the debts of the firm of Gibbons, Wood & Cromlow, paid in part by said Gibbons in his lifetime and the remainder by his executors, and ordered that the land referred to in the complaint be sold, and that the proceeds of the sale be applied—First, to the payment of the costs and expenses of settling up the partnership business; and, second, to the payment to the executors of said Elisha P. Gibbons of the sum of \$16,627.82, with interest from March 9, 1894.

Cooper & Van Swearingen and Edward Campbell, for appellants. W. G. Guiler, for appellees.

STERRETT, C. J. The first and second specifications respectively allege error (1) in confirming the amended report of the master, and directing a decree in accordance with the opinion of court filed September 15, 1894, and (2) in entering, pursuant thereto, the decree of September 18, 1895, recited in said specification. This decree is based on said amended report, and, assuming the latter to be substantially correct, the decree was fully warranted by the findings of fact and conclusions of law therein stated. The second specification is, therefore, groundless, unless there was substantial error in confirming the master's amended report. In view of its controlling effect, we have given the question thus presented a careful consideration. The confirmation of that report involved the consideration of 37 exceptions,—filed thereto by appellants,—all of which were overruled by the court. Waiving the informality of virtually embracing so many questions in one specification of error, we have considered said exceptions in connection with the amended report, bill, answer, and proofs upon which the report is based, and are fully satisfied there was no error in dismissing the exceptions and confirming said report. We find nothing in either of said exceptions that requires further

notice than has been taken of them by the master and the learned court below. Such of them as are material to the issue are either not well founded or contrary to clearly established facts in the case. Some of the most material facts are admitted by the pleadings. As was well said by the learned president of the common pleas, the only practical question of much importance in the case is: What interest, if any, did the appellants, Louis M., Charles B. and Thomas S. Wood, acquire in the real estate in question by virtue of the sheriff's sale to them on their judgment against Samuel A. Wood? In view of the specific facts rightly found by the learned master, he correctly concluded that, as between the partners themselves, the lots in question were partnership property from the time the formation of the partnership was consummated and its business put in full operation; and, consequently, as between themselves and those who dealt with them with knowledge of the facts, the lots were personal estate. *Colner v. Greig*, 137 Pa. St. 606, 612, 20 Atl. 938. There is nothing in either of the four specifications that requires further notice. Neither of them is sustained, and the record discloses no sufficient reason for reversal or modification of the decree. Decree affirmed, and appeal dismissed, with costs to be paid by the appellants.

COMMONWEALTH v. MIKA.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

HOMICIDE — DYING DECLARATIONS — DEGREE OF GUILT — BURDEN OF PROOF.

1. One who had received a wound in a vital spot, from which he died 48 hours thereafter, made a statement, a few hours after he was shot, and after he had accused defendant, when brought into his presence, of being the guilty party, which was taken down as his dying declaration, he having been informed that he would not recover, and having given it as his opinion that he would not. *Held* admissible as his dying declaration.

2. It is not error to charge that, if the jury were satisfied that defendant did the killing, the burden is on defendant in order to reduce the grade of the offense lower than murder in the second degree, and on the state to raise it to murder in the first degree.

Appeal from court of oyer and terminer, Clearfield county; Cyrus Gordon, Judge.

Frank Mika was convicted of murder, and appeals. Affirmed.

The court, in overruling the objection to the admission of deceased's statement as a dying declaration complained of in the first assignment of error, stated as its reason that the deceased had been informed that he would not recover, and had given it as his opinion that he would not recover, and that the court was convinced from the evidence that he had no hope of recovery.

The second assignment of error was to those parts of the following extract from the charge within the quotation marks:

It is not denied that Vincent Lucasovich v.33A.no.1—5

met a violent death; that it was the result of a wound caused by being shot by a bullet; which, in the absence of any quarrel or struggle of any kind, or heat of blood, or provocation, the law presumes to be not only unlawful, but malicious, and it amounts to at least murder in the second degree; the question being, is the prisoner at the bar the man who fired the fatal shot? If he is, the presumption arises that he is guilty of murder; if not, he is innocent; and whether innocent or guilty is a question of fact exclusively for the jury. The burden is upon the commonwealth to satisfy you beyond a reasonable doubt that the prisoner is the guilty agent, and if you are not so satisfied you must acquit him. He is entitled to the benefit of any reasonable doubt that may be in your minds as to his guilt; he being presumed to be innocent until proven guilty. But if you are satisfied from the evidence, beyond a reasonable doubt, that the prisoner is the guilty agent, and that he fired the fatal shot, the killing is unlawful, and, being done by a deadly weapon, used under the presupposed knowledge of the usual consequences which flow therefrom, the law implies malice, and, there being no evidence to reduce the grade, it is presumed to be murder. Such being the case, the burden of reducing the crime from murder to manslaughter or excusable homicide is upon the defendant. He must show all the circumstances of alleviation or excuse upon which he relies to reduce the offense from murder to manslaughter, unless the testimony on the part of the commonwealth shows such to be the case. But though the homicide, without the circumstances of alleviation or excuse,—if you find from the evidence he did the killing,—is presumed to be murder, it is not presumed to be murder in the first degree. The presumption against him rises no higher than murder in the second degree until it is shown by the commonwealth to be murder in the first degree. "So, then, if satisfied that the defendant did the killing, in order to reduce the grade of the offense to a lower grade of homicide than murder in the second degree, the burden is on the defendant, and to raise it to murder in the first degree the burden is on the commonwealth." It must satisfy you of those facts and circumstances which indicate the deliberate intention to kill, and the cool depravity of heart and conscious purpose which constitute, as before said, the crime of murder in the first degree. "The commonwealth, of course, must satisfy you beyond a reasonable doubt that he did the killing, and, when having done so, then the burden of raising it to a higher degree of crime is upon the commonwealth, and to reduce it to a lower grade of crime is upon the defendant."

David L. Krebs and W. H. Paterson, for appellant. A. H. Woodward, Dist. Atty., and Singleton Bell, for the Commonwealth.

PER CURIAM. The defendant was indicted for the murder of Vincent Lucasovich,

a fellow workman in a coal mine, and was duly convicted of murder of the second degree. The cause of death was a pistol-shot wound, inflicted about midnight, in a vital part. Death ensued in about 48 hours thereafter. Defendant was arrested about three hours after the fatal shot was fired; and, when confronted by deceased, the latter accused him of being the guilty agent. Shortly afterwards the dying declarations of the deceased were taken by a justice of the peace, and their admission in evidence constitutes the first specification of error. In view of the circumstances, the evidence was rightly admitted. The second specification, alleging error in the learned judge's instructions as to the burden of proof, cannot be sustained. The same remark is applicable to the remaining specifications, charging error in adopting the theory of the commonwealth, suggesting possible inferences to be drawn by the jury, and in not giving due weight to the defendant's evidence, etc. When considered as a whole, and in connection with the testimony properly before the jury, the learned judge's charge is a correct and adequate presentation of the law applicable to the facts which the testimony tended to establish. It was quite as favorable to the defendant as it should have been. We find nothing in it of which he has any just reason to complain. A careful examination of the record has failed to disclose anything that would justify us in sustaining either of the specifications of error. Judgment affirmed, and it is ordered that the record be remitted to the court below, to the end that its sentence may be executed.

In re AHI'S ESTATE.

Appeal of HEPBURN.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

ASSIGNMENT FOR CREDITORS—CLAIMS AGAINST ESTATE—ADJUDICATION OF AUDITOR.

On an account, assignees for benefit of creditors claimed credit for a payment of \$2,650 to H. Exception was made thereto by the assignors, but subsequently withdrawn, and the auditor decided in favor of the credit. In fact nothing had been paid on the claim, but between that time and the next account, which was confirmed, the assignees paid H. \$850, and the latter account restated the matter so as to show a credit to the assignees of only \$850 on account of the claim, and the balance of \$1,800 still existing as a claim by H. against the estate. *Held*, that on the first account there was an adjudication against the estate of the validity and amount of the claim, which was not disturbed on the second account, so that validity of the balance of the claim in the hands of H. could not be questioned.

Appeal from court of common pleas, Cumberland county; W. F. Sadler, Judge.

Accounting by J. H. Houch and Asbury Derland, as assignees for the benefit of creditors of P. A. Ahi & Bro., they having been appointed as successors to E. W. Biddle and A. A. Thompson, the original assignees, after the latter had filed their fifth account, and

had been discharged on their own petition. From a decree overruling exceptions to the report of the auditor disallowing the claim of S. Hepburn, Jr., his executors, Marie J. Hepburn and another, appeal. Reversed.

John Hays and H. S. Stuart, for appellants. J. M. Weakley and W. Trickett, for appellee.

MITCHELL, J. When the assignees claimed credit in their fourth account for a payment of \$2,650 to Hepburn, and this was excepted to by the assignors, the validity as well as the amount of the claim were brought sub judice, and were before the auditor for determination. The fact that the objection of the assignors was subsequently withdrawn did not change the effect of the auditor's adjudication upon it. If he had decided it upon the contest, there could be no question that his finding, when confirmed, would have been conclusive; and the fact that the only parties excepting withdrew their exception made his task easier, but did not take away the force of his decision in favor of the credit. As between the assignees and the estate, that item was adjudicated. Of course, none of these matters was binding on Hepburn unless he was party, and consented to it.

Turning now to the fact that the credit was allowed although the payment had not really been made, the effect undoubtedly was to authorize the assignees to pay Hepburn at any time without further notice of the matter in their accounting with the estate. As between them and the estate, the latter was discharged, and the debt had been personally assumed by the assignees. If Hepburn was a consenting party to the arrangement, he also had thereby discharged the estate, and was bound to look to the assignees personally for payment. Thus the matter stood on the fourth account. When the fifth account was filed, if the assignees had in the meantime paid Hepburn, there would have been no occasion for any further notice or reference to the matter. In fact they had paid him \$850. But in doing this they had merely reduced their personal liability assumed by the arrangement on the fourth account, and there was still no necessity for further reference to the matter in the new account. It was, however, brought in, and by the assignees as a charge against themselves, by a reduction of the credit left over from the old account in their favor; that is, the fourth account closed with a balance of \$2,585 due to the assignees from the estate. This balance appeared properly as the first item of credit claimed in the fifth account. But as that amount was made up on the assumption that the assignees had paid the full claim of \$2,650, whereas they had only paid \$850, the balance in their favor was reduced by the difference, \$1,800, yet unpaid to Hepburn, and the account was filed, audited, and confirmed on that basis. It is true, as the learned auditor says, that it "is evident that the credit claimed for pay-

ment of \$2,650 to the executors of Mr. Hepburn was mere form,—no such payment. The balance shown to be due the assignees of \$2,585 was also mere form." But the substance of the transaction was that, while in the fourth account, and in the interval until the filing of the fifth, the claim was treated in the accounting as paid in full, yet in the fifth account the transaction was restated in accordance with the actual facts. Why this was done does not appear, though the reasons might not be far to seek, but it is beyond question that it was done, and equally beyond question that no one objected to it. There was no reason why any one should object, for no one was injured. The assignees, being about to be discharged at their own request, would naturally desire to be relieved of all further liability in connection with the estate. Those representing the estate had no reason to object, for it made no difference in the amount of its liability. By the old account it owed the assignees \$2,585 and Hepburn nothing, for he had been paid; by the restatement it owed the assignees \$785 and Hepburn \$1,800, so that its aggregate debt was the same. Hepburn could not object, for his claim was only restored to what it had originally been, a claim against the estate; and, so far as appears, he had never been a party to any change. In all this there is nothing to affect the force of the adjudication on the fourth account. The Hepburn claim was put in as an item of credit on that account, was excepted to, exception withdrawn, and item passed and confirmed as a paid claim entitling the assignees to a credit of \$2,650. In the fifth account the credit to the assignees was reduced in accordance with the actual facts, and the rest of the item entered as a liability still due to Hepburn. The former adjudication that it was a valid claim for \$2,650 was not challenged or reopened in any way, but, on the contrary, was accepted as correct by the filing and confirming of an item that showed a payment of \$850 on account of it. If the whole of it was adjudged good as a credit in the hands of the assignees on the fourth account, the unpaid balance was equally good in the hands of Hepburn, when the assignees passed it back to him in their fifth account, giving the estate an equal credit by the reduction of the balance in their favor. The status of the claim against the estate must be considered as established, and as not needing further proof.

Another question, argued principally by the appellee, is that of the fund out of which this claim is payable. *Prima facie* it is owed by the assignees of the firm of P. A. Ahl & Bro., but, as the individual estates of the partners, if solvent, are also liable for the firm debts, it becomes a question of the marshalling of assets between the creditors of the firm and the creditors of the partners individually, and of the right of Mr. Hepburn's representatives to a preference on

a claim for services rendered by him to the assignees. These questions the record does not supply us with satisfactory data for solving, and they must therefore be remitted to the court below. Decree reversed, and procedendo awarded according to the views herein expressed.

COMMONWEALTH ex rel. McCORMICK,
Attorney General, v. REEDER, Secre-
tary of the Commonwealth.

(Supreme Court of Pennsylvania. Oct. 17,
1895.)

ELECTIONS — CONSTITUTIONAL LAW — LIMITED
VOTING.

1. Const. 1874, art. 8, § 1, declaring that every male citizen 21 years old, possessing certain qualifications, "shall be entitled to vote at all elections." is not violated by Act June 24, 1895, providing for the election at one time of seven judges of the superior court, but declaring that no elector may vote at any election for more than six candidates for the office.

2. The provision of the constitution establishing limited voting in the election of supreme court judges, county commissioners, Philadelphia magistrates, and inspectors of election, does not exclude the plan of limited voting in the election of judges of the superior court, such being established, after adoption of the constitution, under the authority given the legislature by Const. art. 5, § 1, and it being provided by article 12, § 1, that all officers whose election is not provided for in the constitution shall be elected as directed by the law.

Williams, J., dissenting.

Appeal from court of common pleas, Dauphin county.

Application of Henry C. McCormick, attorney general, for mandamus to Frank Reeder, secretary of the commonwealth. From the decree, defendant appeals. Reversed.

J. A. Stranahan, for appellant. M. E. Olmsted, for appellee.

DEAN, J. The act of June 24, 1895, provided for the creation of the superior court, a court intermediate between the supreme court and the courts of common pleas, to be composed of seven judges, to be appointed by the governor, to hold their offices under their appointment until the first Monday of January following. In the meantime, at the general election in November, their successors were to be elected, to hold office for the term of 10 years from said first Monday of January. In the first section of the act it is provided that: "No elector may vote, either then, or at any subsequent election, for more than six candidates upon one ballot for the said office." The commonwealth, alleging this provision of the act to be unconstitutional and void, in that it restricted the right of the voter to cast his ballot for six judges, when seven were to be elected, requested the secretary of the commonwealth, the defendant, to prepare the official ballot under Act June 10, 1893, as indicating seven candidates for the office, instead of six, as provided in the act. This the secretary refused to do, being of opinion

It was his duty to follow the statute. The plaintiff then applied to the court below for a mandamus to the secretary. On hearing of the application, and after argument, by formal decree the mandamus was awarded. The decree was purely formal, however. Judge Simonton, being of opinion this provision of the act is unconstitutional, favored awarding the writ. Judge McPherson was of opinion the provision was constitutional, but for purpose of speeding final hearing and determination of the question, pro forma, concurred in the decree. If he had suggested a decree in accordance with his opinion, the application would have failed because of a divided court; but, having concurred in the decree suggested by Judge Simonton, the secretary brings this appeal from it, and we have the question before us for final determination.

There are seven candidates to be voted for. The legislature has declared no voter shall vote for more than six. In so declaring, has it deprived the voter of a constitutional right? If so, then this provision of the act is void; otherwise not. A constitutional convention and the legislature are equally representatives of the will of the people. A written constitution marks only the degree of restraint which, to promote stable government, the people put upon themselves. They resolve, in this instrument, in substance: We will not do certain things, and we will do certain others. And, generally in the same instrument, any change in the course of government thus marked out is rendered difficult by the formalities and lapse of time which must attend an amendment of it. Therefore, changes are infrequent, and a reasonable degree of stability is attained. But whatever the people have not, by their constitution, restrained themselves from doing, they, through their representatives in the legislature, may do. This latter body represents their will just as completely as a constitutional convention, in all matters left open by the written constitution. Certain grants of power, very specifically set forth, were made by the states to the United States, and these cannot be revoked or disregarded by state legislation. Then come the specific restraints imposed by our own constitution upon our own legislature. These must be respected. But, in that wide domain not included in either of these boundaries, the right of the people, through the legislature, to enact such laws as they choose, is absolute. Of the use the people may make of this unrestrained power, it is not the business of the courts to inquire. We peruse the expressions of their will in the statute, then examine the constitution and ascertain if this instrument says, "Thou shalt not"; and if we find no inhibition, then the statute is the law, simply because it is the will of the people, and not because it is wise or unwise. As is said by Black, C. J., in *Sharpless v. Philadelphia*, 21 Pa. St. 147: "The great powers given to the legislature are liable to be abused. But this is inseparable from the nature of human insti-

tutions. The wisdom of man has never conceived of a government with power to answer its legitimate ends, and at the same time incapable of mischief." So here, even if concurred with the appellee, which we do, that approval of the exercise of such a power by the legislature as manifested in this will naturally lead to abuse of it, that should have no influence in determining the constitutional question. To permit it to control judgment would be, in effect, to say that the people have, by the adoption of this constitution, unwisely neglected to restrain themselves in their law-making power, will wisely restrain them now. We have such opinion, but if we had, we have no power, and therefore turn to the constitution to ascertain from that alone whether the statutory provision is forbidden. Section 1, § 8, declares: "Every male citizen, twenty years of age * * * shall be entitled to vote at all elections." Then follow the other qualifications, such as residence and payment of tax. The provision on this same subject in the constitution of 1838 (section 1, art. 1) reads thus: "In elections by the citizens every white freeman of the age of twenty years * * * shall enjoy the right of elector." Except that the word "white" is rejected, this is almost verbatim the provision on the same subject in the constitution of 1790. The qualification of the voter in that constitution is specified,—his age, sex, residence, and payment of taxes. Although a distinction between the words used in the constitution of 1874 and those used in the older constitutions is sought to be drawn, we can see none between "be entitled to vote at all elections," and "shall enjoy the right of an elector." Both mean the same thing. A man shall not be entitled to vote if he possesses not the enumerated qualifications, and every one of them. If he do possess them all, then he is an elector, and entitled to vote as the law may prescribe. Being an elector, and therefore entitled to vote at all elections, the constitution of 1874, as well as those which preceded, goes a step further and, in section art. 1, declares: "All elections shall be equal." That is, the voter shall not be physically restrained in the exercise of his right by either civil or military authority. Shall there be inequality. Every voter shall have the same right as every other voter.

Is there any other provision in the constitution, touching the method of the exercise of his right by the qualified voter in voting, which gives the judges of the superior court? Section art. 5, provides that: "The judicial power of this commonwealth shall be vested in a supreme court, in courts of common pleas, county courts, orphans' courts, magistrates' courts, and such other courts as the general assembly may from time to time establish." Under the authority of this last specification, "such other courts as the general assembly may from

to time establish," the superior court was created. Nothing is said in the article as to how judges of such courts, when established, shall be elected. Section 15 of the same article clearly applies to the election of district judges of the common pleas, for they are to be elected by the qualified electors of the respective districts over which they are to preside, while the jurisdiction of the superior court judges is limited by no district boundaries. The manner of electing supreme court judges is also prescribed in the constitution; but, being silent in the judiciary article as to the method of electing the members of the superior court, we turn to section 1, art. 12, which declares: "All officers whose selection is not provided for in this constitution shall be elected or appointed, as may be directed by law." And so, in pursuance of the authority to create other courts, in section 1, art. 5, the court is established, and by the authority of section 1, art. 12, the method of election is prescribed.

The constitutionality of the court is not denied by appellee, nor is the right of the legislature to provide for the election of its judges denied. The constitutionality of the method of election alone is in question. As the language of the constitution of 1838, prescribing the qualifications of voters, possesses the same significance as that of 1874, the words, "shall enjoy the right of an elector," and "shall be entitled to vote at all elections," meaning the same thing, do they, as urged by appellee, mean more? Can they, by any reasonable interpretation, include an absolute right to vote for every candidate of a group of candidates for the same office? Without regard to what the legislature might have done to fill the offices created by the establishment of the superior court, whether they might or might not have made the office appointive, all these questions are now unimportant, and we pass no opinion upon them. The court is established. The office is made elective, to be filled by the candidates elected at the general election. We therefore must treat the case as the legislature has treated it. The question now is as to the interpretation to be put upon the language specifying the qualification of the voter who has by law a right to vote at the election for candidates for this office. No sound reason has been urged in the argument why we should enlarge the scope of the words, "shall be entitled to vote at all elections," by practically adding, "also for every candidate of a group of candidates for the same office." The constitution does not so say, and has never been interpreted to so mean.

Within one year after the adoption of the constitution of 1838, the act of July 2, 1839, became a law. It provided: "Sec. 4. Each of such qualified citizens shall vote for one person as judge, and also for one person as inspector of elections, and the person having the greatest number of votes for judge shall be publicly declared to be elected judge, and

the two persons having the greatest number of votes for inspector, shall in like manner be declared to be elected inspectors of election." Here was a restriction immediately after the adoption of the constitution. Two inspectors are to be elected. Yet the qualified voter, who "shall enjoy the right of an elector," is limited to a vote for one. This is more than a mere legislative construction. It is a contemporaneous interpretation of language by those who lived when the constitution was framed, possibly by some of those who took part in the convention, and certainly by those who had voted at the election at which it was adopted. This interpretation was never questioned. A period of 28 years elapsed, when the jury commissioner act of 1867 was passed, providing for the election every three years of two jury commissioners, and limiting the qualified voter to a right to vote for but one. For seven years every verdict in civil and criminal cases in the commonwealth rested on the 12 jurors whose names were put in the wheel by officers elected under this act. Although the legality of the panel and array of jurors has been disputed in many cases, the constitutionality of the election of those who selected them has never been questioned. Then, in 1872, was passed the act providing for the election of delegates to the constitutional convention which framed the constitution of 1874. Again the plan of limited voting was provided for, and its legality not disputed. We concede that, no matter how irregular may have been the election of the delegates to that convention, the adoption of its work by the direct vote of the people cured all such irregularities, and made the constitution the fundamental law of the commonwealth. We cite the act only as evidencing the legislative interpretation of the constitution of 1838.

The convention which framed the constitution of 1874 was composed of eminent men, some of them the ablest lawyers in the state. The construction put upon the constitution of 1838 was well known to them. The method of their own election they knew. Can it be presumed, for a moment, they would have accepted an election to a high office if they had thought it was brought about by unlawful, because unconstitutional, methods? It thus clearly appears that the interpretation put upon the language of the constitution, by those who lived at the time it was framed and adopted, was the same as that put upon like language in that of 1874 by the legislature of 1895; that the interpretation put upon the constitution of 1838 was acquiesced in by the bar, the courts, and the legislature for a period of 35 years, until the adoption of the constitution of 1874; that in two other instances offices of the highest importance, jury commissioners and delegates to a constitutional convention, were by legislative enactment filled on the limited voting plan. In view of this long-continued

interpretation of our own constitution, we do not think it necessary to discuss the authorities cited from other states. In fact, in the case most relied on by the appellee, *State v. Constantine*, 42 Ohio St. 437, in which the court arrives at a conclusion different from ours, it is said: "The right of each elector to vote for a candidate for each office to be filled at an election had never been doubted." In our state, the right of the legislature to limit the vote to a less number than all the officers to be elected, has never been doubted. As the historical interpretation has been wholly different, the conclusions must necessarily be at variance. *Hays v. Com.*, 82 Pa. St. 518, turned on another question than is raised here, viz. whether, by application of the cumulative voting plan, a stockholder's election, in a railroad corporation chartered under act of 1868, could be controlled. This court held that even the constitution could not take from the stockholder his vested right, under the charter, to have one vote cast for each officer to be elected.

But it is argued, from the provisions of the constitution establishing limited voting as to certain offices, the maxim, "*Expressio unius exclusio est alterius*," must move the court to the construction contended for by appellee. The application of this maxim depends wholly on the subject of contention. The expression of one thing often necessarily is, or tends to, the exclusion of others not expressed; but the induction is not warranted in all cases, and if indiscriminately applied would frequently lead to most erroneous conclusions. Take the case before us. The constitution establishes limited voting in the election of supreme court judges, county commissioners, Philadelphia magistrates, and inspectors of election. Therefore, it is argued, the implication is that the plan is excluded in the election of all other officers. But the limited voting plan was recognized and adopted in the constitution, because it was deemed wise that, as to offices nonpartisan in character, or which at least should be, the minority party ought to have representation, and this could only be attained by limited voting. Does the expression of this thing necessarily exclude other things not expressed? As the same reasons for the plan exist as to like offices thereafter created, is it not a necessary deduction that a like plan to that expressed should be followed? Does not the whole spirit of the constitution plainly so imply, while there is not a word indicating that such plan as to other or new courts is forbidden? In the cases specified the constitution is mandatory. It says to the legislature: "In these, enumerating them, thou shalt prescribe the limited voting plan." In the cases not enumerated, but of the same kind, it is discretionary.

For the reasons herein stated, as well as for those assigned in the opinion of Judge McPherson, the decree of the court below is reversed, and the petition of the attorney

general for a mandamus is dismissed, at the costs of appellee.

WILLIAMS, J. (dissenting). I cannot concur in this judgment. Some of the reasons that impel me to dissent from it I will state as briefly as I am able. The government of Pennsylvania is, in the language of the declaration of rights, a "free government," and rests on the authority of the people. Their authority is exercised and their will expressed by their votes. To protect themselves in the unrestricted exercise of their right to vote at all elections and for all public officers, they have declared, in the fifth section of the declaration of rights, that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." In order to define what they meant by "the right of suffrage," and to regulate the manner of its exercise, they devoted the 17 sections of the eighth article of the constitution to this subject. In the first of these sections, they declare that every male citizen 21 years of age, possessing the following qualifications, "shall be entitled to vote at all elections." The qualifications that follow relate to citizenship, to residence, and the payment of a tax. These qualifications cannot be changed, increased, or diminished by the legislature. This was distinctly asserted by this court in *Page v. Allen*, 58 Pa. St. 338, in these words: "No constitutional qualification of a voter can be abridged, added to, or altered by legislation." In *McCafferty v. Guyer*, 59 Pa. St. 109, a statute passed to disfranchise a deserter from the armies of the Union was held unconstitutional, because it added a disqualification not found in the constitution, and the rule of *Page v. Allen*, supra, was recognized and restated in these words: "A right conferred by the constitution is beyond the reach of legislative interference." If there were no other provisions upon this subject, it would be too clear for serious contention that the people had reserved to themselves the unrestricted right of suffrage, and that the legislature was powerless to deny to any qualified voter the privilege of voting at all elections, and for all elective officers, if he desired to exercise it. But some experiments had been made by the legislature with what is called "limited voting," prior to the calling of the constitutional convention of 1873. These had been made without constitutional authority, to secure minority representation on boards of officers where it was thought the presence of a representative of the minority political party might tend to a more impartial discharge of the duties devolving on the board, or to increased efficiency. It was thought best to recognize the principle underlying such legislation, and to indicate in what cases and to what extent this power to limit a citizen in the exercise of his right of suffrage should thereafter be exercised. These cases are where two judges of the supreme court are to

be elected at the same time (article 5, § 16), in the election of inspectors of election (article 8, § 14), in the election of county commissioners and county auditors (article 14, § 7), and the election of magistrates in Philadelphia. These are the only exceptions to the unlimited right to vote at all elections, and for all elective officers, that the framers of the constitution saw fit, when their attention was fixed upon the subject, to allow. "Expressio unius exclusio alterius." It has been suggested that this maxim is not applicable in the interpretation of the constitution, but this court held exactly the opposite in *Page v. Allen*, and *Robb v. Barlow*, 58 Pa. St. 338, and the following language was used: "The expression of one thing in the constitution is the exclusion of things not expressed." It was further said, in the same case: "The inhibitions of the constitution as to legislation are to be regarded as well when they arise by implication as by expression." We are bound by our own precedents, and by every rule of interpretation, to say, in this case, that an enumeration of the instances in which the exercise of the right of suffrage shall be limited is equivalent to a distinct denial of the power to limit it in all cases not in the enumeration.

But this judgment is not only in violation of the constitution, but it recognizes a power in the legislature to disregard the constitutional safeguards of the right to vote that is far-reaching, and that might be used to subvert the will of the majority. In many counties of the state two or more, and in the counties of Philadelphia and Allegheny many, members of the legislature are elected upon the same general ticket. The right of the voter might, with equal propriety, be limited to a certain number of these. If the legislature may deny to the voter the right to vote for one, why not for two, or three, or to vote for all but one? There are counties in the commonwealth where the relative strength of the great political parties is as one to three. Suppose such a county elects two representatives and each voter is restricted in his right to vote so that he can vote for but one. Then the majority, numbering three-fourths of all the voters, secures the same representation as the minority, that numbers but one-fourth of the voters. If this judgment is right, and the legislature may without constitutional authority deny to every citizen of the commonwealth the right to vote for one of the judges of the superior court, why may not the same thing be done as to associate judges in the counties where those officers still exist? Why not in all judicial districts, where two or more judges are elected in the same district? Why not extend the same limitation to school directors, to members of select and common councils in cities, to councilmen in boroughs, to commissioners at large, of whom we have two, and even to presidential electors?

But it is said that jury commissioners are

elected on the plan of limited voting, and if this judgment should be affirmed the law under which they are elected would fail. I can imagine a greater public calamity than that would be. Suppose it should be held, as but for this judgment I cannot doubt it would be held, that the law under which jury commissioners are elected is unconstitutional, then the duty of selecting and drawing jurors would fall back upon the county commissioners, if no other method was provided by law. No serious inconvenience could arise. But meantime, and until the question is regularly raised on quo warranto and decided, it could not be raised on a challenge to the array. The officers will continue to serve until the law is repealed or held to be invalid. But suppose it was inevitable that an affirmance of this judgment would empty every jury wheel in the state. It is better, a thousand times better, that this should happen, than that the sacred "right of suffrage," so carefully intrenched by the people in their fundamental law, should become the football of party majorities, to be limited or restricted as the exigencies of political warfare might seem to require. I would affirm this judgment, and uphold the constitutional declaration that "every male citizen twenty-one years of age * * * shall be entitled to vote at all elections," and, in the language of the declaration of rights, I would hold that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage" at any election, or for any elective officer, except in the instances and to the extent that the constitution has plainly authorized.

CROUSE v. BINKLEY.

(Supreme Court of Pennsylvania. Oct. 24, 1895.)

On rehearing. Denied.

For former report, see 31 Atl. 551.

PER CURIAM. And now, 24th October, 1895, reargument refused. The mortgage debt appears to have been paid before the case was finally disposed of in the court below, and no injustice was done, therefore, by its action.

BARCLAY v. DECKERHOOF et al.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

BUILDING CONTRACT—AGREEMENT FOR REFERENCE—DISQUALIFICATION OF REFEREE—ESTOPPEL.

1. A provision in a building contract, referring to the architect "all disputes * * * and all questions of doubt as to the tenor and intention of the drawings and specifications, or of the contract," embraces the question whether the contractor and his sureties are bound to refund to the owner of the building the amount paid by him on a mechanic's lien, where the contract provides that the contractor shall deliver the building free from all claims, and shall furnish at his own cost all necessary materials.

2. The architect is not disqualified to act as referee, as provided by a building contract, because, prior to so acting, he was called as a witness in an action between the parties involving the matter in dispute.

3. Defendant, having objected to the jurisdiction of the court in an action on a building contract because of the provision in the contract for reference to the architect, by reason of which plaintiff took a nonsuit, cannot thereafter object to resort to the architect as referee.

Appeal from court of common pleas, Bedford county.

Action by John J. Barclay against Simon Deckerhoof and others, principal and sureties on a bond, to recover the amount of an award by a referee. Judgment for plaintiff. Defendants appeal. Affirmed.

Kerr & McNamara, John H. Jordan, and Alexander King, for appellants. John M. Reynolds, for appellee.

PER CURIAM. The agreement referring to the architect "all disputes, however arising, and all questions of doubt as to the tenor and intention of the drawings and specifications or of the contract," is certainly broad enough to embrace the question whether the contractor and his sureties were bound to refund to the plaintiff the amount paid by him on the mechanic's lien, especially in view of the clauses in the building contract by which the contractor agreed to deliver the building free from all claims, and to furnish, provide, and deliver, at his own cost, all necessary materials. The construction given to the agreement by the referee appears to work substantial justice, but whether it does or not is immaterial, inasmuch as the parties agreed that his decision should be final. The fact that the architect, prior to his acting as referee, was called as a witness on the trial in the common pleas, did not disqualify him to act as such referee. It is not alleged that as referee he acted otherwise than fairly and properly. The interlocutory judgment against Deckerhoof ceased to be operative upon the reversal of that case by this court, and cannot have any effect here. By their points submitted on the trial of that case the defendants challenged the jurisdiction of the common pleas, and plaintiff thereupon elected to suffer a nonsuit, and paid the accrued costs. They cannot now object that the tribunal of their original agreement and subsequent election was resorted to. The jurisdiction of the referee does not appear to have been ousted by anything that occurred subsequently to his appointment. While the subcontractor was doubtless bound to observe the terms of his own contract with his principal, he was not bound by the agreement to refer, to which he was not a party. His scire facias on the mechanic's lien, which the plaintiff resisted as far as he could, and the defense which the latter notified the sureties to interpose, cannot, therefore, affect the agreement to refer. There is no sufficient evidence that the plaintiff made a voluntary payment of the mechanic's lien, or accepted the building, and waived performance

of the building contract. On the contrary, evidence shows that unusual care was exercised to negative such conclusions. For these other reasons, given by the learned trial judge, the defendants' point on that subject must well have been refused. It is unnecessary to consider the specifications of error in decision. We find nothing in either of them that would justify a reversal of the judgment entered on the verdict in favor of the plaintiff, nor do we think that further discussion of any of the questions involved is necessary. Judgment affirmed.

In re BOROUGH OF NARBERTH

Appeal of ELLIS et al.

(Supreme Court of Pennsylvania. October Term, 1895.)

BOROUGH—INCORPORATION—REVIEW.

Under Act April 1, 1834 (P. L. p. 100), and its supplements, empowering the court of quarter sessions, with the concurrence of a grand jury, to incorporate a town or village, prescribing the mode of proceeding, providing that the petition for incorporation, signed by a majority of the freeholders within the proposed borough and setting forth its boundaries, be laid before the grand jury, and if a majority of them, after full investigation, find the conditions prescribed by the act have been complied with, and believe it expedient to the petition, they shall certify it to the court, where the judgment of the grand jury must be confirmed, and if the decree of the court be in conformity with the prayer of the petition the decree shall be recorded, etc., but if the court shall deem further investigation necessary, it shall make an order therefor. Act April 1, 1863, providing that, if the boundaries fixed by the petition embrace lands not previously used for farming purposes, and not previously belonging to the town or village, the court shall have the power, at the request of the party aggrieved, to change and fix such boundaries so as to exclude such lands therefrom, a decree of incorporation of a borough is not reviewable unless illegality of proceedings is manifest on the record, or of discretion by the court is distinctly shown and clearly established.

Appeal from court of quarter sessions, Montgomery county; Aaron S. Starnes, Judge.

Petition for the incorporation of the Borough of Narberth. From the decree of incorporation, J. Pemberton Ellis and others appeal. Affirmed.

Irvin P. Knipe, Irving P. Wanger, George S. Graham, for appellants. James Holland and Alex. Simpson, Jr., for appellees.

STERRETT, C. J. It is rightly contended by the appellants that "the general expediency of incorporation," alleged to have been shown by depositions taken for and against the same, but not brought upon the record, is not a proper subject for consideration on this appeal. It is claimed, however, that the record proper presents sufficient errors as to justify the interposition of this court, and require a reversal of the decree.

first section of the act of April 1, 1834 (P. L. p. 163), in connection with its supplements, empowers the several courts of quarter sessions, by and with the concurrence of the grand jury of the county, to incorporate any town or village within their respective jurisdictions, and prescribes the mode of proceeding therein. The second section provides that the petition for such incorporation shall be in writing, signed by a majority of the freeholders residing within the limits of the proposed borough, setting forth its name, style, and title, with a particular description of the boundaries thereof, exhibiting the courses and distances in words, at length, and accompanied with a plat or draft of the same. The next section declares the court shall cause the application to be laid before the grand jury when in session, and if a majority of said jury, after a full investigation of the case, shall find that the conditions prescribed by the act have been complied with, and shall believe it is expedient to grant the prayer of the petitioners, they shall certify the same to the court, and at the next term of court the judgment of the grand jury may be confirmed, and if the decree of the court shall be in conformity with the prayer of the petitioners, the decree shall be recorded, etc., but if the court shall deem further investigation necessary, such order shall be taken thereon as to right and justice shall appertain. The act of April 1, 1863, provides that, if "the boundaries fixed by the petitioners shall embrace lands exclusively used for the purposes of farming, and not properly belonging to the town or village," the proper court shall have power, at the request of the party aggrieved, "to change and modify such boundaries so as to exclude" such lands therefrom. In this case, the power thus conferred was invoked, and was properly exercised by the court below. It thus appears that the questions of compliance with the prescribed conditions, and the propriety of granting the prayer of the petitioners, etc., together with all questions of fact pertaining thereto, or relating to the situation of the territory included within the limits of the proposed borough, etc., are committed to the arbitrament of the grand jury, who, after a full investigation of the case, are required to report their conclusions to the quarter sessions. That court, in its revision of the judgment of the grand jury, is clothed with large discretionary power. It is clearly the province of the grand jury, subject to the reverential authority and discretionary power of the quarter sessions in the premises, to determine all questions of fact and expediency that are necessary to a valid decree of incorporation. It was never intended that any decree incorporating a borough should be disturbed by this court, unless illegality in the proceedings is made manifest by the record, or abuse of discretion on the part of the court below is distinctly charged and clearly established. A careful examination of the

record as presented to us shows that all the requirements of the act and its supplements were substantially, if not strictly, complied with. The application in due form was laid before the grand jury. They certified to the court that, "after a full investigation of the case," they found "the conditions prescribed by the act of assembly, * * * and by other acts supplementary thereto, have all been complied with," and, expressing their belief that "it is expedient to grant the prayer of the petitioners," they approved the application. To this judgment of the grand jury exceptions were filed, testimony was taken, hearings were had, and, upon due consideration of the whole subject, the learned court passed upon the questions involved, and, with the exception of so modifying the boundary of the proposed borough as to exclude certain lands used solely for farming purposes, and not properly belonging to the village, confirmed the judgment of the grand jury, and entered the decree from which this appeal was taken.

The first eight specifications of error are to the refusal of the court below to sustain appellants' exceptions to the findings of the grand jury, recited therein, respectively. The questions of fact involved in these exceptions must have been considered by the grand jury, and determined by them in favor of the appellees. They were afterwards reviewed by the court, and the findings of the grand jury were confirmed. As to all questions of fact necessarily involved therein, this confirmation was evidently intended to be conclusive, and there is nothing in the record to make this case an exception to the general rule. If the action of the court in dismissing the exceptions needs any vindication, it will be found in the opinions sent up with the record. In his supplementary opinion, the learned president of the quarter sessions, referring to the eighth exception, says: "The owners of property along the line of the turnpike may prefer a change or modification of the boundaries that will exclude them from the borough, but we cannot see our way clear to make any such exclusion. Their lands are not used exclusively for farm purposes, nor can it be said that those lands 'do not properly belong to the town or village.' Perhaps it would have been wise to include the bed of the turnpike road within the borough limits, but we cannot make the change at this time; certainly, not without notice to the turnpike company, and affording it a hearing. We may alter the boundaries to exclude farm land, but we doubt our authority to make such alterations to meet objections based upon other grounds. The fact that the turnpike is not within the borough limits is not, in our judgment, such a mistake, if it be a mistake at all, as calls for the rejection of the finding of the grand jury." In adopting the southerly line of the turnpike road as the northerly line of the borough, there was no such error as would justify a reversal of the

decree, nor do we think there was any error in including within the lines of the borough the other highways by which it is bounded on the remaining sides. There is nothing in the record to indicate any error in the conclusions of fact reported by the grand jury, nor does there appear to have been any abuse of the judicial discretion with which the court below is invested in such cases. Neither of the assignments of error is sustained. Decree affirmed, and appeal dismissed, with costs to be paid by appellants; and it is further ordered that the record be remitted for such further proceedings as may be necessary to carry the decree into effect.

ELKINS v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

INJURY TO BRAKEMAN—LIABILITY OF MASTER.

A railroad company is liable to one of its brakemen for injuries suffered by him through a defect in the steps of a freight car, while acting as one of a crew sent to a shipper's yards to shift cars preparatory to their being taken into defendant's trains.

Appeal from court of common pleas, Philadelphia county.

Action by Frederick Elkins against the Pennsylvania Railroad Company to recover for injuries received by him in the course of his employment as a brakeman by defendant. There was judgment for plaintiff, from which defendant appeals. Affirmed.

Geo. Tucker Bispham, for appellant. A. S. L. Shields, for appellee.

McCOLLUM, J. The plaintiff was injured while in the service of the defendant company as a brakeman. The injury he received was due to a defect in the step of a freight car on which he was attempting to get, in the performance of the duties of his employment. It is settled by the verdict that no fault of his contributed in producing it. The car belonged to, and was in the yard of, the Atlantic Refining Company. The plaintiff was one of a crew sent into the yard by the defendant company to shift some cars there. The superintendent of the refining company directed what cars should be shifted, and where they should be placed. It was while the crew were engaged in the work they were sent to do that the plaintiff received the injury for which he seeks compensation in this action. The cause of it has already been stated. If he had received it from the same cause while transporting the car from one point to another on the defendant company's road, the liability of his employer to compensate him for it could not be successfully questioned. In the recent case of Dooner v. Canal Co., 164 Pa. St. 17, 30 Atl. 219, this subject was fully considered in an opinion by our Brother Dean, who, in the course of it, said: "The measure of duty of the receiving road, as to cars turn-

ed over to it for transportation by connecting roads, is settled by many cases. It is bound to make such inspection as the nature of transportation requires, and if it passes haul cars faulty in construction, or dangerously out of repair, it is answerable to its employes who are thereby injured. In many cases, both in England and in this country, which sustain, in substance, this proposition, are cited in Patt. Ry. Acc. Law, p. 300. The defendant company is responsible to its employes for the condition of the cars it receives for transportation over its own road. Why is it not so for the condition of the cars it requires them to shift from one place to another on the tracks and in the yard of the refining company? They are as clearly answerable for service in the latter case as in the former. Their work is of the same nature in one case as in the other, and the risks attending it are the same. No sufficient reason appears for discriminating between the liability of a railroad company for injuries to its employes in handling upon its own line the cars of another corporation which are "faulty in construction or dangerously out of repair," and its liability to them for injuries in handling such cars in its order elsewhere. It is not the ownership of the cars, or of the line on which they are moved, that imposes the liability upon the railroad company, but it is the handling or shifting of them by its orders. The cases cited by learned counsel for the defendant company do not, we think, sustain its contention. They differ materially in their facts from the case at bar. The defendant company was bound to shift the cars in the yard of the refining company without a previous inspection of them. If the latter refused to allow inspection, the former could have persisted in declining to engage in the work of shifting them. But, having done the work, it is responsible to its employes for injuries received by the unsafe condition of the cars they were required to handle. The specification is overruled. Judgment affirmed.

HINDSON v. MARKLE.

(Supreme Court of Pennsylvania. Oct. 1895.)

COAL MINING—DEPOSIT OF REFUSE—LIABILITY OF LOWER RIPARIAN OWNER—TORTS OF SERVANT—WHO LIABLE.

1. If a mine owner places the refuse of his coal mine on his own lands, in a place from which it is washed into a creek by ordinary storms, and damage thereby results to the lower owner, he is liable. *Elder v. Coal Co.*, 27 Atl. 545, 157 Pa. St. 490, followed.

2. Where, in an action by a lower riparian owner to recover for damage by the overflow of a stream which flowed through defective mining lands, it appeared that the water was by defendant in washing the coal through a trough constructed by defendant at a point from which it was discharged on the lower owner's own land, but that from that point it flowed into the stream thickly charged with coal grit, depositing a fine coal dust in the bed of the stream until it was filled to its

when it overflowed over the land of plaintiff to a depth of several feet, completely destroying the land and also growing timber, a verdict for plaintiff was proper.

3. The active managing superintendent of a partnership coal mine is personally liable to a lower riparian owner for injury to the latter's possessions from refuse and culm carried from the mines by a stream passing through the property of both, it not appearing that his management was according to methods enjoined upon him by his employers or associates.

Appeal from court of common pleas, Luzerne county.

Action by George B. Hindson against John Markle to recover for injuries to his estate consequent upon the manner in which the refuse and culm from certain coal mines under defendant's management were disposed of. There was judgment for plaintiff, and defendant appeals. Affirmed.

G. L. Halsey and Geo. H. Troutman, for appellant. William R. Gibbons and William S. McLean, for appellee.

GREEN, J. It seems to us that this case was tried by the learned court below in exact accordance with our rulings in the case of *Elder v. Coal Co.*, 157 Pa. St. 490, 27 Atl. 545. The jury was distinctly instructed that the owner of coal mines may deposit the refuse and culm upon his own lands; that if that material is carried by extraordinary floods into a stream, which runs through the land of a lower owner, and from thence spreads over such land, the owner of the coal lands is not responsible in damages to the lower owner for the injury thus sustained; but, if the refuse is placed on his own land in a position where it is washed into the stream by ordinary storms, or if he deposits his refuse and culm directly in the stream, and damage thereby results to the lower owner, the mine owner or operator is liable for the damage and injury thus occasioned to the lower owner. These are the precise propositions decided in the case referred to, and the court below cannot be convicted of error in following them. The substance of the contention then became one of pure fact, which was correctly submitted to the jury, and found by them in favor of the plaintiff. If there was evidence to justify the court in leaving the questions of fact to the jury, the verdict must be accepted as the solution of the controversy.

The fourth and seventh points of the defendant were practical requests to the court to decide the facts in favor of the defendant, but both points assumed that the testimony was undisputed that the culm was deposited and washed upon the lands of the defendant. Under the fourth point an instruction was asked that, if the jury believe that it was carried to the defendant's land by unusual floods only, the plaintiff could not recover, and by the seventh point a binding instruction that such was the fact was requested. The learned court declined the points, on

the ground that the testimony was not undisputed as to all the culm being deposited on the defendant's land, and thence washed into the stream. The conclusion of the fourth point was correct if the premise was correct, because the finding of the fact whether the culm thus deposited was washed off by unusual floods was left to the jury; but in the seventh point the jury was given no discretion, and the court was asked to declare as an undisputed fact that the culm was removed by unusual storms and freshets. An examination of the testimony proves conclusively that the court could not possibly have affirmed either of the points. Almost the entire testimony in the case proved that the water used in washing the coal passed, not only to the end of the trough on the culm bank, but from that point through a gully leading to the creek, and thence directly into the creek. This water was thickly charged with the fine coal dirt, and in that condition it mingled with the water of the stream, changing its color to black, depositing slowly through years fine coal dust and culm in the bed of the stream, until it was filled to its banks, and then, overflowing the banks and spreading over the land of the plaintiff to a depth of several feet, completely destroyed the cultivated land, and destroyed also the growing timber. We fail to discover any evidence that this occurred only at times of high water and floods. On the contrary, the evidence was that it was continuous, progressing at all times, constantly discoloring the water of the stream and filling its bed. Even the defendant admitted on cross-examination that the water eventually went into the stream, carrying culm with it, for several years before the trial, and making the water black. The testimony to this effect is too voluminous to quote. It came from nearly all the witnesses in the case, and was not substantially contradicted by any. It would have been grave error to have affirmed either of the two points which presented this subject, and the verdict was entirely justified by the evidence. The case of *Coal Co. v. Sanderson*, 113 Pa. St. 126, 6 Atl. 453, is not at all in point. That was the mere flowage of natural water, which was discharged by natural and irresistible forces, necessarily developed in the act of mining prosecuted in a perfectly lawful manner. While the mine water thus discharged polluted the water of the stream in which it necessarily flowed, it caused no deposit of any foreign substance on the land of the plaintiff, and did not deprive her of its use. The fourth and fifth assignments of error are not sustained.

All the other assignments relate to the liability of the defendant. He was the active, managing superintendent of the mines from 1880 to 1890, and a member of the firm which operated the mines from 1890 to the time of the trial. During the whole time it was he who carried on and directed the work at the mines, and whether his acts, and his meth-

ods of mining, had the sanction of his employers or his firm, was immaterial, so far as this plaintiff is concerned. It was his positive and specific acts that caused the plaintiff's injury, and we know of no principle of the law that will relieve him from liability to this plaintiff. If his acts were wrongful, and occasioned injury to the plaintiff, they were acts of misfeasance, for which, under all the authorities, he is liable. They were his own voluntary acts, not enjoined upon him by his employers or his associates, so far as is disclosed in the testimony. They were affirmative, positive acts of trespass upon the plaintiff's land. They were absolutely and directly injurious to the property and rights of the plaintiff, and we are clearly of opinion he is responsible to the plaintiff for the injury done. The assignments of error are all dismissed. Judgment affirmed.

KITCHEN v. UNION TP.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

DEFECTIVE HIGHWAYS—LIABILITY FOR ACCIDENT —OPINION EVIDENCE.

1. At a point where the roadbed was 17 feet wide, a horse, frightened by a derrick operated within 5 feet of the road, went over an unprotected embankment on the other side. *Hdd*, that, the conditions having existed for a long time, and the result being a natural one, the township was liable for its failure to put up a guard.

2. It is not error to allow a witness to supplement his description of the locality of an accident, and of the elements of danger in it to ordinary travel on the highway, with his opinion that it was a dangerous place.

3. In an action for personal injuries, testimony of plaintiff that her husband had had employment but three weeks during the preceding two months is, at most, harmless error.

Appeal from court of common pleas, Luzerne county.

Action by Virgie Kitchen against the township of Union for injuries received on a highway. Judgment for plaintiff. Defendant appeals. Affirmed.

The seventeenth assignment of error complained of the testimony of plaintiff, given at the trial in December, and objected to as immaterial, that her husband had not had steady work since the 1st of October, and that he had worked but three weeks since that time.

Q. A. Gates, for appellant. John T. Lenahan and Edward A. Lynch, for appellee.

McCOLLUM, J. It appears from the evidence in the case that, at the point where the accident occurred, the width of the roadbed was about 17 feet, that the quarry derrick was about 5 feet from the upper edge of it, and that it was about 20 feet from the lower edge of it to the wall, the top of which was from 7 to 8 feet below the roadbed, and about 6 feet above the railroad tracks. It is said that the road was laid of the width

of 50 feet; and, if so, it is obvious that some of the operations of the railroad company were within the lines of it. The derrick was used to move the stone from the quarry, across the highway, to the cars, for transportation to the points where it was wanted. While the derrick itself, from its proximity to the roadbed, was liable to frighten horses, the operation of it was quite likely to do so. If the slope from the lower edge of the roadbed was gradual and even, as the appellant contends, it was, nevertheless, a point of danger, because it declined 8 feet in 20, and terminated in a perpendicular descent of 6 feet to the railroad. There was no fence or guard rail between the roadbed and the slope, and a horse, frightened by the appearance or noise of the derrick, would naturally shy towards the open space between the roadbed and the wall. This is precisely what occurred in the case at bar. The horse, frightened by the movements and noise of the machinery employed in operating the quarry, shied off the roadbed, and, dashing down the slope, landed, with the driver, the cart, and the occupant of it, upon the stones loaded on the flat car at the foot of the wall. The plaintiff received a serious injury, which she attributes to the negligence of the township in not erecting a suitable fence or guard rail at or near the lower edge of the roadbed, opposite the quarry. The condition we have described existed a long while before the occurrence in question, and the township was chargeable with notice of it. Was it a condition which called for the erection by the township of a guard rail or fence, to provide against accidents of the kind under consideration? The jury answered this question affirmatively, and the answer was authorized, if not demanded, by the evidence in the case. The township, however, contended that, conceding its negligence, the plaintiff could not maintain her suit, because her negligence concurred with its own in causing the injury. This contention clearly involved a question of fact, which the jury, under proper instructions, found against the defendant. The case at bar does not belong to the same class as the cases cited to sustain the township's contention. It is plainly distinguishable from them in its facts, and it is, we think, governed by the principles on which *Burrill Tp. v. Uncapher*, 117 Pa. St. 353, 11 Atl. 619, *Plymouth Tp. v. Graver*, 125 Pa. St. 24, 17 Atl. 249, and kindred cases were determined. The cases which constitute the township's principal reliance in this contest recognize and approve the principle applicable to the facts of this case. In *Shaeffer v. Jackson Tp.*, 150 Pa. St. 145, 24 Atl. 629, Justice Heydrick, speaking for this court, said: "The concurrence of that which is ordinary with a party's negligence does not relieve him from responsibility for the resultant injury. Examples of such concurrence may be found in cases where, by reason of causes known to the

public authorities, horses are likely to become frightened, and in their sudden fright plunge over an unguarded precipice, or rush upon some danger within the highway, for the existence of which the authorities are responsible. In such cases the consequences of the neglect of duty are natural and probable, and ought, therefore, to be foreseen." A like view is expressed in *Horstick v. Dunkle*, 145 Pa. St. 220, 23 Atl. 378, and in *Herr v. City of Lebanon*, 149 Pa. St. 222, 24 Atl. 207.

We cannot sustain the exception to the ruling complained of in the twelfth specification. It was a ruling in accord with many decisions of this court, and not in conflict with any of them. In view of the circumstances of the case, and in the light of these decisions, we think it was proper for Dr. Bonham to supplement his description of the locality of the accident, and of the elements of danger in it to ordinary travel on the highway, with his opinion that it was a dangerous place.

If it be conceded that the matter complained of in the seventeenth specification was irrelevant, the admission of it furnished no ground for reversing the judgment, because it was at most harmless error. We are not satisfied that any error was committed in the rulings complained of in the thirteenth, fourteenth, fifteenth, and sixteenth specifications. The case was tried in the court below on correct principles, and presented to the jury in a clear and impartial charge. All the specifications are overruled, and the judgment is affirmed.

VAN LOON v. ENGLE et ux.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

TAXATION — RETURN OF COLLECTOR — LOCAL LEGISLATION.

1. Act 1881, relative to collection of taxes, "whether county, township, poor, school or municipal," is local legislation in violation of Const. art. 3, § 7, cities of the first, second, and fourth classes being excepted from its operation, and it not being confined to municipal matters.

2. A return of lands, on nonpayment of taxes, for sale for collection thereof, required by Act 1881 to contain a sufficient description, by boundaries or otherwise, of the property, is insufficient where it merely gives the name of the owner, the street on, and the ward in, which the lot is situated, though the lot be un-surveyed land, especially where a person is named as owner who has never been in possession, and whose name is in no way connected with the recorded title.

Appeal from court of common pleas, Luzerne county.

Ejectment by Ziba Van Loon against Louis C. Engle, and wife. Judgment for defendants. Plaintiff appeals. Affirmed.

R. D. Evans, for appellant. Emmett D. Nichols and John G. Johnson, for appellees.

WILLIAMS, J. This is an action of ejectment, in which the plaintiff's right to recover depends on the validity of the tax sale through which he acquired his title. The defendants hold the title under a regular chain of conveyances, and are in possession as owners. They have a right to the verdict unless the title has been taken from them by virtue of the tax sale under which the plaintiff claims. This sale was made under the act of 1881 (P. L. p. 45), and upon a collector's return of the lot in controversy for the nonpayment of taxes assessed upon it as seated lands. Two questions are raised, viz. the constitutionality of the act of 1881, and the sufficiency of the return made by the collector.

The act of 1881 purports to be a general law, and provides that "all taxes, whether county, township, poor, school or municipal taxes," shall be a first lien on the real estate on which such taxes are assessed. It provides for the return of such lands upon nonpayment of the taxes, and for their sale for the collection of the taxes unpaid. Cities of the first, second, and fourth classes are excepted from its operations. Townships, boroughs, and cities of the third class remain under its operations. We thus have one system for the collection of taxes and for creating liens in one class of cities, and a different system in the other classes. The difference does not relate only or mainly to municipal taxes. It affects all the taxes levied by all the taxing officers. The collection of a county tax is not a municipal purpose. The same thing may be said of school and poor taxes. Classification has been upheld for municipal purposes only. Legislation for a class of cities is only general and valid, under our constitution, when it relates to some municipal purpose. If it does not affect the exercise of some municipal power, or the number, character, powers, and duties of the municipal officers, or the regulation of some subject within the appropriate range of municipal control, the legislation is local, and unconstitutional. *Ruan Street*, 132 Pa. St. 257, 19 Atl. 219; *Ayers' Appeal*, 122 Pa. St. 206, 16 Atl. 356; *Meadville v. Dickson*, 129 Pa. St. 1, 18 Atl. 518; *In re Wyoming Street*, 137 Pa. St. 494, 21 Atl. 74. The constitutional provisions involved in this inquiry are article 3, § 7, which provides that no local or special law shall be passed "authorizing the creation, extension or impairing of liens," "creating officers or prescribing the powers and duties of officers in counties, cities, boroughs, townships, election or school districts," "regulating the affairs of counties, cities, townships, wards, boroughs or school districts." Under the provisions of the act of 1881 unpaid county, school, township, and poor taxes are collected in one way in the county of Philadelphia and in a very different way in the other counties of the state. In the county of Allegheny the collection of unpaid county taxes falls un-

der the act of 1881 so far as the townships, boroughs, and cities of the third class are concerned. In the cities of Pittsburgh and Allegheny they do not. Thus two different methods are in force within the limits of the same county for dealing with county, school, poor, and municipal taxes. This is so clearly in the face of the constitutional provisions referred to, and so destructive to that uniformity of procedure upon subjects of general interest which it is the object of the constitution to bring about and to preserve, that a simple statement of the necessary consequences of the enforcement of the act of 1881 renders an argument upon the constitutional question unnecessary.

But we concur with the learned trial judge upon the second question, viz. the sufficiency of the description of the lot sold in the collector's return. The description is as follows:

Owner.	Street.	Ward.	Val.	Co. Tax.	Other Taxes.
McGurk.	Washington.	2	62	.37	Were Carried out.

The act of 1881 requires that the return shall contain a statement "of each kind of tax so returned, the names of the parties assessed with the same, the year when such taxes were assessed, a sufficient description by boundaries or otherwise of each separate lot or tract and about the quantity of the same, and the township or borough in which it is located, that the person making such return has a warrant for the collection of such taxes, and the date thereof, and that after a proper effort at the proper time, he could not find sufficient personal property, by the legal sale of which, such taxes or any portion thereof could have been collected." The return does not state the year when the taxes were assessed, nor does it give any description of the lot which it is sought to charge with their payment. It is said in reply to this position that unseated land is sufficiently described by giving the number of the part, and the name of the warrantee, and may be sold without other effort to describe the land. But the number, and name of the person to whom the warrant issues, are matter of record; and, as there can be no actual occupancy of unseated land, the records afford the only means for investigating the ownership. But a sale of unseated land made in the name of a warrantee who was not such in fact, and whose name was in no way connected with the recorded title, would not, ordinarily, pass the title. So in this case. The name of McGurk afforded no help in locating the lot to be sold, for he was in no way connected with the recorded title. He was not in possession, and, as we understand the evidence, he had at no time been in the actual, visible occupancy of the lot. Any lot on Washington street, in the Second ward, might be intended, so far as anything in the

description would enable an intending purchaser to judge, or a lot owner to ascertain. If, therefore, the act of 1881 had been unobjectionable, the collector did not follow its provisions, and his return was insufficient to authorize the sale of the lot for unpaid taxes. The assignments of error are overruled, and judgment appealed from is now affirmed.

COMMERCIAL NAT. BANK OF PENN- SYLVANIA v. McCLAIN et al.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

APPEAL.—REVIEW.

The defense to a note being payment, and nothing being pointed out, applicable as a payment, other than as allowed by the court below, judgment for plaintiff will not be disturbed.

Appeal from court of common pleas. Philadelphia county.

Action by the Commercial National Bank of Pennsylvania against Jennie G. McClain and another, executors of Edward McClain, deceased, on a note. Judgment for plaintiff. Defendants appeal. Affirmed.

Arthur M. Burton, for appellants. Henry C. Terry and John G. Johnson, for appellee.

MCCOLLUM, J. We cannot discover in the bank accounts called for and presented by the appellants anything which authorizes, or tends to sustain, their present contention. The note in suit was made to the order of Nelson Bros. & Co., and payable on demand. The payees transferred it, by indorsement, to the appellee; and the latter received from the maker an assignment of certain securities, as collateral to it. It appears from the recital in the assignment that the note for which the collateral was given was a substitute for three other notes of the assignor, held by the bank, drawn to the order of Nelson Bros. & Co., and indorsed by them. It is claimed by the appellants that the note in question and the notes for which it is a substitute were made by McClain for the accommodation of the payees named in them. But we are unable to find in the accounts, the assignment, or the letters, anything which establishes this claim. This, however, is not a matter of much importance in the case, and we merely refer to it in passing. The controlling question is whether the note has been paid by the maker and payees, or by either of them, and, if not, how much has been paid upon it, beyond the sums credited in the bank's account with McClain. These credits from May 8, 1886, to February 6, 1888, inclusive, amount to \$2,016.88. Whether they represent sums realized from the collateral, and paid to the bank by Terry in accordance with McClain's letter to him, we cannot say; nor is there anything in the evidence to enlighten us on this point. The learned counsel for the appellants has not directed our attention

to anything in the accounts between Nelson Bros. & Co. and the bank which is applicable as a payment on the note, and we are not able to find from the evidence that there should be other credits upon it than those made as above stated. We think, therefore, that the learned court below did not err in its instruction to the jury. Judgment affirmed.

WILSON v. COX.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

JUDGMENT BY CONFESSION—VACATING.

A judgment on a judgment note, entered five years after it was due, and after the death of the payee, who had been insolvent for several years, should be opened, and the maker allowed an opportunity to defend, the evidence tending to show that it was not the intention of the parties that the note should be regarded as evidence of the maker's indebtedness to the payee, or be enforced as such.

Appeal from court of common pleas, Montgomery county; Aaron S. Swartz, Judge.

Judgment was entered January 2, 1894, in favor of plaintiff, Benjamin Wilson, on a judgment note for \$1,000, executed to him by defendant, Charles A. Cox, April 4, 1887, payable one year after date, and found among the papers of Wilson after his death. His administrators were substituted as plaintiffs, on suggestion of his death. Defendant's rule to show cause why judgment should not be opened, and he be let in to defend, was discharged, and he appeals. Reversed.

Jacob V. Gotwalts, for appellant. Charles Lunsicker and Wm. F. Solly, for appellee.

STERRETT, C. J. It may be conceded that the note on which the judgment was entered was executed and delivered by defendant on or about April 4, 1887, but there appears to be little if any doubt that, at the time it was given, the payee was indebted to the maker, on an unsettled account, in a sum equal to or greater than the face of the note. Mr. Smith, the subscribing witness to the note, and the only person who appears to have been present when it was signed and delivered, testified, in substance, that the defendant objected to signing it, and said to the plaintiff: "It is not right for me to sign the note. You know we have not had a settlement and you owe me." To which the plaintiff assented, and gave as his reason for requesting the note, that he wanted "to show it to some one, * * * so they could see where the money went," etc. Defendant then said: "I will sign it, but it is not right. * * * If you die, I will lose this money." In reply to this, the witness said: No; not if I am living, you won't. But it is a queer way of doing business." Defendant thereupon signed the note. The same apparently disinterested witness further testified that plaintiff admitted he was then indebted to defendant on an unsettled account; that subsequently, in conversations with him in rela-

tion to the transaction, he said it was all right,—that he and the defendant did business that way between themselves. As tending to corroborate the testimony to which reference has been made, it was also shown, by a witness familiar with defendant's books, that they show an indebtedness of about \$1,005 by plaintiff to defendant at the time the note was given. An additional circumstance that may have some weight, in connection with other evidence, is the fact that, although plaintiff became insolvent shortly after the note was given, and continued so until his decease, he never entered up the note, or demanded either principal or interest thereof. Without further reference to the evidence in support of the rule, we think it tends to show that, whatever object the parties may have had in view when the note was signed and delivered, it was not their intention that it should be regarded as evidence of the maker's then indebtedness to the plaintiff, payee therein named, or be enforced as such. While the case is involved in considerable doubt, we are of opinion that it presents questions of fact which the defendant should have an opportunity of submitting to a jury for their consideration. Decree reversed, with costs to be paid by the appellee, and it is now adjudged and decreed that the rule to show cause be made absolute, and an issue in proper form awarded.

SAUNDERS v. RACQUET CLUB.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

EQUITY—JURISDICTION.

Where plaintiff claims under deeds the right to build over defendant's lot at a certain height from the ground, and defendant in possession, having a wall which prevented such construction, denies the right, the remedy is not in equity, but at law.

Appeal from court of common pleas, Philadelphia county.

Suit by Frances B. Saunders against the Racquet Club. Decree for defendant. Plaintiff appeals. Affirmed.

John Marshall Gest and John G. Johnson, for appellant. F. H. Bohlen and J. S. Clark, for appellee.

DEAN, J. The plaintiff, Frances B. Saunders, is the owner of lot 925 on the north side of Walnut street, Philadelphia. The lot has a frontage of 48 feet and depth of 159 feet. The defendant is the owner of lot 923 adjoining on the east. This has a frontage of 34 feet 1 inch, and about the same depth as 925. The plaintiff claims the right to project her building for the whole depth of her lot, at a height of 12 feet from the pavement, 4 feet over her line on defendant's lot. The necessary conclusion from the pleadings is that defendant admits plaintiff's right to so project her building for a depth of 53 feet from the front on Walnut street, but denies

her right to so occupy its lot back 106 feet, the remaining depth of the lots. The history of the titles and the language of the grants which give rise to the antagonistic claims start with the year 1830. At that time both lots were owned by Jacob S. Wain, who, in 1832, by deed duly recorded, conveyed 925 to John Northrop, Jr. After a description of the lot itself in this deed, there follows this additional grant: "Together with the right and privilege of building over a four feet wide alley belonging to the said Jacob S. Wain, adjoining to the eastward of the hereby-granted lot, leaving at least twelve feet headway in the clear from the surface of the pavement; he, the said Jacob S. Wain, reserving the right of retaining the three windows as now opened in the wall with reversed blinds; together with common use and privilege of a three and a half feet wide alley extending northward into George, now Sansom, street." In 1836, Northrop conveyed the lot by precisely the same description to George Mifflin Dallas. The last named having died seised thereof, his administrator with will annexed joined by his heirs, on the 28th of March, 1893, by the same description conveyed the lot to this plaintiff. It would seem from the explicit words of this grant she took (1) lot 925, 48 feet by 159 feet; (2) the right to project, at 12 feet from the surface of the pavement, her building over a 4 feet wide alley then (1832) in existence and adjoining her on the east, but belonging to Jacob S. Wain, the grantor; (3) the privilege of using as a passageway, in common with Wain, a 3½ feet alley extending northward to Sansom street. This, we say, appears to be the obvious intent of Wain's first deed in 1832, when he owned both lots, and had the right to do with his remaining one what he chose. The extent of the grant is not uncertain. True, the depth of the four-foot alley is not stated in the deed, but it could be made certain by either party by mere measurement, for it was not an alley to be opened, but one there then, belonging to Jacob S. Wain. And if the title to 923, defendant's lot, had remained in the grantor, it is probable no such dispute as is now before us could have arisen. But Jacob S. Wain having died seised of 923, his executors, in 1889, by deed conveyed that lot to Edward E. Denniston. The averments of the complaint do not give us the words of the grant to Denniston, but we infer, from the fifth paragraph, which sets out that: "Wain, being seised of the premises subject to the right or privilege of Northrop, died, and by authority of his will his executor conveyed lot 923 to Denniston;" that the reservation in his deed was measured by the right or privilege in Northrop's. Then Denniston, in 1890, conveyed 923 to the Racquet Club, this defendant. The words of the reservation in this deed are as follows: "Under and subject, nevertheless, as respects a part of the said hereinabove described and granted lot of ground, to wit, the westernmost four feet

in width thereof, extending one hundred and fifty-nine feet in depth, northward from the north side of said Walnut street to a certain building right and privilege as granted by Jacob S. Wain (a former owner of the said hereby-granted premises) and wife to John Northrop, Jr., his heirs and assigns, by deed bearing date the 13th of April, 1832." The scrivener here, instead of limiting the reservation by a mere reference to the grant in the Northrop deed, or by a repetition of the exact words of it, goes further, and undertakes to interpret it. As plainly as language can express the thought, he says the original grant conferred on Northrop a right and privilege to build for 159 feet, 4 feet over on the lot then being granted by Denniston. Certainly, as argued by appellee, he says it is a reservation of that which was granted to Northrop, but he just as certainly says that was a right to Northrop to project his building for 159 feet, 4 feet over on Wain's other lot. The Denniston deed to defendant was put on record in 1890, and was noticed by plaintiff in 1893, when she purchased 925. She avers, her purchase was in part, at least, prompted by the belief, from this deed, that her right to build 4 feet over on defendant's lot extended the whole length of her lot; and this, on the pleadings, must be taken as verity. Her building, for 53 feet from the front, does extend 4 feet over on 923; but at the end of that distance, by a wall built by defendant, further extension towards Sansom street of the projection is obstructed. She therefore prayed for an order on defendant to tear down and remove the wall, that she might enjoy her alleged right under her deed. The defendant demurred: (1) Because a court of equity has no jurisdiction; the plaintiff's remedy, if she have any, being at law. (2) Because her alleged right is not clear and explicit, and her damage not immediate or irreparable. (3) Because her complaint is defective in substance. On hearing, the court below overruled the first and third grounds of demurrer, sustained the second, and dismissed the bill; hence this appeal.

The effect of the demurrer is to admit all the material averments of the bill, and there remain but two questions to be answered, and on the answers depend the rights of the parties: (1) What is the legal effect of a description in a deed between strangers to plaintiff,—the deed of Denniston to defendant? (2) Does the acceptance and placing on record by defendant of this deed, in view of the admitted facts, estop it from denying plaintiff's right to build over the entire depth of her lot? It is not our purpose to attempt to answer either question, because plaintiff's right, as held by the court below, is not clear, and because equity is without jurisdiction to determine them. This is clearly an ejectment bill. The remedy at law is complete and adequate. We are asked to order defendant to tear down a wall on land of which it is in possession, and of which neither plaintiff nor

her predecessors in title ever had possession. She claims the legal right to that in which defendant denies her right. If she have such right, it is because the written grants distinctly define it. Defendant's estate, which in 1832 extended indefinitely upwards, was, according to her claim, cut off by a horizontal boundary fixed at 12 feet from the pavement. Its right of possession to that above, she avers, there ended, and hers commenced. If this be so, then the severance of lot 923 is by a boundary as clearly defined as if the 4 feet had been cut off at the surface instead of 12 feet above it. The owner of land may sell and convey a seam of coal beneath the surface, and retain his right to all beneath the same parted with, as well as to the surface above. The horizontal boundary of his grant is defined by the thickness of the coal seam. His estate downwards is severed. Where the right in such cases is a purely legal one, the law must determine it before equity will enforce it. As is said by Strong, J., in *Coal Co. v. Snowden*, 42 Pa. St. 488: "But where the complainant himself avers that his right is denied, and where that denial is the very ground of his complaint, it would be a novelty, indeed, for a court of equity to assume jurisdiction." This was said in a case where a mining right resting on a legal title was denied. The same thing in substance was said by Sharswood, J., in *Tillmes v. Marsh*, 67 Pa. St. 507, where the right to build over a three-foot alley way depended on a legal title; and by the present chief justice in *Duncan v. Iron Works*, 136 Pa. St. 478, 20 Atl. 647, which was a contest over the right to mine iron ore, resting on a legal title averred on one side and denied on the other.

Nor is there any inadequacy of remedy at law in this case not present in every case, where one in possession refuses to quit until ousted by a writ of hab. fa. possessionem. The method of trial of such cases before a chancellor may be less vexatious, and his commands more prompt and peremptory, than the trial and processes before a court of law. But the right of possession, and compensation for the wrongful detention of it, can be determined with as much certainty in the one court as the other. If the alleged rights were those of joint tenants or tenants in common, it might be otherwise; but here they are neither, are as effectually severed and as clearly defined as a boundary between separate owners of the surface. For these reasons, we think the court was right in sustaining the demurrer. Therefore the decree is affirmed.

THOMAS v. CARTER et al.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

WILLS—TESTAMENTARY CAPACITY.

Though one be of sound mind in regard to his dealings in general, yet, if he be under an insane delusion, and his will be the direct off-

spring thereof, and different from what it would have been but for such delusion, it cannot stand.

Appeal from court of common pleas, Philadelphia county.

Issue between John M. Thomas, sole acting executor of Charles Carter, deceased, as plaintiff, and William Carter and others as defendants. Judgment for defendants. Plaintiff appeals. Affirmed.

Mayer Sulzberger and Samuel Dickson, for appellant. John G. Johnson, for appellees.

PER CURIAM. In this issue devisavit vel non, framed for the purpose of trying and determining the three questions of fact recited therein, John M. Thomas, sole acting executor of the writing purporting to be the last will and testament of Charles Carter, deceased, is plaintiff, and William Carter and others, including all the children and heirs at law of said decedent, are defendants. The proper solution of these questions depended, of course, upon a variety of minor facts and circumstances calculated to shed light on one or more of said main questions, and thus enable the jury to reach a correct conclusion as to each of them. This necessitated the introduction of a mass of testimony which was submitted to and passed upon by the jury. The cause appears to have been carefully and ably tried in the court below. We have given to the questions presented by the record that consideration which their importance and the interests involved appear to require, and we are all of opinion that there is nothing in the assignments of error that would justify us in disturbing the judgment that was entered on the verdict in favor of the defendants; nor do we think that either of the specifications of error requires special notice. The case depended mainly on questions of fact which were for the exclusive consideration of the jury, and to them it appears to have been fairly submitted in a clear and comprehensive charge, in which the principles of law applicable to the facts which the testimony tended to prove were fully and accurately stated. We find no error in the admission or rejection of evidence. Our examination of the testimony that was received and submitted to the jury has satisfied us that the findings of fact on which their verdict is necessarily predicated were fully warranted by the evidence, and hence there appears to be nothing on which to base a reversal of the judgment.

In affirming defendants' requests for charge, the following substantially correct instructions were given to the jury by the learned trial judge, to guide them in properly applying the facts, as they might find them from the testimony, to the questions presented in the feigned issue: "A man may be of sound mind in regard to his dealings in general, but he may be under an insane delusion; and whenever it appears that the will was the direct offspring of the partial insanity or

monomania under which the testator was laboring at the very time the will was made, that it was the moving cause of the disposition, and if it had not existed the will would have been different, it ought to be considered no will, although the general capacity of the testator may be unimpeached." "The wife and children of a man are the natural objects of his affections, and where they are disinherited by a husband and a father when he comes to dispose of his estate, the reasons for doing so are a proper subject to enter into the consideration of a jury in considering a case like the present, and any person will naturally inquire, why was this thing done? Was the testator under an insane delusion, or has some powerful cause induced him to act thus?" "If a monomaniacal delusion is unalterably entertained against a wife or a daughter, who otherwise would have been his legatee or devisee, and who would seem to be the natural object of a man's regard when he came to make a final disposition of his estate, and such delusion is shown to have been the operating motive which excluded her, and if the supposed act or misconduct on the part of the wife or child or both had no existence in fact, and was a creature of the diseased imagination of the testator, and the will was engendered by this delusion, and was its offspring, and made under its influence, operating at the time and in the testamentary act; if, in short, the will was dictated by the delusion,—it cannot be sustained as a last will and testament, because it is the production of a mind incapable of correct reasoning as to the object of his bounty, and the character of his wife and children, and their relations towards himself." These and other instructions of like import, in the general charge, were fully warranted by the testimony; and on principle as well as authority they were neither erroneous nor misleading. *Taylor v. Trich*, 165 Pa. St. 586, 30 Atl. 1053; *Boughton v. Knight*, L. R. 3 Prob. & Div. 64. In the former, after defining "partial insanity" as "a derangement of one or more of the faculties of the mind which prevents freedom of action," it was said: "The question in any given case is whether the act under investigation was done upon consideration of existing facts, or under the influence of a delusion that controlled the will of the doer and destroyed his freedom of action." In its controlling principle, that case is not unlike the one before us. Judgment affirmed.

COMMONWEALTH v. PAUL. (No. 106.)
(Supreme Court of Pennsylvania. Oct. 7, 1895.)

OLEOMARGARINE — INTERSTATE COMMERCE — ORIGINAL PACKAGES.

Ten-pound packages of oleomargarine, put up out of the state, and sent into it, by the manufacturer, to be there sold by his resident

agent, from his store, by the package, are not "original packages," within the interstate commerce clause of the federal constitution, but being intended for sale to the consumer, and in fact so sold, are subject to the police regulation of the state.

Appeal from court of quarter sessions, Philadelphia county.

J. Otis Paul was prosecuted for selling oleomargarine in violation of Act May 21, 1885. From a judgment for defendant on a special verdict, the commonwealth appeals. Reversed.

A. Morton Cooper, Carroll R. Williams, and George S. Graham, Dist. Atty., for the Commonwealth. A. B. Roney and Henry R. Edmunds, for appellee.

WILLIAMS, J. It is not necessary to the decision of this case that we should enter upon the discussion of the existence and extent of the police power residing in the several states of the Union. It is quite as unnecessary to argue that the power of congress to regulate commerce between the citizens of the different states was not intended to abridge the lawful exercise of the police power by way of the state governments. If judicial decisions can be said to settle any question, these questions are clearly and properly settled by the decisions of the highest tribunal known to our laws, and settled in accordance with the rules laid down in this state since its first organization. In *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, the right of this state to deal, in the exercise of its police power, with the manufacture and sale of oleomargarine, and the validity of the particular statute under consideration in this case, were distinctly affirmed. During the last year (1894) a Massachusetts statute relating to the same subject came before the supreme court of the United States in *Plumley v. Com.*, 155 U. S. 461, 15 Sup. Ct. 154, and was sustained as a lawful exercise of the police power. The defendant in that case had, as the defendant in this case has, a license from the internal revenue department of the United States, authorizing him to deal in oleomargarine. It was held, however, that this did not authorize him to engage in the manufacture or sale of oleomargarine in violation of the state laws, lawfully passed, forbidding or regulating such manufacture and sale. The dealer in articles which the state, in the exercise of its police power, places under restrictions, must make his peace with the state in which his business is conducted, as well as with the internal revenue laws of the United States. This proposition the defendant denies. He has made his peace with the tax laws of the United States, but denies the power of the state to regulate or restrict his sales of the commodity in which he deals, and asserts that he is engaged in interstate commerce, within the true intent of the constitutional provision conferring upon congress the power to regulate commerce between the several states. In determining the question thus raised, it is important to keep in

mind the facts found by the special verdict, as follows: (1) The defendant is a resident in and citizen of this state, with a store or place of business at No. 214 Callowhill street, Philadelphia. (2) He is conducting the sale of oleomargarine as the agent for the Chicago Butterine Company, which is a firm or corporation doing business in Illinois, and is the licensed dealer at No. 214 Callowhill street. (3) The oleomargarine was not made from milk or cream. It was designed to be used in place of butter. It was sent from Chicago to Philadelphia to be sold as food, and the tub sold to Crawford, which is complained of in this case, was sold to him for use as an article of food. (4) The tub contained 10 pounds only; was put up, sealed, and stamped at the factory in the state of Illinois; was received in the same form in Philadelphia, and then "placed in defendant's store, and offered for sale as an article of food." (5) This was one of "many transactions of like character made by the defendant during the last two years"; or, in other words, this was the way in which the defendant did business for his nonresident principals, the manufacturers. They put up the article in 10-pound packages, suited for the retail trade; and, because they do not allow their agents to open or divide these, they treat their trade as wholesale, though in fact they supply the actual consumer, and not the retail dealers.

Looking now at these facts in the light of the cases cited, we shall find every question raised by them has been decided against the defendant by the supreme court of the United States, except one. The validity of our act of assembly has been distinctly affirmed as a lawful exercise of the police power. Act May 21, 1885. The fact that an internal revenue license affords the defendant no justification for disregarding a lawful exercise of the police power by the state is stated with equal clearness. The proposition that the judiciary of the United States should not strike down the police power of the states, in the exposition of the interstate commerce powers of the general government, was asserted and abundantly vindicated in *Plumley v. Com.*, supra (decided within the last year). Our statute is directed specially against the sale of oleomargarine as an article of food. The defendant, in willful and flagrant disregard of the letter as well as the spirit of the statute, keeps these tubs, of the commodity manufactured by his principals, at the store in Callowhill street, for sale as an article of food." He offers them for sale for use as an article of food, and he sold to Crawford the 10-pound tub which is the ground of complaint in this case for use as food. Now, it is very clear that this sale was a violation of our statute. The conviction was eminently proper, therefore, and should be sustained, unless the sale can be justified as one made of an "original package," within the proper meaning of that phrase. The nonresidence of the manufacturer does not play any important part in this case, for he comes into this state to establish a "store" for the sale of

his goods, pays the license exacted by the revenue laws, and puts his agent in charge of the sale of his goods from his store, not to the trade, but to consumers. We have, therefore, a Pennsylvania store selling its stock of goods to its customers, for their consumption, from its own shelves; and, unless these goods are in such original packages as the laws of the United States must protect, the sale is clearly punishable under our statute.

We first encountered this question of what shall constitute an original package, within the meaning of our national interstate commerce legislation, in *Com. v. Zelt*, 138 Pa. St. 615, 21 Atl. 7. A nonresident manufacturer of intoxicating drinks put up his whisky and other liquors in quart and pint bottles, adapted for use in the retail trade to consumers. These he sent to an agent in charge of a store rented for the purpose in Washington, Pa. The bottles were corked, some sealing wax put over the cork, and the brand or initials of the manufacturer impressed thereon. The bottles so secured were then put in pasteboard boxes or covers, and packed in open boxes or barrels, for shipment to the Pennsylvania store. When they were received at the store the bottles were arranged and displayed on the shelves, and offered for sale to the consumer as original packages of whisky. Neither the distiller who shipped the whisky, nor his agent who sold it, had a license to sell intoxicating drinks under the liquor laws of this state, but made sales of whisky and beer by the pint and quart under the pretense that each bottle was an original package of commerce. The learned judge before whom an indictment against the seller of the bottles of liquor was brought to trial submitted the question to the jury whether the method of putting up the liquors in bottles was not adopted as a device to evade the liquor laws of this state. The jury found the fact to be that it was a mere device, and rendered a verdict of guilty. Upon an appeal to this court the ruling of the court below was affirmed, and, in speaking on the second assignment of error, we said that whether whisky or beer could be put up in pint bottles, and sold by the single bottle, as an original package, under the protection of the interstate commerce laws, was a question that would be decided when it was squarely raised. The question was next raised in *Com. v. Schollenberger*, 156 Pa. St. 201, 27 Atl. 30, and its decision became necessary to the disposition of that case. In that case a nonresident manufacturer of oleomargarine had established a store for its sale in Philadelphia, and held a license, under the internal revenue laws, authorizing such sale. His agent sold a tub of "the goods" to a boarding house keeper, for use, in the place of butter, on his table. The defense was that the tub had not been broken or divided by the seller, and was therefore an original package, within the meaning of the interstate commerce cases. We held that

the conclusion did not follow from the fact stated, and attempted to define an "original package" as such a package as was used in good faith by producers and shippers for convenience in handling and security in transportation of their wares in the ordinary course of actual commerce. But we also said that where the size of the package was adapted for the retail trade, so that "breaking bulk" was not necessary to "reduce the goods into the common mass" and fit them for the retail trade, the traffic so conducted was not interstate, but intrastate, commerce; or, in other words, the common every-day retail traffic of the community in which the store was located. Let us look at the consequences of the adoption of the opposite rule. If a pint bottle of whisky is an original package, under the protection of congress, and can be sold as such regardless of the police legislation of the state, we cannot punish the sale to a minor, to a person of known intemperate habits, to a lunatic, on election day, or on the Sabbath. All power over the traffic for police purposes is gone. And why? Because the power to regulate interstate commerce, intended to guard against stoppage along state lines for examination or the collection of customs duties, has been extended by construction until it is made to reach and protect a retail traffic carried on within any state, if the things sold have come into the retailer's store from a nonresident manufacturer or shipper. If this be a sound construction, then the power of a state to restrict or prohibit an injurious traffic does not depend on the deleterious character of the thing sold, or the manner in which sales are made, or the public or private injury inflicted by the sale, but on the manner in which the thing sold comes into possession of the seller. If he makes the article, or buys it of another citizen of the state, he cannot sell it without punishment. If he buys it of a nonresident who sends it to him across the state line, he may sell it with impunity, and the state is powerless to stay his hands or to regulate his sales. A pint of whisky put up in a flask, if made or bought in this state, cannot be sold without a license granted by the courts after an examination into the character of the applicant and his business. The same flask of whisky, put up across the border, may come, as an original package, into any community, and be sold to any person,—whether a minor, a drunkard, or a lunatic,—under the protection of the constitution of the United States. We cannot adopt a construction that seems to us so unnatural and unreasonable, and that would work such absurd and monstrous results. On the contrary, we hold, as we think is held by the recent case of *Plumley v. Com.*, already referred to, that the mere fact that a police law may affect the trade in articles brought from another state does not amount to an attempt to regulate interstate commerce, or

to an assumption of power belonging to congress.

Coming now to the facts of this case, find the alleged "original package of commerce" to be a small tub of oleomargarine containing 10 pounds, and in fact sold to consumer for use, as an article of food upon his table. It is true that the defendant treats his trade as one carried on at wholesale, but the facts of the special verdict show that this is not because he supplies dealers, or sells in large quantities, by shipment, but because he treats the little tubs and packages he sells his customers as "original packages of commerce," and lawbreaking traffic as "interstate commerce." He does not "break bulk," by taking a pound out of a package, and weighing it on his scales, for the supply of a customer, requires him to take a whole tub,—whether of ten pounds, or of two, or of one, is immaterial, but it must be a whole package, as it was put up at the factory. If the pound bottle or the pound package has not been opened and divided before the sale, the contention is that it has not become a part of "the common mass" of property entering into the ordinary business of the citizens of the state, but is an original package, under the protection of congress, as interstate commerce. The question to which we are now brought is the same that was encountered in *Com. v. Schollenberger*, 156 Pa. St. 27 Atl. 30. It is whether a package intended and used for the supply of the retail trade is an "original package," within the protection of the Interstate Commerce Cases. We held in that case that a manufacturer puts up his products in packages evidently adapted for and intended to meet the requirements of an unlawful retail trade in another state, and sends them to his own agent in that state, for sale to consumers, is not engaged in interstate commerce, but is engaged in an effort to carry on a forbidden business by masquerading in a character to which he has no honest title. We are not dealing with the legislative question. Whether the traffic in oleomargarine is injurious, and should be restricted, is a question that has been decided for us. It has been declared injurious. It has been placed under restrictions. The restrictions have been held to be a valid exercise of the police power both by this court and the supreme court of the United States. Our question is whether this valid restriction can be enforced, or whether the transparent trick of putting up oleomargarine in small packages, in another state, so that it can be sold at retail to consumers, as an article of food, will clothe an unlawful retail traffic with the coat of mail belonging to honest, legitimate, interstate commerce, and set the police laws of the state at defiance. In disposing of this question, we say as follows: (1) The character of the package, whether original or not, is a question of fact when there are facts to be passed upon.

bearing upon this question, and should go to the jury. (2) It is a question of law when the facts are agreed upon, or presented by a special verdict, as in this case, and should be decided by the court. (3) It is fair to presume that a package was intended, by him who devised it, for the purpose for which he uses it in his own business. (4) A package devised by a nonresident manufacturer, or put up by him, adapted for sale at retail to individual consumers,—such, for example, as a flask of whisky, or a tub or pail or roll of oleomargarine,—and actually sold by him or his agent to the consumer for use as an article of food or drink, in violation of the laws of the state where such sales take place, is not an "original package," within the meaning of the law relating to interstate commerce. (5) The punishment of such sales, under the police power of the state, is not an interference with the powers of congress, or with the commerce between the states which is protected by the constitution of the United States. The judgment is reversed, and judgment is now entered on the special verdict, in favor of the commonwealth. The record is remitted, that sentence may be imposed according to law.

COMMONWEALTH v. SCHOLLENBERGER.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

Appeal from court of quarter sessions, Philadelphia county.

(George Schollenberger was prosecuted for selling oleomargarine in violation of Act May 21, 1885. From a judgment for defendant on a special verdict, the commonwealth appeals. Reversed.)

A. Morton Cooper, Carroll R. Williams, and George S. Graham, Dist. Atty., for the Commonwealth. A. B. Roney and Richard C. Dale, for appellee.

WILLIAMS, J. This appeal is from a judgment entered upon a special verdict in the same form as that considered in the opinion just filed in *Com. v. Paul*, 33 Atl. 82. The questions raised are the same, and the same judgment must be rendered. The judgment is reversed, and judgment is entered in favor of the commonwealth, upon the special verdict. The record is remitted for purposes of sentence and execution.

COMMONWEALTH v. PAUL. (No. 105.)

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

Appeal from court of quarter sessions, Philadelphia county.

George E. Paul was prosecuted for selling oleomargarine in violation of Act May 21, 1885. From a judgment for defendant on a special verdict, the commonwealth appeals. Reversed.

A. Morton Cooper, Carroll R. Williams, and George S. Graham, Dist. Atty., for the Commonwealth. Richard C. Dale and Henry R. Edmunds, for appellee.

WILLIAMS, J. The questions raised in this case are identical with those just disposed of in *Com. v. Paul* (in which an opinion is this day filed) 33 Atl. 82. For reasons there stated the judgment is reversed, and judgment entered in favor of the commonwealth on the special verdict. The record is remitted for purposes of sentence and execution.

CITY OF BRADFORD v. FOX.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

PAVING—INVALID ORDINANCE—ESTOPPEL.

1. The provision of Act May 23, 1889 (P. L. 323) art. 5, § 10, that councils shall not order a street to be paved at the cost of abutting owners unless an ordinance therefor be passed by two-thirds of each branch of the councils, in which case they may direct the improvement at the cost of the owners, without petition, is a limitation on the power of the councils.

2. One is not estopped to allege invalidity of an ordinance providing for paving at the cost of abutting owners, because not passed by the number of votes required by Act May 23, 1889 (P. L. 323) art. 5, § 10, merely because, before its passage, he opposed the paving of the street with stone, as originally proposed, expressing a preference for brick, which the ordinance, when passed, provided for.

Appeal from court of common pleas, McKean county; A. G. Olmsted, Judge.

Proceeding by the city of Bradford against J. B. Fox to enforce a lien for paving a street. Judgment for plaintiff. Defendant appeals. Reversed.

T. A. Lamb, Eugene Mullin, and T. F. Mullin, for appellant. Wm. Wallace Brown and Rufus B. Stone, for appellee.

STERRETT, C. J. On the trial of this *scire facias*, the plaintiff gave in evidence, under objection, its statement of claim, registered under the provisions of article 15, § 22, of the act of May 23, 1889 (P. L. 323), and then rested. The learned trial judge thought a *prima facie* case in favor of the plaintiff was thus presented, and for answer thereto the defendant introduced evidence proving that the alleged ordinance, under which the paving was done, was not passed by a vote of two-thirds of all the members of each branch of councils, as required by article 5, § 10, of said act. After providing for grading, paving, etc., at the cost of abutting property owners, etc., that section declares: "Councils shall not order any street, lane or alley, or part thereof to be paved or macadamized at the cost of the owners whose lands front upon the street, lane or alley, or part thereof to be improved, unless the ordinance for such improvement shall have been passed by a vote of two-thirds of all the members of each branch of councils, in which case councils may direct the improvements to be made at the cost of the owners without petition," etc. This provision is not merely directory. For obvious reasons, it is clearly a limitation of the power of coun-

cils, and should be rigidly enforced whenever they attempt to transcend their authority. In this case, the paving was not petitioned for by the property owners on the line of the proposed improvement. It was clearly and conclusively proved, by the record of councils, that the ordinance in question was declared passed and approved by the mayor in utter disregard of the law. The learned trial judge, in affirming defendant's first and second points for charge, held, in substance, that the verdict must be for defendant, unless he had estopped himself from setting up such defense. In the language of these points, the jury were instructed that, if "the ordinance did not receive two-thirds of the votes of all the members elected to each branch of councils, then the city never acquired jurisdiction to pave the street in question at the expense of the owners of the property fronting thereon, and the verdict must be for the defendant," and, "to have been legally passed, said resolution and ordinance must have received at least four votes in the select council and seven in the common council, and if passed by a less number, said resolution and ordinance were not legally passed, and the verdict must be for the defendant." As to the facts of which these points are respectively predicated, the uncontroverted proof, by the records of councils, was that, on the third reading and final passage of the ordinance, it received only three votes in the select branch and six in the common branch,—less than a two-thirds vote in each branch of councils.

The only answer the plaintiff could make, or attempted to make, to this otherwise conclusive defense, was that, by certain acts of the defendant, he was estopped from setting up the manifest invalidity of the ordinance. As to the acts of the defendant which are alleged to constitute estoppel, the testimony was so conflicting that the court deemed it necessary to submit the questions of fact involved to the jury, with instructions which appear in the general charge. Without referring specially to said testimony, it is sufficient to say that a careful examination of all the evidence that has any bearing on the subject of the alleged estoppel, and viewing it in its most favorable light from the plaintiff's standpoint, we are convinced that it is wholly insufficient to justify the submission of that question to the jury. Defendant's seventh and eighth points, requesting the court to charge, in substance, (1) that the evidence was insufficient to estop defendant from setting up the invalidity of the ordinance, and (2) that, under all the evidence, the verdict must be for the defendant, should both have been affirmed without any qualification. The acts of alleged estoppel consist almost exclusively in defendant's opposition to paving the street with stone instead of brick, as was at first proposed; and that occurred a considerable time before the passage of the void ordinance. When councils

were proposing to pass an ordinance to pave the street, defendant, in common with other interested property owners, had a perfect right to express his preference for a brick pavement, and to use all fair and honorable means to that end. If he did anything more than that, the testimony fails, to show it; and that was all done in expectation of the passage of a valid ordinance, under which such improvement could be legally made. There is not a scintilla of evidence to the contrary. The regular passage of a proper ordinance, and approval thereof by the mayor, were absolutely necessary to the validity of the proceedings to pave the street. No one knew this better than members of the councils, and it was their especial duty to see that the ordinance was regularly and legally passed. There is no evidence that the defendant, or any one else, interfered with them, or any of them, in the discharge of that strictly personal duty and obligation. In the absence of such an ordinance, without even an allegation that defendant induced the municipal authorities to pass the invalid ordinance, or to take any action thereunder, and without a particle of evidence that he knew of the defect in its passage, it would be grossly unjust to say he should be estopped from setting up, as a defense, the manifest invalidity of the ordinance under which the work was done. We fail to discover in the testimony anything from which a single element of estoppel can be fairly and justly found. Judgment reversed.

DAVIDSON v. LAKE SHORE & M. S. RY. CO.

(Supreme Court of Pennsylvania. Oct. 28, 1895.)

RAILROAD CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

As plaintiff approached a railroad along a highway which crossed it obliquely, he stopped two rods from the crossing, looked and listened, heard a train approaching from one direction, which, on coming in sight, proved to be on a parallel road, 125 feet beyond the first road, but heard or saw none coming from the opposite direction. After the train had passed, he drove on, and was struck by a train coming from the opposite direction, which might, as far as obstructions were concerned, have been seen while it was distant from the crossing 650 feet, which distance the train, going 15 miles per hour, would travel in 30 seconds. No signal was given, and there was at the time a drizzling rain. *Held*, that the question of contributory negligence was for the jury.

Appeal from court of common pleas, Venango county.

Action by John C. Davidson against the Lake Shore & Michigan Southern Railway Company for personal injuries. Judgment for defendant, and plaintiff appeals. Reversed.

J. H. Osmer, A. R. Osmer, and N. F. Osmer, for appellant. McCalmont & Osborne, for appellee.

WILLIAMS, J. This appeal is from a judgment entered upon a compulsory nonsuit. The question raised by it is whether the existence of contributory negligence on the part of the plaintiff is, upon the evidence that was before the court, a question of law upon which it was proper for the court to pass, or a question of fact to be submitted to the jury. It may be stated as a general proposition that, where the facts are simple, and the evidence by which they are presented is involved in no uncertainty, their legal value is for the court to determine; but, where the evidence is conflicting, or the facts are left in doubt, the conclusions are to be drawn by the jury. Illustrations of both branches of this proposition are abundant in our own cases. In *Mulherrin v. Railroad Co.*, 51 Pa. St. 366, the plaintiff was struck by an engine while he was walking upon the railroad track. This fact was not denied. We held as matter of law that he was guilty of contributory negligence, and could not recover against the railroad company. In *Moore v. Railroad Co.*, 108 Pa. St. 349, the plaintiff, passing along the highway, came to a railroad crossing. He saw a train coming upon one of the tracks. Instead of waiting in a place of safety, he advanced to the space between the tracks, and while standing there was struck by an engine moving in an opposite direction to the train he was watching. We held that it was negligence per se for the plaintiff to put himself unnecessarily in a place of danger between two tracks, and that negligence on the part of the company in the failure to give notice of the approach of the engine was not enough to justify a recovery. The plaintiff's contributory negligence was plain, and stood in the way of his recovery. The same state of facts was presented in *Marland v. Railroad Co.*, 123 Pa. St. 487, 16 Atl. 624; *Railroad Co. v. Mooney*, 126 Pa. St. 244, 17 Atl. 590; and in *Connerton v. Canal Co.* (decided at the last term, and not yet officially reported) 32 Atl. 416. In all these cases the injured person was struck by a train on the instant of stepping on the track, and at a crossing where the train could have been seen for a considerable distance if the injured person had looked to see if it was approaching. We held in these cases that the presumption that the injured person did stop, look, and listen was rebutted by the facts; and that, as no one possessed of the senses of sight and hearing could have looked and listened without both seeing and hearing the approaching train, which was in plain view, and almost on him, there was a legal presumption that he did not stop, look, and listen, but negligently stepped in front of the train, which he might have seen and heard if he had tried. A similar state of facts was encountered in *Myers v. Railroad Co.*, 150 Pa. St. 386, 24 Atl. 747. The injured person drove in front of a freight train moving at the rate of eight miles an hour backward, but with a headlight on the rear car, by which he was struck. The train was in full view for a third of a mile. It was in the night. The head-

light must have been within 80 feet of him at the point where he should have looked, and, had he looked, it was impossible not to see it. He drove on the track, and was instantly struck. He testified that he stopped, looked, and listened as he approached the crossing, and neither saw nor heard the train. This was plainly impossible, in view of all the circumstances. "*Res ipsa loquitur.*" The facts spoke a language that could not be misunderstood or disregarded. We said he was guilty of contributory negligence as matter of law, and could not recover. In all these cases, and in others that might be cited, the facts were undisputed. But there is another large class of cases in which the facts were disputed or involved in doubt, and in these we have uniformly held that the question of contributory negligence was for the jury. In *McNeal v. Railroad Co.*, 131 Pa. St. 184, 18 Atl. 1026, there was doubt as to the proper point at which the plaintiff should have stopped, looked, and listened, and we held that whether he exercised the proper degree of care was a question of fact for the jury. The same question was raised upon substantially the same facts in *Ellis v. Railroad Co.*, 138 Pa. St. 506, 21 Atl. 140, and in *Whitman v. Railroad Co.*, 156 Pa. St. 175, 27 Atl. 290, and the same rule was held. To the same effect is *Smith v. Railroad Co.*, 158 Pa. St. 82, 27 Atl. 847, and *Link v. Railroad Co.*, 165 Pa. St. 75, 30 Atl. 820, 822. In all these cases the parties injured drove directly in front of a moving train, and were injured. If that single circumstance was enough to dispose of the question, regardless of the surrounding circumstances, the plaintiff in each of these cases would have been denied access to the jury. But it is not enough. There must be no doubt or uncertainty about the facts attending the accident in order to justify the courts in treating the question of contributory negligence as one of law. In *McNeal v. Railroad Co.*, supra, both branches of the general proposition stated above were recognized, and we said that the rule that a plaintiff cannot recover if, in spite of what his senses must teach him if he uses them, he steps in front of a moving train, is a rule that will not be relaxed or pared down by exceptions; but that it is applicable only to clear cases, and, where the question is not clear upon the evidence, it is for the jury.

We come now to inquire to which class of cases the one under consideration belongs. The evidence shows that there are two parallel lines of railroad on the same side of the Allegheny river with the public road along which the plaintiff was driving. These are the New York, Pennsylvania & Ohio, which is nearest the river, and the defendant's road, which is about 125 feet north of the other. Going towards Oil City the public road is north of both the railroads until the crossing where the accident occurred is reached. As the crossing is approached, the public road changes its direction, and approaches and crosses the defendant's road obliquely. From this point it con-

tinues on towards the crossing of the New York, Pennsylvania & Ohio Railroad, which is several rods away. The plaintiff and his daughter, who was with him in the wagon, testify that at about two rods from the crossing he stopped, looked, and listened. They heard a train approaching from the direction of Oil City, which presently came in sight; but neither saw nor heard any train approaching from the opposite direction. They watched the train as it came near them until they saw that it was on the more southerly of the railroads, and when it passed drove on the crossing of the defendant's road, and were struck by a train coming from the opposite direction. The evidence, as it stood, showed that the defendant's train gave no notice of its approach to the crossing by whistle or bell. The train could have been seen for about 600 to 650 feet if attention had been on it at the proper moment; and this distance would have been covered by a train moving at the rate of 15 miles per hour in about 30 seconds. The day was rainy, and, in the language of several of the witnesses, "it was drizzling" at this time. Upon these facts the court below held that the legal presumption and the positive testimony of the plaintiff and his daughter to the effect that the plaintiff did stop at a proper place, look both ways, and listen for an approaching train, was rebutted, and that the mere fact that the plaintiff drove in front of a moving train established his contributory negligence, as matter of law, and deprived him of the right to recover for the injury sustained. This was a mistake. The case belongs to that class of cases of which *McNeal v. Railroad Co.*, supra, is an example, and the question of defendant's contributory negligence was for the jury. The testimony of the plaintiff and his daughter may be true, and the approach of the train from the east may have arrested their attention after they had looked both ways along the defendant's road, so that the approach of the train from the west without whistle or bell was unnoticed. The inferences to be drawn from the facts are for the jury. It is for them to say, in view of all the circumstances, whether the plaintiff did in fact stop, look, and listen; and whether, when the nearness of the tracks of the two roads, the approach of the train from the east, the character of the day, and the absence of signals by the train coming from the west, are considered, the plaintiff exercised the measure of care which the law requires of him. The judgment appealed from is reversed, and a venire facias de novo is awarded.

ARTHURS v. BRIDGEWATER GAS CO.
(Supreme Court of Pennsylvania. Oct. 28, 1895.)

ACTION FOR DAMAGES — RETURN OF MONEY RECEIVED FROM SETTLEMENT.

Defendant requested an instruction that if plaintiff received any of the money paid a cer-

tain person by defendant, knowing then or afterwards that it was part of that paid in settlement of the claim in controversy, and had not returned, or offered to return, it, she could not recover. *Held*, by a divided court, properly qualified by a condition that she learned prior to bringing the action that the money was part of the consideration of the settlement.

Appeal from court of common pleas, Beaver county.

Action by Mary Arthurs against the Bridgewater Gas Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The charge of the court below was as follows:

"This is an action of trespass brought by Mary Arthurs against the Bridgewater Gas Company to recover damages for an injury which she sustained, as alleged, on the 1st day of November, 1892, by an explosion of gas, which caused the house in which she lived to be blown up, and which, it seems, caused the death of two children,—one the child of the plaintiff, and one the child of Mrs. Hewitt,—and also injured the plaintiff in this case. The plaintiff in this case, it seems, resides in Beaver Falls, in this county, and was occupying a residence there at the time when this explosion occurred. Close to the residence of the plaintiff was the house of one Henry Hewitt, and, upon the day in question, Mr. Hewitt had a party there (a plumber) for the purpose of attaching his gas pipe to his mixer in the cooking stove, in order that he might use the gas of the defendant company for fuel. About one o'clock, it seems, on that day, the defendant company sent Oliver Clark (one of their employes) to the premises, whose purpose in going there was to turn on the gas into the house of Henry Hewitt. It is not seriously disputed but that he went there about one o'clock on that day, and asked Mrs. Hewitt for a pick and shovel, saying that he intended to turn on the gas. He went out, and, as claimed, returned in a few minutes, and stated to the plumber who was engaged there that he had turned on the gas. Shortly after this Mrs. Hewitt testifies that she smelled gas very strongly around the premises,—on the outside of her premises, and in the vicinity of the house occupied by the plaintiff in this case; and some time between that and the time of this explosion (the exact time, I cannot mind, and it is not very material) she took one of her children over to the house of the plaintiff in this case, and says that at that time the gas smelled very strongly. She returned, and, as I understand it, just shortly before the explosion occurred she went out, and she had hardly gotten out before, all of a sudden, the explosion took place; and she saw the house of the plaintiff enveloped in flames, and found afterwards that her child was killed, as well as one of the children of the plaintiff in this case, and the plaintiff was badly injured. Her arms, up as far as her elbows, and her hands, were burned in a terrible manner, as you have seen when she

was on the witness stand. Her face was badly burned, and she sustained very serious injuries. About that there can be no question. Now she seeks to recover from the gas company for the injuries she has thus sustained, claiming that it was the fault of the gas company that this explosion occurred. And if it was the fault of the gas company, and wholly their negligence, without any contributory negligence on her part, and there were nothing else in the case than that question, then she would be entitled to recover. However, even though there was any damage in this case, yet, before she could recover for the injury or injuries which she has sustained, you would have to be satisfied, from the evidence, that the explosion was caused by the fault and neglect of the gas company; and that there was no fault on her part which contributed in any degree to the accident.

"The first question, then, you will determine from the evidence in this case, is, was this explosion the result of gas which flowed in her house, through the pipes of the defendant, the result of the negligence of the company or the negligence of the company's employees? Did the employé of the defendant company, by mistake, turn on this gas which caused this disaster? This question, at the very outset, is seriously disputed in this case. On the part of the plaintiff it is alleged, and is testified to by some witnesses, that the employé came there, as I stated before, about one o'clock, for the purpose of turning on the gas; that he went out, ostensibly, for that purpose, saying he was going to do it; and that he returned, and said that he had turned it on. Now, this was about one o'clock. The explosion, it would seem from the evidence, did not take place until between three and four o'clock. A period, therefore, of two hours, at least, or two hours and a half, intervened between the time when it is alleged he turned on the gas and the time of the explosion. During this period the young man in the employ of Mr. McKean, the plumber, continued on the premises of Mr. Hewitt. Just exactly what he was doing there all this time is not very clear from the evidence, but that he was there during this entire period is not disputed. The plaintiff alleges that this evidence he has adduced clearly shows that this gas must have been turned on by the employé of the defendant company, while, on the other hand, it is seriously contended by the defendant company that that was not the fact, but that this other young man, who was there engaged in plumbing, in attempting to attach the gas pipes to the mixer, may have done it, because he had the opportunity to do so. He had the opportunity, because he was there during all that time, as they claim, and that he had some for a wrench,—such a wrench as is used in cases of that kind for turning on and off of gas at streets. They also allege, on the part of the defense, that it could not have been occasioned by the turning on of the gas by Oliver Clark,—that he could not have done

it,—inasmuch as two hours and a half, or at least more than two hours, intervened between the time when it is alleged he did so and the explosion, and, if he had made the mistake, that the explosion would have taken place much earlier. And they fortify that position by calling an expert, whose testimony you have heard, who testifies to the quantity of gas that would have gone through that size pipe,—which, I believe, was three-quarters of an inch,—and that it would take, according to his testimony, but a very few minutes until the gas mixed with the air would be in an inflammable condition, and that, in coming in contact with the least fire, would cause an explosion. He claims that, if that amount of gas would continue for a period,—I believe he said 10 or 15 minutes,—that it would enter through an ordinary dwelling, and, if there was fire there in a certain condition, that it would ignite within that time, and cause an explosion. On the part of the plaintiff, however, it is alleged, in reply to this, that there was no fire in the kitchen proper, but that there was some opening (I do not know just what it was,—some little opening) by which the gas could freely enter the kitchen, while the dining room, in which the fire was, was a close room; and they therefore say that a sufficient quantity of the gas, although it had been escaping for so long a period of time, did not enter the dining room (which was also a kitchen, at that time used as a dining room), and that a sufficient quantity did not get in there, until Mrs. Arthurs went to open the door communicating with the kitchen, and that by reason of her doing so the gas suddenly entered through the door, and came in contact with the fire which was in the dining-room stove, and thus caused the explosion. Now, if it was true, gentlemen, that, although it was a tight room, that if that gas had been escaping into the outer kitchen for a period of two hours and a half, and a sufficient quantity would have entered in a much shorter time to have caused the explosion, then, of course, it could not have been possible that the gas had been turned on that long a time or period of time. But if, by reason of the character of the room, a sufficient quantity could not have entered—that is, a quantity sufficient according to the testimony of the expert—to have caused the explosion in a shorter time, then the defendant's theory on that point would not be correct. Now, this is a question for your determination, entirely. And, in determining a fact of that kind, you should not only take the evidence, but you must take the circumstances, also, into consideration, and from the circumstances that have been testified to, in addition to the direct testimony, determine which is the true theory. Is it true that Oliver Clark, the employé of the defendant, turned on that gas at one o'clock, and no explosion occurred until half past three, and yet, notwithstanding this lapse of time, the gas escaping through

this ¾-inch pipe was the cause of the explosion? Is it true? Because, if it would not have been possible for this gas to have been escaping all that length of time, and delaying the explosion as long as it did, why, then, that is a circumstance in this case which you have to consider, in determining whether the witnesses tell the truth in this case.

"There are a variety of circumstances in addition to what I have mentioned, that have been testified to in this case, you must also consider. The condition in which these boxes were found outside: What does the evidence show in reference to the box or boxes? Were they both turned on, or was but one turned on? If so, which one, and when was it done? While I cannot recall to you everything, it is your duty, before you arrive at a verdict, to recall all the testimony, and see whether this explosion occurred by reason of the gas that had been turned on, or alleged to have been turned on, at the hour of one o'clock. Because, if it did not occur by reason of that fact, then there is no evidence in this case that the company would be to blame at all. Although it is a fact undisputed that the explosion was caused by gas being ignited, yet if the defendant company were not to blame for that,—if it was not the result or mistake of their employé turning on the wrong box, or whatever you may term it,—the company then is not liable. If it were caused by any other party than the employé of the company, or if it were caused by any circumstances over which the company had no control, the company is not liable. They are not only liable for their own acts, but the acts of their employés. If the evidence does not satisfy you that it was done by the employé of the company, then your verdict must be for the defendant. But if, on the contrary, you should, after carefully weighing the testimony in this case, come to the conclusion that it was the result of Mr. Clark's carelessness in turning on, by mistake, the gas at the wrong box, then, unless you should find that there was contributory negligence on the part of the plaintiff, you would have to find for the plaintiff. Negligence is the absence of care under all the circumstances. And I might say to you here that in a case of this kind you have a right to determine what was the duty of the company in the premises, and what was the duty of the plaintiff, also. I do not remember of any particular testimony relating to the question of contributory negligence; by which I mean such negligence on the part of the plaintiff as in any degree contributed to the injury complained of. If there is any, however, and you would be satisfied from it that the plaintiff herself had contributed in some measure, by her own fault or negligence, to the injury, in any way, then she could not recover.

"Now, gentlemen, there has been considerable evidence in regard to the pipes that led into the house of Mrs. Arthurs. If you remember,—and I presume, probably, you do

better than the court does,—that the pipe which had been connected with the stove in that house was detached before Mary Arthurs, the plaintiff, took possession of the house. Now, whether anything had been done afterwards with the piece of pipe that was left there, or with the pipe that ran into her house, by which this accident was in part produced, or not, is a fact which you may determine, if you can find any evidence in this case that is satisfactory upon that question.

"I apprehend that both parties, in a case of this kind, might have some duties to perform. On the part of the company, it would strike me that it would be their duty to use the utmost care in turning on gas, so as not to make a mistake and turn the gas into the wrong house. While, perhaps, on the part of the plaintiff, it might be her duty to be careful, if there were any pipes leading into her house from the main in the street, that those pipes should be properly closed. I do not say that such was the case here, because these pipes had been detached before she got into possession of the premises. But if it were left open, and in such a condition that any little mistake made in turning it on would run all the gas into the house, and be liable to create an explosion, then such a thing as that, if they knew it, and permitted it to remain in that way, might be considered, if there was an injury caused thereby, as being guilty of contributory negligence. But there is, as I said, no evidence in this case that this woman knew anything about it, as the detachment had been made before she took possession of the premises. If there is any such evidence in the case, however, it is for you to determine from it how far she might have, in any manner, contributed by her fault to the injury in controversy.

"We apprehend, probably, the main question will be the question of turning on this gas. How is it,—whether it was turned on, as claimed by the plaintiff here, by Oliver Clark, the employé of the defendant? For if it was, as I said before, it would seem to me that it would be pretty strong evidence of negligence, at least, if not almost conclusive upon that question. However, this is a fact for you to determine.

"You must be careful, in a case of this kind. Because it happens to be a corporation that is the defendant is no reason why it should be mulcted in a large amount of damages, unless the injury was produced by the act of the company or its employés. Because a serious injury happened to have resulted from an accident here, and one which we all regret, is no reason why the company ought to pay, if the company is not at fault. We must not let our sympathies run counter to justice. We do naturally sympathize, but we must not permit it in a court of justice. Somebody may be liable here, but you have nothing to do with that, if it is not the defendant. We might as well close our halls of justice, if we permit verdicts to be rendered simply because one

party is rich and the other poor, and the poor party sustained the injury and received the verdict. Unless the evidence is of such a character as to satisfy your minds, after divesting yourselves of all prejudice or sympathy, if any you have, that the company is guilty of negligence, or that the employees of the company are guilty,—and, of course, the company is liable for the acts of its employees,—then you should not hold the company liable.

"If you come to the conclusion that the company was liable, then there is still another question for you to determine, before you can give a verdict in favor of the plaintiff, and that is the question of compromise. Now, on the part of the defendant, it is alleged that although they claim they are not liable, but, if they were responsible, that in order to avoid litigation, or in order to prevent a lawsuit, they effected a settlement with the plaintiff in this case. Now, I would say to you, gentlemen of the jury, that if they effected, or attempted to effect, a settlement; whether they succeeded in either case; whether they merely made the proposition, or attempted to make the settlement, or did actually effect it,—it does not matter much,—you are not to consider that upon the question of liability, even if you should come to the conclusion that the settlement was not valid. They had a right to buy their peace. It is commendable for parties, if there is no fraud practiced, for one or the other to effect a settlement, rather than have them come into the courts. Parties themselves ought to know their rights better than courts or juries can tell them. And therefore, where a fair settlement has been made in such a case, it should be enforced by courts and juries. It must, however, be a fair settlement; that is, it must be a settlement made by competent parties, and must not have been procured by fraud practiced by one party on the other. And if there was a settlement effected in this case, gentlemen,—that is, a valid one,—it will end this case, and ought to end it, too.

"Now, let us see, for a moment, what the allegations of the one party and the other are in this respect. The defendant has produced in evidence before you a release signed not only by the plaintiff, but by her husband and her husband's brother, in which the consideration of two thousand dollars is acknowledged to have been received, and which purports to be a full and complete settlement of all matters in controversy in this case, or of all matters pertaining to the injuries for which a recovery is asked in this case, as well as the claim of the husband for his damages by reason of the death of his child, and the loss of the service of his wife. This settlement was mainly procured by Father Burns, acting, as he claims, as agent of the plaintiff in this case. Much has been said in the argument of counsel on the one side and the other in reference to the fact as to who made the suggestion of getting Father Burns to intervene.

Now, I do not regard that as very material. Those might be matters which you might consider as bearing upon the credibility of the witness, but the material matter is whether Father Burns had authority to make a settlement. Was he authorized by Mary Arthurs, the plaintiff, to make this settlement? Now, Father Burns testifies that he went there, and that she said that she would be satisfied with any settlement he made, or something to that effect. I may misquote the evidence, but it will be for you to correct me. At all events, according to his testimony, she assented to his making an effort in the way of compromising this case; and it virtually amounts—what he testified to—to an agreement on her part to abide by what he did. That is his testimony. There are other questions in reference to the question of authority that I might call your attention to, if I deemed it necessary, but I will only mention one or two little matters. It is alleged that she received a small portion of this money. Now, if she received that money, knowing that it was by virtue of this settlement, that would be a strong corroborative circumstance of the fact that she had authorized this settlement to be made. And there are other matters which you will probably readily recall, and from which you can determine whether Father Burns tells the truth or not. Now, then, it is in evidence here that Father Burns had informed her that a settlement was effected for the sum of two thousand dollars. It is not disputed but that that sum was paid by the company to Father Burns, and it is not disputed but that the husband of the plaintiff in this case has gotten most of the money. These are matters that cannot be controverted. But at the time when the settlement was effected; when the contract of compromise, so to speak, was consummated and executed (that is, when the money was paid),—Mrs. Arthurs, the plaintiff, did not sign the written contract, because, as it was alleged, she was at that time under such physical disability that she could not hold the pen, or do anything with her hands.

"Now, on the part of the plaintiff in this case, they seek to make void this settlement, on the ground that at the time it was procured the plaintiff was not of sufficient mental capacity to make a valid contract. They call a number of witnesses on the part of the plaintiff, who testify that at that time she was laboring under such extreme pain, both mental and physical, that she was not competent to understand what she was doing. This period of time continued for about three weeks from the time of the fire, which would bring it a few days past the time when this contract was made and signed by the other two parties,—the husband and the brother. On the part of the defendant, however, it is claimed that she was only physically incapable of executing a contract of that kind; that mentally she knew what she was doing, but was physically incapable of writing. And they rely upon the testimony of Father Burns,

who had the conversation with her, and who tells you she talked as intelligently to him then as at any other time, but that she was in agony and in pain. And perhaps the principal reason that is given here by the witnesses for believing that she was incompetent is the fact that she was suffering great pain. Now, we will leave it to you to determine, under all the evidence in this case, whether the reasons given by the witnesses for believing that she was not capable of entering into a contract at that time was sufficient to satisfy you of her mental inability to do it, because it does not make any difference under what physical pain she was laboring, or even mental pain, so long as she knew what she was doing. That is the question. It would not make any difference. And it often occurs, for instance, in men making wills. They make them at the very last moment, when they are suffering the most intense pain and agony, and yet their mind is sufficiently clear to enable them to know what they are doing. Was that the case here? The nurse and some of the other witnesses testify that most of the time she was delirious,—laboring under fever; but they also say sometimes, for a few minutes, she was conscious and was intelligent, as I understood their testimony. Now, if it were true, even, that she was not competent at all times, yet if, at the time Father Burns talked to her, she understood what she was doing, and at that moment she authorized him to make this settlement, and it was made, then we say to you the verdict must be for the defendant.

"Now, in case you should find that she was not competent at that time, but that she had authorized Father Burns to make a settlement, but that at the time she did so her mental condition was such that she was not able to contract, and therefore not legally qualified to appoint anybody to act for her,—although you may find that,—and yet if, subsequently, she ratified what Father Burns had done in her behalf, then she could not complain; she could not recover. Now, did she, or not, afterwards, do anything to ratify this contract? And at the time she did these acts was she in her right mind then, and did she have mental capacity to know what she was doing? Because, if she did, and, with a knowledge of what had been done for her, she afterwards signed this paper, then that ought to end this case, because that was the real consummation of the contract, as far as she was concerned. She had not signed before. It is not pretended here that she was a party to this contract, except through her agent, at the time the money was paid, but that she did afterwards, on the 31st day of December, as the testimony here shows, sign this contract. What was her condition at that time? That will become a serious question, because, if her disability had not been removed, and even assuming that she had not been in her right mind when the contract was entered

into by Father Burns, if that disability had been removed, and she had become conscious and competent to do business of this kind, then when she put her name to this paper she ratified it, and it is her contract, and it binds her. Now, what are the facts in relation to that? Father Burns testifies that the plaintiff, previous to her signing this paper, he was to see her, and told her that a couple of the Bridgewater Gas Company's men would be there the next day, with a paper for her to sign; that she spoke about the money, and that he told her there was one hundred pounds deposited in the bank for her use; and that she was told the other \$1,500 had been paid to her husband. You will recollect the testimony of Father Burns, the questions that she asked him, and the answers he gave her. If this were true, then on the 30th day of December, the day before she signed the paper, she did know just what the arrangement was, because that had been the arrangement; for you will remember that at the time the settlement was made the arrangement was finally consummated, and the money paid; that \$500 should be put to her use, and the other \$1,500 were paid to the husband. Now, Father Burns claims that on the day before the signing of this paper he told her this, and told her the men would be there the next day; the men came the next day, and she signed it. They called a number of other witnesses here to show that at that time she was in her right mind, and that any mental disability she might have had previously had been removed. The same physician who testified for the plaintiff that she was not competent to make a contract the first three weeks after the fire was called by the defendant on the matter we are now talking about, and he then testified that after that she was competent to make a contract, and was intelligent to understand what she was about. Some of the other witnesses called testified to that fact. And in opposition to this testimony the plaintiff testifies herself to the fact that she did not know, and had no recollection, of any such a conversation, and did not know at the time she was signing this paper what it was. I believe that is all the testimony the plaintiff produced to rebut this other testimony,—was the testimony of the plaintiff herself. What, then, are the true facts in the case?

"By Mr. Moore: Recall her testimony of the conversation with Father Burns at that time. She tells the conversation entirely different.

"The Court: When I said, gentlemen, the plaintiff did not know, and had no recollection, of this conversation, I meant the conversation as detailed by Father Burns. She speaks of some other things,—about the doctor and nurse, etc.

"By Mr. Moore: What was said about the two men coming down to see her, and so on?

"The Court: Gentlemen, all I have to say

the plaintiff herself gives a different view of it from what Father Burns does. I do not give you the whole of what she testifies, but, substantially, it is as I have told you. She testifies in contradiction to Father Burns, and speaks of other conversations, but disclaims all knowledge of the conversation he testifies he had with her, and she claims that the conversation in reference to the men coming there was different from what he testifies that it is. Of course, you must consider all this evidence on both sides, and determine where the truth lies. There is another piece of evidence here which bears upon this question of ratification, and the effect you will give to it is for you to determine. It seems that some months before this paper was executed her attorneys wrote a letter to the president of the gas company, which letter was read in your court, and in which it is claimed that this contract had been made, and in which they asked for information in regard to the amount of money she should receive, or that her husband received. And in this letter it is stated that they do not claim anything from the company, or something to that effect. I may not be able to give the exact contents, but the letter you heard read, and I probably given you the substance of it. Now, if that letter was written by the attorneys of Mary Arthurs, and if they got information from Mary Arthurs, upon which that letter was based, then that would show that if Mary Arthurs, at that time, did not intend to claim that this contract was valid. But it would be evidence of ratification on her part, if she gave her counsel information. But it is fair to the plaintiff to say, if counsel would write such a letter, their own responsibility, without any consultation with the plaintiff, and without knowledge, and without communicating facts to her, that it would not bind her. They were acting for her, as her attorneys, and by her information they wrote the letter, it is evidence in this case upon the question of ratification. And I say, again, if she received any money, no matter how small, was, if she knew when she received it, she might say, if she knew before this case was brought—that that money was part of the consideration of this contract, and that that would be evidence of ratification—because she could not keep the money, a part of it, and still avoid the contract; or, if she knew the facts. Of course, if a party can ratify a contract, they know all the facts in relation to it. Hence it becomes material in this case to whom you will believe.

Now, gentlemen, if you should find, then, upon this part of the case, that there was negligence on the part of the defendant—that the negligence on the part of the defendant did not cause the injury in controversy, the verdict must be for the defendant, if you should find that there was

contributory negligence, the verdict would have to be for the defendant. Although, as I said before, I am unable to recall any evidence upon that question, yet there may be some I have omitted. Or, even if you should find that there was negligence on the part of the defendant, and that that negligence caused the accident, and yet should find that this settlement was valid,—the settlement that had been made by Father Burns,—the verdict would have to be for the defendant. Or, even if you were to find it was invalid when made, and it was afterwards ratified by her, then you would find for the defendant. But if you should find that the accident was caused by the negligence of the company, and by that alone, and you should further find that this settlement was invalid, and that it had never been ratified, then your verdict would have to be for the plaintiff. And, if you find for the plaintiff, then the question would be, what is the measure of damages? Ordinarily, in cases of this kind, a plaintiff is entitled to recover all actual moneys expended for nursing and medical attendance, etc., and also to recover for loss of earning power, or any pecuniary loss which the plaintiff may have, and also for pain and suffering and other things. That is the ordinary rule, but that rule is not the rule in this case, because at the time when this accident occurred—at the time when these injuries were sustained—she was a married woman, and was living with her husband. This is shown by the pleadings in this case, as well as by the evidence. In the plaintiff's statement of claim it is alleged that her husband was living with her at that time, and the proof is that he continued to live with her during the time of her sickness. Therefore the husband was entitled to these sums that I have referred to,—relating to her service, and the money expended for nursing and for doctor bills,—because he was liable to pay them. She could not recover, because she was not liable. If she lived with her husband, he was entitled to her services. And, although he may have deserted her since, with that the company have nothing to do. That might have happened if this injury had not occurred, and hence that is no element of damage in this case. We instruct you, therefore, that the measure of damages in this case are such damages as, in your judgment, if you find for the plaintiff, would compensate her for any personal privation or inconvenience to which she has been subjected, and for the pain and suffering which she has endured, and is likely to endure during the remainder of her life. For these matters, and these alone, you can give damages in this case, if you should find for the plaintiff. I can lay down no rule, in such a case, by which you can measure them. The general rule is compensation, in such cases. And you should always be careful to discriminate, and not give damages for something that she cannot recover. It would be a violation of your oaths to give her any damages for the

loss of her time, or her earning power, or her expenses, because, as I said before, the law is very plain that the husband, if he lived with her at the time when this injury occurred, is the party who is responsible for the expenses,—who is entitled to her service, and who was bound to maintain her. She is confined in her claim here to her pain and suffering, bodily and mental, which she has already endured, or likely to endure during the remainder of her life, and, of course, for any privation or inconvenience personally to herself. Her personal deformity, of course, would be an element you have a right to consider; the long pain and her mental suffering. Now, gentlemen, with these remarks we leave the case with you, hoping you will do justice between these parties without fear, favor, or affection.

"A Juror (Mr. Smith): I would like to ask this question: Suppose this lady, Mrs. Arthurs, was rational, and her mind was perfectly clear to enter into a contract, on the day she did, or, rather, enter into an agreement with Father Burns the day previous to the signing of this article or this contract, as you might call it; the following day her mind became cloudy and irrational, as the stage of the disease might have caused it,—then would we suppose her action was a legal one?

"The Court: If her mind was not in condition on the day she signed it. That is the point. If, on the day she signed it, she was not mentally competent to know what she was doing, then the signing of the contract was no ratification.

"A Juror (Mr. Brown): I want to ask one question: Was that gas turned on full or partly,—has it been proven? With a flow of gas in a three-quarter inch pipe, on full, would blow that house up. But was it turned on full?

"The Court: Gentlemen, you will have to recollect from the evidence whether it was or not.

"The defendant has submitted to us the following points, which we will now proceed to answer: 'First. If the jury believe that Mary Arthurs appointed Rev. Father Burns to settle and adjust the claim for damages with the defendant company, which she had sustained by the injury complained of, then all the acts and declarations of said Burns in relation to said adjustment and settlement became the acts and declarations of the plaintiff, and are binding upon her.' Answer. We affirm this point, as a general proposition. 'Second. If the plaintiff appointed Father Burns her agent, as set forth in the preceding point, and in pursuance of such appointment the defendant company, through its president, Merritt Green, in good faith, settled and adjusted the matters in controversy, and paid to said Burns the amount agreed upon in full settlement of all claims of the plaintiff, then the plaintiff cannot recover, even though the agent to whom he paid the

money misappropriated the same.' Answer. We affirm that proposition. 'Third. If the jury believe that the plaintiff did in fact appoint Father Burns to settle and adjust the claim for damages, as set forth in the first point, and that the said Burns did make said settlement with the defendant company, then the plaintiff cannot recover, even if the plaintiff was mentally unsound at the time of the appointment of the agent, unless the plaintiff proves that the defendant had notice of such mental unsoundness, or was guilty of fraud in the transaction.' Answer. We affirm this point, but qualify it by saying that the company would be charged with notice of such mental unsoundness, if they had knowledge of such circumstances as would lead a prudent man to make inquiry, and they failed to make such inquiry. 'Fourth. If the jury find, from all the evidence in the case, that the plaintiff, by reason of mental unsoundness, was not legally qualified to appoint an agent to adjust the matters in controversy for her, but if subsequently, when her mental capacity had been restored, she was informed of what her agent had done in her behalf, and, with that information, signed the release in question, this would constitute such a ratification as would prevent recovery in this case.' Answer. We affirm this point, unless you should find that the contract was obtained by fraud. 'Fifth. If the jury believe that Messrs. Moore, Moore & Reader were attorneys and agents for the plaintiff on the 6th day of May, 1893,—at the date of the letters offered in evidence,—then the plaintiff cannot recover in this case, there being no evidence or claim on her part that she was then mentally unsound.' Answer. We cannot affirm this point, because it asks us to say, as a matter of law, that that would be conclusive, and would prevent a recovery. We cannot so instruct you, gentlemen. We have already stated to you how you may consider that evidence, and we leave it to you to decide; that is, this evidence on the question of ratification, if the letter was written by her authority. 'Sixth. If the jury believe that the plaintiff received any portion of the money paid to Father Burns by the defendant company, knowing at the time she received it, or afterwards learning, that the money so received was a part of that paid in settlement of the claim in controversy, and has not returned, or offered to return, the same, the plaintiff cannot recover.' Answer. We affirm this point, provided you find that she learned that the money was a part of the consideration of this settlement prior to the bringing of this suit. If she learned that prior to the time of the bringing of this suit, she should have returned the money, because she could not keep the money, or any part of it, and also, at the same time, enforce payment of the claim. There is one other matter I may not have charged fully upon. The plaintiff, since I commenced my charge to the jury, has asked me to charge you as

follows: 'That if the jury find that the settlement or release of damages was brought about by fraud or deceit, through the agency of Reverend John Burns, he acting for the defendant, then in that case the release is invalid, and cannot bind the plaintiff.' Answer. If you should find the facts to be as stated in this point, then the legal question involved in it is correct. We affirm this point. If Father Burns was acting for the defendant in this case, and used any deceit or fraud, then the contract is invalid. In fact, if the company, or any of their employés or any of their agents, procured this contract by fraud, it is void. That is about, substantially, what the plaintiff has asked me to charge.

"Mr. Moore: I desire to draw the attention of the court to one matter: If the plaintiff never received any portion of the consideration of that release, then, I take it, it would be your duty to instruct the jury that she was not bound by the release; it was void for want of consideration.

"The Court: That is not in this case. at all. They will either believe the whole of it, or some of it."

The assignments of error were as follows:

"First. The court erred in not affirming, without qualification, the defendant's third point, which point and answer are as follows: If the jury believe that the plaintiff did in fact appoint Father Burns to settle and adjust the claim for damages, as set forth in the first point, and that the said Burns did make said settlement with the defendant company, then the plaintiff cannot recover, even if the plaintiff was mentally unsound at the time of the appointment of the agent, unless the plaintiff proves that the defendant had notice of such mental unsoundness, or was guilty of fraud in the transaction. Answer. We affirm this point, but qualify it by saying that the company would be charged with notice of such mental unsoundness, if they had knowledge of such circumstances as would lead a prudent man to make inquiry, and they failed to make such inquiry.' Second. The court erred in its answer to defendant's fifth point, which point and answer are as follows: 'If the jury believe that Messrs Moore, Moore & Reader were attorneys for the plaintiff on the 6th day of May, 1895,—at the date of the letters offered in evidence,—then the plaintiff cannot recover in this case, there being no evidence or claim on her part that she was then mentally unsound. Answer. We cannot affirm this point, because it asks us to say, as a matter of law, that that would be conclusive, and would prevent a recovery. We cannot so instruct you, gentlemen. We have already stated to you how you may consider that evidence, and we leave it to you to decide; that is, this evidence on the question of ratification, if the letter was written by her authority.' Third. The court erred in its answer to the defendant's sixth point, which point and answer are as follows: 'If the jury

believe that the plaintiff received any portion of the money paid to Father Burns by the defendant company, knowing at the time she received it, or afterwards learning, that the money so received was a part of that paid in settlement of the claim in controversy, and has not returned, or offered to return, the same, the plaintiff cannot recover. Answer. We affirm this point, provided you find that she learned that the money was a part of the consideration of this settlement prior to the bringing of this suit. If she learned that prior to the time of the bringing of this suit, she should have returned the money, because she could not keep the money, or any part of it, and also, at the same time, enforce payment of the claim.'"

W. H. S. Thomson and J. R. Martin, for appellant. Moore, Moore & Reader and J. H. Cunningham, for appellee.

PER CURIAM. The six justices before whom this case was heard being equally divided in opinion, it is ordered that the judgment of the court of common pleas stand affirmed.

SHELLAR et al. v. SHIVERS et al.

(Supreme Court of Pennsylvania. Oct. 28, 1895.)

LANDLORD AND TENANT—OIL WELLS—RIGHT TO FIXTURES.

1. An oil lease, the term of which is for "three years, or as much longer thereafter as oil or gas might be found in paying quantities," extends only for three years, unless gas or oil is found in paying quantities before their expiration.

2. Casings in an oil or gas well are trade fixtures, and become the property of the landowner, if not removed by the lessee during, or within a reasonable time after the expiration of, his lease.

3. Where an oil lease provides that it is to continue for a term of three years, unless oil or gas is found in paying quantities before their expiration, and in that event as long as the productiveness of the well lasts, the words "at any time," in one of its clauses, giving the lessee "the right * * * to remove any or all machinery," refer to that part of the terms which is dependent upon oil or gas being found in paying quantities.

Appeal from court of common pleas, Washington county.

Trespass by Samuel M. Shellar against James S. Shivers, Insell Brenell, and others, to recover for the removal of certain casings from an oil well on property belonging to plaintiff. Plaintiff died pending the action, and his widow and heirs were made parties plaintiff. There was judgment in their favor, from which defendants Shivers and Brenell appeal. Affirmed.

The following opinion was rendered by McIlvaine, P. J., in the court below:

"On the 27th day of October, 1892, Samuel M. Shellar was the owner in fee and was in possession of a tract of land, situated in Buffalo township, containing 255 acres, more or

less. On that day the defendants entered upon said tract of land, against the will and without the consent of the owner, Samuel M. Shellar, for the purpose of taking casing out of a hole that had been drilled for oil and gas in the spring of 1887, and of removing other fixtures which had been used in drilling this well, which produced neither oil nor gas in paying quantities. The casing and fixtures, at the time the well was drilled, belonged to the defendants. Samuel M. Shellar, claiming that this entry upon his land for the purpose indicated was unlawful, brought an action of trespass against the defendant. He having died before that action was tried, his heirs and the defendants have agreed upon the facts, and have submitted them, in the nature of a special verdict, for the opinion of the court. On November 11, 1885, Samuel M. Shellar executed and delivered to J. B. Akin a lease of this 255 acres, for oil and gas purposes. The term was for 'three years, or as much longer thereafter as oil or gas might be found in paying quantities, with the right in the said lessee to enter upon said premises, at any time, for the purpose of mining,' etc. The lease also provided that the lessee had 'the right to remove at any time any and all machinery, oil-well supplies, or appurtenances, of any kind, belonging to the said lessee.' The lessee and those who claimed under him entered under said lease upon this tract of land, and drilled a well, completing it in April, 1887. The well produced neither oil nor gas in paying quantities, and the lessee and his assigns ceased operations on the premises. The engine and boiler used in drilling the well were taken away, but the casing in the well, and other fixtures, were left and remained on the premises, and were there on the said 27th day of October, 1892, when the defendants entered to remove them. The question for determination is, were the defendants trespassers? Had they a right to remove the fixtures connected with and used in drilling this well, which was completed and abandoned as worthless in April, 1887?

"The term was for three years from November, 1885, or as much longer as gas or oil is found in paying quantities; that is, as much longer as gas or oil is found in paying quantities, if found before the expiration of the three years. *Gas Co. v. George*, 161 Pa. St. 47, 28 Atl. 1004. There was no oil or gas found in paying quantities. Therefore this lease expired on the 11th day of November, 1888, nearly four years before the defendants undertook to remove the fixtures which they left behind when they ceased operations; and from the time they ceased operations at this well until the expiration of the lease, over eighteen months' interval. I do not think that there can be any doubt that the casing in an oil or gas well, the derrick, and other appliances used in drilling and operating it, are trade fixtures, and can be removed by the owner or lessee during the term of the lease. On the other hand, I think there can be no doubt that

they are such fixtures that they become the property of the landowner, if not removed by the lessee during the term, or at least a reasonable time after its expiration. The two propositions are both, of course, true, to modification by the agreement of the parties. Are they modified in this case? If they are not, then the defendant has no right to enter upon the plaintiff's land for the purpose of removing the fixtures. The lease provides that the lessee has 'the right to remove, at any time, any and all machinery,' etc., etc. It is claimed that the words 'at any time' must be given the fullest meaning, and that the defendant has the right to remove these fixtures, by agreement of the parties. The lessor, was unlimited as to time, and although their entry to remove the casing was made four years after the lease expired, and five years and six months after the well was completed, and found to be of no use as an oil or gas well, yet their entry and purpose was lawful as they had the right to remove all fixtures at any time. We think that it was not the intention of the parties, as inferred from the language of the lease. The term was for a fixed period, to be extended for an indefinite period, and the extension depended upon what the future might develop. The right to enter at any time, and the right to move machinery at any time, was part of that part of the term that was unlimited; that is, after three years the lessee had the right, at any time, to enter and drill a well, if oil or gas was being produced in paying quantities, and had the right, after the three years had passed, to remove the machinery and fixtures after or when they would cease to produce oil or gas in paying quantities. If this construction is correct, the rule of law as to removal of fixtures must be as in cases where the tenancy is unlimited in duration, as when it depends upon contingency, and that is that the removal must be made within a reasonable time; or, in other words, the law, in such cases, allows the lessee a reasonable time for the removal of fixtures. Here the lessees, if oil or gas was found in paying quantities, would have had a reasonable time within which to drill a well, casing and remove their derricks after it became apparent that the operation of drilling wells was no longer profitable, let this be so long after the expiration of the term. At any time when they thought it would no longer pay to operate their wells which had been producing oil or gas in paying quantities, they had a right to remove the fixtures connected with such wells. Under the terms as we have them in this case, however, the operations ceased on this lease in April, 1887, when a dry hole was found. Nothing was done between the completion of this well and when the lease expired, in November, 1888, and after that four years are allowed to elapse, before an attempt to remove these fixtures was made. In our opinion, this was not a reasonable time. If, under the words 'at any time,' the

could take four years after the expiration of the lease to remove his fixtures, he could as well take twenty years. To say that the lessor could prevent this by giving notice that the fixtures must be moved within a certain time is to read something into the contract that is not there."

John W. Donnan and R. B. Stone, for appellants. T. F. Birch, for appellees.

PER CURIAM. This judgment was entered on the case stated, for the opinion of the court, in the nature of a special verdict. The question involved was whether, under the terms of the lease, the lessees had the right to remove the material, machinery, and fixtures placed by them upon the property for the purpose of drilling the oil well, and remaining there after the expiration of the lease. In a clear, concise, and satisfactory opinion, the learned judge rightly held that they had not; and he accordingly entered judgment in favor of the plaintiffs, as provided for in the case stated. The correctness of this conclusion is so fully vindicated in the opinion that, without further discussion of the subject, we affirm the judgment on said opinion. Judgment affirmed.

FELTS v. DELAWARE, L. & W. R. CO.
et al.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

CHANGE OF VENUE IN CIVIL CASES—REPEAL OF STATUTE—VOLUNTARY NONSUIT.

1. Act April 14, 1834 (P. L. 395), in effect, though not so called in its title, an act relative to change of venue in civil cases brought by and against canal and railroad companies, is repealed by Act March 30, 1875, "relating to and authorizing changes of venue in civil cases," and expressly repealing all prior legislation on the subject.

2. Plaintiff may show his election to take a nonsuit by absenting himself from court when his presence is required there for purposes of the impending trial.

3. Where plaintiff in ejectment shows his election to take a nonsuit by absenting himself from the trial, it is error to allow a jury to be called, and a verdict rendered against him.

Appeal from court of common pleas, Lackawanna county.

Ejectment by Isaac B. Felts against the Delaware, Lackawanna & Western Railroad Company and others. Judgment for defendants, and plaintiff appeals. Reversed.

A. Ricketts, for appellant. W. H. Jessup, Horace E. Hand, W. H. Jessup, Jr., M. I. Corbett, and James H. Torrey, for appellees.

McCOLLUM, J. The questions raised by this appeal are whether the learned court below erred in refusing to direct the removal of the case, under the act of April 14, 1834 (P. L. 395), to the court of common pleas of Pike county, and in calling a jury, and taking a verdict against the plaintiff, in his absence, and after he filed his

written declination to appear and proceed to trial in Lackawanna county. In answering the first question, we are required to consider and determine whether the act of 1834 was supplied or repealed by the act of March 30, 1875, "relating to and authorizing changes of venue in civil cases." The later act was obviously passed for the purpose of giving effect to the constitutional provisions relative to the change of venue in civil cases, and it expressly repealed all prior legislation on the subject. In *Watson v. Railroad Co.*, 83 Pa. St. 251, an effort was made to set aside the removal of a case under the act of 1834 and the act of April 28, 1870 (P. L. 1292), on the ground that the constitution was adopted and in force before the removal, and that the provisions in it relative to the change of venue in civil cases supplied and repealed these acts. The effort failed because, in the opinion of this court, the constitution did not operate, *eo instante*, as a repeal of them; but there was no claim or suggestion by any one that legislation in conformity with its provisions on the subject could not have done so. We have a fair illustration of the professional thought respecting the effect of the act of 1875 upon prior legislation in regard to change of venue in the effort heretofore made in this case to remove it for trial to another county. *Felts v. Railroad Co.*, 160 Pa. St. 503, 28 Atl. 838. The act of 1834 was not called, in its title, an act relative to a change in civil cases, nor an act for the removal of cases brought by and against canal and railroad companies. It was, however, in effect, an act relative to a change of venue in civil cases brought by and against such companies, and may be justly regarded as fairly within the repealing clause of the act of 1875.

It is contended by the learned counsel for the railroad company that the case at bar is not within the purview of the act of 1834, because other parties are made codefendants with it. But, in the view we have taken of the effect of the act of 1875 upon the act of 1834, it is not necessary to consider this contention.

The general rule is that the plaintiff may suffer a nonsuit before or at any stage of the trial, and we are not prepared to say that this case is within any exception to it. "No formality is required as to the manner in which a plaintiff may take a nonsuit. He may absent himself from court when his presence is required, and thus accomplish his purpose." 16 Am. & Eng. Enc. Law, p. 729. This is precisely what was done in the case now before us. Having absented himself from court when his presence was required there for the purposes of the impending trial, he may be considered as having elected to suffer a nonsuit. But we fail to discover anything in the record which justified the learned court below in calling a jury, and taking a verdict against him, under the circumstances appearing in the case. For this reason we are constrained to reverse the judgment. If the plaintiff is desirous of

trying the case in the court in which he brought it, he is at liberty to do so, on withdrawing his declination at or before the time it is called for trial; otherwise a nonsuit may be entered, in accordance with the practice in such cases.

The first and second specifications of error are overruled, and the third specification is sustained. Judgment reversed, and venire facias de novo awarded.

PRYOR v. MORGAN et al.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

GIFTS — EVIDENCE — INSTRUCTIONS — VOLUNTARY PAYMENT — PARTIES — REMEDY.

1. In an action for property which plaintiff claimed as a gift from intestate, plaintiff's evidence that she was threatened with imprisonment, if she did not give it up, is admissible to explain her surrender of it to the administrator.

2. Defendant's evidence, in an action for property claimed to have been given plaintiff by her aunt a few days before her death, that shortly before her last sickness she told plaintiff she could not keep her any longer, and that plaintiff made arrangements to leave, but was detained by deceased's illness, was properly rejected as irrelevant, its purpose not being disclosed by the offer thereof.

3. Where property claimed by plaintiff to have been given her by intestate was surrendered by her to the administrator, on his demanding it, without her disclaiming or making a gift or sale of it to him, her right to recover is not barred on the principle of a voluntary payment.

4. In such case, plaintiff can sue the administrator either as an individual or as administrator.

5. So, too, she may replevy the property, or waive the tort and sue in assumpsit.

6. That counsel, in argument, claimed his client's right to property was through an absolute gift, does not make it error to instruct as to a gift in expectation of death; the evidence tending to prove such a gift, and the pleadings warranting a recovery in case of gift, whatever its nature.

Appeal from court of common pleas, Monroe county; Edwin Albright, Judge.

Action by Emma Pryor against Edward B. Morgan and another, administrators of James B. Morgan, deceased. Judgment for plaintiff. Defendants appeal. Affirmed.

Charles B. Staples, for appellants. John B. Storm and W. A. Erdman, for appellee.

DEAN, J. Emma Pryor, the plaintiff, claimed to recover from defendants the value of certain county bonds, worth \$2,000; shares of bank stock, \$870; school-district bonds, \$600; money and jewelry, \$285; the value of the whole being about \$3,800. All of the property belonged, in her lifetime, to Mercy Morgan, an aged single woman, resident in Stroudsburg, and who died on 10th of January, 1892. The plaintiff, a niece of Miss Morgan, alleged her aunt had made a gift of this property to her about three days before her death; that defendants' intestate, James B. Morgan, as administrator of Mercy Morgan, by misrepresenta-

tion, had induced her to surrender the possession to him, and thereupon converted it to his use. It appeared from the evidence that Mercy Morgan, at her death, was about 77 years of age. Her occupation was that of seamstress. She had, through a long life of industry, economy, and thrift, accumulated this little estate. For nearly all of the last 50 years of her life, she had lived in the family of her sister, Mrs. Ellen Silvara. Emma Pryor, the plaintiff, is a daughter of Mrs. Silvara. She had married some years before, but, during the last four years preceding Miss Morgan's death, had, with her children, occupied the house with her mother and aunt. There was conflicting evidence as to whether the relations between these women, thus situated, were at all times harmonious; but there was also evidence of deep affection on part of the aunt for her niece, which was reciprocated by the niece in such kindness and services as are usually appreciated by the aged and infirm. The aunt often, in the presence of disinterested persons, expressed her gratitude for these services, and declared her intention of giving her niece, at her death, all she had. To an intimate friend of 30 years, Lydia Palmer, she said, two or three years before her death, she would give all her property to her niece; would get a box and put her papers in it; then, only two or three weeks before her death, told the same witness she had done so. Other evidence of a like character, indicative of an intention to make the gift to Emma, was adduced. The illness ending in Miss Morgan's death was of about 10 days' duration, and there was evidence that she was conscious of the serious nature of her illness, and did not hope for recovery. She had in her room a tin box, in which she kept the property sued for. This she constantly had near her, and kept the keys to it under her pillow. On the Friday preceding the Sunday of her death, it was testified by one witness (a boy then 10 years old, the son of Emma Pryor, the plaintiff) that Miss Morgan called his mother to her bedside, and gave her the box, saying: "Here, Emma, take it. It is all I have. I give it all to you;" that his mother took the box, and went out of the room with it. There was proof that the securities, money, and other articles claimed were in the box. There was conflicting evidence as to what took place, and what was said, when the administrator demanded the keys, and took possession of the box; the plaintiff giving evidence tending to show she then asserted her right, and only surrendered the possession because of fear of imprisonment. On the other hand, defendant offered evidence tending to show declarations and conduct of plaintiff inconsistent with her claim now. The learned judge of the court below submitted the evidence to the jury, instructing them that if they believed there was a gift *inter vivos*, or an absolute gift, of the box and contents, or if a gift *donatio causa mortis*,—in expectation of death,—subject to the implied right of revocation if the donor recovered, plaintiff was

to a verdict. As to the character of evidence necessary to establish either, he instructed them they must find there an actual delivery of the box,—a change of physical possession; that the property sued must have been in it at the time of the change of possession; that, if a *donatio causa mortis*, the donor must have been in conscious possession of death, and the donee must have received possession until after the expected death. He further expressly told them that notwithstanding all the testimony tending to show Miss Morgan's affection for her niece, and her expressed intention to reward her by a gift of her estate, yet, of itself, this was insufficient to warrant a verdict; that they believed the testimony of plaintiff's sister, James Pryor, as to the actual delivery of the box, with the expressed intent to give its contents at the time, the verdict must be for defendant. Under the charge, there was a verbatim statement of the plaintiff. The court had reserved, as a question of law, whether there was any evidence which would warrant a submission to the jury to find a gift. Afterwards, in an answer filed, it entered judgment on the verdict at the point reserved; and now defendant moves, pressing 11 assignments of error,—2 of which are rulings on offers of evidence, and 9 are questions and answers to defendant's points. First exception is to the admission of testimony in explanation of plaintiff's surrender of the box to James B. Morgan, the administrator. Plaintiff was told she would be limited if she did not give it up. Defendant objected to the evidence as immaterial. The court admitted it. Plaintiff claimed the property was hers as a gift from her aunt. Defendant might very suggestively ask, "Then, did you give it up to the administrator after her death?" She attempted, by this question, to answer, "Because I was told I would be imprisoned if I did not." Whether this questioner explained her inconsistent conduct as for the jury, but that it was material, obvious, and there was no error in admitting it.

Second assignment: Defendant offered to call as a witness, Mary Sigafus (also a niece of James B. Morgan), who had already testified to considerable length, that Miss Morgan had told Emma Pryor, shortly before her sickness, she could not keep her any longer, and that she would have to get out, and that Emma Pryor had made arrangements to leave, but that her aunt's illness had detained her. This was objected to by plaintiff as irrelevant, and the court sustained the objection. The purpose of the evidence, is not disclosed in the charge. Why she could not keep her niece is not hinted at. The evidence, possibly from some view of the case, may have been relevant, but, taking the offer as it stands, its relevancy is not apparent; and the court is not to convict the court of error in rejecting it, where the purpose is not disclosed in the offer itself.

Third assignment: The court instructed

the jury that although the property was taken from the plaintiff by defendant in his official capacity, as representative of the intestate aunt, at the time believing he had a right to do so, yet, if it was proven the plaintiff was the owner, she was entitled to recover its value, with interest from the date it was taken. Appellants complain that this was error, and *Barr v. Craig*, 2 Dall. 151, *Irvine v. Hanlin*, 10 Serg. & R. 220, and other cases following them, are cited to show that a voluntary payment by one with full knowledge, or the means of knowledge, of his right, cannot be recovered back. But this principle has no application to the facts here. The foundation of plaintiff's right depended on her legal title to specific property. If she made out that title, it was wrongfully taken from her possession, for it is not pretended she disclaimed title to it, or made a gift or sale of it to the administrator. The most that can be said is she permitted him to take it when he demanded it as a right. She was not bound to assert her right by physical resistance. If it was a gift from her aunt, then he asserted an unlawful demand, and the possession which he took in pursuance of it was unlawful. On her statement, she could have replevied it; but she could also waive the tort, and sue in *assumpsit* for its value. On the evidence, there were no equities to enforce. The action was at law to determine the single question, who had title to the box? and the answer to that determined the verdict. And she might bring her action against defendant as an individual, or as administrator, at her election. In *Michener v. Dale*, 23 Pa. St. 59,—a case almost exactly such as this, on its face, and where the suit was against the administrator individually,—this court held, "The property having been converted, and its equivalent only being in the hands of the administrator, the action was well brought in *assumpsit*."

Fourth assignment: This complains of a misstatement of evidence by the court. The learned judge instructed the jury that, to warrant a verdict for plaintiff, they must find either a gift *inter vivos*, or a *donatio causa mortis*, and then adverted to the essentials of proof to establish either. It is urged, the plaintiff did not claim it to be a gift in expectation of death, and therefore the suggestion of such a finding was error. We do not know what plaintiff claimed, except from the statement filed. That simply avers title and right of possession to the property, and that defendant deprived her of it, and converted the property into money, and refused to pay it over. Under this statement she could show title by purchase, inheritance, or gift. She offered evidence which tended to show an absolute gift, and a gift in expectation of death. What counsel claimed in his argument to the jury to be the nature of her right is no limitation on the court. The evidence was all in, and before the jury. That

definition, which counsel often forget, doubtless occurred to the learned judge,—that a court is a place where justice is judicially administered; and as the evidence, in one view of it, tended to prove a *donatio causa mortis*, he instructed the jury on that subject. This not only was his right, but also was his duty.

The fifth to eleventh assignments of error may be considered together. They, in substance, complain that the charge was one-sided, with no adequate presentation of defendant's evidence. We have carefully examined it in the light of the evidence, and are of the opinion the complaint is not well founded. The evidence was, to some extent, contradictory, and the court did not go over it in detail on either side; but the law which, in such cases, so carefully guards the estates of the dead from the rapacity of the unscrupulous, was most pointedly stated, and the jury was instructed to apply it to the evidence before finding as a fact any essential element of plaintiff's case. On every point they were made to understand the presumptions were with defendant, and the burden of rebutting them was on plaintiff. Although concise, it was a clear and impartial charge,—free from error. Therefore all the assignments of error are overruled, and the judgment is affirmed.

FOURTH ST. NAT. BANK v. WHITAKER.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

LIMITED PARTNERSHIPS—RENEWAL CERTIFICATE—FALSE STATEMENTS AS TO CAPITAL—LIABILITY OF SPECIAL PARTNER.

1. Act 1836, § 11, provides that every renewal of a limited partnership shall be certified and recorded, and an affidavit of a general partner be made and filed, and notice be given in the manner required for its original formation; and every such partnership which shall be otherwise renewed shall be deemed a general partnership. Section 8 provides, relative to the certificate and affidavit required on the first organization of such a partnership, that, if any false statement be made therein, all persons interested in the partnership shall be liable for all engagements thereof as general partners. *Held*, that the requirements as to certificate and affidavit, and the effect of false statements therein, were the same in case of renewal as on the first organization, and that, they having in case of a renewal, contained a false statement that the amount of capital contributed by the special partners remained unimpaired and undiminished, the special partners were liable generally, though they supposed such statement was true.

2. The capital originally contributed by special partners to a limited partnership is not, on renewal, "unimpaired and undiminished," though the partnership has merchandise to more than that amount, where it is in fact insolvent.

3. Special partners are, in case of a false statement in the certificate on renewal of a limited partnership, that their contribution remained unimpaired and undiminished, liable on notes of the partnership given after such renewal in place of matured notes issued before the renewal.

Appeal from court of common pleas, Philadelphia county.

Action by the Fourth Street National Bank against Granville B. Haines and others, trading as Haines & Co. There was judgment against defendant William Whitaker for want of a sufficient affidavit of defense, and he appeals. *Affirmed*.

Charles Biddle, Wm. Rudolph Smith, and Geo. Tucker Bispham, for appellant. R. C. Dale and Saml. Dickson, for appellee.

DEAN, J. On the 31st of December, 1891, Granville B. Haines, Richard Wood, Samuel B. Brown, Richard W. Bacon, and William Whitaker, of Philadelphia, by the name of Haines & Co., formed a limited partnership, under the act of 1836, for carrying on a wholesale and retail dry-goods business. The term of the partnership was one year. Richard W. Bacon and William Whitaker were special partners, the others general. The special contribution of capital by each of the special partners, Bacon and Whitaker, was \$100,000,—\$50,000 each in cash, and a like sum in merchandise; their entire contribution as special partners being \$200,000. The articles of association were subscribed by all the partners, duly acknowledged, and recorded in the office of the recorder of deeds for Philadelphia. At the end of the year 1892, under the provisions of the eleventh section of the act of 1836, the partnership was renewed for another year. That section reads thus: "Every renewal or continuance of such partnership, beyond the time originally fixed for its duration, shall be certified, acknowledged and recorded, and an affidavit of a general partner be made and filed and notice be given in the manner herein required for its original formation, and every such partnership which shall be otherwise renewed or continued shall be deemed a general partnership." In the articles of renewal is this averment, referring to their articles of the year previous: "The amount of capital contributed by the said special partners to the common stock was \$100,000, one-half thereof being in cash and the other half thereof being in goods and merchandise, making the aggregate amount of capital contributed by them \$200,000, as designated in the said original certificate; and the same remains unimpaired and undiminished as their contribution to the present renewal and continuance of the said limited partnership, being in merchandise, an inventory and appraisalment whereof have been filed in the court of common pleas No. 3 of Philadelphia county." On the expiration of this renewed partnership at the end of the year 1893 there was another renewal for a year, with like averments and certificate in the renewed articles, which were also made of record, as required by the act. The business was carried on, under this last renewal, until the 26th of March, 1894, when a general assignment for the benefit of creditors was made by the part-

nership. Before the assignment, the Fourth Street National Bank, the plaintiff, became the holder, for value, of six notes drawn by the partnership, each in the sum of \$5,000, payable to the bank's order on demand, and dated, respectively, February 24, March 1, 5, 8, 14, and 21, 1894. These not being paid on demand, the bank brought suit against all the members of the firm as general partners. The sworn statement of claim avers: (1) That plaintiff accepted the notes on the faith of the writing signed by all the members of the partnership and recorded in the office for the recording of deeds the 30th of December, 1893; (2) that said writing set forth that the original contribution of \$200,000 in cash and merchandise by the special partners "remains unimpaired and undiminished as their contribution to the present renewal"; (3) that at the time said writing was made and put of record the entire original capital contributed by the special partners had been consumed and lost in the business, and the partnership of Haines & Co. was insolvent; (4) that the statement that the same remained unimpaired and undiminished was false in fact. The plaintiff therefore averred liability of each and all of the members of the firm as general partners. To this the defendant William Whitaker made affidavit of defense, setting out that on the last renewal of the partnership, on 30th of December, 1893, all the members joined in a petition to the court of common pleas for the appointment of an appraiser of the assets of the proposed renewed partnership, and the appointment was made; that the appraiser under oath reported he had examined carefully and appraised the goods and merchandise of the proposed partnership, and that these included the original contributions of Whitaker and Bacon, the special partners, and the value of the same as merchandise was \$200,000; that the partnership had other merchandise, accounts, and cash more than sufficient to pay its debts; further, that the \$200,000 of merchandise appraised as the original contribution of capital by the special partners was set apart as such, and transferred to the new partnership. The defendant then avers in this preliminary statement of facts: (1) That he, at the time of the renewal, believed the statement and affidavit of the appraiser to be true, and that he (defendant) had done all that was required of him as a special partner. (2) That he is informed and believes the notes were not accepted by plaintiff on the faith of the statement; that the notes in suit are renewals of notes given for partnership debts of 1893, and are but a continuation of the evidence of indebtedness of the older partnership before the articles of December, 1893, for renewal were entered into. (3) That the notes sued on were given without his knowledge or consent, and plaintiff knew, when it accepted them, the general partners had no authority to impose liability on him except as special partner. (4) That he has

no personal knowledge as to any misstatements of fact in the articles of 1893; that he believed the statements of the general partners and of the appraiser, whose duty it was to know, to be true. On the record thus made up plaintiff took a rule for judgment for want of sufficient affidavit of defense. After argument, the court below, in a carefully considered opinion, made the rule absolute, and defendant appeals.

The averment in plaintiff's statement that when the last renewal was signed, the entire capital stock of the special partners had been lost in the business of Haines & Co., and the partnership was largely insolvent, is not denied in the affidavit of defense. It is denied by defendant there was any intentional misstatement on his part. It must, therefore, be here taken as true that, when all the members joined in the representation on the public records that the \$290,000 capital remained unimpaired and undiminished, that statement was untrue in fact. The question, then, is, what effect, if any, does an unintentional misrepresentation of this character have on the liability of defendant as a member of the partnership? As already quoted, the eleventh section of the act provides for the attesting and recording of articles of renewal, and public notice of the same, under the same formalities as are required in the original formation of the partnership. The penalty of a failure to comply with the directions of the act as to the first organization is found in the eighth section, as follows: "And if any false statement be made in such certificate or affidavit, all the persons interested in such partnership, shall be liable for all engagements thereof, as general partners." This court held, in *Haddock v. Manuf'g Corp.*, 109 Pa. St. 372, 1 Atl. 174, that: "This evidently means that the affidavit shall give as full information upon the renewal as upon the original formation of the limited partnership. A mere formal affidavit, setting forth the renewal only, would not give creditors any valuable information as to the condition of the firm, and the object of the act was to provide this notice." *Andrews v. Schott*, 10 Pa. St. 47, is to the same effect, although in this last case there had been the introduction of a new partner, and the decision was rested on the ground that there was the formation of a new partnership instead of the renewal of the old one. But the point is settled by a deliberately considered judgment in *Haddock v. Manuf'g Corp.*, *supra*, that the requirements of the act as to statement and affidavit for renewal are as rigid as in those for the original formation of the partnership. The object of the act was to open a venture to capital with the protection or advantage of restricted liability, but upon a condition that the public should have full means of knowledge as to the amount and character of the venture, and thereby be enabled to form a judgment as to how far the partnership was worthy of credit. Here the record contained

the joint representation to the public of all the partners in December, 1893, that the original \$200,000 remained unimpaired and undiminished, when, through business losses before that date, it had in large part disappeared. We do not consider it material that, as concerns this defendant, the misrepresentation was not intentional; that concerns his ease of conscience, but it neither restricts his liability nor affects the rights of creditors. The act seems to be carefully silent as to any modification of the language which operates to inflict the penalty. It does not say "willfully, knowingly, intentionally false statement," but simply, "if any false statement be made," then all persons interested shall be liable as general partners. As to the nature of such a misstatement as this, it is only necessary to recur to *Haddock v. Manuf'g Corp.*, supra: "When a special partnership is continued or renewed, it must be in the same condition, so far as the special capital is concerned, as when it was originally formed. Such capital must be unimpaired. It must be in such condition as to be available for creditors, and it is the duty of the general partner to furnish this information in his affidavit. If this duty is neglected, the partnership becomes general, and the special partner has no immunity." Clearly, there was a false statement here of a most material fact, and although not known to defendant when he joined in the subscription to the articles, he cannot, for that reason, claim immunity as a special partner. It was his legal duty to know the truth or falsity of statements subscribed to by him, and placed on the public records; and, although ignorance of its falsity may exempt from the imputation of moral turpitude, the statute does not exempt him from legal responsibility.

The distinction drawn by the learned counsel for appellant between impaired and unimpaired capital of business partnerships is without weight in the interpretation of this statute. The object is to give information to the creditor of the financial standing of the partnership when it invites business. Its credit depends on its ability to pay. Its ability to pay depends on the value of assets it can lawfully appropriate in payment. This partnership did have, in December, 1891, \$200,000 capital in money and merchandise, to which the creditor of that term could look for payment of his debts. But in December, 1893, the partnership was wholly insolvent. All its assets were insufficient to discharge its indebtedness. It had \$200,000 worth of merchandise on hand, which was set aside, and called unimpaired and undiminished capital of the special partners. But to whom did this merchandise in equity belong? Certainly to those who had given credit on the strength of it, and it was under a pledge both legal and moral to them for their debts. All that was

needed to enforce forfeiture of the pledge was a judgment ripe for execution. True, the mere physical possession of the merchandise was in the partnership, but the special partners could not have withdrawn from the insolvent firm \$200,000 in cash, and held it against the creditors. How could the partners, all consenting, lawfully put aside for the same partners \$200,000 worth of merchandise? Yet it was represented by the statement this \$200,000 was subject to the claims of future creditors, as if the partnership had been then formed, and the capital first contributed, when the fact was, after having undergone the perils of two years' business, it was impaired to the amount that the debts of the insolvent firm exceeded the assets. Of this important fact the statement contained no hint. As is said in *Vanhorn v. Corcoran*, 127 Pa. St. 255, 18 Atl. 16, where the assets of a partnership largely indebted were turned over as a contribution of capital to a limited partnership: "The whole of it, in equity, was liable to creditors, and could not be withdrawn from them without fraud until the last dollar of the debts of the firm was paid. So that, instead of property, the defendants contributed a mere equity, to wit, whatever was left of the assets of the firm after payment of its debts."

As to the notes sued on being given for notes issued before the filing of the renewal certificate, the evidence of the old debt was extinguished, and a new security given. The general partners had an implied right to negotiate for extension of time on matured notes, and give those of the new partnership, which last was in possession of all the assets of the old.

It is argued by appellant the effect of sustaining the judgment of the court below here will be to discourage the formation and renewal of limited partnerships, because capitalists could not longer invest their money prudently in such business enterprises. We have no fears of such consequence. For almost 60 years limited partnerships have multiplied and prospered in this commonwealth, under an unbroken line of decisions, which have uniformly exacted strict adherence to all the material requirements of the law. The credit of such associations stands deservedly high in public estimation, because those who trust them feel they can rely on the truthfulness of their public statements. This confidence can only be maintained by a rigid judicial enforcement of those requirements, which the legislature plainly deemed important. No prudent capitalist will refrain from investment in such enterprises because compelled to a strict observance of the truth with regard to material facts. No prudent creditor will trust them if this measure of business honesty be not exacted. We see no error in the judgment, and it is therefore affirmed.

FOURTH ST. NAT. BANK v. BACON.
(Supreme Court of Pennsylvania. Oct. 7, 1895.)

Appeal from court of common pleas, Philadelphia county.

Action by the Fourth Street National Bank against Granville B. Haines and others, trading as Haines & Co. There was judgment against defendant Richard W. Bacon for want of a sufficient affidavit of defense, and he appeals. Affirmed.

Charles Biddle, Wm. Rudolph Smith, and Geo. Tucker Bispham, for appellant. R. C. Dale and Saml. Dickson, for appellee.

DEAN, J. The facts in this case are precisely those in case of Same Plaintiff v. Whitaker (opinion herewith filed) 33 Atl. 100. For the same reasons, the judgment is affirmed.

REITZEL v. HAINES et al.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

LIMITED PARTNERSHIP—FALSE STATEMENTS IN RENEWAL CERTIFICATE—LIABILITY OF SPECIAL PARTNER.

A special partner's liability as general partner, by reason of a false statement, in the certificate on renewal of a limited partnership, that the capital contributed by special partners remained unimpaired and undiminished, is not affected by the fact that he believed the statement to be true; Act 1836 declaring all parties liable as general partners "if any false statement be made in such certificate."

Appeal from court of common pleas, Philadelphia county.

Action by Jane C. Reitzel against Granville B. Haines and others, trading as Haines & Co. Plaintiff's rule for judgment against defendants Richard W. Bacon and William Whitaker for want of a sufficient affidavit of defense was discharged, and plaintiff appeals. Reversed.

John C. Bell and Joseph L. Caven, for appellant. Charles Biddle, Wm. Rudolph Smith, and Geo. Tucker Bispham, for appellees.

DEAN, J. On 2d of January, 1894, defendants delivered to plaintiff a duebill for \$6,955.50, payable on demand, with interest. On the 26th of March following, the partnership made a general assignment for the benefit of creditors. Then plaintiff, averring liability of all the partners as general partners, brought this suit. The material facts are the same as appear in the case of Bank v. Whitaker (opinion filed this day) 33 Atl. 100, and need not here be repeated. In her statement plaintiff averred that the statement put of record by the limited partnership "that the aggregate amount of capital stock paid by the special partners, to wit, \$200,000, remained unimpaired and undiminished as their contribution to the renewal and continuance of said limited partnership, was false in fact; that at the time said certificate was made and published the entire capital stock of the special partners had been consumed and lost in the

business of Haines & Company, and that at that time the said firm was without capital, and was insolvent to the amount of many thousands of dollars;" therefore defendants became answerable to her as general partners. To this particular averment defendant, in his affidavit of defense, answers, after reciting the facts incident to the appraisal and setting apart of \$200,000 of merchandise, December 30, 1893, as and for the capital stock of the special partners, himself and William Whitaker: "At the time the partnership was renewed, I believed that the said statement and affidavit were true, and that I and every one else concerned had done all that I or they were required to do to entitle us to renew the partnership as a limited partnership." The substance of the certificate and affidavit to the renewal was that the original \$200,000 contributed by the special partners in December, 1891, remained unimpaired and undiminished in December, 1893. The plaintiff avers that this was false in fact, for at the latter date it had been consumed and lost, and the partnership was insolvent to the amount of many thousands of dollars. The defendants deny knowledge of this fact, but do not deny the fact; therefore there was a false statement in the certificate of a most material fact. The act says: "And if any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all engagements thereof, as general partners." P. L. 1835-36, p. 144. The case is clearly against defendants. For the reasons given for the judgment in Bank v. Whitaker, supra, we reverse this judgment, with directions to enter judgment against defendants, unless other legal or equitable cause be shown to the court below why judgment should not be entered.

BLUMENTHAL et al. v. WHITAKER.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

LIMITED PARTNERSHIPS—ORGANIZATION—RENEWAL—CERTIFICATE—LIABILITY OF SPECIAL PARTNERS—AFFIDAVIT OF DEFENSE.

1. An affidavit of defense by a special partner in a limited partnership, sought to be held as a general partner on the ground that the certificate on renewal of the partnership falsely stated that the capital contributed by the special partners remained unimpaired and undiminished, sufficiently denies the falsity of the statement by an averment on information and belief; the oath to the certificate being required by Act 1836 to be made, not by a special partner, but by a general partner.

2. Under Act 1836, permitting only cash contributions to a limited partnership, providing for a certificate which shall state certain facts, among them the amount of capital contributed by the special partners, and declaring that no such partnership shall be deemed to have been formed till certificate has been made and recorded as directed by the act; and Act March 30, 1865, permitting the contributions of special partners to be in goods or merchan-

dise, provided that "in the certificate, now required by law, the nature and value of the said goods shall be fully set forth and described," the "nature and value" of the goods not being set forth, but it being merely alleged that the contribution of the special partners is a certain amount, in goods and merchandise,—a limited partnership is not formed, but the liability of all the partners is that of general partners.

3. Under Act March 30, 1865, permitting contributions of special partners to a limited partnership to be in goods or merchandise, provided that they shall first be appraised by one appointed by the court of common pleas, and in the certificate required by Act 1836, on formation or renewal of a limited partnership, the nature and value of the goods shall be fully set forth and described, the nature and value of the goods must be set out and described in the certificate itself; and where the original organization of such a partnership was ineffectual because the certificate merely stated that the contribution was a certain amount in merchandise, a certificate purporting to be on renewal of the partnership is not sufficient to cure the original defect and cause a valid renewal, or to cause the creation of a new limited partnership, where it merely refers to a detailed statement of the merchandise and its value, filed in the court of common pleas by the appraiser. Mitchell, J., dissenting.

Appeal from court of common pleas, Philadelphia county.

Action by Albert Blumenthal and others, trading as Blumenthal Bros. & Co., against Granville B. Haines and others, trading as Haines & Co. There was a judgment against defendant William Whitaker for want of a sufficient affidavit of defense, and he appeals. Affirmed.

Charles Biddle, Wm. Rudolph Smith, and Geo. Tucker Bispham, for appellant. William S. Divine and Samuel B. Huey, for appellees.

DEAN, J. The court below made absolute a rule to show cause why judgment should not be given for want of a sufficient affidavit of defense, and defendant appeals. A full statement of the facts concerning the organization in December, 1891, of the partnership of Haines & Co., of which defendant was a member, down to the assignment for benefit of creditors, on 26th March, 1894, is given in the opinion filed herewith in case of *Bank v. Same Defendant*, 33 Atl. 100, so the same facts need not here be repeated. There is a difference, however, between the claim here and those of the Fourth Street National Bank and Jane C. Reitzel against this defendant and Richard W. Bacon in two particulars, to wit, there was no question raised in either of those cases as to the formal regularity of the proceedings necessary under the act of 1836 to constitute a limited partnership. In this case it is strenuously contended there was a fatal omission to observe the essential requirements of the law in the original organization, and that, therefore, from the first, all the partners were answerable as general partners. Here the debt of plaintiffs was contracted between October 26 and December 14, 1893, before the re-

newal statement and certificate of December 30, 1893, was put of record; so that any false statement of fact in that certificate could not have been relied on by plaintiffs as a basis of credit when they sold their goods to the insolvent partnership. There were but two statements of fact on record which could have misled these plaintiffs,—that of the original organization in December, 1891, and that of the first renewal in December, 1892. In the year intervening between the first and second renewals the financial affairs of the partnership and the condition of the special capital may have undergone a complete change. In the original articles of copartnership, filed of record December 31, 1891, and subscribed by all the partners, is this statement of fact: "Fourth. The amount of capital contributed by said special partners is \$200,000, one-half thereof being in goods and merchandise." One year afterwards, on 31st of December, 1892, when the partnership was renewed, this statement was made, subscribed by all the partners: "The amount of capital originally contributed by each of the said special partners to the common stock was \$100,000, one-half thereof being in cash and the other half thereof in goods and merchandise, making the aggregate amount of capital contributed by them \$200,000, as designated in the said original certificate, and the same remains unimpaired and undiminished as their contribution to the present renewal and continuance of the said limited partnership." The plaintiffs aver in their declaration of claim that this part of defendant's statement of renewal is false, as follows: "And the plaintiffs do now aver that the said averments made by the said defendants in the said certificate, to wit, that their contribution of capital remained unimpaired and undiminished in the renewed limited partnership as above set out, were untrue and false in fact; that on December 31, 1892, the capital contributed by the said special partners was impaired and diminished, and almost entirely used and wasted in the business of the firm, and that the said firm was even then insolvent." To this defendant replies in his affidavit of defense: "I do not admit that the said averments so quoted from the certificates, or either of them, or any part thereof, are untrue or false in fact. At the time the certificates, and each of them, were signed by me, I believed that each and all of the statements in the said certificates, including the averments quoted in plaintiffs' statements, were true. I believed that the averment in the certificate of December 31, 1892, that the contribution of Richard W. Bacon and myself to the capital of the firm remained unimpaired and undiminished, was true in fact. * * * I had no reason whatever to suppose that the said averments, or either of them, were in the slightest particular untrue; nor do I now know or believe they are untrue. On the contrary, so far as the special capital on December 31, 1892, is con-

cerned, from information obtained within four weeks last past, I believe and expect to be able to prove that the said special capital was wholly unimpaired." On a comparison of this affidavit with those in the Fourth Street National Bank cases and the Reitzel case against the same defendant (33 Atl. 100, 103), there is a very significant variance. The last-named cases were claims on written instruments delivered after the certificate of December, 1893, and there is, in substance, no denial of the falsity of that certificate, but at best only an averment of ignorance of its falsity at the time it was made. Here, however, as to the certificate of 1892, the oath is that from information obtained within four weeks last past defendant believes and expects to be able to prove that in December, 1892, there was no impairment or diminution of capital. It will be noticed the act requires the oath to the certificate to be made by the general partner, and not by the special one. If this defendant, the special partner, had been the affiant, his averment now of belief would hardly be sufficient. Absolute knowledge, on such a state of facts, would probably be required now. But, as his knowledge of the then fact must depend now on information, it would be a harsh exaction to hold that he must swear absolutely to knowledge resting on present inquiry. Admit, with all its force, the suggestion, why did he not, by personal examination and inquiry, know the truth or falsity of the statement when he subscribed it, and thus be able now to deny or admit plaintiffs' averment, not on belief, but on actual knowledge? At best, however, this is purely technical, so far as it affects the merits of the case. Plaintiffs suffered no injury if the statement of 1892 is true. A trial on the merits but delays their judgment if it is false. As defendant makes oath he now believes and expects to prove it true, we think the affidavit in that particular sufficient.

But the second objection, which was not raised in the other cases, is a more serious one. Under the act of 1836, before the passage of the act of 30th of March, 1865, no contribution except cash to the capital stock of limited partnerships was permissible. The first act required the name of the firm, the nature of the business, the names of the general and special partners, the amount of capital the special partners contributed, and the commencement and duration of the term, all to be set out. These facts were all set out in the original certificate of December, 1891, but the following is the whole of the statement concerning the contribution of the special partners: "The amount of the capital stock contributed by said special partners is \$200,000, one-half thereof being in goods and merchandise." The right to make any part of the contribution in merchandise rests wholly on the act of 1865, the first section of which says: "It shall and may be lawful for any special partner to make his contribution to the common stock of any

limited partnership he may become a member of, in cash, goods or merchandise: provided, that when such contributions are made in goods or merchandise, the same shall first be appraised under oath, by an appraiser who shall be appointed by the court of common pleas of the county in which such partnership is to be carried on: and provided also, that in the certificate, now required by law, the nature and value of the said goods shall be fully set forth and described." It will be noticed the "nature and value" of the goods now permitted to be put in as capital stock are to be set forth in the certificate now required by law; that is, as required by the act of 1836. There was no specification of the nature and value of the goods in the original certificate of December, 1891. What is the effect of such omission? The act of 1836 says: "No such partnership shall be deemed to have been formed, until a certificate shall have been made, acknowledged and filed and recorded, nor until an affidavit shall have been filed as above directed." It seems to us, no argument is necessary to show that the bare mention of merchandise in the certificate is not sufficient. There is a palpable omission to set out the nature and value. In thus characterizing it we have no notion of departing from the reasonable interpretations put upon the act in *Andrews v. Schott*, 10 Pa. St. 47 (substantial compliance with the act is what is required); in *Singer v. Kelly*, 44 Pa. St. 148 (the statute should be construed so as to promote its objects, rather than destroy them); in *Cock v. Bailey*, 146 Pa. St. 342, 23 Atl. 370 (it never was intended these acts should be used as a trap to catch persons who have honestly complied with every substantial requirement, and impale them on a meaningless technicality); and in *Powder Co. v. Steytler*, 146 Pa. St. 434, 23 Atl. 215 (progressive legislation has discovered that changes which leave the business intact, or even increase its capital, do not demand the punishment of special partners by imposing general liability for neglect of mere formalities). But approaching the interpretation of the statute in the liberal spirit of these decisions, who can, without a violation of every rule of statutory interpretation, undertake to say that, when the act declares the nature and value of the goods shall be fully set forth, calling the contribution \$50,000 worth of merchandise is a substantial compliance with its provisions? While the adjudications of cases under the acts of 1874 and 1876 are not always in point, under the act of 1836 the opinion of the court as to the importance of a compliance with this provision is in point, because the purpose in setting out the nature and value of the goods in case of a joint-stock company and a limited partnership is the same. The act of 1876 enacts that: "Where property has been contributed as part of the capital, a schedule containing the names of the parties so contributing, with a description and valuation of the property so contributed, shall be inserted." In *Maloney Manuf'g Co. v. Bruce*, 94 Pa. St. 249,

where the property contributed had been scheduled as "furniture, fixtures, and all the goods, tools, and chattels now on the premises * * * valuation, \$12,500," this court held: "This is not the kind of schedule contemplated by the act of 1876. The description is too general to enable any one to form a correct estimate of the extent of the property, and a lumping valuation renders it equally difficult to judge of values. The property contributed was intended as the equivalent of a cash capital, and the plain object of the provision in the act of 1876 requiring a schedule was to enable creditors to ascertain precisely of what the property consisted, and to judge of its value." In *Vanhorn v. Corcoran*, 127 Pa. St. 255, 18 Atl. 16, it was said: "Prima facie, a firm transacting business is a general partnership. * * * A limited partnership that has not complied with the law of its creation is not a limited partnership at all. It is, however, a partnership in which all the members are liable as at common law. It would lead to more than confusion to permit a defective schedule like this to be supplemented by evidence to show that there really was property, and that it was of the value indicated. It would open the door to all kinds of fraud and perjury, and no man would know whether such an association was a valid limited partnership until after the verdict of a jury." In *Sheble v. Strong*, 128 Pa. St. 315, 18 Atl. 397, where the subscription to the capital stock was made in machinery at a large valuation, it was held to be fatally defective, the present chief justice saying in the opinion: "Assuming that the subscriptions to the capital stock are certified according to the fact, it is very clear that the statement is fatally defective, in that it does not contain such a detailed description and valuation of the machinery as the supplement of 1876 requires." There is no distinction between the acts of 1874 and 1876 and the acts of 1836 and 1865 in this particular; that the creditor must have such a statement in detail of the nature and value of the goods or property contributed as cash as will enable him to form his own judgment as to its value. The reasons for so holding are just as imperative under the older acts as the later ones. Having omitted this important statement in the certificate of 1891, then, the act declares the consequence: "No such partnership shall be deemed to have been formed." As a result, this partnership was general for the year 1892, instead of limited, as the members sought to make it. It is, however, argued, the renewal in December, 1892, constituted it a limited partnership, for in that certificate it is stated a detailed statement of the merchandise and its value was filed in court of common pleas No. 3 of Philadelphia county, No. 715½, December term, 1891. We have given this question most careful consideration, with a view to securing for defendant a trial on the merits if his complaint of error could be sustained; but both the certificate and affidavit aver that the partnership formed is a renewal of that

created by the organization of December, 1891. That was, as we have seen, a general partnership. By the fatal defect of a most material part of the certificate, creditors had notice it was a general partnership, and a renewal of this simply continued the general liability for the year 1892. In reply to this it is argued, nevertheless it at least must be treated as the organization of a new limited partnership; but when we turn to the certificate and affidavit for the nature and value of the goods, where the act peremptorily requires they shall appear of record, we find nothing but a reference to an appraisalment filed in court. The first section of the act provides for an appraisalment to be made by an appraiser appointed by the court. The object of this obviously was to prevent fraud by overvaluation, but this direction is immediately followed by this: "And provided also, that in the certificate now required by law, the nature and value of said goods shall be fully set forth." The act could not have been more explicit if it had said, "But said appraisalment shall in no wise dispense with setting forth the nature and value of the goods in the certificate and affidavit required to be filed with the recorder of deeds by the sixth and seventh sections of the act of 1836." If the attempt had in fact been to form a new partnership, instead of to renew an old one, the failure to file a statement of the nature and value of the merchandise in the office where the law requires it to appear would have been fatal; the partnership would have been deemed general. The parties cannot select a depository for the information other than that specified in the act. They might as well have referred the public to their own business office, where they would find the detailed statement on file. We are of opinion the court below committed no error in decreeing the rule absolute, and the judgment is affirmed.

MITCHELL, J., dissents, being of opinion that the defect of the certificate of 1891 in not containing a statement or schedule of the goods was cured by the renewal certificate in 1892 referring to the detailed statement filed in common pleas No. 3.

BLUMENTHAL, et al. v. BACON.
(Supreme Court of Pennsylvania. Oct. 7, 1895.)

Appeal from court of common pleas, Philadelphia county.

Action by Albert Blumenthal and others, trading as Blumenthal Bros. & Co., against Granville B. Haines and others, trading as Haines & Co. There was judgment against defendant Richard W. Bacon for want of a sufficient affidavit of defense, and he appeals. Affirmed.

DEAN, J. The facts in this case being the same as those of *Same Plaintiff v. Whitaker* (opinion filed this day) 33 Atl. 103, the law is the same, and the judgment is affirmed.

CHRISTNER v. JOHN.

(Supreme Court of Pennsylvania. Oct. 28, 1895.)

APPEAL—CERTIORARI—PERFECTING PROCEEDINGS—REMITTITUR TO SUPERIOR COURT.

A case in which, prior to Act May 9, 1889, the appellate remedy would have been a writ of error, and of which, because of the amount involved, the supreme court, under Act 1895, establishing the superior court, has no jurisdiction, unless it acquired it before the establishment of the superior court, will be remitted to the superior court, under the direction of Superior Court Act, § 9, relative to appeals "erroneously taken directly to the supreme court" in cases reviewable by the superior court, where, prior to the establishment of the superior court, the only steps taken for an appeal were in the trial court (the common pleas); it being necessary, for the jurisdiction of the supreme court, that a writ of certiorari should have issued from it, under Act 1889, § 1, declaring that "all appellate proceedings in the supreme court heretofore taken by writ of error, appeal or certiorari, shall hereafter be taken in a proceeding to be called an appeal," and Sup. Ct. Rule May 27, 1889, declaring that "all appeals taken under the Act of May 9, 1889, must be taken in this court as writs of error have heretofore been taken, and in all such cases a writ of certiorari must be issued to bring up the record."

Appeal from court of common pleas, Somerset county.

Action by Herman Christner against A. F. John. Judgment for plaintiff. Defendant appeals. Remitted to superior court.

Coffroth & Ruppell, for appellant. Scott & Ogle, Kooser & Kooser, and Valentine Hay, for appellee.

STERRETT, C. J. This case came into the common pleas on defendant's appeal from the judgment of a justice of the peace for \$93.05 and costs, and was so proceeded in that a verdict was rendered in favor of the plaintiff for \$106.12. The jury fee having been paid, judgment was regularly entered on the verdict October 31, 1894. No proceeding of any kind was had in this court until after July 1, 1895, when a certiorari was taken and filed in the court below August 9, 1895. In the meantime, however, on November 1, 1894, the defendant entered an appeal in the court below, and there gave bond, with sureties, in the sum of \$300, conditioned to prosecute his appeal with effect, etc. It was undoubtedly a case in which, prior to the act of May 9, 1889, the proper appellate remedy would have been a writ of error; and it is equally clear that under the act of 1895, establishing the superior court, we have no jurisdiction of the case, unless it was acquired by virtue of the appeal entered in the court below in November, 1894. But, under our construction of the act of 1889, and the rule of court relating thereto, adopted May 27, 1889, no such effect can be ascribed to the appeal entered in that court, because it was not only unauthorized by said act, but it was positively forbidden by the rule of court referred to, and was therefore

null and void. The rule declares: "All appeals taken under the act of May 9th, 1889, must be taken in this court as writs of error have heretofore been taken, and in all such cases a writ of certiorari must be issued to bring up the record." 125 Pa. St. xxi. The first section of the act of 1889 provides "that all appellate proceedings in the supreme court, heretofore taken by writ of error, appeal or certiorari, shall hereafter be taken in a proceeding to be called an appeal." This uncalled-for legislation had the effect of producing confusion,—the inevitable result of the short-sighted policy of attempting to call essentially different things by one and the same name. Only a few months after the passage of the act, this court had occasion, through its then chief justice, to call attention to this fact, thus: "As some confusion exists as to the proper construction of the act of May 9, 1889 (P. L. 158), relating to writs of error and appeals, we deem it proper to say that the primary object of said act appears to be to substitute an appeal for the ancient and well-understood writs of error and certiorari. This is a mere change of name. The proceeding itself is unchanged. The writ of error, which comes here under the mask of an appeal, is still a writ of error, in effect, with all its incidents. The same may be said of appeals which come up in the place of a certiorari. In each of this class of appeals the appeal must be taken in this court as writs of error and certiorari were formerly taken. The provision in the second section of the act, that 'the record on any appeal perfected in the court from which the appeal may be taken, may be filed in the supreme court without requiring a writ of certiorari,' evidently refers to appeal from the orphans' court, appeal in equity, and from the distribution of money, which have always been taken in the court from which the decree appealed from was made. As to such appeals, the practice remains unchanged. In such cases a certiorari was almost invariably used to bring up the record. It is the only proper and legal mode of doing so. Instead of simplifying proceedings in this court, the act of 1889 has produced nothing but confusion. It was not called for by any public need; it was not asked for by this court, nor by any considerable number of the members of the bar who practice therein; and it serves no useful purpose." McAlarney's Rules of Court, 37. Again, in *Rand v. King*, 134 Pa. St. 645, 19 Atl. 806, our Brother Williams, after pointedly calling attention "to the difference between the several modes of review in use in this state," proceeds to say: "Since the act of 1889, these modes remain applicable in the same cases, within the same limits, and with the same effect, as before, the only difference being that now they are called by the same name. That act provides 'that all appellate proceedings in the supreme court heretofore taken by writ of error, appeal or certiorari shall be hereafter taken in a pro-

ceeding to be called an appeal.' It will be noticed that this act does not profess to extend the right of review, to change its extent in cases already provided for, or to modify in any manner its exercise. It simply provides that dissimilar proceedings shall be called by the same name. An appeal in name may therefore be a writ of error or a certiorari, in legal effect; and it is necessary, in every case, to look into the record, and determine at the outset of our examination whether what is 'called an appeal' is such, in fact, or is a writ of error, or a certiorari. The practical effect of calling proceedings so essentially unlike by the same name is to obscure, and divert attention from, the peculiar characteristics of each. This increases the sense of uncertainty on the part of the practitioner, and the labor of the appellate court."

While we have uniformly adhered to the early construction given, in the cases above cited, to certain provisions of the act of 1889 therein referred to, it is proper to say that the justly-deserved criticisms therein contained were not intended to apply to the commendable provision, in the second section of the act, which requires that the parties to any appellate proceeding in this court shall be stated in the same order in which they stood in the court below, etc. The practical utility of that provision is obvious.

From what has been said, we are warranted in concluding that in the case before us the first legal and effective step in appellate proceedings was that taken in this court in August, 1895,—since the establishment of the superior court. The judgment being less than \$1,000, we have no jurisdiction to hear and determine the case thus pending in this court. The ninth section of the superior court act provides, *inter alia*: "If an appeal is erroneously taken directly to the supreme court in any of the classes of cases made reviewable by the superior court, the supreme court shall not quash the appeal but shall remit the case, at the costs of the appellant, to the superior court for hearing and decision." It is accordingly ordered that the above-entitled case be remitted, at the costs of the defendant, to the superior court, for hearing and decision.

RUFFNER v. HOOKS.

(Supreme Court of Pennsylvania. Oct. 28, 1895.)

JURISDICTION OF SUPREME COURT.

Certiorari to review a judgment in trespass, granted after the rendition of a verdict, but before judgment was entered thereon, will be ineffectual, where the judgment was not actually entered until jurisdiction of the supreme court therein was transferred to the superior court by legislative enactment.

Appeal from court of common pleas, Armstrong county.

Trespass by John B. Ruffner against Hugh A. Hooks, in which there was judgment for

plaintiff, and defendant appeals. Remitted to superior court.

W. L. Peart, for appellant. W. D. Paton, for appellee.

STERRETT, C. J. In this action of trespass, a verdict in favor of plaintiff for damages was rendered September 5, 1894, and on September 29, 1895, judgment was entered thereon. In the meantime a certiorari from this court was taken by the defendant, and filed in the court below June 23, 1895. No judgment having been entered on the verdict until after July 1, 1895, there was nothing on which to base a writ of any kind from this court, and hence no effect can be given by us to the improvidently issued writ of certiorari, because, on the day last named, the superior court act took effect, and this court ceased to have direct appellate jurisdiction of such case. In some cases wherein writs of certiorari, etc., were improvidently issued before judgment was entered, we have heretofore treated the writ as postdating the entry of judgment, and this sustained the proceeding, but those were all cases clearly within the jurisdiction, and, in that respect, different from the present case. Since July 1, 1895, the only direct authority we have had on the premises is to remit the case, under the provisions of the ninth section of the act of 1895, establishing the superior court. While the case, in some of its features, differs from *Christner v. John* (in which an opinion, just been filed) 33 Atl. 107, we think it should be disposed of in the same way. It is therefore ordered that the above-entitled case be remitted, at the costs of the defendant, to the superior court, for hearing and decision.

MARTIN v. McCRAY.

(Supreme Court of Pennsylvania. Oct. 28, 1895.)

SECONDARY EVIDENCE—NECESSITY OF INSTRUCTIONS.

1. The court having immediately stated the evidence, which was all he was asked to do, error cannot be predicated of failure to instruct the jury to disregard such evidence.
2. Secondary evidence of the contents of a bill shown to be in existence, but not produced, is properly rejected.

Appeal from court of common pleas, Washington county; J. A. McIlvaline, Judge.

Action by John Martin against Michael McCray for the price of coal sold and delivered. Judgment for plaintiff. Defendant appeals. Affirmed.

J. M. Braden and Albert S. Sprowl, for appellant. McCrackens & McGiffin, for appellee.

PER CURIAM. There is nothing in the assignments of error to warrant a reversal of the judgment. In the first subject of complaint is that "the court failed in not instructing the jury to disregard

tirely" the improper and irrelevant testimony elicited by the plaintiff's cross-examination of the defendant, recited therein. This admittedly improper testimony was immediately stricken out by the learned trial judge, on motion of defendant's counsel. He thus promptly did all he was asked to do, and should not be convicted of error for not doing more. As to the second assignment, the court was clearly right in sustaining the objection, and excluding secondary evidence of the contents of the bill shown to be in existence, but not produced. Judgment affirmed.

ERMENTROUT v. STITZEL.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

ALLEYS — ABANDONMENT — JUSTIFICATION OF OBSTRUCTIONS.

1. Acceptance by one of a deed making no reference to an alley, but including land on which it was located, is not an abandonment of it by him, he having actual as well as constructive notice and knowledge of its existence and location, and other lots having theretofore been deeded with rights therein, and he not having done or claimed anything, under the deed, regarded by him or them as prejudicial to their rights.

2. One, by putting a grape arbor in an alley on which his lot abutted, and allowing a tree growing therein when he bought the lot to remain, does not abandon the alley, or justify others in closing it; his obstructions not being serious, and he not having been asked by the other lot owners to remove them.

Appeal from court of common pleas, Berks county; G. A. Endlich, Judge.

Trespass by Daniel Ermentrout against George D. Stitzel, trustee of Clara E. Kauffman, for obstructing an alley. Judgment for defendant, notwithstanding a verdict for plaintiff, and plaintiff appeals. Reversed.

C. H. Ruhl, for appellant. Stevens & Stevens, for appellee.

MCCOLLUM, J. The defendant, having succeeded to the title conveyed by the Friendship Building & Savings Association to Mary A. Althouse, had a clear right to an alley, in accordance with the plan made by Kendall Bros. in 1883, from Clymer street to the alley connecting with the Hill road at a corner of Josiah Dives' property. This right was defined in and secured by the reservation in the deed to her grantor, and in the latter's deed in trust for her. It does not appear to have entered her mind, prior to the institution of this suit, that the Kendall alley was abandoned by the plaintiff, or by any owner of a lot or lots abutting upon it, nor that she was invested by any act of theirs, or either of them, with authority to exclude them from it, in the rear of her property. Her rights in the alley were the same as the plaintiff's, and other owners of lots abutting thereon. As they could not deprive her of the use of it in the rear of their lots, she could not prevent

them from using it in the rear of hers. The correspondence between the litigants in the summer preceding the issuance of the writ in this case shows that they understood their rights and obligations in reference to the alley were mutual, and that they recognized it as an existing way, in the maintenance of which they had a common interest. Neither of them claimed an abandonment of it, or denied to the other the use of it. Their principal contention appeared to relate to a fence and gates erected by the defendant in the alley in the rear of her lot, and she claimed that they were placed there for the protection of her property, and were constructed so as to afford reasonable facilities to the lot owners for the use of the alley, while the plaintiff claimed that they constituted an unreasonable obstruction to her use of it, and amounted to a practical denial of his rights in it. The learned court below, regarding this contention as the material one in the case, submitted it to the jury, in a clear, adequate, and, as we think, correct charge; reserving, however, the questions raised by the defendant's sixth and seventh points. The jury found, from the evidence in relation to the use of the alley by the lot owners, and the work done by them upon it, that the obstruction complained of was an unreasonable one.

The questions raised by the points referred to were (1) whether there was any evidence of the commission of a trespass by the defendant; and (2) whether the plaintiff was estopped by his deed from the building association, and his neglect to fence the alley, from asserting any right in the latter. So much of the seventh point as alleges that the plaintiff never "recognized the right of defendant through his property" need not be considered, because it is a statement which plainly disregards the uncontradicted evidence in the case.

The learned court below, upon consideration of the reserved questions, concluded that the plaintiff had no right in the alley, and entered judgment non obstante veredicto. The grounds of this conclusion were that his acceptance of a deed which contained no reference to the alley, but included the land on which it was located by the Kendall plan, together with his alleged encroachment upon it, and his neglect to remove the apple tree in it, constituted an abandonment of it. In this conclusion we think there was error. The plaintiff accepted the deed with actual, as well as constructive, notice and knowledge of the existence and location of the alley. The deed gave him no right in the alley which interfered in the slightest degree with the rights of the other lot owners therein. He neither did nor claimed anything under the deed which he or they regarded as prejudicial to their rights. There was no permanent or material encroachment upon the alley by the plaintiff, or anything done or omitted by him indicative of an intention to aban-

don it, or to deny to the defendant and the other lot owners the use of it for the purposes to which it was dedicated. The evidence in relation to the grape arbor and the apple tree did not show an obstruction which would have justified the defendant, or any other lot owner, in closing the alley. The former is the only obstruction placed in it by the plaintiff, and it affords no justification of, or excuse for, the act of the defendant. *Belas v. Pardoe* (Pa. Sup.) 15 Atl. 665. The apple tree was in the alley when the plaintiff bought his lots, and, as he was not requested to remove it, the fair inference is that it was not regarded as a serious obstruction. It is worthy of note, in this connection, that there was no reference in any of the defendants' points to the grape arbor and apple tree as constituents of the defense, nor request for instructions based on the evidence in relation to them. Besides, it is well to remember that the other lot owners have the same rights in the alley that the litigants have, and that the latter cannot exclude the former from it. In support of the views we have taken concerning the effect of the plaintiff's acceptance of a deed which contained no reference to the alley, it is sufficient to cite *Appeal of Ferguson*, 117 Pa. St. 451, 11 Atl. 885. The specifications of error are sustained. The judgment is reversed, and judgment is now entered on the verdict, in favor of the plaintiff and against the defendant, for one dollar and costs.

WINTON COAL CO., Limited, v. PANCOAST COAL CO.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

ASSUMPSIT—BY TENANT IN COMMON—ESTOPPEL—EQUITY JURISDICTION—ACCOUNTING.

1. Where one of several tenants in common in a stratum of coal has taken coal therefrom, and sold it, and received the proceeds, another of such tenants may sue him in assumpsit, the only thing in dispute being whether plaintiff's interest is a one-fourth or a one-eighth.

2. Plaintiff, a tenant in common in a stratum of coal, by recognizing an agreement executed by his cotenants and defendant, allowing defendant to mine the coal, so far as the price per ton to be paid by defendant was concerned, and by receiving an eighth thereof, is not estopped to claim that his interest is a fourth, though in the agreement his interest is recited as an eighth; he having refused to sign the agreement, and it being provided therein that nothing in it should alter, affect, or impair the interest of any of the grantors.

3. The supplement of April 22, 1856 (P. L. 502), to Act 1850, relative to litigation between tenants in common, will not be construed to require a suit in equity, where one has a legal right, as this would be depriving parties of the right to jury trial, contrary to the constitution.

4. Act 1850, giving equity jurisdiction for the stating of an account, where coal mines are held by tenants in common, requiring all the tenants in common to be made parties, and the ascertainment by the court of the quantity and value of the coal taken, and the sum that may

be justly and equitably due by or from or to them, respectively, does not present an action in assumpsit by one tenant in common against another, where no question of account is involved, or can possibly be raised, but the other cotenants have been paid by defendant, according to an agreement between them, and the only question is which of two amounts plaintiff is entitled to receive from defendant, dependent on whether his interest in the coal is an eighth or a fourth.

Appeal from court of common pleas, Lackawanna county.

Assumpsit by the Winton Coal Company, Limited, against the Pancoast Coal Company. Judgment for defendant. Plaintiff appeals. Reversed.

Garrick M. Harding, S. B. Price, John B. Collings, and A. H. Winton, for appellant. Jessups & Hand and Willard, Warren & Knapp, for appellee.

STERRETT, C. J. This record does not present the precise question that was left undetermined in *Luck v. Luck*, 113 Pa. St. 256, 6 Atl. 142,—whether, in the absence of an express agreement to pay assumpsit will lie between tenants in common for use and occupation of the common property. This contention relates to proceeds of coal mined from an underlying stratum in a tract of about 108 acres of land. The testimony introduced by plaintiff company tended to show title in it, as tenant in common with defendant and others, to an undivided one-fourth part of said coal; that all the coal taken out, up to the time suit was brought, was mined, sold, and the proceeds thereof received by defendant company, and portions of said proceeds were paid by it to the other tenants in common. But plaintiff company claims that, instead of the one-eighth which it received, it was entitled to one-fourth of said proceeds. Plaintiff also offered in evidence monthly statements rendered by defendant, showing the number of tons of coal mined, and the royalty payable thereon by the terms of the lease signed by all the cotenants except plaintiff. In this offer plaintiff admitted the correctness of the statements as to the amount of coal mined and rate of royalty, but at the same time claimed that its share of said admitted proceeds of sale was one-fourth, instead of one-eighth. This offer was rejected by the learned trial judge, and a verdict directed for defendant, on the ground that in such case assumpsit will not lie between tenants in common.

The testimony thus offered and rejected tended to show that one tenant in common had mined an admitted amount of the common coal, sold it for a price satisfactory to both parties, and holds a part of the proceeds of sale to the exclusion of its cotenant, who sues to recover a sum equal to that which it has already received of the common fund produced by said sale. Plaintiff's cotenancy, to the extent of a one-

eight interest in the proceeds of the coal sold, is conceded; and it has already received, as is admitted, that proportion thereof. It claims, however, that the quantum of its interest in said proceeds is one-fourth, instead of one-eighth, and hence it seeks to recover one-eighth more. In view of the facts that appear to be undisputed, and of the further facts which the proffered testimony tends to prove, we think the learned court erred in holding that, in the circumstances, an action of assumpsit could not be maintained.

The complicated machinery and delay of the old action of account render has never made it a favorite remedy; and the tendency of American courts, if not, also, those of the mother country, has been to give the statute of 4 Anne, c. 16, § 27, a remedial and liberal construction, so as to allow indebitatus assumpsit for money had and received to lie in place of the old action of account render, by one tenant in common against his cotenant for rents and profits which the latter has actually received over and above his share thereof, and which actually belong to his cotenant. *Brigham v. Eveleth*, 9 Mass. 541; *Miller v. Miller*, 9 Pick. 34; *Cochran v. Carrington*, 25 Wend. 409; *Scantlin v. Allison*, 32 Kan. 376, 4 Pac. 618; *Abel v. Love*, 17 Cal. 233; *Borrell v. Borrell*, 83 Pa. St. 492; *Hudson v. Coe*, 79 Me. 83, 8 Atl. 249; 11 Am. & Eng. Enc. Law, 1128; *Shara & B. Lead. Cas. Real Prop.* 98, 110. As was said in *Fanning v. Chadwick*, 5 Pick. 124, account render "is almost obsolete, even in England, and there seems to be no necessity for reviving it here. Justice may be administered in a form more simple and less expensive, by an action of assumpsit," * * * which "now has all the advantages, without the disadvantages, peculiar to an action of account." Where the cotenant has actually received the rent of the common property, or has converted coal, lumber, oil, gas, or minerals (part thereof) into cash, and retains a share thereof which actually belongs to his co-owner, there would seem to be no good reason why, in a proper case, he may not be sued in assumpsit for his cotenant's share thereof.

By the agreement of December 30, 1886, which was offered in evidence, plaintiff was recognized by defendant as a tenant in common with it of the stratum of coal, as the same then existed. It is true, the agreement assumes to set out the respective interests of the tenants in common; but, by paragraph 3 thereof, the defendant agreed that there is nothing in the contract that should alter, affect, or impair the title, interest, or estate of any of the grantors. Inasmuch as plaintiff refused to sign this agreement, and only recognized its provisions in so far as they provided for royalties or price to be paid for coal mined by defendant, it is not estopped to any greater extent. Defendant has not sold the coal claimed by plaintiff to the coal in place,

but has mined, sold, and disposed of the coal itself, in such manner that the same cannot be recovered by ejectment. Nor is the present an action for the use and occupation of the land, but merely for the proceeds of coal sold, plaintiff's title to which has been legally divested; and, from the nature of the transaction, the coal thus mined and sold cannot be recovered in specie, in any form of action. By sustaining this action, defendant is not deprived of any legal right, nor prevented from setting up any defense that might otherwise be interposed. On the contrary, circuity of action is avoided, and the rights of both parties may be fully protected. No conflicting title to the coal that still remains in place, or right of inheritance, will be tried, inasmuch as the coal mined, etc., has been converted into money. In actions for the purchase money of land, where it is necessary to effect justice, the courts may pass upon the title to the real estate involved. *Lewis v. Robinson*, 10 Watts, 338.

The supplement of April 22, 1856 (P. L. 502), to the act of 1850 is inapplicable to this case. To construe it otherwise would deprive the parties of the right to trial by jury, and, to that extent, would make the act unconstitutional. We have heretofore held that the statute must be restricted to such cases as are proper subjects of equitable jurisdiction; that this preliminary question, whether there are sufficient grounds for equitable interposition, is for the courts, and not for the legislature; and that the legislature cannot, by its mere declaration to that effect, convert a legal right into an equitable one. *Coal Co. v. Snowden*, 42 Pa. St. 488; *Norris' Appeal*, 64 Pa. St. 280. For like reasons, we think the original act of 1850 is not applicable to this case. That act gives equity jurisdiction for the stating of an account where coal mines or mineral shall be held by two or more persons as tenants in common, and coal shall be taken out by one or more of said owners. It provides that all the tenants in common shall be made parties, and that the court shall ascertain the quantity and value of the coal taken, and the sum that may be justly and equitably due by, from, or to them, respectively, therefor, according to their respective interests in the lands. In the case before us no question of account is involved, or could possibly be raised. As the case is now presented, there does not appear to be any reason for bringing in any of the other tenants in common. The plaintiff admits the quantity and value of the coal mined and sold by defendant. There is no controversy as to the sum due, unless it shall appear later by a dispute as to the quantum of plaintiff's interest; and even then the only question will be whether it is more than one-eighth, and, if so, how much more. It is quite clear that no question of account can possibly arise, as the case is now presented. It follows that there is nothing to bring it within equity jurisdiction, and the reasoning of this court as to

the operation of the act of 1836 would seem to apply with equal force to an attempted application of the act of 1850 to this case.

For these and other reasons that might be suggested, we think that both specifications of error should be sustained. Judgment reversed, and a venire facias de novo awarded.

COMMONWEALTH ex rel. HENSEL, Attorney General, v. BOROUGH OF BEAVER et al.

(Supreme Court of Pennsylvania. Oct. 28, 1895.)

PUBLIC SQUARES—DEDICATION BY STATE—STREETS—REGULATION BY BOROUGH.

1. Where the state platted land, owned by it, as a town, marking squares reserved thereon as "Public Squares," and sold lots thereby, it dedicated the squares to appropriate public uses.

2. Boroughs, under the authority given them by Act April 3, 1851 (P. L. 321), to regulate public squares, may make pleasure drives around them.

3. Boroughs may, by ordinance, or its equivalent, define the limits of sidewalks and curbs thereon, leaving sufficient space for travel.

Appeal from court of common pleas, Beaver county.

Suit by the commonwealth, on the relation of W. U. Hensel, attorney general, against the borough of Beaver and others, members of council, for injunction. From the decree plaintiff appeals. Affirmed.

The opinion of the court below, per EWING, J., was as follows:

"On the pleadings and findings of fact there arise two general questions as to the power of the borough authorities and the manner of its exercise: First, as to the public squares within the borough limits; and, second, as to the public streets therein. Counsel for the complainant take the broad ground that the state has never dedicated these squares for public use, but simply reserved them, and that the state, as owner, has the absolute power of disposal, control, and at least has the sole and exclusive right to direct and limit the uses thereof; and that the borough authorities have no power over the squares to regulate and manage, unless perhaps to keep them clean, but not even to cut down a tree, whether of natural growth or planted by the borough or a private person. The very able and ingenious argument of Hon. Daniel Agnew, late chief justice, contained in that valuable publication, 'Settlement and Titles in Northwest Pennsylvania,' and in other documents, and his argument in this case, presents this view in the strongest possible light. I have so long been accustomed to follow and rely on his judgment in such matters as to doubt my own judgment when not in harmony with his views; but in this case the argument fails to convince me that it is correct. The state, as owner of the land, laid out a town plot to procure money by the sale of lots therein. Follow-

ing the custom of private owners, and especially that of William Penn and his descendants, it provided for reserving for its uses certain squares in the town. Its officers had these squares marked in the plan 'public squares,' and by this plan lots were sold. If a private owner had so laid out a plan of lots, and so marked and reserved public squares, declaring they were not to be sold, but reserved for public use, and had so sold the lots, there can be no doubt that under the law then in force down in the courts of this and other states, and of the United States it would be deemed to be a dedication for such appropriate uses as would, under usage and custom, be deemed to have been fairly in contemplation at the time of so laying out and selling in the plan as courthouses, markets, churches, and for pleasure grounds, etc. *Barre v. Howell's Lessee*, 6 Pet. 498; *President of City of Cincinnati v. White's Lessee*, 430; *New Orleans v. U. S.*, 10 Pet. 305; *Com. v. Rush*, 14 Pa. St. 186-189; *Cook v. Bowman*, 3 Pa. St. 202. The various cases in relation to the public squares and commons in Allegheny City, in my judgment sustain this view. The act of assembly of 1851 reserved the squares 'for use of the state,' and designated the use in the squares. P. L. 1851, p. 321. In *Bowman v. Anderson*, 48 Pa. St. 258, the court stated thus: 'It has been the practice of this country in laying out towns to have the town surveyed, and a plan made in accordance with the survey, designating the streets, public squares, and open spaces left for commons, wharves, or any other public purposes. Those streets, squares, and open spaces are thus dedicated to the public by the plan of the town, and whether they be the property of the state or of private individuals.' In *Cook v. City of Burlington*, 30 Iowa, 95, the act of congress of July 2, 1836, directing the laying off of the town of Burlington, provided that the strip of land on the river bank at the town of Burlington, B., and running with said river the whole length of said town, 'shall be reserved for public use and remain for use as a public highway and for other public purposes.' *Held*, that the strip so reserved was dedicated to public use, and that after the sale of the lots the act making this dedication was the character of a contract, and could not be abrogated by congress or its grantee.

"It is difficult to see any equitable reason why there should be one rule as to the property of a private owner and another when the state is the owner, does the same thing. It seems to me that the state by its action not only reserves the squares from sale, but also dedicates them to public use. The squares in question. The argument drawn from the fact that the state has the power to designate thereafter some of the squares for other uses to which these squares might be put, is at most but persuasive authority. If the state in derogation of the right, it would not sustain the question. *New Orleans v. U. S.*, 10 Pet. 305.

716. The state, after the sale of lots, held the legal title thereto, but in trust for the proper public uses. The original borough charter gave but meager powers to the borough authorities. The legislature had power to provide by special or general enactment how all such public squares or streets should be used; and this whether the legal title to the land was in the state or in a private person, provided it did not violate the terms of the original dedication. To this inherent power of the legislature to exercise municipal authority may be attributed the acts of assembly designating the portions of these public squares to be used for a courthouse and for churches, rather than to any right, or even claim, to exercise such power as owner of the land. This power of regulation had not then been delegated to borough councils. By Act April 3, 1851 (P. L. p. 321, § 2), the corporate officers of boroughs were given power, *inter alia*, 'to regulate the roads, streets, lanes, alleys, courts, common sewers, public squares, common grounds, footwalks, pavements, culverts, gutters, and drains, and the heights, grades, widths, slopes, and forms thereof, and they shall have all other needful jurisdiction over the same.' By act of assembly of 8th of May, 1855, the trustees of the Beaver Academy were authorized to occupy the public square in the southeast corner of the borough of Beaver for new academy buildings, 'provided that the same be done with the consent of the burgess and councilmen of said borough.' This is persuasive authority in favor of power in the borough, although the borough of Beaver did not come under the general borough law until proceedings had at No. 2, September session, 1868, of the court of quarter sessions of Beaver county. This legislation, and the proceedings in court bringing the borough under the general borough law, vested in the corporate authorities full power to regulate and care for these public squares; not, however, to affect the designation of public uses heretofore made by the acts of assembly, but to improve, beautify, and regulate for public benefit, specially for the inhabitants of the town, and incidentally for the public generally. The legislature may, by general act, resume its power of regulation and control, but it is very doubtful if any special act relating to the public squares of Beaver would now be constitutional. The present constitution prohibits special or local legislation regulating the affairs of boroughs or relating to public grounds not of the state. Const. art. § 7. But, even if the state has the power claimed by plaintiff, it has failed to exercise for many years,—it has failed to care for the public squares. The borough authorities must care for them to prevent them from remaining or becoming a public nuisance. And will be time enough for the attorney general to intervene when the legislature directs one to take charge or designates some other public use with which the regulations

complained of are inconsistent. The council can regulate, care for, and improve the public squares by ordinance or resolution, or otherwise by its officers in any way not inconsistent with the proper public use. We are unable to see that making the driveways complained of is an unreasonable or unlawful exercise of the power to regulate. Unless the shade trees are to be removed from the alleys of 25 feet in width there is not sufficient room to make a convenient or safe pleasure drive around the squares without occupying a part thereof with such driveway. The council, in its discretion, has seen fit to make the sufficient way by taking a part of the alley ways and a part of the square. We would, if fixing the plan, have paid less attention to existing rows of trees, looking to the future to supply the place by others; but we are unable to say that the plan of the council is either unreasonable or that it is not the best that could have been adopted at this time.

"The commonwealth has no ground for complaint of invasion of its rights in these public squares. As to the streets or alleys complained of, a different question arises. No action has been taken to vacate these alleys laid out by the commonwealth in its plan of the town of Beaver, and vacation thereof is denied. Numerous encroachments have been made thereon by buildings and otherwise. Borough authorities, the public, and other owners of property have submitted to these encroachments for 30, 40, or 50 years. All this, however, does not legalize the obstructions, nor bar the right of the public to have the street kept open. This bill is filed to prevent the borough authorities from closing the alleys. We are asked by counsel to take the broad ground that 'the public is entitled, not only to a free passage along the highway, but to a free passage along any and every portion of it not in the actual use of some other traveler.' *Com. v. McNaugher*, 131 Pa. St. 55, 18 Atl. 934, and other authorities are cited in support thereof. This doctrine would not only require the removal of the porches and steps encroaching on these alleys, but would exclude shade trees or any other ornamentation on the streets. The case of *Com. v. McNaugher*, *supra*, was that of a permanent building and fences erected unlawfully to exclude the public from use of the street. The general proposition that the public have a right to travel on foot or in vehicles over every portion of the highway is modified largely by exceptions. In *Com. v. Zimmerman*, 95 Pa. St. 292, *Mercur, J.*, in delivering the opinion of the court, says: 'So shade trees may stand between the sidewalk and the central part of the street without constituting a nuisance *per se*. The mere partial obstruction of a part of the street, when in fact such obstruction does not interfere with the public use, does not create a nuisance. * * * The right to partially obstruct a street does not appear to be limited to a case of strict necessity. It

may extend to cases of convenience or ornament, provided it does not unnecessarily interfere with public travel.' In *Com. v. Hauck*, 103 Pa. St. 536, defendant had built his house within a foot of the street line, and had laid a sidewalk $7\frac{1}{2}$ feet on the street, and outside the sidewalk had planted six trees and placed two hitching posts, and this on a street 36 feet in width. Held not to be a nuisance, nor an unlawful obstruction of the highway. In *Livingston v. Wolf*, 136 Pa. St. 519, 20 Atl. 551, a borough ordinance authorizing the use of 3 feet 6 inches of the footway for steps, bay windows, etc., was held to be a reasonable regulation. In *Huling v. Henderson*, 161 Pa. St. 553, 29 Atl. 276, plaintiff, a lot owner, having planted shade trees on the street in front of his lot out on the public street, recovered damages against defendant for trimming the trees so as to kill them. These and numerous other cases in this state and elsewhere show that in the absence of municipal regulation, lot owners may, for purposes of necessity, ornament, or convenience, partially obstruct a highway in a reasonable manner, so as not to prevent the use of the highway by the public; and that the municipal authorities may, by ordinance or otherwise, regulate the manner of this public use and the ornamentation. What is a reasonable exercise of this discretion depends on the circumstances. In this case, except as a pleasure drive, there is but little vehicle travel on these highways around the public squares, the lots being occupied, for the most part, as private residences. Adopting the views of Judge Agnew, 10 feet would be sufficient width for the roadway for all this travel. The public squares, now well cared for, are enhanced in attraction by having a portion of these 25-foot streets occupied for ornamentation. Lot owners have so used it for many years without objection. We are of the opinion that the corporate authorities have power by ordinance, or its equivalent, to define the limits of sidewalks and curbs thereon, to the extent that is proposed as to Commerce, Insurance, and Corporation alleys, and except as hereinafter stated as to Turnpike alley. If any party is aggrieved by the lawful exercise of authority an appeal lies to the court of quarter sessions. *Borough of Chartiers' Appeal* (Pa. Sup.) 8 Atl. 181; Act 1851, § 27 (P. L. 326).

"The next question is, have the corporate officers proceeded in proper form to exercise this authority? The manner in which the borough councils proceeded to change these streets—i. e. to fix the place for curb, sidewalk, and driveway—was faulty in many particulars.

"First. Such a change would best be made by a formal ordinance setting forth specially the location of each, and specifying the portions to be used as ornamental, either by lot owners or the borough authorities, with a plan easily understood; and, if changes of grade were to be made, they should be speci-

fied. They acted by an informal resolution, adopting the plan or plot of the borough engineer; and while, on examination, this fixes the locations, yet it is not clear and definite as to the alleys. Apparently it does not affect Turnpike alley. But the resolution in place of an ordinance would be sufficient if other defects are not fatal. *Sower v. Philadelphia*, 35 Pa. St. 231.

"Second. Act 1851, § 3, par. 8 (P. L. p. 323), makes it the duty of the corporate officers 'to give due and personal notice to all persons resident in the borough directly interested therein of any proposition to fix or change the roads, streets, lanes, etc., or in the grading or regulation thereof and to designate a time and place when they shall be heard in relation thereto.' The lot owners abutting on these alleys were directly interested in the changes of sidewalk and driveway, and yet no notice of the proposition to change was given them. Such notice and a hearing might have resulted in a plan satisfactory to all. Were it an open question, we would hold the giving of this notice to be a prerequisite to the jurisdiction to pass such ordinance. There are authorities in the lower courts on both sides of the question; the weight of them being in the affirmative. But in *White v. Borough of McKeesport*, 101 Pa. St. 400, in an action of trespass by a lot owner against the borough, it is expressly held that this provision is but directory, and its omission does not invalidate the proceeding. The case of *City of Pittsburg v. Coursin*, 74 Pa. St. 400, therein cited in support, is easily distinguishable from this question. In *Beaumont v. City of Wilkes-Barre*, 142 Pa. St. 210, 21 Atl. 888, the court below followed with hesitation, the ruling in *White v. McKeesport*, and held the provision to be merely directory. The supreme court affirmed the judgment 'on the opinion of the court below. The judgment, however, might have been affirmed on one of the other grounds. In *Opening of Taylor Ave.*, 146 Pa. St. 638, 21 Atl. 392, the court below holds, *inter alia*, as follows: 'I am of the opinion that personal notice of the ordinance, at least, must be given, and also of any proposition to fix, regulate, etc., the roads and streets of the borough, to all persons directly interested therein;' apparently not having noticed the case of *White v. McKeesport*. There were other irregularities in the proceedings. The proceedings were set aside, and on appeal to the supreme court the judgment was affirmed without any opinion filed, or reference to the opinion of the court below, although *White v. McKeesport* was cited by appellant's counsel. The judgment might have been affirmed on other grounds. I feel bound to follow the express ruling of the supreme court until the same court has expressly overruled its own decision.

"Third. The same section, par. 4, makes it the duty of the corporate officers 'to publish it in at least one newspaper, * * * and by

not less than twelve advertisements, to be put in the most public places in the borough, every enactment, regulation, ordinance or other general law, at least 10 days before the same shall take effect.' No such publication or advertisement was made of this enactment.

"Fourth. The third paragraph of the sixth section of the same act makes it the duty of the burgess to sign the several by-laws, rules, regulations, and ordinances adopted, after they shall have been duly and correctly transcribed by the secretary. The third section of the act of 23d May, 1893 (P. L. 114), provides 'that every ordinance and resolution passed by council shall be presented to the chief burgess of such borough; if he approve he shall sign it, but if he shall not approve he shall return it with his objections to said council at its next regular meeting.' Then follow directions as to how it may be passed over the objections of the burgess, and the section provides further: 'That before any ordinance shall come into force and effect as aforesaid, the same shall be recorded in the borough ordinance book, with the certificate of the secretary, and be advertised as heretofore required by law.' While, as we have before seen, the enactment may be a formal ordinance or the less formal resolution, yet, when the resolution is in the nature and has the effect of a formal ordinance, it is necessary that it should be signed by the burgess, transcribed, and published, as is required in case of an ordinance. See 1 Del. 482. This resolution hanging the alleys was not transcribed in the ordinance book, was not presented to or signed by the burgess, and was not advertised or published as required by law. If the act of 23d May, 1893, approved a day before the passage of the resolution, was the law governing the proceeding, the failure to present the resolution to the burgess for his signature is fatal to its validity, so far as changes in the alleys are concerned. We are of the opinion that it applies only to a burgess elected in 1894 and thereafter. If it was not, it should have had the signature of the burgess. Perhaps this alone would not be fatal. It should have been published at least 10 days before it could take effect. It is barely possible to sustain the ordinance, as a resolution in nature of an ordinance, with all these irregularities, and hold that on its now being signed by the burgess, and duly published for 10 days, it would be effective to authorize the changes as to the public alleys in question; but the safer procedure is to pass an ordinance in due form, definitely setting forth the new regulation of the law walks and roadways. All these defects and irregularities, taken together, seem to be fatal to its validity as an ordinance changing the alleys. As to the public squares, it is not necessarily in the nature of an ordinance, and as a mere resolution it was sufficient.

"We will not make any order requiring the

borough authorities to take action to remove nuisances on the alleys maintained by private persons, whether it be barricades or shade trees, except the recently erected railing across Turnpike alley at Commerce alley, which they should have removed. As to Turnpike alley, the authorities should be required to so change the curbing and gutters at Market street and Commerce and Insurance alleys as to permit the free passage of vehicles over that part of Turnpike alley lying outside the line of shade trees from property line, as described in the findings; and this either by cutting down or removing the curbing, or by placing over the gutter metal crossings, or otherwise so as to afford easy passage for vehicles, and to take measures to remove the railing recently placed across Turnpike alley at Commerce alley. We will not require the replacement of any of the work done, as that would be a detriment to the public, and be of no private advantage to any one. And, if our views be correct as to the power of the corporate authorities in the premises, when duly exercised, it is probable that in a short time an ordinance or resolution will be passed with due notice to and hearing of property holders and observance of all legal requirements, in consequence of which much of the work already done will be validated. Further proceedings to change these alleys complained of must be enjoined until a resolution or ordinance therefor has been duly passed and published. Let a decree be prepared by counsel in accordance with this opinion. The borough of Beaver should pay the costs."

D. F. Patterson, Ellis N. Bigger, J. R. Harrah, and Wm. A. McConnel, for appellant.
J. R. Martin and L. E. Grim, for appellees.

PER CURIAM. All that can be profitably said in relation to the questions involved in this appeal will be found in the opinion of the learned judge of the Fifth judicial district, who specially presided at the hearing. An examination of the record has failed to disclose any substantial error in either of his rulings, and we are all of the opinion that the decree should be affirmed on his opinion. Decree affirmed, and appeal dismissed, with costs to be paid by the appellant.

BUCHANAN v. BOROUGH OF BEAVER et al.

(Supreme Court of Pennsylvania. Oct. 28, 1895.)

BOROUGHS—CHANGES IN STREET—NOTICE TO ABUTTING OWNER.

An abutting owner may maintain a bill to enjoin changes in a borough street, he not having notice thereof or an opportunity for hearing.

Appeal from court of common pleas, Beaver county.

Suit by John M. Buchanan against the borough of Beaver and others to enjoin changes in certain streets. From the decree for plaintiff, allowing the injunction till a resolution or ordinance providing for the changes should be duly passed and published, plaintiff appeals, alleging error in the finding of the court that "the corporate authorities have power, by ordinance or its equivalent, to define the limit of sidewalks and curbs thereon to the extent that is proposed." Affirmed.

The opinion of the court below, per Ewing, J., was as follows: "The opinion and finding of facts this day filed in the case of the commonwealth of Pennsylvania against the same defendants are adopted for this case so far as applicable, and this renders it unnecessary to repeat the conclusions of fact or of law therein set forth. The plaintiff is specially interested as owner of lots abutting on the alleys on which changes of sidewalk, curb, and driveway were being made and in contemplation. He was entitled to notice and a hearing; and, not having had this, he can maintain his bill, taking advantage of fatal irregularities in the enactment of the resolution under which the changes are in contemplation. An injunction should issue, restraining the defendants from further proceeding to change the location of curb, sidewalk, and driveway on the alleys in question, under the authority of the resolution of May 24, 1893. As to the public squares, we are unable to see any action of the corporate officers in relation thereto in which the complainant is specially interested, or otherwise requiring the court to interfere. The costs should be paid by the borough of Beaver. Let a decree be prepared by counsel in accordance with these views."

J. R. Harrah and Wm. A. McConnel, for appellant. J. R. Martin and L. E. Grim, for appellees.

PER CURIAM. All that need be said in relation to the questions presented by this record will be found in the opinion of the learned judge of the Fifth judicial district, who specially presided at the hearing. We are all of the opinion that there is no substantial error in any of his rulings; and the decree is therefore affirmed on his opinion, and it is ordered that the appeal be dismissed, with costs to be paid by the appellant.

RIGG v. SCHWEITZER et al.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

EXECUTOR'S SALE—RIGHT OF PURCHASERS TO ANNUL—BIDDING BY EXECUTOR—EVIDENCE.

1. One to whom property is struck off at an executor's sale cannot have the sale annulled because the executor bid; his bidding being bona fide, for the single purpose of obtaining the property for himself.

2. In an action by a purchaser at an executor's sale, to annul it, on the ground of fraudulent bidding by the executor's agent for

the purpose of puffing, the objection of evancy to questions asked the executor the amount he intended to bid on the property and his reasons for refusal to buy it after sale for the sum he bid on it, was proper and sustained.

3. Whether a purchaser at executor's sale when he signed the agreement for purchase believed the representations made to him concerning the bidding, is for the jury to find for him to state.

Appeal from court of common pleas, county; James N. Ermentrout, Judge.

Action by John A. Rigg against Solomon Schweitzer and another, executors of the estate of William Schweitzer, deceased, and others, titled, under the will, to the proceeds of the sale of certain of deceased's real estate, to annul the executors' sale thereof. Affirmed for defendants. Plaintiff appeals. Affirmed.

Ermentrout & Ruhl and Cyrus G. Decker, appellants. H. P. Keiser, Edwin Sass, and Aug. S. Sassaman, and J. H. Jacobs, appellees.

MCCOLLUM, J. Solomon Schweitzer was alleged to purchase the property to which of which this contention relates, and parties beneficially interested in it were to be paid by him. He employed Lewis to bid for him, but, as he was outbid, the property was sold to the plaintiff, who gave him his check for the hand money, and executed articles of agreement embracing, and in accordance with, the other conditions of the sale. The employment of, and the names of, Moyer, were bona fide, and for the purpose of securing the property to the principal. He was not a puffer engaged to bid for him; but the fact that he was resented, or that he intended to purchase the property, was unknown to the defendant. In bidding upon it, his agent followed the instructions, to the letter. Schweitzer was one of the executors by whom the property was sold under a power in the will of an ancestor who died seized of it, and was therefore virtually a bidder at his own sale. These are facts established by abundant evidence, and found by the learned court. In the light afforded by them this case must be determined.

The plaintiff refuses to comply with the articles of agreement, has notified them to withhold payment of his check, and that the sale, and all proceedings under it, be annulled. His principal contention appears to be based on a denial of the facts as found by the court and stated above, to the extent that it is so, we overrule the cause the evidence warrants, and so require, the finding of them. So much of his contention as relates to findings established and refused is only another form of attack upon the findings made. The case

which authorized the latter certainly warranted the refusal of the former.

It is well settled that an executor or administrator may purchase property of the estate, at his own sale of it, subject to the power of disaffirmance in the heirs or creditors. If, therefore, he bids upon it through an agent, in good faith, the other bidders have no right to complain, and there is nothing in his having done so which furnishes ground for setting aside the sale of it to them. *Pennock's Appeal*, 14 Pa. St. 446, and *Beeson v. Beeson*, 9 Pa. St. 279.

We think the plaintiff has no just cause to complain of the rulings on which the 21st, 22d, 23d, 24th, and 25th specifications are based. Ample latitude was allowed him in the introduction of evidence fairly tending to support his allegation of fraud, but the relevancy of the questions to Schweitzer respecting the amount he intended to bid upon the property, and the reasons for his refusal to buy it after the sale for the sum he bid upon it, is not clear. These were matters remote from, and of but little, if any, significance in the decision of, the issue. Whether the plaintiff, when he signed the agreement, believed the representations made to him concerning the bidding, was a matter for the jury to find, and not for him to state. *Thomas v. Looee*, 114 Pa. St. 35, 6 Atl. 326, and cases cited.

We agree with the learned court below that there was no agreement to release Schweitzer from any of the conditions of the sale, in the event of his becoming the purchaser of the property. The case appears to have been carefully tried and considered in that court, and we discover nothing in the record which calls for a reversal of the decree. Decree affirmed and appeal dismissed, at the cost of the appellant.

KENNEDY v. McCLOSKEY et al.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

EQUITY—PARTIES—JOINDER—VARIANCE—STATUTE OF FRAUDS—RESULTING TRUST—DECREE.

1. A bill alleged a formation of a syndicate of certain creditors of an insolvent, including plaintiff, to buy his mill at the assignee's sale: an agreement between them and a certain person that he should buy it at the sale, and hold it in trust for them; an agreement, after such purchase, between them, to form a company to own and operate it, with a certain capital (a certain amount of the stock to be allotted to plaintiff); and that the others were about to form a corporation and take a conveyance of the property, disregarding plaintiff's rights,—and a decree directing such allotment was prayed for. *Held*, that such corporation having been organized after the filing of the bill, with no stockholders except the defendants, who answered the bill, and a conveyance of the property having been made to it, it was proper to make it a party.

2. Where plaintiff's bill alleged an agreement by a syndicate of creditors, including him, to buy the mill of their insolvent debtor at the assignee's sale (a certain person to buy

it at such sale, and hold it in trust for them), by reason of which plaintiff refrained from bidding; an agreement by them, after such purchase, to form a company, with a certain capital, of which he was to have an allotment of stock to a certain amount; and it was further alleged that, disregarding these agreements and plaintiff's rights, the purchaser was about to convey the property to a corporation to be organized by the others; and a decree was asked directing an allotment to plaintiff of his share of the stock, and defendant's answer denied all the facts, but the proof sustained the allegations, except that it showed that the allotment to plaintiff was not to be made till after the others had taken out of the profits an amount equal to 50 per cent. of their claims against insolvent,—such variance will be held not fatal, but a decree will be made for the issue of the stock, the certificate to be delivered to plaintiff when the profits amount to 50 per cent. of the claims of the others.

3. Certain creditors of an insolvent, including plaintiff and defendants other than defendant M., agreed to purchase insolvent's mill at the assignee's sale. It was agreed that defendant M. should buy it at the sale, and hold it in trust for them. After such purchase it was agreed that a company should be formed to own and handle the property, plaintiff to have a certain amount of the stock. Plaintiff, on account of the agreement, refrained from bidding, and contributed or tendered his part of the purchase money in the way agreed upon. Defendants, ignoring plaintiff's rights, and denying any agreement with him, proposed to form a corporation and convey the property to it. *Held*, that there was a trust *ex maleficio* as to plaintiff's interest, and defendants could not plead the statute of frauds as to the agreements.

Appeal from court of common pleas, Montgomery county; H. K. Weand, Judge.

Suit by John M. Kennedy against John J. McCloskey and others. Decree for defendants. Plaintiff appeals. Reversed.

Henry M. Tracy and Harrity & Beck, for appellant. Montgomery Evans, Louis M. Childs, and Henry Freedley, for appellees.

DEAN, J. J. Morton Brown & Co. owner and operated the Woodstock Mills, a woollen factory in Norristown. On August 3, 1893, being financially embarrassed, they confessed a judgment to William Johnston for \$151,847.73, in trust for certain creditors, among them the following, for the sums specified: John M. Kennedy, \$1,000; William Johnston, \$3,617.53; C. A. Furbush, \$14,199.41; William A. Flanagan, \$26,058.63; M. A. Furbush, \$1,800; M. A. Furbush, representing the M. A. Furbush Machine Company, \$2,974.45; George L. Schofield, \$250. Judgment was entered and execution issued same day, and levy made upon all the personal property on the mill premises. The property consisted of raw materials, and partly-manufactured goods. Afterwards, on the same day, Brown & Co. assigned to Andrew Flanagan for benefit of creditors. This assignment included the mill property, and other real estate. The sheriff made sale of the personal property on August 15, 1893, for the price of \$7,639.51, to John J. McCloskey, one of defendants, who afterwards sold at a profit. On October 12, 1893, the assignee sold the mill property to the same purchaser for

the sum of \$600, subject to two mortgages aggregating \$35,000. On October 25, 1893, McCloskey made a declaration of trust, in which he declared he held the mill property in trust for Flanagan, Johnston, M. A. Furbush, and George L. Schofield, as their interest might appear, and under their direction to convey the same to a corporation thereafter to be organized. On 1st of December, 1893, the Woodstock Mills Company was organized, and McCloskey and wife on the same day, for the consideration of \$50,000, conveyed the property to it, subject to the mortgages of \$35,000. The capital stock of the corporation was stated in the application for charter to be \$75,000, in 3,750 shares, each share of the par value of \$20, and that 10 per cent., or \$7,500, had been paid to the treasurer, and that the subscribers to the stock are:

William A. Flanagan.....	2,097 shares
William Johnston	824 "
David S. Brown.....	533 "
Crosby M. Brown.....	75 "
George L. Schofield.....	20 "
Murrill A. Furbush.....	201 "

Total 3,750 shares

The articles of association set forth that \$25,000 of the subscribed capital is to be paid in cash, and the remaining \$50,000 is represented by the Woodstock Mills Property, subject to the mortgages; the last-named stock to be nonassessable, and to be issued to the parties subscribing, as follows:

William A. Flanagan.....	1,398 shares
William Johnston	550 "
David S. Brown.....	355 "
Crosby M. Brown.....	50 "
George L. Schofield.....	12 "
Murrill A. Furbush.....	135 "

Total 2,500 shares

While all the stock has been thus allotted, none of it has been issued.

It will be noticed that while Kennedy (the plaintiff's name) appears in the list of beneficiaries in the trust judgment, along with Johnston, Furbush, Flanagan, and Schofield, it does not appear in the list of those to whom stock is allotted. He says, in his bill, it ought to be there, and for these reasons: That he, Flanagan, William Johnston, and C. A. Furbush, before the sale of the personal property, on 13th of August, 1893 (they being among the largest creditors), agreed to form a syndicate to buy in the personal property, and also the real estate, when it should be sold; that afterwards, but about the date of the sale of the personal property, M. A. Furbush and George L. Schofield were admitted as members, parties to the same operation; that he attended the sale of the personal property, and saw a large quantity of his own wool, in the original packages which he had delivered to the insolvent partners, sold, yet refrained from bidding, although this and other property was knocked down at prices greatly below its market value; that he refrained only because of the

agreement made between him and the creditors. Further, that after the sale of personal property, and before the sale of real estate, it was again agreed it should be purchased by McCloskey for the syndicate, and the day after the sale it was agreed, among them, a company should be formed, with a capital of \$80,000, of which he was to have an allotment of stock amounting to \$3,300. He therefore prayed a decree directing said allotment, and for general relief. The defendants having denied the material averments of the bill, the case was referred to Henry C. Boyer, Esq., master, to find the facts and suggest a decree.

After a full hearing, the master finds the real understanding or agreement between the members of the syndicate, as to the terms on which Kennedy should participate, was that all respects as averred in the bill; that Kennedy's interest is not correctly averred, nor that when Kennedy was to come into the enjoyment of it. While all the witnesses on that subject admit there was some sort of agreement, which Kennedy was to participate, no one of them concur as to the exact terms of it. Some of the same witnesses join in a denial, by their answers, of any agreement all with Kennedy. The master comes, however, to this conclusion: "McCloskey testified on October 12, 1893, he purchased the property as the representative of Murrill A. Furbush, Johnston, Flanagan, Schofield, and C. A. Furbush, and that the question of Kennedy's interest was something to be settled afterwards, but that on the 25th of August, 1893, he agreed by all parties that Kennedy was to come into the combination after the others had received fifty per cent. of their claims out of the personal and real estate; that after that Kennedy was to come in on an equal footing. Owns McCloskey's relations to all the parties.—In communication with each of the parties, directly,—the master is of the opinion that the agreement was as he states it; and the master finds, as a fact, that the agreement was that Kennedy was to be regarded as a coadvocate with the other members of the syndicate, entitled to share in the profits resulting from the purchase of the personal property and the real estate upon an equal footing. After the others had realized from the entire advance fifty per cent. of their claims against Johnston Brown & Co., which amounted to \$47,000 in the aggregate." The bill avers that the agreement was that McCloskey should buy the property for the joint use of all the parties, and hold the same in trust for them; that it was then agreed a stock company, with a capital of \$80,000, should be formed, in which Kennedy should be allotted \$3,300 of stock. Therefore, there is this variance between the averments of the bill, and the fact as found by the master: Kennedy was not to immediately participate in the profits of the syndicate, only after the others had received 50 cents of the dollar of their claims. These amounts to \$47,000. Fifty per cent. of this, after

ducting \$26.24, Kennedy's share of the \$600 purchase money of the real estate, also their cash contributions to the capital stock, and other disbursements, would be \$26,250. Deducting from this the \$17,000 profit already received from the personal property would leave \$9,250 yet to be paid them out of profits of the woolen mill, when Kennedy would be entitled to the delivery of 164 shares of the stock of the Woodstock Mills Company.

The learned judge of the court below dissented from the master's finding of facts and conclusions of law. He was of opinion the Woodstock Mills Company could not be made a party defendant, as suggested by the master, because it was a stranger to any alleged contract or agreement. We think this objection lacks real merit. Every shareholder of the company was a party to the answer to the bill, which averred they were about to form a company and take a conveyance of the property. After the bill was filed they did take a conveyance, and organized the Woodstock Mills Company. It was the identical party defendant which assumed a corporate form under a corporate name, pending litigation. Equity is not so dull as to permit the substance of an issue to elude its grasp by a mere change of name. We think the suggestion of the master, to make the Woodstock Mills Company a party to the decree, a proper one, and necessary to the administration of equity between the real parties to the issue, of whom it was one.

As a further reason for dismissing the bill, the court is of opinion, there is a fatal variance between the contract averred by plaintiff and that proven. The plaintiff averred a contract by which he was to share in the operations of the syndicate, and in consequence he was lured into inaction, as an individual, for the protection of his own interests; that defendants had thereby largely profited in the past, and would greatly profit in the future; that by the contract he was to share in these profits, along with the others, in proportion to his debt against the bankrupt firm. The necessary conclusion from his averment is that he was to come immediately into the possession of his proportion. The master finds this last to be a mistake, but every one of the other averments substantially true. The only variance is, Kennedy was not to get his share of stock until his coadventurers had been paid 50 per cent. of their claims out of the profits. If the answer of defendants had admitted the facts to be as the master finds, and had only denied that the period for Kennedy's participation had yet arrived, because the profits had not yet reached 50 per cent. of their claims, and a statement of an account of profits had sustained the answer in this last particular, plaintiff's bill would, without doubt, have been dismissed, at his costs. But, while the proof fails to sustain the bill as to the time plaintiff was to have his stock delivered to him, it amply sustains it in all other particulars. There is therefore not such substantial variance as calls for the dismissal of the bill. Pledgers in

equity are no longer held to the strict technical rules which formerly were sufficient to control decrees, but often failed to accomplish equity. Bisp. Eq. § 384. The undoubted rule is that every averment of the bill necessary to entitle the plaintiff to the relief sought must be stated. The relief sought here was for a decree directing an allotment of stock to plaintiff, in the sum of \$3,300, on the averment that defendants denied his right thereto, and, if the same passed to others, he would have no adequate remedy at law. The proof showed plaintiff's right to what he claimed, and, from the attitude and denial of defendants, that right was in peril. This was sufficient to move the chancellor in his behalf, although the decree might not be framed in exact accordance with his prayer, because of an immaterial variation between the averments of a part of the contract and the proof.

The court below, further, was of opinion the transaction is within the statute of frauds, as his interest rested entirely in parol, and no money had been paid by him. But this overlooks the facts as testified to, and as found by the master, which clearly constituted a resulting trust, and converted defendants into trustees *ex maleficio*. The plaintiff says he and defendants entered into an agreement to purchase, for their benefit, the mill plant. Defendants answer, specifically, "We deny it." He says, in pursuance of the agreement, McCloskey did purchase the plant for their joint benefit. The specific answer of defendants is, "We deny it." He says a joint-stock company was to be formed, in which he was to have \$3,300 of stock. The specific answer is, "We deny it." When the master finds these averments of plaintiff to be true, and that, in good part, on the admissions of defendants on the witness stand; and, further, that Kennedy, in pursuance of the agreement, refrained from bidding; that he tendered his share of the \$600 purchase money on the real estate, took part in the creditors' meeting, and agreed to accept the stock allotment; that Furbush actually made a payment for his account,—this established a trust *ex maleficio*, as to Kennedy's interest. Under the agreement entered into between them, Kennedy contributed or tendered his share of the purchase money in the way agreed upon; and the title was taken, McCloskey expressly testifies, by him, for the benefit of all, including Kennedy. As is said in *Bigley v. Jones*, 114 Pa. St. 510, 7 Atl. 51: "The presumption is, in the absence of all rebutting circumstances, that one who pays the purchase money of land intends to become the owner of it, although, as a matter of convenience, or through an arrangement of the parties, for collateral purposes, the conveyance may be in the name of another. The same rule applies if several persons pay the consideration, and take the title to one of their number. If the parties contribute unequally, the trust results to each of them in proportion to the amount paid by each

And for this a number of authorities are cited. A resulting trust in this purchase, for Kennedy, clearly appears from the agreement and conduct of the parties; a trust, too, of which, from the facts, defendants were fully conscious, and wrongfully refused to execute. Whoever may plead the statute of frauds, surely they cannot.

The findings of facts and conclusions of law by the master are sustained by the evidence and the law, and are therefore approved. But we do not adopt his decree in full. We do not think it necessary to turn the management of the property over to a receiver until the defendants have been paid profits equal to 50 per cent. of their claims. None of the stock has yet been issued. No full account of the profits, up to the date of filing his report by the master, was taken. He did find their debts amounted to \$47,000; that they had made a profit of \$17,000 on the sale of personal property. But they had made cash contributions for interest on mortgages and taxes, and paid \$600 cash in purchase money, leaving still unpaid them, of the 50 per cent., \$9,250. Whether any profits had been made by the defendants, or the Woodstock Mills Company, other than the \$17,000 on the personal property, he did not inquire or determine. We therefore modify the decree suggested by him thus: (1) The proper officers of the said Woodstock Mills Company are hereby directed to mark and allot on the stock book of said company 164 shares of the capital stock to John M. Kennedy. (2) The said officers are directed to issue and deliver a certificate for said 164 shares, in his (Kennedy's) name, to the prothonotary of the court of common pleas of Montgomery county, to be by him safely kept until the said court directs him to deliver it to said John M. Kennedy. (3) That on application of said John M. Kennedy, now or hereafter, without further pleadings, this cause shall be referred to the same master, or, in case of his inability to act, to some other, to state an account of said Woodstock Mills Company, to determine whether the profits have equaled the sum of \$9,250, the balance of the 50 per cent. yet due to defendants, and, if it be found they equal or exceed said sum, then the said prothonotary, on direction of the court, shall deliver to said Kennedy said certificate; otherwise, shall hold the same until other accounting determines that said profits equal or exceed said balance. Further: Nothing in this decree shall be taken as hindering an amicable settlement of the matters at variance between the parties, or an agreement between them to deliver said certificate to John M. Kennedy without an account, or the surrender of the same by him to said company. The decree of the court below is reversed and set aside, the report of the master is confirmed absolutely, and the decree suggested by him, as herein modified, is adopted. The costs of this appeal to be paid by appellees.

SHARER v. PAXSON et al.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

CARRIERS — PUSHING PASSENGER FROM TRAIN — CONTRIBUTORY NEGLIGENCE — TICKET AS EVIDENCE.

1. Where a person gets on a moving train, his negligence in so doing does not contribute to his death, caused by his being pushed therefrom by an employé of the company.

2. A carrier's liability for injury to a person who, having a ticket, safely boards its moving train, is the same as its liability to any passenger.

3. In an action against a carrier for death of a person pushed by its employé from its train, evidence that he had a railroad ticket, entitling him, on its face, to a ride on the train, is admissible without evidence that it was purchased or owned by him, or that he boarded the train pursuant to it.

Appeal from court of common pleas, Lycoming county; John J. Metzger, Judge.

Action by Mary Sharer against Edward M. Paxson and others, receivers of the Philadelphia & Reading Railroad Company, for death of Ellet Sharer, plaintiff's husband. Judgment for plaintiff. Defendants appeal. Affirmed.

The fourth specification of error was as follows: "The court erred in overruling the objection of the defendants' counsel to the admission in evidence of the ticket found by the witness Harry Sweet in the vest pocket of Ellet Sharer, the deceased, after his removal to the hospital, which objection, and the ruling of the court thereon, is as follows: 'Philadelphia & Reading Railroad ticket, Williamsport to Newberry, shown witness (Harry Sweet). Q. Do you recognize that ticket? A. Yes, sir. Q. Where did you get it? A. From his vest pocket. It laid on the floor. By the Court: Sharer's vest pocket? A. Yes, sir. By Mr. McCormick: We offer this ticket in evidence. By Mr. Reading: The offer is objected to—First, because it is not shown that the ticket was purchased or owned by Ellet Sharer at the time of the accident, nor that it was pursuant to it that he was attempting to get upon the train; second, because irrelevant and immaterial. By the Court: We will admit it and seal a bill for defendants.'"

John G. Reading, Jr., for appellants. J. C. Hill, Henry C. McCormick, and Seth T. McCormick, for appellee.

MCCOLLUM, J. The jury found that the plaintiff's husband was standing upon the step of the car, with a firm hold on each side rail, and that while in this position the company's servant broke his hold on the rails, and pushed him from the step, and that in consequence of this action of the servant he received the injury which resulted in his death. The evidence was sufficient to warrant the finding, and the instructions in regard to it were clear and impartial. The testimony of R. C. English was direct and positive, and it was corroborated by the testimony of Ellis Shaffer. True, it was contra-

dicted by a number of witnesses called by the company, but, if the facts involved in the finding were material, they were for the jury upon the whole testimony in relation to the occurrence. It is contended, however, that, inasmuch as the deceased reached the position from which he was pushed while the train was moving, his own negligence contributed to his death, and is a bar to this action. The attempt to board a moving train is undoubtedly a negligent and hazardous act, but if it is successful, and the negligent party gets safely upon the car, it will not justify or excuse the subsequent negligence of the company or its servants by which he is injured. The rights of Sharer in the position from which he was thrown were the same as if he had taken it before the train started, or as the rights of a passenger who, while the train is moving, leaves his seat in the body of the car, and stands on the platform of it. He was on the car when the negligence of the company intervened and hurled him from it. His presence there was not the proximate cause of his death. The peril involved in getting there was passed, and the negligence or misconduct of which he was the victim was not included in the risks to which his position exposed him. *Railway Co. v. Boudrou*, 92 Pa. St. 475. If he had been thrown from the car by an ordinary jolt of it, as was the plaintiff in *Railroad Co. v. Hooper*, 99 Pa. St. 492, he might have been considered as having voluntarily exposed himself to or assumed a risk incident to his position, and thereby caused or contributed to the injury he received. But he had no reason to anticipate the act which caused his death, and to push him from the step under the circumstances established by the verdict was as great an outrage as to push from the platform while the train is moving any passenger who may be found standing upon it. The negligence of the deceased in attempting to get on the moving car cannot relieve the company from responsibility for the consequences of the negligent act committed by its employé after the former accomplished his purpose. He was lawfully upon the steps of the car, and entitled to the rights of a passenger in it. This sufficiently appeared by the ticket in his possession. The risk he ran in getting there was no abridgment of his right to pass from the step to the platform and thence to a seat in the car.

The company's principal contention is that under all the evidence in the case the court should have directed the jury to find for the defendant, and we are clearly of opinion that it cannot be sustained. We discover no error in the instructions or in the ruling complained of in the fourth specification. If there was error in the admission of the declaration of the deceased, it was cured by the withdrawal of the evidence in relation to it, and the instruction to the jury to disregard it. The specifications are overruled. Judgment affirmed.

LUCKENBACH v. LUCKENBACH et al.
(Supreme Court of Pennsylvania. Oct. 7, 1895.)

ORPHANS' COURT — PROCEEDINGS BY LEGATEE'S CREDITOR FOR SALE OF LAND.

Under Act Feb. 24, 1834, declaring that, when a legacy is charged or payable out of real estate, the "legatee" may apply to the orphans' court to make an order touching the payment of the legacy out of such real estate, such court has not jurisdiction of such an application made by a judgment creditor of a deceased legatee, though the claim was for supporting the legatee, and the will had given the legatee a house for life, with a provision that if, at any time, during her life, she should find it necessary or convenient to sell it for her maintenance, the executor should have power to sell it, and apply the proceeds to her maintenance; and it is immaterial that the judgment creditor obtained judgment against the executor as garnishee, the residuary legatees not having been parties to the proceeding against him.

Appeal from orphans' court, Northampton county; W. W. Schuyler, Judge.

Petition by Julius B. Luckenbach to the orphans' court for sale of real estate. From the decree in his favor, Anna L. Luckenbach and others appeal. Reversed.

Wm. C. Loos, for appellants. W. E. Doster, for appellee.

DEAN, J. In 1878, George Luckenbach died, leaving a will, in which was this provision: "Item. I give and bequeath unto my wife the use and occupation of my dwelling house in Market street, in the borough of Bethlehem, during her natural life; but if it should prove at any time during her life that she should find it necessary or more convenient to make sale thereof for her maintenance and well-keeping, in such case my executor shall have full power to make sale of the above-named dwelling house, and to give legal deed and title thereto, and the proceeds of such sale shall be safely invested and loaned out on bond and mortgage, and the interest accruing therefrom, and the capital, if necessary, to be employed and used for the benefit, maintenance, and comfort of my wife, during her lifetime, and after her decease all the furniture in her possession shall be sold to the best advantage." The testator left three children,—Edwin, Maria, and Julius. After his father's death, Julius moved into the homestead, and his mother lived with him until her death, in October, 1892, the son supporting her. Ten years after the father's death a contract was entered into between him and his mother by which she agreed to pay him \$4.50 per week for her maintenance from the death of her husband, and no charge to be made for rent of the property. Three years after this she gave to him an order on the executor of her husband, requesting him to make sale of the property under the provision of the will just cited. This request she afterwards revoked. The executor proceeded to make sale. The other children, by proceedings in court, resisted the sale. During the

pendency of the litigation the mother died, and Julius brought suit in the common pleas against her administrator for the amount due him under the contract for support, and recovered judgment for \$3,358.75. On this judgment he issued attachment execution against the administrator of Maria Luckenbach, and also against the executor of George Luckenbach, and summoned them as garnishees. The latter made no defense, and he took judgment against him. Julius then presented his petition to the orphans' court, setting out the facts in substance as we have stated them, averring as a legal conclusion his substitution by reason of his judgment against his mother's administrator, and the judgment in the attachment against her husband's executor, to all the rights of his mother under the father's will, and praying for a sale of the homestead property to satisfy the debt due him for her support. The other parties interested in the estate, these appellants, denied some of the averments of the petition, but especially that in which Julius claimed a substitution to his mother's right as a legatee under his father's will. They also denied any jurisdiction in the orphans' court to order a sale, and to apply the principal sum realized to the payment of Julius' judgment. The court being of opinion, though apparently not without some misgivings, that under the act of 24th of February, 1834, the proceeding could be sustained, made the decree that an order issue for the sale of the property as prayed for. From this decree the appeal before us is taken. As the whole case hinges on whether the court below had jurisdiction to make the order, we shall consider only the assignment of error bearing on that question.

The section of the act of assembly which the court thought conferred jurisdiction is as follows: "When a legacy is or shall be hereafter charged upon, or payable out of real estate, it shall be lawful for the legatee to apply, by bill or petition, to the orphans' court having jurisdiction of the accounts of the executor of the will by which such legacy was bequeathed; whereupon such court, having caused due notice to be given to such executor, and to the devisee or heir, as the case may be, of the real estate charged with such legacy, and to such other persons interested in the estate, as justice may require, may proceed, according to equity, to make such decree or order touching the payment of the legacy, out of such real estate, as may be requisite and just." The act says: "It shall be lawful for the legatee to apply by bill or petition to the orphans' court * * * to make such order touching the payment of the legacy out of such real estate as may be requisite and just." The legatees themselves can alone adopt this statutory remedy. This is decided in Field's Appeal, 36 Pa. St. 11. While the point is not discussed at length in the opinion, it is directly decided in this language: "For deficiencies the legatees must proceed themselves against the devisees or

their assigns whose land is charged with the payment. We know of no law authorizing the executors to attend to this duty." And for the decision Lowrie, J., cites Conrad's Appeal, 33 Pa. St. 47, which holds that an executor has nothing to do with legacies expressly charged on land, either primarily or as part of the residuary estate of testator, and that such legacies can only be enforced in the orphan's court by the legatee. The appellant in Field's Appeal directly raised the question of jurisdiction on a construction of the act of 1832, and his contention by the decision was sustained. To the same effect are Littleton's Appeal, 93 Pa. St. 181, and Baker's Appeal, 59 Pa. St. 315. Was, then, Julius, in any legal sense of the word, a legatee? On the face of the record, he was simply a judgment creditor of his mother. True, by inquiring into the cause of action, we discover that his claim against the mother, the legatee, arose from supporting her, and that as a legatee she was entitled to support, if she considered it necessary, out of a sale of this property; but that was only on a contingency happening during her life. The will says: "If it should prove at any time during her life that she should find it necessary or more convenient to make sale thereof for her maintenance and well-keeping, in such case my executor shall have full power to make sale thereof." Under this power the widow requested the executor to make sale, and then revoked the request. While her power to revoke was in dispute, as an incident to the litigation following the executor's attempt to sell, she died. Her standing as a suitor legatee in either event, whether by the revocation or her death, with the property unsold, ended. The land passed to the residuary devisees, and left Julius in the position of a creditor of his mother, who in her lifetime was a legatee. No right of hers, as legatee, passed to Julius from the mere fact that she was his debtor, which would constitute him a legatee. Whatever may be his remedy against the land in the possession of the residuary legatees for the recovery of his debt, it is not by a special proceeding under a statute which necessarily excludes all but legatees.

But it is argued that, notwithstanding Julius is not nominally a legatee, and the judgment of itself gives him no standing to maintain this proceeding, yet, having issued an attachment against the executor of the husband, and having obtained judgment against him as garnishee, under the authority of Reck's Appeal, 78 Pa. St. 432, in equity, he stands in the position of a legatee by virtue of the attachment. But that case was adjudged upon a construction of that will alone, and it was held in equity the creditor was entitled to come in on the fund in the hands of the executor for distribution. The important facts alleged in this answer, which would determine the equities of the parties, were not passed on in that case. Here it is

averred: (1) On the interpretation of the will there is no power of sale in the executor, if it be not executed on an unrevoked request by the beneficiary in her lifetime. (2) That there is collusion between the creditor and the executor. As the residuary legatees were not parties to the attachment proceedings against the executor, they are not concluded by the judgment in that proceeding. The executor did not represent them, and made no defense. They have a right to be heard in equity, before equity appropriates their estate to creditors by virtue of an attachment to which they were not parties. The error pervading the case, it seems to us, is in treating the alleged collusive proceedings at law in the common pleas, between the creditor and the executor, as determining the rights in equity of the residuary legatees to their father's estate, the same as if there had been a distribution, with notice to all parties, in such an equity tribunal as the orphans' court. There never has been such opportunity for hearing to these residuary legatees. We are therefore of opinion the orphans' court had no jurisdiction to order the sale of the homestead property on this petition, and the decree is reversed; the costs to be paid by appellee.

HARTMAN v. MEIGHAN.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

ENTIRE CONTRACTS—RECOVERY FOR PART PERFORMANCE.

One who makes an entire contract, and willfully defaults in a substantial performance thereof, cannot recover for a part performance, though the other party was not damaged by the default.

Appeal from court of common pleas, Philadelphia county.

Action by George W. Hartman against John Meighan for the value of certain work done under a contract. Judgment for plaintiff. Defendant appeals. Reversed.

The specification of error was as follows: "The trial judge erred in charging the jury as follows: 'Now, if you believe in this case that the plaintiff refused to go on unless he received a payment of one hundred dollars, and that the contract did not provide for that payment, and that there was no custom of the trade and no understanding of the parties or acts of theirs evincing that that was the custom, and that, therefore, the plaintiff broke his contract and refused to go on because payment was not made, he would be entitled to recover for the value of the work less what it cost the defendant to complete the contract in accordance with its terms. It appears in this case the defendant hired a man named Donnelly to have the contract completed for \$35 per house. It is said that it was completed in a different way; that a different kind of heat-

er was supplied. Well, gentlemen of the jury, that is his right, if there was a breach by the plaintiff,—to change the contract, and have it performed in a different way; but it is incumbent upon defendant to show what it would have cost him to have completed it in accordance with the contract. If he had it substantially completed for a sum which was equal to what the first contract price was, then he is not injured, even if there was a breach upon the plaintiff's part, because the damage is what you seek to discover. In this case the defendant had it completed in some way for \$35 per house, and that, together with what he has paid, amounts to \$38.65, which is \$2.35 less than what the original contract price was. When he went on to complete the contract through somebody else, it is his duty to show you that he suffered damage by being obliged to go elsewhere and complete the contract; and he can only have set off against this claim so much damage as he suffered, and it is your duty to ascertain what, if any, damage he did suffer. If he suffered none, then the plaintiff would be entitled to recover the entire amount, even if he was guilty of a breach, for the defendant suffered no damage on his part.'"

Alex. Simpson, Jr., for appellant. Walter E. Rex, for appellee.

STERRETT, C. J. It may be true, as stated by the learned counsel for appellee in his argument, that "substantial justice has been done in this case by the verdict of the jury," but it is by no means certain that such was the result. Our examination of the charge in connection with the testimony has satisfied all of us that the instructions contained in so much thereof as is recited in the specification of error were erroneous, and the jury were thereby misled to the defendant's prejudice. In the first sentence of that excerpt, the learned judge said: "Now, if you believe * * * that the plaintiff refused to go on unless he received a payment of one hundred dollars, and that the contract did not provide for that payment, and that there was no custom of the trade and no understanding of the parties or acts of theirs evincing that that was the custom, and that, therefore, the plaintiff broke his contract and refused to go on because payment was not made, he would be entitled to recover for the value of the work less what it cost the defendant to complete the contract in accordance with its terms." We are not aware that it has ever been recognized as a sound principle of the law of contracts that a plaintiff who has willfully defaulted in the substantial performance of an entire contract may, nevertheless, recover to the extent of his part performance. Equally unsound and untenable is the subsequent instruction to the effect that plaintiff in this case could recover his claim unless de-

fendant proved affirmatively that he had suffered damage by plaintiff's default. Our own cases, among which are *Martin v. Schoenberger*, 8 Watts & S. 367, and *Tool Co. v. Wilson*, 123 Pa. St. 19, 16 S. W. 36, inculcate no such doctrine. In the former it was said: "To permit a man to recover for part performance of an entire contract, or to permit him to recover on his agreement when he has failed to perform, would tend to demoralize the whole country. * * * No plaintiff ought ever to be permitted to recover for part performance of his engagements, unless prevented by the defendant from performing, or so trifled with that it becomes his duty to declare the contract at an end." In this case the plaintiff's agreement, as set forth in his statement, is an entire contract, and the excuse he assigns for admitted nonperformance is that he "was not permitted to complete it, although he was ready and willing to do so." The burden of proving this was on him, and, if he failed to make the necessary proof, it was either his fault or his misfortune. It follows from what has been said in relation to that part of the charge recited in the specification of error that, as a whole, it is erroneous and misleading, and the judgment must be reversed. Judgment reversed, and a venire facias de novo awarded.

CLARK v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)
OPENING AND GRADING STREETS — WAIVER OF DAMAGES.

Where, in a proceeding to open a street, the final decree in which was rendered eight months before the grading was authorized by ordinance, one disclaims "any damage for the property taken by the opening of said street," having at the same time and in the same court a proceeding of his own pending for assessment of damages for change of grade, which is not abandoned or even referred to, there is no waiver, either by estoppel or intention, of damages for the change of grade.

Appeal from court of common pleas, Philadelphia county.

Proceeding by Clarence H. Clark against the city of Philadelphia. There was judgment for defendant, and plaintiff appeals. Reversed.

Joseph S. Clark (John G. Johnson, of counsel), for appellant. E. Spencer Miller, Asst. City Sol., and Charles F. Warwick, City Sol., for appellee.

MITCHELL, J. Appellant's amended statement is a petition under the act of May 16, 1891 (P. L. 75), for the appointment of viewers to assess damages for a change of grade of Forty-Fifth street. The city of Philadelphia set up in its answer that, in a prior proceeding in the quarter sessions for the opening of said Forty-Fifth street, the petitioner had expressly waived his claim for damages

for his land taken by the opening, and therefore was now barred from his present claim. The court below sustained this view by charging the rule for the appointment of viewers.

The waiver must be either by estoppel or by intention.

1. The claim of a property owner against the city for the opening of a street is a single claim for the depreciation in the value of his land, though it may include various elements, such as the value of the part actually taken, and the injury to what is left, whether the latter is by reason of diminished or inconvenient shape, difference of grade, or other attendant circumstances. It was accordingly held in *Pusey v. City of Allegheny*, 98 Pa. St. 522, and other cases that have followed it, including *Righter v. Philadelphia*, 161 Pa. St. 73, 28 Atl. 1015, that the claim must be asserted as an entirety in the same proceeding, and, if any part of it be omitted, the owner will be estopped from setting up in a subsequent action. To this rule, however, there is the necessary limitation that the claim need only include elements already existing. No proceeding can be required to include rights of action which are yet inchoate. Where, therefore, "the grading occurs as a separate act of the public authorities, and so long after the opening of the street that the assessment of damages at the time of the appropriation cannot include those resulting from the grading, the latter may be ascertained by a second view." *Pusey v. City of Allegheny*, supra. The present case comes within the exact terms of this exception. The report of the viewers to open Forty-Fifth street was confirmed, and the ordinance thereon made June 25, 1887. The ordinance under which the grading of the street was done was not passed until March 1888. The right to damages for change of grade does not accrue until the actual change is made on the grounds. *Ogden v. Philadelphia*, 143 Pa. St. 430, 22 Atl. 694. Where, therefore, the appellant, in the proceeding in the quarter sessions to open the street, disclaimed "any damage for the property taken by the opening of said street," there was no necessary legal implication that he thereby waived a claim for damages by change of grade which was as yet inchoate, and of which no right of action yet existed. There was, therefore, no estoppel, by virtue of his disclaimer, against the assertion of the right when it should arise. The opening of the street and the grading were separate acts,—one through the operation of the court of quarter sessions, and the other through an ordinance of council, and the latter was, in the language of *Pusey v. City of Allegheny*, already quoted, "so late after the former that the assessment of damages at the time of the appropriation cannot include those resulting from the grading."

The argument of the appellee that, by the construction, the advantage to the city was in having the complete damage assessed in

single proceeding will be lost, and proceedings in the quarter sessions secure an opening without the risk of assessment for benefits, would be a good argument ad inconvenientem addressed to the lawmaking power; but even then there is another horn to the dilemma, which is that the assessment of damages for a change of grade not yet actually made is speculative, as it is compensating the owner in advance for an injury not yet done to him, and which in fact may never be done. This is the view that was successfully urged by the city of Philadelphia in *Re Plan 166*, 143 Pa. St. 414, 22 Atl. 669; and the rule was there settled that no damages are recoverable for change of grade until the actual work on the ground is begun. By this rule, as was there said, "the city is not exposed to the danger of speculative damages for a change that may never be made in fact, while the property owner will still be compensated, but for an actual change when it is made on the land." The subject has inherent difficulties, because no general rule can be formulated which will invariably work justice to all parties. But the vigilance of the city officers can in most cases protect the city's interest by seeing that dedications of land or waivers of damages for opening are not accepted, unless they include waiver of damages as to grade, and that ordinances for opening shall also provide for grading, so that the acts shall be concurrent, and claims for both be necessarily presented in the same proceeding. It may also be worth while for the lawmaking authorities to consider whether the jurisdiction of the quarter sessions over the opening of streets, at least in cities of the first class, where damages are so important a part of the expenses of government, should not be limited or taken away, if it may constitutionally be done, and the whole subject left exclusively to the city councils, where it properly belongs. The authority is not in its nature judicial, but legislative; and its survival in the quarter sessions is a remnant of the colonial days, when that tribunal, before the accurate definition and separation of constitutional powers, exercised a general and very miscellaneous jurisdiction over the great body of local affairs. That the jurisdiction in the rural parts of the state, where roads are matters of general concern, and the land damages for opening are relatively small, is still beneficial, and the public interest is watched and subserved, is probably unquestionable; but it is patent to every one who has presided in the quarter sessions of Philadelphia during the past 20 years that the opening of streets by proceedings under the road laws is always at the instance and for the benefit of private enterprise, and the public necessity or convenience alleged as a basis is, like the right of eminent domain under the corporation laws, the thinnest kind of a mask for individual profit.

2. The waiver of appellant's claim to damages may extend to and include damages resulting

from the opening at the grade on the city plan, if such was in fact the intention of the waiver at the time; and it is argued for the city that such must have been the intention, as the appellant must have known that, when the street was opened, it would be at the established grade. We do not, however, think this result follows; certainly there is no sufficient evidence of it in the appellant's petition and the city's answer, which are all the court had before it. The waiver, as it is set out in the viewers' report, is of damages for "property taken by the opening"; and, as we have seen, the municipal acts of opening and grading were not contemporaneous, but the first was ended by a final decree of court more than eight months before the latter was authorized by ordinance. The damages for change of grade are not within the letter of the waiver, nor do the circumstances show that they were within the intent. But this is not all. It appears in the appellant's statement that, at the very time when this waiver was made in the proceeding to open, he had a separate proceeding of his own pending in the same court, for the assessment of his damages by the change of grade. It is true that it was subsequently held that he had no right of action for the paper change, and therefore the proceeding was not only premature, but in the wrong court (*In re Plan 166*, 143 Pa. St. 414, 22 Atl. 669); but the fact that appellant then had such an action pending, which he was pursuing for the assessment of these very damages, and which was not abandoned, nor even referred to, is conclusive that the waiver was not intended to cover anything more than its literal terms included,—the damages for property taken in the opening. There was no waiver, therefore, either by estoppel or by intention, of the damages claimed in this proceeding, and the appellant was entitled to have viewers appointed, and the case proceed regularly according to the statute.

This result is not in conflict, as is argued, with the decision in *Righter v. Philadelphia*, 161 Pa. St. 73, 23 Atl. 1015. In that case the opening and grading were done at the same time; and the ground of the decision, as stated by our Brother Fell, is that, as an action must have included both elements of damage, the waiver must be presumed to have been intended to include both. "If no dedication had been made, and the city had done precisely what it did,—opened and graded the street at the same time,—the plaintiff's action for the opening would have included his damages for the grading. * * * The question is one of intention, to be gathered from the deed, with the aid of the circumstances surrounding the parties." And the most potent factor among such circumstances is the opening and grading at the same time, in which respect the case differs from the present. That was an illustration of the rule laid down in *Pusey v. City of Allegheny*; this is an example of the exception. Judgment reversed, and procedendo awarded.

**CITY OF PHILADELPHIA v. THIRTEENTH & FIFTEENTH STS.
PASS. RY. CO.**

(Supreme Court of Pennsylvania. July 18, 1895.)

STREET-RAILWAY COMPANIES — CHARTER — CONSTRUCTION — REPAIR OF STREETS — DUTY OF RAILROAD COMPANY — ACTION FOR DAMAGES — SET-OFF.

1. The facts that the consideration to the state for passing Act March 27, 1873 (P. L. p. 435), confirming the merger of certain street-railway companies, was the surrender of other rights or franchises claimed by the new company formed by such merger, and that the occupation of a certain street was terminable on specified contingencies, did not vary the nature of such act as a legislative grant of new franchises, as well as a confirmation of others claimed under prior charters.

2. Where the charter of a street-car company requires it to keep the street occupied by it in good repair at its expense, the fact that at the time the charter was granted a part of a certain street afterwards occupied by the company was required to be kept in repair by other parties who had privileges thereon does not prevent the duty of keeping in repair becoming incumbent on the company when circumstances otherwise created such duty.

3. The charter of a street-car company required it to conform to the grades of the streets traversed by its railway, and that "the streets thus occupied" should be kept in good repair. The charter of another street-car company, which was afterwards merged with the former company, provided that it should keep in repair "that portion of the street which they use and occupy." *Held*, that such companies, and the one into which they were merged, were required to keep in repair the whole of the street, from curb to curb, occupied by the company's railway.

4. The charter of a street-car company provided that it should be "compelled to keep in constant repair that portion of the street which they use and occupy, and be subject to such ordinances of council as relate thereto"; and the city ordinance provided that all street-car companies should be at the entire cost and expense of maintaining, paving, and repaving that may be necessary on any street occupied by them. *Held*, that such company was bound to keep in repair not only the portion of the street occupied by it, but the whole street, from curb to curb.

5. Where the charter of a street-car company and city ordinances require it to repair and repave streets occupied by it, such duty extends to the replacement of an old pavement by a new one of a different and improved kind, ordered by the city.

6. Where the charter of a street-car company and city ordinance require it to keep in repair and repave streets occupied by it, the fact that the occupation of the street is terminable on certain contingencies, which may happen at any time, and at the will of the city, does not destroy the obligation of the company to keep in repair so long as it occupies the street.

7. The charter of a street-car company made it subject to a certain ordinance, which provided that it should be the duty of any such company to pave or repave the highways as in such ordinance provided, and that, "should they refuse or neglect to do so for 10 days from the date of notice. * * * councils may forbid the running of any car or cars on the road until the same is fully complied with." The city, by ordinance, instructed the director of public works to stop the running of such company's cars on a certain portion of a street occupied by it "until the said street is repaved in accordance with the notice to do such work, served by

him on the" company as required by the merger ordinance. *Held* that, in an action brought by the city against the company to recover the money expended by the city in paving such street, the defendant could not show damages by way of set-off by causing the stoppage of its cars, in the absence of any offer to show that the stoppage of its cars was justified by the facts which justified the actions of council in passing the resolution for repaving, the duty of the defendant to do its part, and the failure to do so in the time required, did not exist.

Appeal from court of common pleas, Philadelphia county.

Action by the city of Philadelphia against the Thirteenth & Fifteenth Streets Passenger Railway Company of Philadelphia to recover damages for money expended by plaintiff in paving certain portions of Broad Street and other streets traversed by defendant, vs. the defendant. Plaintiff alleged defendant had neglected to keep in repair and pave as required by its charter and the city ordinance. From a judgment for plaintiff, defendant appeals. *Reversed*.

J. G. Johnson, G. W. Biddle, and Biddle, for appellant. E. Spencer Miller, James Alcorn, Asst. City Sol., and Charles Warwick, City Sol., for appellee.

MITCHELL, J. The railway company (appellant) was formed by the merger of several passenger railway companies previously existing,—one of the same name, chartered April 8, 1859; and the other called the Navy Yard, Broad Street & Fairmount Railway Company, chartered May 16, 1861. The validity of the merger under then existing laws having been questioned, an act of assembly was passed March 27, 1873 (P. L. p. 435), confirming the merger, providing for the surrender of certain corporate rights, and transferring other rights, and making them positive. This act was solemnly accepted by the appellant by deed in the form prescribed by the act, filed in the office of the secretary of the commonwealth April 8, 1873, and became the amended and operative charter of the consolidated company (appellant). It is argued that this was not in any sense a charter, nor an amendment to a charter, but merely a contract between the legislature and the railway company by which the former confirmed certain rights other than those on Broad Street, and the company abandoned its rights on Broad Street, with a temporary license to run its cars thereon until the Thirteenth and Fifteenth Streets should be opened, from time to time, for six consecutive squares north or south of specified points. This claim, however, cannot be sustained. The act is, in its nature and effect, a grant of franchise; some positive, and at least some negative, privilege in the nature of an amended franchise,—the right to abandon a part of the franchise to lay tracks on Broad Street that was contained in the charter of the Navy Yard, Broad Street & Fairmount Railway. The facts that the consideration for passing the act was the surrender

der of other rights or franchises claimed by the company, and that the occupation of Broad street was terminable on specified contingencies, did not vary the nature of the act as a legislative grant of new franchises as well as a confirmation of others claimed under prior charters. Those charters were by the act continued and confirmed as to all the franchises and powers of both companies, except so far as changed or taken away by the act itself, and of course the franchises so continued were accompanied with all the incidents, duties, and obligations attached to them in the first instance. The act of 1873 therefore is the operative and controlling charter of the appellant, but we must look for its grants and limitations, as well as for its burdens and obligations on the appellant, to the terms of the two original charters, which remained unchanged and confirmed. The charter of the original Thirteenth & Fifteenth Streets Railway provided in section 9: "That the councils of the city of Philadelphia may from time to time, by ordinances, establish such regulations in regard to said railway as may be required for the purposes of paving, repaving, grading * * *; and the said company shall conform to the grades established by councils of the several streets and avenues traversed by the said railway. * * * The streets thus occupied by said company shall be by them kept in good order and repair at their own proper expense." The charter of the Navy Yard, Broad Street & Fairmount Company provided in section 10 that "the said company shall be compelled to keep in constant repair that portion of the street which they use and occupy, and (b) subject to such ordinances of councils as relate thereto, not inconsistent with this act." By both of these provisions the company is charged with the duty to keep in repair. Both provisions are general, applicable to all streets on which tracks are laid, and continuing; that is, applying from time to time, whenever repairs may become necessary. The fact that part of Broad street, at the time of the charter of the Navy Yard, etc., Company, was required to be kept in repair by other parties who had privileges thereon, could not prevent the duty becoming incumbent on the appellant when circumstances should otherwise raise it. There is nothing, therefore, peculiar in regard to the situation of Broad street which makes the duty of the appellant in regard thereto any different from that in regard to any other street upon which its tracks are laid. The duty to keep the streets in repair being thus clear under either and both charters, two questions arise as to its extent: First. Does it include the whole street, from curb to curb, between the points longitudinally where the line is laid on it, or is it restricted to the space between the tracks? Secondly. Does it extend to a practical repaving with a different and improved pavement?

First. The obligation to repair the whole

street from curb to curb, if not expressly decided, has been so clearly foreshadowed as to leave little doubt of what the conclusion must be. Under the charter of the Thirteenth & Fifteenth Streets Company the question could hardly arise, for the words are that the company shall conform to the grades of the streets traversed by the said railway, and the streets thus occupied shall be kept in good order and repair. This so clearly means the whole of the streets which the railway traverses that further elaboration seems to be unnecessary. But it is argued that Broad street is only occupied by virtue of the franchise of the Navy Yard, etc., Company, and the obligation of that charter is only to keep in repair "that portion of the street which they use and occupy," which should be construed to mean that portion between the tracks. To this argument it would be sufficient answer that at most the words can only be claimed as doubtful and ambiguous, and in such cases all public grants are to be construed liberally in favor of the public, and strictly against the grantee. *Railroad Co. v. Bruce*, 102 Pa. St. 23. But it is not necessary to resort to this rule. As already said, the provisions of both the original charters in reference to keeping the streets in repair are general, and applicable to all streets on which tracks are laid, and are meant to be of continuous application from time to time, as circumstances may require. Both charters included the right to lay tracks on several streets and on different streets at different times, but neither looked to the occupation of the whole length of any of the streets named. The right was given to occupy certain portions longitudinally of the specified streets, and the corresponding duty was imposed of keeping those portions in repair. Whether the language used was as in the one case "the streets traversed and occupied," or, as in the other, "that portion of the street which they use and occupy," the idea was the same, to wit, that the franchise to occupy and the obligation to keep in repair should be coextensive. In *Pittsburgh & B. Pass. Ry. Co. v. City of Pittsburgh*, 80 Pa. St. 72, a somewhat analogous case, where the question was not what part of the street, but what kind of obstruction, the company were bound to remove, the principle was well stated that under the general law the obligation to keep the whole street in repair rested on the municipality, and that obligation the charter transferred to the company. So it is in the present case. Whatever the duty of the municipality would have been as to repairs upon the streets where the tracks are laid is now the duty of the railway company laying and using the tracks, and that plainly includes the whole width of the street. But the duty does not rest on these provisions alone. It arises independently, but with equal conclusiveness, from other parts of the charter. Section 10 of the act of incorporation of the Navy Yard, etc., Company provides that "the said company shall be compelled to keep in constant repair that portion of the street which

they use and occupy, and [be] subject to such ordinances of councils as relate thereto." This includes existing as well as future ordinances, and among those existing at the date of the charter was the general ordinance of July 7, 1857 (Ord. 1857, p. 248), which provided that all passenger railroad companies should be "at the entire cost and expense of maintaining, paving, repairing, and repaving that may be necessary upon any street * * * occupied by them." This, as was well said by Thayer, P. J., in *Philadelphia & G. F. Ry. Co. v. City of Philadelphia*, 2 Wkly. Notes Cas. 639, means "not upon a portion of the street occupied, but upon the whole street." The subject was elaborately and very ably discussed in that case, and the opinion of Thayer, P. J., is cited with approval in *City of Philadelphia v. Ridge Ave. Pass. Ry. Co.*, 143 Pa. St. 444, 22 Atl. 695, where the present chief justice says: "It has never been seriously doubted, nor can it be, that the duty to repair or to repave, when either is adjudged necessary, extends to the entire roadway from curb to curb."

Secondly. That the duty to repair, where it exists, extends to the replacement of an old pavement by a new one of a different and improved kind, was expressly held in *City of Philadelphia v. Ridge Ave. Pass. Ry. Co.*, 143 Pa. St. 444, 471, 472, 22 Atl. 695, where it was said by the present chief justice: "The duties specified in [the company's] charter were imposed with reference to the changes and improved methods of street paving which experience might sanction as superior to and more economical than old methods. In other words, the company is bound to keep pace with the progress of the age in which it continued to exercise its corporate functions. The city authorities have just as much right to require it to repave at its own expense with a new, better, and more expensive kind of pavement as they have to cause other streets to be repaved in like manner at the public expense." In the present case of Broad street, the fact that the occupation is terminable upon certain contingencies, which may happen at any time, and at the will of the city, does not destroy the obligation. As a fact, the occupation has already lasted some years, and from the nature of the surface of the ground and its existing uses is likely to last some years longer; but, however this may be, it does not alter the mandate of the charter and the ordinances to keep the street in repair so long as it is occupied.

A question is raised in the argument that the appellant is not liable because the so-called "repair" or "repaving" of Broad street was in fact a first or original paving, and there is no obligation to pave in the first instance, as so much of the ordinance of July 7, 1857, as required paving of a street not previously paved was repealed by the ordinance of April 1, 1859 (Ord. 1859, p. 138). There is nothing on the record, however, to show the fact now alleged. The appellant did not at any time offer to prove it, nor ask

to have the jury pass upon it. The fact were practically treated as undisputed. The judge directed the verdict as a matter of law and there is no assignment of error to his action in so doing. Gen. Wagner, for the plaintiff, testified that the former pavement was partly cobble and partly macadam, and other witnesses speak of a paving with macadam in the center and cobble at the sides. Even if the whole street was macadamized it would not follow necessarily that it was not paved. That is a question of intention. Some misapprehension seems to exist in the professional mind as to our recent decision on this subject, and they have therefore been reviewed, and the ratio decidendi discussed in *City of Philadelphia v. Eddleman* (opinion filed herewith) 32 Atl. 639, to which reference is made for all that is necessary to be said on the present point.

The only remaining assignments of error to be noticed relate to the exclusion of appellant's offer to show damages by way of set-off from the improper method of paving Broad street, causing stoppage of the cars and consequent loss of profits. Passing by the question whether the offer was clearly within the exception to the general rule that a set-off in tort cannot be made to an action *ex contractu*, these offers substantially sought to raise the question of an abuse of the municipal authority and discretion. By the ordinance of September 25, 1890 (Ord. p. 301) the councils instructed the director of public works to stop the running of the cars "on Broad street north from Glenwood avenue until the said street is repaved in accordance with the notice to do such work, served by him on the passenger railway company * * * as required by the ordinance of July 7, 1857," etc. The ordinance of July 7, 1857 (section 4), provides that "it shall be the duty of any company as aforesaid * * * to pave or repave the highways, as hereinbefore provided, and should they refuse or neglect to do so for ten days from the date of such notice, * * * councils may forbid the running of any car or cars upon the said road until the same is fully complied with." As heretofore shown, the appellant is subject to the ordinance of 1857, and it thus appears that the act of stopping the cars while the repaving was being done was expressly authorized by that ordinance. It was not offered to be shown that the state of facts which justified the action of councils did not exist, to wit, the resolution for repaving, the notice to appellant to do its part, and the failure to do so in the time required. Appellant's offer was to show that the work could have been done without stopping the cars, and therefore with less loss to appellant. But, as the city was acting on its express legal rights, the offer was immaterial and irrelevant. It was not for appellant, or even the court and jury, to review the city's exercise of its unquestionable discretion. Judgment affirmed.

In re KERN'S ESTATE.

Appeal of GILPIN.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

GIFTS—NOTES—DEATH OF MAKER.

1. Where plaintiff gave her accommodation note to deceased, and was obliged to pay it the fact that she paid it out of the proceeds of property which deceased had given her absolutely does not affect her right to recover against his estate on a note given her as security.

2. A note, not under seal, and without consideration, given by one to his child, is not enforceable against his estate, the gift being revoked by his death.

Appeal from orphans' court, Philadelphia county.

Accounting by Hood Gilpin, executor of William H. Kern, deceased. The claim of Mabel Ella Kern, consisting of two notes, against the estate, was allowed, and the executor appeals. Reversed in part.

Bernard Gilpin and John G. Johnson, for appellant. N. D. Miller, Arthur Biddle, and Biddle & Ward, for appellee.

MITCHELL, J. With regard to the \$10,000 note, though the circumstances are somewhat confused, and the testimony would have supported a finding that Mr. Kern intended the delivery of the coal company stock as well as of the note to his granddaughter, as security for her note, discounted in his favor, yet it is also consistent with the view taken by the learned judge below, and we cannot say that he was in error. It appears, then, that she gave her note or duebill, and received his note for the same amount as security. Subsequently, she was compelled to pay her note, and was therefore entitled to recover from his estate the amount of his note which she held as security. It makes no difference that she paid her note out of the proceeds of the coal company stock, because the stock was hers. As found by the learned auditing judge, it had been delivered to her by her grandfather, and was therefore an executed gift. A payment with the proceeds of part of it was as much a payment out of her own means as a check on her own bank account would have been. We find no error in this part of the case.

But the allowance of the claim on the \$30,000 note cannot be sustained on any legal principle. It was a mere promise to pay, without consideration, and not enforceable against the promisor or against his estate. The learned counsel for the appellee have gone very far back in history to show that a consideration was not essential in the early common law, and that a seal was only a matter of technical form. But the necessity of a consideration, having been settled more than 400 years ago, is scarcely open to discussion now; and, while the distinction between sealed and unsealed instruments may be technical, it is part of the bedrock on

which the whole law of contracts is built. The cases cited by the learned court below are cases of sealed instruments, and stand on entirely different grounds. The note is also spoken of as "an executory contract not under seal," but this is a misnomer. It is not a contract at all, but a mere naked promise, nudum pactum, for want of a consideration, which is an essential part of the definition of a contract,—"an agreement upon sufficient consideration, to do," etc. 2 Bl. Comm. 442.

An effort is made to sustain the case on the ground of natural love and affection of the maker of the note for his granddaughter; but the argument falls into confusion from the indiscriminate use of the terms "moral obligation" and "moral consideration." They are not convertible terms, even if there is any such thing as a moral consideration. Natural love and affection are a good consideration for an executed contract or gift, and in this state a moral obligation is a good consideration for an express promise; but natural love and affection are not a moral obligation in such sense as will support even an express promise to make a gift. "Natural affection is not a sufficient consideration to support a simple contract." Byles, Bills (8th Am. Ed.) p. 214. "A consideration founded on mere love and affection is not sufficient to sustain a suit on a bill or note." Daniel, Neg. Inst. § 179. It is the nature of a gift to be revocable until executed by delivery, and the authorities are uniform that the delivery of a promissory note or check is not an executed gift of the money, but remains revocable, and will be revoked by the death of the promisor before actual payment. 8 Am. & Eng. Enc. Law, 1320; Daniel, Neg. Inst. §§ 179, 180; Chit. Bills, p. 85; Byles, Bills (15th Ed., 1891) p. 144; Wood's Byles, Bills (8th Am. Ed., 1891) p. 213. Decree reversed as to the \$30,000 note, distribution to be corrected accordingly; costs to be paid by the appellee.

RINGROSE v. RINGROSE.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

DEED FROM PARENTS TO CHILD—PROVISIONS FOR SUPPORT—EJECTMENT—EVIDENCE OF CONSTRUCTION BY PARTIES.

1. A deed from parents to a child, reciting that the land is conveyed to the grantee "by his agreeing to support his father and mother," and keep them during their lives with food, apparel, lodging, "use and occupancy of the dwelling [on the premises] where they now reside," medical attendance, funeral expenses of both of them, etc., is not an absolute deed, free from conditions, but charges the land in the hands of the grantee and his successors with the provision in favor of the grantors, which cannot be fully performed till death of both the grantors.

2. Grantors in a deed made on condition that the grantee support the grantors (his parents) for life, they, among other things, to retain the use and occupancy of a dwelling on the premises, may enforce the provisions by ejectment.

3. Where, after a conveyance by parents to their son, reciting that the land is conveyed "by his agreeing to support his father and mother," etc., they give and he accepts another deed, reciting, "Said conveyance and this conveyance being conditioned for the support and maintenance of the party of the first part as fully and to all intents and purposes as before," the second deed is evidence to show the construction given to the first deed by the parties thereto.

Appeal from court of common pleas, Bradford county.

Ejectment by Mary Ringrose against Joanna Ringrose. Judgment for defendant. Plaintiff appeals. Reversed.

The assignments of error were as follows:

"(1) The court erred in refusing the plaintiff's first point. The point and answer were in these words: 'First. That the plaintiff, by this action, only seeks to enforce the provisions for her support, maintenance, etc., contained in the deed of March 28, 1874, and for that purpose she is entitled to recover in this action. Answer. We refuse to affirm this proposition.'

"(2) The court erred in refusing the plaintiff's second point. The point and answer were in these words: 'Second. That under all the evidence in this case the plaintiff is entitled to recover the land described in the writ, to be released upon the payment by the defendant to the plaintiff of such sum as the jury shall find the plaintiff is entitled to for her support and maintenance from February 5, 1890, to the present time, and, in addition thereto, \$25 annually from February 5, 1890, within such reasonable time as the jury shall determine it should be paid. Answer. We refuse to so charge.'

"(3) The court erred in refusing the plaintiff's third point. The point and answer were in these words: 'Should the court refuse to charge as asked in the second point, that the plaintiff is entitled to recover the dwelling house upon the premises described in the writ, to be released upon the payment by the defendant to the plaintiff of such sum as the plaintiff is entitled to for her support and maintenance from February 5, 1890, to the present time, and, in addition thereto, \$25 annually from said February 5, 1890, within such reasonable time as the jury may determine it shall be paid. Answer. We refuse to so charge you. In our view of this contract, that would be recoverable in damages, and not by ejectment.'

"(4) The court erred in refusing the plaintiff's fourth point. The point and answer were in the following words: 'Fourth. That if the jury find from the evidence that the defendant was present at the orphans' court sale of the lands in suit, and heard the administrator give notice that the lands would be sold subject to the support of the plaintiff, and that the defendant acquiesced in the sale being so made, and purchased the lands for less than she otherwise could have done, then she took the lands subject to the support of the plaintiff, and the plaintiff is entitled to recover. Answer. We refuse that, for the rea-

sons given in our general charge, and we direct you to render a verdict in favor of the defendant.'

"(5) The court erred in directing the jury to render a verdict in favor of the defendant in the following words: 'We direct you to render a verdict in favor of the defendant.'

"(6) The court erred in sustaining the defendant's objections to the plaintiff's offer of deed of February 8, 1881; the offer, objections, and ruling of the court being as follows: 'Col. E. Overton: We offer in evidence deed dated February 8, 1881, from Roger Ringrose and Mary Ringrose, his wife, to Michael Ringrose, for the same lands described in the deed of March 28, 1874, between the same parties, acknowledged the 12th of February, 1881, before Mr. W. Baker, a justice of the peace, and not recorded. This deed is offered for the purpose of showing that Michael Ringrose took the lands in suit subject to the support and maintenance for life of Roger Ringrose and his wife, Mary, and the survivor of them, as well as subject to certain other conditions fully set forth in the deed of March 28, 1874, already given in evidence. And it is offered also for the purpose of showing the construction which Roger Ringrose and Mary Ringrose, his wife, the grantors in the deed of March 28, 1874, and Michael Ringrose, the grantee, themselves put upon the deed of March 28, 1874. The deed offered contained the following clause: "Said conveyance and this conveyance being conditioned for the support and maintenance of the party of the first part as fully and to all intents and purposes as before." Mr. D'A. Overton: We object that the deed offered is not admissible to affect the grantee, because—First, it is absolutely void; second, being a deed poll, it cannot in any way affect the grantee; third, that it does not prove, or tend to prove, either of the purposes for which it is offered. Also that this deed was never delivered to the defendant, to the knowledge of Joanna Ringrose, until after her purchase, and that she only knows of its ever being delivered by mere hearsay, and not from any knowledge of her own, and that the plaintiffs themselves have the deed in their possession. Mr. McPherson: We propose to follow this deed with proof that it was duly delivered to the grantee, and that subsequently, after his death, it came into the possession of the defendant, his widow, and that his widow, the defendant, had knowledge of the contents of this deed. Mr. D'A. Overton: We make the further objection that the deed on its face expresses that the deed is given for the purpose of revoking the said gift, and annulling the condition, as aforesaid, for the payment of the said several sums of money aforesaid, and for no other purpose whatever. Mr. McPherson: We also offer to prove that the widow, the defendant, appeared before the auditor appointed to distribute the funds in the hands of the administrators of Michael

Ringrose raised from the orphans' court sale of this real estate in suit as the property of Michael Ringrose, and offered this deed of February 8, 1881, in evidence before the auditor, for the purpose of preventing an allowance to Bridget Ringrose and Mary O'Neil of the \$250 mentioned in deed of Roger Ringrose of March 28, 1874, to Michael Ringrose; and I desire to add to the purpose of our offer that the offer of this deed is also made for the purpose of aiding and assisting the court and jury in construing the deed of March 28, 1874, between the same parties. Mr. D'A. Overton: We object, also, that it is irrelevant, immaterial, and incompetent. The Court: Defendant's objections to the deed offered sustained. (Plaintiff excepts. Bill sealed for plaintiff.)

"(7) The court erred in sustaining the defendant's objections to the following question and offer of the plaintiff, Mrs. Bridget Bolan, formerly Bridget Ringrose, being the witness on the stand; the question, offer, objections, and rulings of the court being as follows: Q. During the time you were there living with the defendant, did you have a conversation with her in relation to your father having by subsequent deed revoked the gift or provision for the payment of \$250 to you, contained in the deed made in 1874? Mr. D'A. Overton: We object—First, that the question is leading; and, second, that it is immaterial and irrelevant. The Court: What is the materiality of it? Mr. McPherson: We offer to show by this witness that she had a conversation with the defendant within a few weeks after her brother's burial, and that the defendant informed her of the fact that her father, Roger Ringrose, made another deed to her husband, Michael, in which he revoked the provision in the former deed for the payment of \$250 to this witness and to Mary O'Neil; that the defendant also stated to her in that conversation that her husband always intended, however, to pay her the \$250. This is for the purpose of showing that the defendant had actual notice and knowledge of the deed heretofore offered in evidence, dated February 8, 1881, between Roger Ringrose and wife and Michael Ringrose. And this is to be followed with evidence that the defendant put that same deed in evidence before D. C. De Witt, the auditor appointed to make distribution of the funds in the hands of the administrator of Michael Ringrose's estate; and to be followed by a new offer of the deed itself. The purpose of this offer is to show the defendant's knowledge of the contents of the deed, to aid in the construction of the former deed, and to be considered in connection with the way in which the real estate in suit was actually sold by the administrator. Mr. D'A. Overton: We renew our last objection. (Objection sustained. Plaintiff excepts. Bill sealed for plaintiff.)"

"(8) The court erred in sustaining the defendant's objections to the following offer of the plaintiff, Michael O'Neil being the wit-

ness on the stand; the offer, objection, and ruling of the court being as follows: 'Mr. McPherson: We offer to show by this and other witnesses that the real estate in suit sold was worth at least \$2,500, and that there were persons present at the sale who heard the notice given, and who were interested in the estate, and that they would have bid from \$2,000 to \$2,500 for the property at that sale, if it had not been for the notice given that it was being sold subject to the support for life of Mary Ringrose, the plaintiff. Mr. D'A. Overton: We object to the witness testifying to that. That is immaterial and irrelevant, as to what he would do or would have done. (Objection sustained. Plaintiff excepts. Bill sealed for plaintiff.)'

"(9) The court erred in sustaining the defendant's objection to the following offer of the plaintiff, Mrs. Bridget Bolan being the witness on the stand; the offer, objection, and ruling of the court being as follows: 'Mr. McPherson: We offer to show by this witness that she was present at the sale, and that she bid on the property to the amount of \$1,500, and that she would have bid largely in excess of that amount had it not been that it was announced that it was being sold on condition that the old lady should have her support out of the farm. (Objected to as irrelevant and immaterial. Objection sustained. Plaintiff excepts. Bill sealed for plaintiff.)'

"(10) The court erred in sustaining the defendant's objection to the following offer of the plaintiff, Michael O'Neil being the witness on the stand; the offer, objection, and ruling of the court being as follows: 'Mr. McPherson: It is simply to show a recognition of the incumbrance here that we claim. We offer to show that after the death of Michael Ringrose the defendant, his widow, made provisions with this witness to take the old lady, the plaintiff, to his home, and maintain and support her; she, the defendant, agreeing to recompense him for so doing. Mr. D'A. Overton: We object, that it is immaterial, irrelevant, and incompetent. (Objections sustained. Plaintiff excepts. Bill sealed for plaintiff.)'

I. McPherson, E. J. Angle, E. Overton, and N. C. Elsbree, for appellant. D'A. Overton and J. C. Ingham, for appellee.

GREEN, J. The deed from Roger Ringrose and his wife, the present plaintiff, to Michael Ringrose, dated March 28, 1874, was for three tracts of land, one of which, known as the "Homestead Farm," containing 100 acres, is the subject of the present action of ejectment. A nominal consideration of \$3,000, which was never paid, or intended to be paid, was recited in the deed; but in the body of the deed, and immediately following the description of the lands, appears the following recital: "The above-described land and interest in the same conveyed to the party

of the second part by his agreeing to support his father and mother, Roger Ringrose and Mary Ringrose, his wife, to do well and sufficiently maintain, support, and keep the said Roger and Mary Ringrose, his father and mother, during their natural lives, or the survivor of them, with good and sufficient meat, drink, apparel, washing, and lodging, use and occupancy of the dwelling where they now reside, and medical attendance in sickness and in health, and the funeral expenses of either of them, with the use of horses and carriages to take them to and from church at any time, and all times, and elsewhere at all times, as they may wish to go, and to furnish to each and either of them the sum of \$25 per year during their natural lives, and also to pay to Mary O'Neill \$250, and to Bridget Ringrose \$250, at the death of the said Roger Ringrose and Mary Ringrose, his wife, and not before." It is apparent at once that the true and only consideration of the conveyance was the performance by Michael Ringrose of the stipulations expressed in the foregoing recital. The expression of the obligation of the grantee is peculiar, but perfectly clear. "The above-described land and interest in the same conveyed to the party of the second part by his agreeing to support his father and mother," etc.; that is, the land is conveyed because of, or in consideration of, the agreement of the grantee to do the several things next expressed. Of course, the performance is to take place in the future. The question arising in this case is whether the provision in favor of the grantors is a charge upon the land which will follow it into the hands of subsequent purchasers, whether at judicial or private sales. Being embodied in the deed, it is notice to all purchasers claiming by subsequent conveyances. If the agreement for support and maintenance was a mere personal covenant of the grantee, unaccompanied by any provision for the permanent occupancy by the grantors of any part of the land conveyed, it would not be a charge upon the land. This was the case in *Krebs v. Stroub*, 116 Pa. St. 405, 9 Atl. 469, where the contract, while it contemplated the event of a residence on the land at the mere will of the grantors, made no provision for it, conferred no such right upon the grantors, and it was not reserved by them, expressly or otherwise. The deed was absolute to the grantee, who executed a bond independently of the deed, the condition of which alone expressed the things he was to do. But in this case the deed itself provides in favor of the grantors for the "lodging, use, and occupancy of the dwelling where they now reside," and it was to continue during their natural lives. As all the services which were to be rendered to the grantors were personal to them, they were necessarily to be rendered to them as occupants of the house on the homestead where they then, and for many years before, had resided. In the case of *Rohn v. Oden-*

welder, 162 Pa. St. 348, 29 Atl. 899, where a similar provision was contained in the deed, we held that it created a charge on the land as to all the provisions. We said: "Immediately after the provision for the widow, a direction that both husband and wife, and their heirs, shall have the right to occupy three rooms of the house during their joint lives and the life of the survivor. As this is a palpable charge on the title, into whosoever hands it might pass, it is entirely consistent with the idea that the grantors intended to have the security of the land for all the reservations in the deed in their favor." It is true that the words of the grant in that case contained at the beginning the expression, "under and subject nevertheless to the payment of the taxes, etc., and those words were held to create a charge on the land, although they were annexed simply to a direction to pay money. But the provision for the occupancy of the house also created such a charge, and it carried with it all the provisions in the deed of the grantors.

In the case of *Wusthoff v. Dracourt*, 100 Pa. St. 240, we held that a devise of a house to one Henrietta Miller for life, with a remainder in fee to her children, "reserving, however, two of the rooms of said house to the use and during the life of the widow Mary Wusthoff, mother of said Henrietta Miller, and wife of Julian Dracourt," was a devise by this fourth article that the widow Wusthoff may have the choice of those two rooms which shall the best suit her, because I desire that the said widow, Mary Wusthoff, should be sure of a shelter, home, and lodging the time she may have to live,"—created an estate for life in the widow Wusthoff in the two rooms, of which she might make any disposition, and that it did not create a charge on the land for her personal use. The widow Wusthoff selected the two most valuable rooms in the house, and, instead of occupying them herself, leased them to a stranger for a money rent, which she received and retained for her own use. We held that she was at liberty to do this, although she had a daughter, the devisee of the whole house, who, during her life, was obliged to pay the taxes and the money rent, because the widow's interest was an estate for life in the two rooms. In the present case it is not necessary to go into the question whether the right to the use and occupancy of the whole house, was preserved to the grantor and his wife during their joint lives and the life of the survivor. As a matter of course, this right could be enjoyed without having and exercising any possession of the house, and the interest in the house was beyond all question a life estate in both. Said Roger Ringrose in *Wusthoff v. Dracourt*, "The devise of the use of a thing is a devise of the thing itself."

In the case of *Bear v. Whisler*, 7 Watts & S. 300, the grantor, Philip Hartman, made an

ment with Jacob Angney, by which he sold and conveyed to Angney a certain tract of land containing 125 acres, "for and in consideration of the said Jacob Angney, his heirs, executors, administrators, or assigns, or either of them, faithfully discharging the following covenants and agreements, to wit: The said Jacob Angney shall pay six certain obligations of \$80 each"; and, further, that "said Jacob Angney shall and will grant and provide for said Phillip Hartman and Elizabeth, his wife, during their natural lives, the privilege to occupy that part of the dwelling house which they now live in, and provide" them with flour, firewood, a cow, hay, and pasture, two pigs, etc. An ordinary deed in fee simple was afterwards made, conveying the title to Angney, with a recital at the end of the attesting clause that it was made subject to the conditions and obligations of the agreement. The grantee not having performed all the terms of the agreement, and the land being sold away from him at a sheriff's sale, an action of ejectment was brought by the heirs of Hartman, the grantor, against an alienee of the purchaser at sheriff's sale, to enforce the payment of the money obligations mentioned in the agreement. We held that the terms of the agreement could be enforced as by the grant of an estate upon conditions, and upon that subject we said (Rogers, J.): "Whether this was an estate on condition depends on the intention of the parties indicated by the agreement and the deed, which must be taken as one instrument. The principal object of the contracting parties was to provide a comfortable provision for the grantor and his family. If the intention is clear, and is expressed by apt words, why should the vendor be restrained to the remedy by the action of covenant? If the vendee had altogether failed in the performance of his agreement as to the vendor, would it have been an adequate remedy to the vendor to give him an action of covenant? It is manifest it would not. Would he not have been entitled to recover the possession of the premises, in such a case, by action of ejectment? But if the vendor would himself have been entitled to this remedy, I cannot perceive why the present plaintiffs are debarred from it, particularly as the object is merely, in this form of action, to enforce the performance of the agreement in good faith. The provisions of the deed equally apply to the recipients of the money as to the vendor himself. But, furthermore, it is apparent from the face of the deed that something remains yet to be done by the vendee before his title is perfect, and that so far he may be viewed in the light of a trustee in equity for the vendor, notwithstanding the legal title has been conveyed. Of this the purchaser at the sheriff's sale had notice, because it is spread upon the face of the title under which he claims. We must look to the substance of the agreement, and not to the form. * * * So a purchaser at sheriff's sale takes the land subject to the payment of purchase money, which appears on the face of

the deed to remain unpaid, and of which he has notice." The whole of this reasoning is directly applicable to the facts of the present case. In *Bear v. Whisler* the conveyance was absolute without any condition on its face, but by a brief reference to the agreement subject to which the conveyance was made all the stipulations of the agreement were imported into the deed with the same effect as if they had been written in the deed. The word "subject" merely gave notice of the conditions and obligations of the agreement, but the agreement itself did not contain that word, or any other equivalent word or expression operating as a condition or restraint upon the effective words of the conveyance, except as such a consequence was derived from the terms of the agreement itself; hence the whole force of the reasoning of the opinion of this court was based upon the inquiry, what was the intention of the parties? In the present case the words of the agreement of the parties are incorporated into the deed, and are a part of it; and they need no words of reference or condition in another instrument to bring them within the operation of the deed. Being in the deed in this case, they have the same operative effect as was given to them in *Bear v. Whisler* after they were brought into the deed by the subjecting and conditional reference in the deed. The question, then, what was the intention of the parties as to the estate? being upon condition, the solution is perfectly simple. The deed expressly declares that the lands are conveyed to the grantee "by his agreeing to support his father and mother," etc.: that is, because he agrees to support them, for that reason, and upon that consideration, they have made the conveyance. The cause and reason of the conveyance are more effectively and directly expressed in these words than by the words "under and subject," or "upon condition"; for the obligatory words immediately follow the words of conveyance and description, and the connecting words, "by his agreeing to support his father and mother." In other words, A. conveys land to B. B. thereby agrees to support the grantor, and B. takes his title clogged with this expression of the purpose of the conveyance to him. It is conceded that if the deed had contained the words "subject to the support," etc., or "on condition of the support," etc., those words would have created a condition which would have fastened on the title. Why? Manifestly because such was the intention of the parties. But such intention is not specifically declared by such words. It is inferred, because the purpose of support is implied from the words "subject to," or "on condition of" support. But that purpose is more directly expressed when the deed declares that "the above-described land, and interest in the same conveyed to the party of the second part by his agreeing to support his father and mother." It is true, more words are used, but they are more expressive of the very purpose and intent of the conveyance.

There are, however, other reasons quite as forcible as the above, establishing the same intent. The "use and occupancy of the building where they now reside" necessarily imports the retention of the possession of part of the premises granted for the purpose of receiving the support and maintenance provided for, and these words, as we have seen, create an estate in the land which belongs to the grantors. If it belongs to the grantors, it never passed to the grantee, and hence affects his title through all its subsequent movements. The other stipulations are also such as to indicate clearly that they were to be performed on the land. Thus the grantors are to be supplied, while occupying a house on the land, with "good and sufficient meat, drink, apparel, washing, and lodging," also "medical attendance in sickness and in health, and the funeral expenses of either of them, with the use of horses and carriages to take them to and from church at any time, and all times, and elsewhere at all times as they may wish to go." It is simply incredible that it ever entered into the minds of either of the parties that such services as these were to be rendered at any other place than on the land itself. At any other place they would be an intolerable and costly burden, which would practically destroy the value of the grant.

In the case of *Ogden v. Brown*, 33 Pa. St. 247, the words of the instrument were a present grant of title to the grantee "in the consideration that the said Stephen Wilcox deliver unto me, the said Amy Cranmer, one-third of all the produce of all kinds whatsoever,—grain to be delivered in the half bushel, and hay in the barn,—during my natural life; then the said Stephen to have free and peaceable possession, clear of all incumbrances except the lord of the soil." We held this to be an executory contract, under which the fee passed to Stephen Wilcox on the death of his mother, although there were no words of inheritance in the deed, simply because such was the intention of the parties. In the opinion by Strong, J., he said: "The purpose of the instrument was so evidently to make provision for Mrs. Cranmer, while she should live, that it can hardly be presumed her intention was to part with her interest irrevocably, without effectuating her purpose." We cite the case as an illustrative instance in which the legal effect of the instrument was made to depend upon an interpretation of the intent of the parties, and that intent was chiefly worked out by the consideration that the grantor meant to have support during her life as a result of the grant. We think the same line of reasoning affects the interpretation of the instrument we are considering. It is entirely conclusive that Roger and Mary Ringrose intended to have their support from their son, Michael, during the whole of the remainder of their lives, as a result and as the reason for their conveyance of the title. The consideration

could never be paid until the death of both of them, and an actual residence on the land during the entire period was specifically provided as a part of the consideration of the conveyance.

In construing a similar instrument in *Shirley v. Shirley*, 59 Pa. St. 287, Thompson, C. J., said: "Courts, in my opinion, should be slow to give the effect of absolute conveyances to instruments for provisions made between parents and children of the kind of which we are speaking, unless the intention be very clear. Such agreements are usually fruitful sources of strife, litigation, and very often of great wrong to aged and feeble parents; and, when held to be absolute conveyances, it puts them entirely at the mercy sometimes of unwilling, and often unkind offspring." There could be no more forcible or pointed illustration than is afforded by the facts of the present case of the justice and humanity of the foregoing comments. The venerable plaintiff is now almost 90 years of age, entirely helpless to earn any present support, and dependent upon the provision in her deed to her son for the very means of existence. Her son is dead. Her husband died before him, and she is left alone to maintain a struggle for her life with her own daughter-in-law, who has obtained the title to the land through proceedings in the orphans court. It is matter of much satisfaction that we are not obliged to hold that the conveyance by which she granted the land in question to her son was an absolute deed, free of all conditions or restraints, and that we are at liberty to decide, as we do, that the land and its owners must perform the service, and render the tribute, because and on account of which the plaintiff, still maintaining by a legally reserved right an actual residence on the land, was induced to and did part with all the rest of her title. The condition upon which she granted the title has not yet been fully performed, and cannot be until her death; and until it has been fully performed the title of the grantee and his successor has not become complete.

The case of *Driesbach v. Serfass*, 126 Pa. St. 32, 17 Atl. 513, affords another instance in which the foregoing considerations were applied and enforced in the construction of an instrument quite similar to the present. There the grantor, over 70 years of age, and childless, conveyed by a deed the fee-simple title to a tract of 50 acres of land to his niece who was a married woman. The consideration recited in the deed was one dollar, and "other good and valid considerations in law hereinafter mentioned, and to be strictly kept by the said Sally Ann Serfass." These considerations appeared in a clause following the description of the land, thus: "Excepting, nevertheless, the residence of the said Peter Berger, the grantor hereof, of the first part, in the house and on the premises, during his natural life, until the death and burial of the said Peter Berger; and I, the said Sally Ann

Serfass, the grantee in the aforesaid premises, do hereby bind myself, my heirs, etc., to find good house room and sleeping and lodging apartments for the convenience of the said Peter Berger during his life, and to find good and sufficient board, lodging, meat, drink, clothing, and nursing, medical attendance, and all other necessities for him during his life, and a decent burial for him, etc.; all of which is to be and remain a lien upon the premises aforesaid until the whole of the duties aforesaid are performed," etc. Sally Ann Serfass and her husband entered upon the premises, and performed the services until she died. Then her husband engaged one Driesbach to go into possession and take care of the grantor, Berger, until his death, and surrendered the possession to Driesbach. Afterwards Berger made an absolute deed of the premises to Driesbach for five dollars, and, later, died. After his death, Driesbach refused to surrender the possession to Serfass, who thereupon brought ejectment to recover the land. We held that the deed to Sally Ann Serfass was not in the nature of a will, nor yet an absolute deed, but merely an executory contract vesting an equitable estate in the grantee; the legal title remaining in the grantor during his lifetime. We held also that there could be no recovery in ejectment by the heirs of the original grantee in the absence of evidence that the covenants in the deed on the part of the grantee had been performed by the grantee or her representatives. There was no reservation of any part of the premises, but the right of residence in the house and on the land was excepted, and it was also declared that the grantor's right to the services of the grantee should be a lien on the land. The determination of the case was not upon the fact of the exception as to residence, nor upon the language declaring the grantor's rights under the deed to be a lien, but upon the intention and meaning of the parties. Thus our Brother Williams, delivering the opinion, said: "We have seen that the object of the transaction was to secure the continued performance of such services as his age and condition might render necessary. It is important to remember also that this was an arrangement between near relatives, and that the services of the niece are stated to be the consideration which she pays and is to pay for the property of her uncle. He is to have the right to live in the house, to remain in possession; and she is also to take possession, and live in the same house, in order to fulfill her agreement. * * * It is equally clear that the exceptions and covenants were intended to protect the grantor against the words importing a present grant. That such words do not necessarily pass a present fee has been repeatedly held. The whole instrument, and the nature and object of the transaction, must be considered. In *Williams v. Bentley*, 27 Pa. St. 294, it was held that the strongest words of conveyance in the present tense will not pass an estate if from other

parts of the instrument the intention appears to be otherwise. * * * The right of Serfass to recover possession in this action depended upon whether the consideration agreed upon had been paid. * * * It would be contrary to the original intentions of the parties, as well as against good conscience, to permit the vendee to recover the possession of the land from his vendor, or one holding his title, without rendering, or offering to render, the equivalent contracted for." Every word of these comments is directly applicable to this case. That it was the intention of these parties that the services were to be rendered in consideration of the conveyance is too plain for argument. That it would be a gross injustice to permit the grantee, or one claiming under him, to retain the land without performing the service, is equally clear. And, no matter how strong the words of present grant in the deed are, if the intention was that the title should not pass entirely except upon the complete performance of the service stipulated for in the deed, then it does not pass. Such are all these authorities, and by them this case is governed. We are clearly of opinion that the plaintiff was entitled to an unqualified affirmance of her first, second, and third points, and we therefore sustain the first three assignments of error. We sustain the fifth assignment, and think the instruction should have been to find for the plaintiff. We think, if Michael Ringrose accepted the deed of February 8, 1881, it was evidence to show the construction given to the deed of March 28, 1874, by all the parties, and should therefore have been received in evidence, and we therefore sustain the sixth assignment. For the purpose of showing the knowledge of the second deed by the defendant, we think that deed should have been received in evidence, with the other facts offered under the seventh assignment, and we therefore sustain that assignment. For a similar reason we sustain the tenth assignment. We do not sustain the fourth, eighth, and ninth assignments. Judgment reversed, and new venire awarded.

IN RE FESSENDEN'S ESTATE.

Appeal of TYLER.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

FINDINGS OF FACT—REVIEW—MARSHALING ASSETS—CHARGE ON LAND—DISCHARGE.

1. A finding of material fact by an auditor without evidence, though approved by the court, is ground for reversal.
2. Where two tracts of land are alike subject to a charge laid on them by will, the purchaser of one of them is entitled to have the other, which was sold on a judgment entered against his grantor after his purchase, first resorted to for satisfaction of the charge.
3. In proceeding to enforce a legacy for the support of a certain person, charged by the will on land, the devisee of the land, who was primarily liable by his acceptance of the devise, being a party defendant, as well as his grantees,

the decree should be entered against him for the amount due, to be levied, on failure of him and the grantees to pay, on the land, in the inverse order of its alienation.

4. Under Act April 27, 1855 (P. L. 369), providing that where no payment or claim has been made on account of a charge on land for 21 years, or no acknowledgment thereof is made within that time by the owner of the land, an extinguishment thereof is presumed, a charge for support of a person, imposed by will on land devised, is not extinguished, though no claim was made against the land for more than 21 years after the devisee conveyed it, he having in the meantime discharged his primary liability by furnishing the support.

Appeal from orphans' court, Susquehanna county.

In the matter of the estate of Asa Fessenden, deceased, Z. D. Jenkins, committee in lunacy of S. N. Fessenden, filed a petition to enforce a legacy for support of S. N. Fessenden, provided by the will of Asa Fessenden, and therein charged on land devised by him to F. A. Fessenden. From the decree for petitioner, B. A. Tyler, executor of Moses S. Tyler, to whom F. A. Fessenden had conveyed part of the land, appeals. Reversed.

The following is the part of the opinion of the court below referring to the extinguishment of the charge on the land: "One objection to looking to the land for Samuel's support is founded upon the seventh section of the act of April 27, 1855 (P. L. 369; *Brightly*, *Purd.* Dig. 1064, § 11), which provides as follows: 'In all cases where no payment, claim or demand shall have been made on account of, or for any ground-rent, annuity or other charge upon real estate, for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made, within that period, by the owner of the premises, subject to such ground-rent, annuity or charge, a release or extinguishment thereof shall be presumed, and such ground-rent, annuity or charge shall thereafter be irrecoverable.' It is contended by counsel for B. A. Tyler that, as the 57-acre piece was deeded to him or his grantor on the 7th of March, 1868, and that this petition was presented to the court on the 20th of January, 1890, a period of about 22 years, during which no payment, claim, or demand had been made upon him or his immediate grantor on account of this charge upon the land, and no declaration or acknowledgment of the existence thereof had been made within that period by him or his immediate grantor, the charge upon the 57-acre piece was extinguished. Now, the act above referred to is constitutional (*Biddle v. Hooven*, 120 Pa. St. 227, 13 Atl. 927), and it applies to a legacy on land (*Pratt v. Eby*, 67 Pa. St. 396; *Wingett's Appeal*, 122 Pa. St. 490, 15 Atl. 863). There is no exception in the act in favor of lunatics. *Metz v. Hipps*, 96 Pa. St. 15. In deciding whether this act bars the claim against the 57-acre piece we must bear in mind the situation of the parties. F. A. Fessenden, by accepting the leg-

acy of the two pieces of land, assumed, and substantially agreed to perform, the conditions annexed to the gift. He became personally and primarily liable for the support of Samuel, and the support of Samuel is charged upon these two pieces of land by the will. And Samuel may resort to the land when Frederick Fessenden fails to discharge the personal liability resting upon him. It is an undisputed fact in the case that Frederick has supported Samuel from the death of Asa Fessenden, the testator, in 1864, until October 28, 1880. Up to this time there was no occasion for Samuel to resort to the land, and no power in him to do so, for Frederick was performing the conditions of the devise, and to that extent exonerating the land. Under such circumstances, can it be said that no payment has been made on account of this charge upon real estate for 21 years, or that no acknowledgment of the existence of it has been made within that period by the owner of the premises? True, it may be said that Tyler was the owner under an absolute conveyance from March 7, 1868, to the filing of this petition, on the 21st of January, 1890, and that during that time no claim had been made upon Tyler; neither did Tyler make any acknowledgment of its existence. The word 'owner,' in this act of assembly, we think means in this case the devisee and his grantees. The act was never intended to bar a claim or a charge while it was being performed by the person primarily liable. If it could be made to apply under such circumstances, then one who has accepted a legacy conditioned for the support of another can sell the land upon which the legacy may be charged, faithfully perform his liability for 21 years, and free the land from the charge. That the statute does not run while the condition is being performed is held in *Brown's Petition*, 9 Phila. 548. Of course, there is no pretense for invoking this act to relieve the 18-acre piece, for Frederick Fessenden was in possession of it down to the time of the sheriff's sale on the 22d of April, 1874, and, according to the report of the auditor, down to 1890. Under this act it may well be contended that the charge upon the land for Lura E. Fessenden is barred, if nothing has been done for her for the period of 21 years; but Samuel's claim, we think, is not barred, and he may resort to the land."

Wm. D. B. Ainey and Searle McCollum, for appellant. T. J. Davies, for appellee.

MCCOLLUM, J. We cannot discover a scintilla of evidence in this case to support the finding that the 18-acre lot was sold on a judgment entered on the 25th of March, 1867. It is an important finding, because upon it is based so much of the decree appealed from as requires that the 57-acre lot purchased by Moses S. Tyler on the 12th of

March, 1868, "shall be exhausted in payment of the sum due the estate of Samuel N. Fessenden," before resorting to the 18 acres for the payment of any portion of the same. The general rule is that the finding of an auditor approved by the court will be sustained on appeal if there is any evidence which warranted it, but his finding of a material fact without evidence, or palpably against it, constitutes ground for reversal. In the case before us it seems to be conceded by the learned counsel for the appellee that no evidence was submitted to the auditor on the hearing by either of the litigants, showing when the judgment on which the 18-acre lot was sold on the 22d of April, 1874, was entered. As the purchaser of this lot acquired his title to it more than seven years after Tyler purchased the 57-acre lot, it was incumbent on the former to prove the existence of facts which gave him, as against the latter, the position and rights of a first purchaser. These lots, prior to the sale of either of them, were alike subject to the charge laid upon them by the will of Asa Fessenden in favor of his son Samuel. *Prima facie*, Tyler, by his purchase, acquired the right, in equity, to have the 18-acre lot sold in satisfaction of this charge before resorting to his lot for payment of it. If his grantor still owned the 18-acre lot, or had, subsequent to his purchase of the 57 acres, sold and conveyed it to the present owner of it, there can be no doubt that this equity could be enforced. We think it is equally clear that it could be enforced if the lot was sold on a judgment entered after the Tyler purchase. But the learned court below appeared to think it was sold on a judgment entered before this purchase, and that, therefore, the present owner of it must be regarded as the first purchaser of a portion of the property charged with the support of Samuel. Whether the conclusion is warranted by the premises is a question which was not discussed or raised in the paper book or on the argument at bar, and we express no opinion in regard to it. To do so intelligently we ought to know when the judgment was entered, and when it was revived; because, if it was entered before the Tyler purchase, a timely revival was necessary to continue the lien of it beyond the 12th of March, 1873. It is claimed by the appellant that the lien of the Read, Watson & Foster judgment was lost before the sale in 1874, and that the Meacham judgment was entered on the 6th of April, 1870; and to show the good faith of his contention in this respect his counsel exhibited on the argument at bar an exemplification of the record which appeared to sustain it. We may add that the registry of the acknowledgment of the sheriff's deed shows that the lot was sold on the Meacham judgment. It seems to us that justice to all concerned requires that we sustain the first specification, and reverse the finding on which it is based, so that it may be ascertained on competent evi-

dence upon what judgment the lot was sold, the time of its entry, and of the revival or revivals of it, if there were any before the sale.

We are not satisfied from our examination of the testimony that the learned auditor erred in the finding complained of in the third specification, or in not finding, as it is claimed in the second specification he should have found, as to the matters mentioned therein. We think that, as F. A. Fessenden was made a party defendant in this proceeding, and was, by reason of his acceptance of the devise, personally and primarily liable for the support of Samuel, the decree should have been entered against him for the amount due Samuel's estate to be levied on his and his vendees' failure to pay it within a time specified on the lands secondarily liable for it, in the inverse order of their alienation. We agree with the learned court below in its conclusion that the charge upon the Tyler lot is not extinguished by the act of April 27, 1855 (P. L. 369), or by the supplement thereto of February 26, 1869 (P. L. 3). The reasons given for this conclusion are quite sufficient to sustain it. There was no default on the part of the person primarily liable for Samuel's support prior to 1890, and Tyler knew there was none. From 1894 to 1890 Samuel was maintained by his brother Frederick in accordance with the provisions of his father's will, and to that extent the burden on the lands on which his support was charged was lightened. Frederick's support of him during this period was in relief of his vendees, who were advised by the will of his father of the terms on which he might dispose of the lands devised to him; but it cannot be construed as an extinguishment of the charge upon them. We are not convinced that the proceedings to ascertain the amount due Samuel's estate were premature, or tainted with fraud. To the extent that the rulings complained of conflict with the views herein expressed, the specifications are sustained. The remaining specifications are dismissed. Decree reversed, at the costs of the appellee, and it is ordered that the record be remitted to the court below for further proceedings in accordance with this opinion.

FISHER v. KAUFMAN.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

LOCATION OF SURVEYS—ADJOINERS—BOUNDARIES—EVIDENCE—JUNIOR SURVEYS—BOARD OF PROPERTY—DECISION ON CAVEAT—CONCLUSIVENESS AGAINST PATENTEE.

1. Where the south line of the S. survey was called for as the north line of the M., and every corner, course, and distance of that line was thus adopted, and the location of the line was undisputed, and there were no marks special to the M. to stop it short of its call, the M. could not, under the rule that marks on one of a block of tracts are competent to locate another

of the block, be placed 50 rods south of the S., by running the official courses and distances of the M.'s adjoiner on the east, which was surveyed the same day, and was in the same block of tracts, from an established original corner on the north line of the adjoiner, merely because no marks remained, or could be established, to stop the running of the adjoiner's courses short of their official distances.

2. Defendant could show that a line claimed by plaintiff to indicate the north line of a survey was not that line, but a line run as the result of a compromise between the owner of a subsequent interfering survey on the north and the owner of the survey in suit; and the surveys of and patent to the north adjoiner and the deeds executed between the owners pursuant to the compromise were admissible for that purpose.

3. Where the marks of the north line of a survey could not be found, and the line could not be located on the ground, the survey of and patent to a junior survey, made long before the controversy began, and before the marks of the north line became effaced, which called for the north line of the older survey on the south, were admissible to show recognition of that line as claimed to exist.

4. Act April 3, 1792, relating to caveats filed against the granting of warrants to survey, does not make the decision of the board of property on a caveat filed by a patentee against the granting of a warrant to survey land claimed to be covered by the patent conclusive against the patentee; and hence, by failing to bring ejectment against the warrantee within six months after an adverse decision on the caveat, as provided by section 11 of the act, the patentee did not lose title to land included in the patent to survey which the warrant issued.

Appeal from court of common pleas, Schuylkill county.

Trespass by Charles K. Fisher against John M. Kaufman. From a judgment for defendant, plaintiff appeals. Affirmed.

J. W. Ryon and A. W. Schalck, for appellant. S. H. Kaercher and Guy E. Farquhar, for appellee.

DEAN, J. On the 29th of October, 1887, the plaintiff, Charles K. Fisher, filed his application to the commonwealth for a warrant for 30 acres of land alleged to be vacant in South Manheim township, Schuylkill county, adjoining lands of Isaac Hoffmeister on the east, Casper Thiel and Sophia Meyers on the south, Christian Kaufman on the west, and Daniel Reber, Daniel Bartoletti, and John Sigfried on the north. To this application John M. Kaufman and others, owners of the Casper Thiel and Sophia Meyers tracts, called for as adjoiners on the south, filed a caveat, averring the land described had already been appropriated by patent on these last-mentioned two tracts. After production of evidence and several hearings before the board of property, it was decided the Thiel and Meyers patents did not include the land applied for by Fisher, and on the 18th of September, 1889, they directed the warrant to issue to Fisher. Accordingly, on the 18th of October following, the warrant went out for survey of land described in application. On the 27th of January, 1890, in pursuance of it, a survey was made by John F. Staud, county surveyor, and survey returned and accepted. On 21st of February, 1890,

patent issued for land described in survey. The description in the survey is of 119 acres and 157 perches of land, situate in South Manheim township, Schuylkill county, adjoining on the west lands of Christian Kaufman, now Kaufman and Schultz; on the south, Sophia Meyers, now Daniel B. Fisher and John M. Kaufman; also the late Casper Thiel, now Daniel B. Fisher and John M. Kaufman; on the north, Abraham Bartoletti, now Isaac Hoffmeister, late Abraham Bartoletti, now Daniel Bartoletti, late Adam Sweigert, now Charles E. Quail and Daniel E. Reber. The survey embraces a somewhat narrow strip, from 40 to 50 rods wide, and about 350 rods long. On this strip defendant, Kaufman, cut and removed timber, and thereupon Fisher brought trespass for damages. The plaintiff's case depended on the single question whether the land covered by his survey was vacant at the date of the grant to him by the commonwealth. It will be noticed his survey calls for the Casper Thiel and Sophia Meyers surveys on the south, and on the north for late Adam Sweigert and the two Abraham Bartoletti's. These are the adjoiners for almost the entire distance on the long lines of the tract. The defendant claims title under the Meyers and Thiel surveys, and alleges they also extend to the Sweigert and Bartoletti's on the north. In is conceded the Sweigert survey called for by the Meyers and Thiel was located on the ground December 21, 1792. The Meyers and Thiel are returned as surveyed October 12, 1796. They, with the John Harris, an adjoiner, surveyed the 13th of October, 1795, constitute a block, and were returned as adjoining each other. Therefore, in locating any one of them under the settler's rule for locating one of a block of tracts marks on any one can be invoked as tending to establish the location of any of its fellows in the block.

In view of the controversy as it shaped itself in the trial in court below it is no important whether any of the original mark of the south line of the Sweigert can now be found upon the ground. That line is established by the return of the survey in the land office, by its recognition as a north call for the Meyers and Thiel surveys, and by the call of plaintiff's own survey on the side. His warrant was descriptive, and did not direct the survey of land adjoining the Sweigert, but the accepted survey is of land adjoining on the north by land "late Adam Sweigert." The official survey of the Sweigert on its south line is "from a Spanish oak at its southeast corner, S., 63 W., 162, to stones; N., 86 W. 38, to stones; N., 28 W., 2, to post; S., 60 W., 16, to stones." The Spanish oak in the official drafts of the Sophia Meyers and Sweigert is a corner common to both surveys, and the northern line of the Meyers from the Spanish oak to the western boundary of the Sweigert is precisely the south line of the Sweigert. And while the return of the Charles Fisher survey does not specify the corner as a Spanish oak, instead

marking it "stone," its northern line from that corner west, as far as the Sweigert extends, allowing for variation of compass, is precisely the south line of the Sweigert and north line of the Meyers. That south line was, doubtless, at first established by marks on the ground. Nearly all of them have disappeared. In their place are the later marks of others than the first surveyor. These, and the tradition of the owners of the tracts, have so preserved the boundary that to-day the surveyors on neither side doubt its exact location. The only question in dispute is whether the Meyers and Thiel surveys are stopped short of their call for the southern line of the Sweigert by their own marks on the ground. By the call the southeast corner of the Sweigert is a corner common to both it and the Sophia Meyers. While the county surveyor, who nominally made the return on the Fisher warrant, had very meager knowledge of the locations of the surveys from his own work, yet Dreibelbis, another surveyor, who in fact suggested the framing of the plat in the return, had knowledge of the original locations of these old surveys from his own work. Although called as a witness by plaintiff, he in effect admits the identity of the stone corner with that of the original Spanish oak established for the southeastern corner of the Sweigert, and its identity with the corner established for the north line of the Meyers four years afterwards. There was no evidence to show that any marks special to the Meyers survey had been made on its north line to stop it short of its call for the south line of the Sweigert. Every mark on that line therefore became a mark for the Meyers. The plaintiff's survey calling on the north for the same line, the learned judge of the court below came to the conclusion that as to the location of the south line of the Sweigert there was no doubt, and so said to the jury; and, further, he was of opinion there was no evidence of marks on the ground to stop the Meyers from going to that line, and therefore he instructed them there was no vacant land between these two surveys for plaintiff to appropriate. If there was none between the Sweigert on the north and the Meyers on the south, then plaintiff is without title to three-fourths of that claimed by him. But the other fourth lies east of both the Sweigert and Meyers, and, according to defendant's location, laps on the Thiel survey, which is an adjoiner of the Meyers in the same block, and surveyed the same day. Every mark which locates the Meyers, then, becomes a mark for the location of the Thiel, so far as to tie it to the Meyers on the east, as represented in the official return. They adjoin. The eastern line of the Meyers becomes, in part at least, the western line of the Thiel; and the boundaries of the latter are to be determined by its own marks on the ground, if they can be found; if not, then by the courses and distances in the official return

of survey, starting with the monuments of the Meyers. Although the Thiel was represented as a tract of nearly 400 acres, with 15 corners, 7 of them marked trees, after the lapse of a century these marks have nearly all been obliterated by the hand of man or by time. It called on the north for the Daniel Stout, then for vacant land, then for Jacob Swink. On this north line the first corner called for at the end of 106 perches, after leaving the Meyers, its adjoiner on the west, is a chestnut. This had disappeared, and so the original corner could not be identified by counting the growth or by the production of a block. But defendant adduced some evidence tending to show that the point had been recognized as an old corner. A charred old chestnut stump, partly covered with stones, and some growing chestnut sprouts, were where the corner was called for, if on the continuation of the Meyers line. There was also some testimony on the part of surveyors that they believed this to be an original corner of the Thiel. If that was an original corner of the Thiel, and the termination of the official line from the Spanish oak, the latter a corner common to the Meyers and Sweigert, it undoubtedly fixed the north line of the Meyers and Thiel from the official Spanish oak to the official chestnut, and there was no land vacant out of which to appropriate the remaining fourth of the Fisher survey. But the plaintiff also invoked the rule that the original marks on any one tract of a block were evidence tending to establish the location of other tracts in the block. The original marked chestnut had disappeared. The evidence of the sprouts, stones, and that it was in the course of the north line of the Meyers fixed by the recognized south line of the Sweigert, was weakened by these facts: The south, east, and about one-half the north lines of the tract were fixed by original monuments or marks on the ground, corresponding not only in course and distance with the original survey, but substantially in the calls for adjoiners. The last original mark on this north line, going west and south to close the Thiel with its companion, the Meyers, on the west, is a chestnut oak corner on the south line of the Jacob Swink, an older survey. This, it is conceded, is an original corner of the Swink, and also a corner of the Thiel, marked for both surveys. Running from this corner the official courses and distances, the last line being S., 15 E., 63, would establish the north line of the Thiel and Meyers 50 rods south of the Sweigert, and leave vacant land for appropriation by plaintiff's warrant. From this chestnut oak common to the Swink and Thiel to the north line of the Meyers and Thiel there are no marks on the ground to stop this line short of its official distance, unless the north line of the Meyers and Thiel, established by the line from the Sweigert and Meyers Spanish oak to the chestnut corner,

claimed by defendant, stops it. The appellant argues that running the official course and distance from the established corner of the Thiel and Swink, the chestnut oak, fixes not only the northern line of the Thiel, but its companion of the block, the Meyers, and leaves open to appropriation the 50 rods between them. In view of the undisputed evidence as to the south line of the Sweigert having been adopted as the north line of the Meyers, we do not think the argument can be sustained as to the Meyers. Running the official course and distance of the Thiel from the Swink chestnut oak, because there are no marks now on the ground special to itself to stop it, would be disregarding the most conclusive proof as to the location of the Meyers. By all the official surveys, and by all the oral testimony, except in this one particular, the Sweigert fixes the northern line of the Meyers. It cannot be torn from its adjoiner on the north, and placed 50 rods further south, even though the undoubted genuineness of the Swink chestnut oak should wholly change the contour of its companion, the Thiel. It is argued the call of the Meyers for the Sweigert was a mistake. We do not think so. There was doubtless a mistake in the measurement or record of the measurement of the west line of the Meyers from the Jacob Dobias tract to the chestnut oak corner on the southwest; or possibly the course only of the line was marked, for one tree, counting to date of survey, is found on that line, and the distance merely overestimated, and not chained, as not seldom was the case in surveys of that period; hence the frequent excess, and sometimes the shortage, in quantity of the official returns. But, however this may have occurred, that George Eckert, the deputy surveyor of 1793, adopted every corner, course, and distance of the south line of the Sweigert as part of the north line of the Meyers is indisputable, and there it must remain, unless we disregard every conviction produced by significant and unassailable evidence.

Nor does the rule of *Ormsby v. Ihmsen*, 34 Pa. St. 462, help us to a correct conclusion from the facts developed here. That rule is: "From the lapse of twenty-one years after the return of a survey into the land office there arises a conclusive presumption of law that it was regularly made upon the ground as returned." The Thiel survey was returned as joining the Swink, and from an established corner of the Swink, running by the courses and distances, the northern line of both the Meyers and Thiel would be 50 rods further south; but the Meyers was returned as adjoining also the Sweigert on the north, and as adopting the line of that survey with its marks. Running from this established line the courses and distances, there is no vacant land. If either of these monuments, the marked chestnut oak of the Swink or the line of the Sweigert, was absent, we might resort to the legal presumption to help us fix the

disputed north line of the Thiel; but, both facts being established, the legal presumption leads to diametrically opposite conclusions. The modification, or rather the applicability, of the rule to the varying facts of this class of cases is so clearly stated by our Brother Williams in *Grier v. Coal Co.*, 128 Pa. St. 79, 18 Atl. 480; *Bloom v. Ferguson*, 128 Pa. St. 362, 18 Atl. 488,—that repetition is useless. Where, because of peculiarity of the facts in a particular case, the presumption helps us not at all in arriving at a correct conclusion, it is a waste of time to talk about it.

Locating the Meyers, then, up to the Sweigert, and placing the Thiel as adjoining it on the west, there was still left for the jury the determination of the boundary of the Thiel at the north, up to where it connected with its companion, the Meyers. The court below correctly held that the location of the Meyers cannot be questioned; but neither can the genuineness of the Swink chestnut oak be questioned as a corner of the Thiel. Without this undoubted corner, the certain location of the Meyers would have fixed without question the north line of the Thiel to the official corner, by a mere prolongation of the north line of the Meyers; but, starting from this Swink corner, the official course and distance would determine the north line of the Thiel, unless the prolonged north line of the Meyers on the ground stopped it short of the distance. Appellant contended that about the end of the official distance there was a chestnut stump, which gave evidence of being the remains of the original chestnut corner of the Thiel. The defendant alleged that the stones and chestnut sprouts at the end of the line, continued on the course of the north line of the Meyers, indicated the locality of the original chestnut corner. The disputed evidence on this question was left to the jury, who found for defendant. The learned judge, for want of time, did not undertake to eliminate irrelevant matters in the evidence of the surveyors as to the originality of the two corners; nor do we think, if he had done so, it could have helped appellant's case with the jury. As he had correctly instructed them, the south line of the Sweigert must be the north line of the Meyers. The continuation of that line according to the official course must be the north line of the Thiel, to the chestnut corner, unless there were convincing evidence of marks on the ground which extended the line S., 15 E., 63, past it, and 50 rods further south. The evidence touching the chestnut stump of plaintiff and the chestnut sprouts of defendant as being original corners was not unevenly balanced; but to establish the probability of defendant's contention the official older adjoining surveys, and the official returns of the junior Roadermel block, were significant in its favor. It was manifestly the intention of the deputy surveyor to locate his block of three warrants to the south of

and adjoining the older surveys on the north so far as there were older surveys on that side, to leave no vacant land between them. He was mistaken in the call for Daniel Stout, for no tract of that name had yet been located at that point, but a descriptive warrant calling for survey of land at that point had been issued, and he assumed it to be located; and, although it never was located by its description, the fact that he made it a call only shows more clearly his intention to locate the north line of his block by older surveys. Mistakes in length of lines in the surveys of unseated lands in the early days of the commonwealth are so common that proof now of the fact is but slight evidence of mistake in the call. It is certainly so when the excess is no larger than is claimed here; surveys calling for nearly 1,000 acres exceeding that quantity by but little over 100.

What we have said in effect passes upon appellant's assignments of error from the fourth to the nineteenth, inclusive. The evidence fully established, there could be no vacant land between the Meyers and Sweigert, and was sufficient to warrant the jury in finding there was none between the Bartolett and Thiel.

The twentieth and twenty-first assignments complain of the ruling of the court in admitting in evidence copies of the Bartolett surveys, and other papers and deeds in the line of title to those tracts. They were objected to, because, being junior surveys, they could not affect the location of the Meyers and Thiel older surveys as returned into the land office. Unquestionably these surveys could neither restrict nor enlarge the older ones. They were not offered for that purpose. The plaintiff had offered evidence of a line on the ground which tended to establish the location of the north line of the Meyers and Thiel as he claimed. The defendant, in answer to this, proposed to show that this line was a compromise line, adopted about 1844 by the owners of the Bartolett and Thiel, and had no connection with the lines of 1796 made for the Meyers and Thiel; and for the further purpose of showing that the deputy surveyor, when the lines on the ground were about 44 years old, had recognized them by locating the younger survey up to them. It was not proposed to establish the lines of an older survey by a younger one, but to show recognition of the lines of an older by evidence that at a much earlier date, before the lines were half as old as now, and the original marks had not been effaced, the commonwealth had acknowledged the lines of the older on the ground in her location of the younger survey. For this purpose the evidence was admissible. *Manufacturing Co. v. Cross*, 128 Pa. St. 636, 18 Atl. 519.

The first, second, and third assignments are to the refusal of the court to rule that the decision of the board of property on defendant's

caveat was conclusive against him. Since the construction given the eleventh section of act of April 3, 1792, in *Galbraith v. Elder*, 8 Watts, 81, a decision of the board of property on facts as here presented has been held not to conclude the right of the patentee. The patents were issued to Daniel Roadermel in 1797. Defendant claimed the land in dispute to be embraced in those patents by location of the surveys upon the ground. That fact was determined in his favor by the judgment of the court below on competent evidence. The nature of the grant by the commonwealth to the patentee is thus stated by Sergeant, J., in *Balliot v. Bauman*, 5 Watts & S. 150: "The patent conveys the full legal title of the state, and is, as to her, a merger of the previous proceedings, and a waiver of informalities. It is, moreover, full and express notice to every person whatever that the land has been granted away, and is not vacant." If, nearly a century afterwards, the commonwealth can take from the patentee, by a decision of the board of property, 119 acres of this land, which she declared by that instrument was not vacant, and give it to another, then by the same decision, she can confiscate the whole. As is said by Kennedy, J., in *Galbraith v. Elder*: "From the terms and provisions of the section it is evident that the case intended to be provided for is one in which neither of the parties has obtained a patent for the land, but one in which each claims a right to have it in preference to the other." Here, in the proceedings before the board, the defendant asked for no patent. He claimed he had one nearly a century old, and that appellant sought a patent for part of the same land, which ought not to issue. That he stood in this attitude on the hearing before the board did not operate to render its judgment conclusive, even though he brought no objection within six months. He had a patent, and had been, by himself and predecessors, constructively in possession for nearly a century. Notwithstanding the very able argument of counsel for appellant on this assignment of error, we have, after examination, been unable to find a single case of those cited by them which applies to the facts here. All of them are cases of antagonistic claimants for patents, not of claimants under patents, or claim by one under a patent and the other for a patent. The eleventh section of the act provides a limitation on the conflicting claims of warrantees to vacant land. Its object was to quiet titles, not to disturb those already settled by the commonwealth's solemn deed. The only effect of a decision of the board to grant a patent for land already patented is to turn the first patentee over to the courts to be vexed by a lawsuit. *Galbraith v. Elder*, supra, has never been overruled, and the facts of this case do not move us to depart from it. All of the assignments of error are overruled, and the judgment is affirmed.

BOYLE v. BOROUGH OF HAZLETON
et al.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

BOROUGHS—EXCAVATION IN STREET—PERMITS—LIABILITY FOR INJURIES.

1. Where a borough ordinance declares it unlawful for any person to dig or in any way disturb a street without a permit from the street commissioner, a permit from the burgess will have no effect, though he and his predecessor in office had been in the habit of exercising such powers.

2. Where one digs a ditch in a borough street without the permit from the street commissioner required by ordinance, the borough, having actual or constructive notice of the unsafe condition of the street, caused by the work, is liable for an injury to a traveler caused thereby.

Appeal from court of common pleas, Luzerne county.

Action by Marietta G. Boyle against the borough of Hazleton and Benjamin Rausch for injury received by plaintiff while driving on a street of defendant borough. From a judgment for plaintiff against defendant Rausch alone, plaintiff appeals. Reversed.

James L. Morris and John T. Lenahan, for appellant. G. L. Halsey and T. F. McNair, for appellees.

MCCOLLUM, J. The principal questions raised by this appeal are (1) whether Rausch dug the sewer ditch at the intersection of Fern and Laurel streets under a lawful permit from the municipal authorities, and (2) whether the learned court erred in holding that there could be no recovery against the borough. Section 3 of the ordinance in relation to streets and alleys provides that "it shall not be lawful for any person, company, corporation or their employes to open, dig, or in any way disturb any street or alley without first applying to the street commissioner and obtaining a written permission for that purpose," and makes it the duty of such commissioner to "see that all persons to whom permits are so granted shall restore the street or alley to as good condition as before being opened, dug, or disturbed." It is conceded that no permit was issued to Rausch under this ordinance, but it is claimed that a permit was issued to him by the burgess, under section 1 of the ordinance in regard to building permits, which authorized him to dig the ditch. The learned court below thought that to authorize an opening in the street of this character the borough ordinance required that the written permission of the street commissioner should be first obtained, but, inasmuch as the burgess testified that it was his habit and the habit of his predecessor in office to issue permits to make such openings, the ditch must be regarded as dug under a valid municipal license. The permit issued by the burgess, and relied on to legalize the work done by Rausch at the intersection of Fern and Laurel streets, simply allowed him to lay a drain on Church street; but, as he

testified that it was given on his verbal application for leave to dig a ditch at the former place, the insertion of the words "Church Street" was considered as a clerical mistake, and the permit as containing a license to do the work complained of. It should be stated, in connection with the foregoing reference to the testimony and the conclusions of the court, that the ordinance which authorized the burgess to issue permits required that he should describe in them the place where the work was to be performed, and that he occasionally delegated his power under it to a policeman. It also required that the permit should be obtained before the commencement of the work, while the evidence in this case would fairly sustain an inference that the permit in question was issued after the accident. We agree with the learned court below that under the ordinances of the borough Rausch was bound to obtain from the street commissioner written permission to dig the ditch before proceeding to do so, but we cannot concur in its conclusion that a permit from the burgess to lay a drain on Church street authorized him to dig a ditch at the intersection of Fern and Laurel streets. The burgess was not empowered by any ordinance to grant a permit to any person, company, or corporation to open, dig, or in any way disturb any street or alley within the borough; but, as we have already seen, the power to do so was expressly committed to the street commissioner. If the burgess was in the habit of assuming and exercising powers not vested in him, but plainly delegated to another, such habit may be considered as a violation of the borough ordinances, but not as a nullification of them. No number of violations of them will constitute or establish a custom or usage which the law will recognize as of any validity. We cannot, therefore, regard the evidence in relation to the habit of the burgess and of his predecessor in office as a warrant for giving to the permit in question the effect of a permit issued in accordance with section 3 of the ordinance, which declares it to be unlawful for any person, company, or corporation to open, dig, or in any way disturb any street or alley in the borough without a written permission from the street commissioner. The validity of this ordinance is not questioned, and the work done by Rausch was in contravention of it. In digging the sewer ditch without the written permission of the street commissioner, he was a trespasser; and if his work rendered the street unsafe for ordinary travel it was the duty of the borough authorities, having actual or constructive notice of the dangerous condition created by him, to take proper measures to protect the public against it. In other words, a municipality cannot tolerate unlawful and dangerous obstructions on its streets, and claim exemption from liability for injuries caused by them. The cases cited to sustain the borough's contention that it is not liable to the plaintiff for the injury she received in consequence of the work done by Rausch are not applicable to the facts of this case. They

are cases in which the work was done under a contract with or license from the municipality, while in this case the work was done without its permission, and in violation of its laws. We see no occasion, and we are not disposed, to go a hair's breadth beyond them in relaxing the supervision by a municipality of the streets within it. The specifications of error are sustained. Judgment reversed, and *venire facias de novo* awarded.

LYON v. CLEVELAND. (No. 514.)

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

JUDGMENT—REVIVAL—LIEN—SECRET CONVEYANCE OF LAND.

The lien of a judgment on a farm which defendant owned and lived on when judgment was entered is continued by a revival of the judgment by an amicable *scire facias*, signed by defendant alone, the record title and the possession remaining the same, notwithstanding a secret conveyance by defendant to his wife; and subsequent notice of the conveyance does not affect the lien, so that another proceeding for revival, based on the original judgment, against defendant and his wife, is not only unnecessary, but unauthorized.

Appeal from court of common pleas, Bradford county; Benjamin M. Peck, Judge.

A judgment for George Lyon, to the use of Gustav Conklin, against J. C. Cleveland, was revived by amicable *scire facias*. Defendant's rule to strike off the revived judgment, and to set aside an alias *fi. fa.* issued on it,—on the ground that the issuing by plaintiff, subsequent to the revival, of a *scire facias* against defendant and Florence A. Cleveland, terre-tenant, on the original judgment, to revive it, was an abandonment of the judgment on the amicable *scire facias*,—was discharged, and defendant appeals. Affirmed.

Edward Overton, for appellant. D'A. Overton and J. C. Ingham, for appellee.

WILLIAMS, J. This appeal presents an interesting question. It cannot be said to be definitely settled, but its solution will be made comparatively easy by a distinct statement of it, and of the facts on which it arises. The plaintiff is the holder of a judgment against the defendant, which was entered in 1886. It then became a lien upon a valuable farm owned by the defendant, and occupied by himself and his family. In 1801 the defendant and his family were still in possession of the farm, without visible change. The record showed the title remaining in him. There is no allegation of notice, actual or constructive, that the defendant had parted with his title to any one. Upon his state of facts, the plaintiff applied to the defendant to revive and continue the lien of the judgment by an amicable *scire facias*. This was done, and the judgment of revival duly entered on the records by the notary. During the following year,

Mrs. Cleveland told the plaintiff that her husband had conveyed the farm to her by a deed executed by him prior to the revival of the judgment by amicable *scire facias* in 1891. This information started in the mind of the plaintiff the question whether the unrecorded conveyance to Mrs. Cleveland would affect in any manner the lien of his judgment as revived by the amicable *scire facias*, signed only by the defendant. He seems to have assumed that this question must have an affirmative answer, and to have turned to consider, in the next place, what it was necessary for him to do in order to preserve the lien of his judgment upon the farm in the hands of Mrs. Cleveland as terre-tenant. The answer to the first of these questions will dispose of this appeal, and of the appeal of Mrs. Cleveland in another case which was heard at the same time with this one. *Lyon v. Cleveland*, 33 Atl. 145. We are to inquire, therefore, what effect the secret conveyance by Cleveland to his wife had upon the lien of the plaintiff's judgment upon the farm so conveyed.

It may be well to begin this inquiry by considering just what is meant when we speak of the lien of a judgment upon real estate. At common law, a judgment was not a lien upon either personal or real estate. We have no statute that, in express words, makes a judgment a lien on land. The lien is not an incident of the judgment, therefore, but the result or outgrowth of a succession of statutes subjecting land to seizure and sale upon execution process. Accordingly, it has been uniformly held that a judgment on which a seizure and sale of land is not authorized is not a lien on the real estate of the defendant. *Beam's Appeal*, 19 Pa. St. 453; *Schaffer v. Cadwallader*, 36 Pa. St. 126. Judgments against the commonwealth, against counties and townships, against municipal corporations, and against canal and railroad companies, belong to this class. Writs of *fi. fa.* for the seizure and sale of the property of the defendant do not ordinarily issue upon such judgments, but other methods of compelling payment are provided by statute. When the right to seize and sell land in satisfaction of a judgment does exist, it must be exercised within such period as the law giving the right may appoint. Formerly, this period was a year and a day; and, if this was allowed to elapse, the plaintiff was required to warn the defendant by a writ of *scire facias post annum et diem* before he could seize the defendant's land in satisfaction of his judgment. While the right of seizure lasted, the judgment was said to be a lien on the defendant's real estate. When the right of seizure was lost by lapse of time, the judgment was said to have lost its lien.

By our act of April 16, 1845, the plaintiff's right to seize land was extended, from a year and a day, to five years from the date on which the judgment was entered. The judg-

ment is therefore said to be a lien for five years from its date upon all the real estate owned by the defendant at that time, because the plaintiff may levy upon and sell such real estate for the collection of the sum due him on his judgment at any time within five years. If the five years are allowed to expire, the plaintiff is in the same situation that he would have been in under the old law limiting his right to execution to a year and a day. His right to seize the defendant's land is lost by the lapse of time; or, in other words, the judgment has lost its lien, since it will not support execution process until regularly revived. The revival of a judgment means simply a new award of execution process for its collection. This may be had by means of a writ of *scire facias*, which, after the expiration of five years, is in effect a *scire facias quare executionem non*. If issued before the expiration of five years, it is a *scilicet* *fa.* to revive and continue the lien of the judgment for another period of five years. Judgment of revival may be had also by the consent of the defendant without a writ. Such a revival is known as an "amicable *scire facias*," and authorizes the prothonotary to enter judgment against the defendant for the amount due on the judgment, and that the lien of the judgment be extended for another period of five years. This judgment may be again revived as often as the lapse of time may require, either amicably or by writ; and the right of the plaintiff to resort to the real estate owned by the defendant when the judgment was entered is thereby preserved. The last judgment of the series is that by which the amount of the plaintiff's demand is ascertained, and his right to execution therefor determined. The several judgments that precede it have served to preserve the plaintiff's right to seize, upon execution process, all the real estate that could have been seized under the original judgment; or, in other words, they have continued the lien of the judgment upon the lands that were originally subject to it. But, being more than five years old, they will not support execution process, and have ceased to have any significance except as supports to the last of the series, and to process issued upon it. When the defendant in the judgment sells land, the purchaser is bound to take notice of the record. The record informs him of the existence and amount of the judgment; and the law, which he is also bound to know, informs him that the land he is buying is subject to seizure and sale for the payment of the judgment at any time within five years. If he takes possession of the land or records his deed, the plaintiff is bound to take notice of his situation as a terre-tenant, and thereafter, upon the revival of the lien of his judgment, to give the terre-tenant notice. *Armington v. Rau*, 100 Pa. St. 165.

If the purchaser does not record his deed

or take possession, but leaves the defendant in undisturbed possession of the land, so that the plaintiff has no knowledge of the conveyance, actual or constructive, he does not become a terre-tenant of the land, and has no interest therein of which the plaintiff can take notice. As between himself and his vendor, he may have a good title; but as to the lien creditor he has none, because the conveyance to him is and remains a secret one, while the vendor is permitted to remain in possession in the same manner as before the secret conveyance was made. Under such circumstances, the revival of the judgment against the defendant is all that is possible to the creditor, and it will continue the right to seize and sell the real estate which was subject to seizure under the preceding judgment or judgments of the series. It can make no difference whether the judgment of revival is obtained by means of the writ of *scire facias* regularly issued or by an amicable *scire facias*. It is a judgment against the defendant who was the owner of the land when the judgment was entered, and who remains so to all appearances, and as to all means of knowledge open to the creditor. If the creditor or the purchaser must lose, and if both of them may be said to be innocent parties, then the loss must fall on him whose neglect to give notice has occasioned the omission or failure complained of; but if the purchaser records his deed, or enters into the actual possession of the land, he becomes a holder of the land bound by the judgment,—a terre-tenant,—of whose position and interest the judgment creditor is bound to take notice at his peril. If, thereafter, the plaintiff, in a judgment against the vendor, disregards the position of the terre-tenant, and revives his judgment without legal notice to him, he will lose his lien, as to the lands so acquired by the terre-tenant, at the end of five years from the time when the notice of the terre-tenant's title can be brought home to him.

It remains to apply these principles to the facts of this case. The judgment held by Conklin was entered against Cleveland in 1886. The defendant then owned the farm on which he lived, and the judgment became a lien upon it. In 1891 the state of the record and of the possession remained the same as in 1886. The plaintiff, having, therefore, no notice of any change in the title, revived his judgment by an amicable *scire facias*, signed by the defendant. This judgment of revival continued the right of the plaintiff to execution against all the lands previously bound by the judgment entered in 1886; in other words, it continued the lien of the judgment upon all such lands against the defendant and all persons claiming under him by means of any secret conveyance. Mrs. Cleveland held such a conveyance. She was bound to know of the judgment and its lien upon the farm. She was bound to know that, if she expected to assert the rights of a terre-

tenant, it was her duty to make her title public, so that the plaintiff could be fixed with notice of it. She did nothing. The plaintiff did the only thing possible for him,—he revived his judgment against the defendant; and we have no doubt that the revival bound the land, as to any interest acquired by Mrs. Cleveland, just as completely as it would have done if she had joined in the agreement with her husband. This revival continued the lien of the judgment for five years from the date of its entry, and the subsequent recording of a deed, or notice given in any other manner, could have no retroactive operation. This, then, was the situation when, in 1892, Mrs. Cleveland gave the plaintiff notice that she held a deed for the farm, which had been executed before the entry of the judgment upon the amicable scire facias. This notice did not affect the lien of the judgment in the slightest degree. It gave her no rights as a terre-tenant, except such as began at that time. The plaintiff and the lien of his judgment stood after the notice was given just as they stood before. There was no reason for taking any precautionary steps, or making any effort to bring Mrs. Cleveland on the record, until it became necessary to revive the judgment again against the defendant. The plaintiff seems to have reached an opposite conclusion. He at once issued a scire facias on the original judgment, which was at the time more than five years old, and named Mrs. Cleveland therein as a terre-tenant. This was not only unnecessary, but it was wholly unauthorized. The defendant took defense on the ground that the judgment had been once regularly revived as against him, and that he was not liable to a second judgment for the same cause of action. Mrs. Cleveland took defense on the ground that the lien of the judgment of 1886 had been lost by the lapse of time, and could not be revived against her. The court below overruled the defense set up by the defendant; disposed of Mrs. Cleveland's allegation that as to her the judgment of 1886, having ceased to be a lien, would not support the scire facias, by admitting evidence to show the continuance of the lien against the defendant; and then rendered judgment against both. This was an error. The writ should not have been issued. Having been issued, the court should have refused to enter judgment upon it against either of the defendants. The plaintiff needed no help until it should become necessary to revive his judgment again. When that time comes, he will issue his writ of scire facias, naming Mrs. Cleveland as terre-tenant; but he will proceed upon the judgment entered upon the amicable scire facias in 1891, which, as we have seen, binds the land as well in the hands of Mrs. Cleveland, upon the facts of this case, as in the hands of her husband. But the error into which the plaintiff and the court below fell was not in this case, but, as we have said, in the action brought by scire facias against the defendant and his wife, as terre-

tenant, on the original judgment entered in 1886. The judgment appearing upon this record is therefore affirmed.

LYON v. CLEVELAND. (No. 84.)

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

Appeal from court of common pleas, Bradford county.

Scire facias by George Lyon, to the use of Gustav Conklin, against J. C. Cleveland and Florence A. Cleveland. Judgment for plaintiff. Defendant Florence A. Cleveland appeals. Reversed.

Edward Overton, for appellant. D'A. Overton and J. C. Ingham, for appellee.

WILLIAMS, J. This case arises upon the same facts considered in *Lyon v. Cleveland*, in which case an opinion has just been filed. 33 Atl. 143. The judgment now appealed from is that which was rendered by the court below upon the trial on the writ of scire facias issued in 1892, to revive the judgment of 1886 against J. C. Cleveland, defendant, and Florence A. Cleveland, his wife, as terre-tenant. The reasons for holding this judgment to be erroneous are stated with sufficient fullness in the opinion just referred to, and we shall do no more at this time than to refer to it as sustaining the judgment now to be entered in this case. The judgment is reversed.

In re BRIDGEPORT TURNPIKE.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

HIGHWAYS—CHANGES—SHUTTING UP OLD ROAD.

Under Act June 13, 1886, providing that, "whenever the whole or any part of a road shall be changed or supplied, the same shall not be shut up or stopped until the road laid out to supply the place thereof shall be actually opened and made," an order shutting up the old road before the new is opened is void, and a subsequent order setting aside the first furnishes no ground of complaint, especially for one unaffected by either order; and it is immaterial that the second order excepts therefrom part of the road crossing a railroad at grade, it being already supplied by a bridge and its approaches.

Appeal from court of quarter sessions, Cumberland county.

In re proceedings to set aside the decree of the court of quarter sessions of Cumberland county vacating the old turnpike road running from Bridgeport to New Cumberland. The petition of citizens to set aside said decree was granted, and the Philadelphia, Harrisburg & Pittsburg Railroad Company appealed, by certiorari. Affirmed.

J. W. Wetzel, for appellant. John Hays, for appellee.

McCOLLUM, J. If the order of February 21, 1893, can be considered as embracing a direction to the supervisors to close the New Cumberland and Bridgeport turnpike road against the public before the construction and actual opening for public use of the road laid out to supply its place, it is to that extent a nullity. Neither the Philadelphia, Harris-

burg & Pittsburg Railroad Company, nor its lessee, acquired by this order any right to obstruct the old turnpike road, or standing to contest the order of June 12, 1894, recognizing and preserving the rights of the public in it until the completion of the road designed as a substitute for it. Section 24 of the act of June 13, 1836, provides that "whenever the whole or any part of a road shall be changed or supplied the same shall not be shut up or stopped until the road laid out to supply the place thereof shall be actually opened and made." An order in plain violation of the statute under which proceedings for the vacation of highways are instituted and conducted is void, and a subsequent order setting it aside furnishes no just ground for litigation or complaint. In this case the record shows that the order of February 21, 1893, was made under a misapprehension by the court of the fact respecting the construction and opening of the road laid out from New Cumberland to Riverton. The power of the court to vacate an order so made is conceded. It is alleged that the road laid from New Cumberland to Riverton was designed to take the place of the turnpike road, and that the former has not been "actually opened and made." There is no denial of this allegation. The railroad company, in its answer to the petition on which the rule to show cause was granted, simply denied that it had obstructed any portion of the turnpike road, and asked that the petition be dismissed. There is no claim that the company acquired any right by the order of February 21, or lost any by the order of June 12. We have then a case in which a corporation unaffected by either order asks us to reverse the last one on the ground of alleged irregularities in making it. Regarding, as we do, the order of June 12th as designed to prevent closing of so much of the turnpike road as is required for public use until the completion and opening of the road laid to take its place, we cannot do so. We cannot say that the order is vitiated by the exception in it of that portion of the turnpike which crosses the tracks of the Northern Central Railway at grade, and is already supplied by the bridge and its approaches constructed by said company in pursuance of an arrangement between it and the township authorities. Specification overruled, and order affirmed.

McGILL et al. v. McGILL.
(Supreme Court of Pennsylvania. Nov. 4, 1895.)

TENANTS IN COMMON—JOINT ACTION.

Where tenants in common mortgage their common property to secure the debt of one, on his promise to reimburse them for any loss on account thereof, and the property is sold to pay the debt, they may maintain a joint action against him.

Appeal from court of common pleas, Washington county.

Action by J. Clark McGill and others against James A. McGill. Judgment for plaintiffs. Defendant appeals. Affirmed.

J. M. Patterson and J. M. Braden, for appellant. McCrackens & McGiffin, for appellees.

WILLIAMS, J. The main question raised at the trial in the court below, and now raised in this court, is over the right of the plaintiffs to join in this action. It appears from the evidence that they and the defendant were children of the same parents. To assist him in the purchase of a one-half interest in a grocery store, they joined with him in the execution of a mortgage upon a piece of real estate in which, as heirs at law of their deceased father, they were tenants in common. He did not pay the debt which the mortgage was intended to secure, and the property covered by it was sold to make payment. The plaintiffs were sureties for their brother, the defendant, and their individual interests or shares as tenants in common in the real estate sold have gone to pay his debt. It is alleged, and the jury have found, that the defendant undertook to reimburse his brother and sisters for the amount they might be compelled to pay for him by reason of the mortgage, or, in other words, to restore to them the value of their shares in the real estate held in common by them. Such a promise might have been proceeded upon by each of the cotenants separately, but we see no reason why they may not join, as they might do in trespass or in ejectment, for an injury or an ouster from the common property. When tenants in common sever, each can recover only for his or her individual interest in that which is the subject of the action; but, where they join in seeking redress for an injury to the property held in common, the trespasser would not be heard to object to the joinder. For the same reason, where one of several tenants in common promises his cotenants to indemnify them if they will risk the common property for his benefit, he ought not to object if they sue upon the promise as it was made. If he had bought the interests of these plaintiffs from them, and given his promissory note for the purchase price of the three shares, making it payable to the three vendors, it would not admit of doubt that they might join in an action on the note. Here the shares of the plaintiffs in the common property were sold under the supervision of the defendant, and for the payment of his debt. His verbal promise to reimburse them, made, as the jury have found, to the three owners as tenants in common, will support, as the note payable to the same three persons would have done, one action in the name of all the promisees. It is said that one of the plaintiffs has already been reimbursed by the payment of his debt out of the proceeds of the sale of the mortgaged premises. If so, it may be that the

sum recovered may need to be distributed by the court below in such manner as shall secure to each a sum equal to his or her share in the fund. The court below is entirely competent to deal with the subject. The judgment is affirmed.

CROSS v. BROWN et al.

(Supreme Court of Rhode Island. Oct. 28, 1895.)

GARNISHMENT—PROPERTY SUBJECT TO—PRACTICE.

1. Where, in an action against a nonresident, jurisdiction has been obtained of defendant and the garnishee, a debt due defendant by a resident, payable in another state, is subject to garnishment.

2. The fact that a chose in action has no situs in a state for purposes of taxation does not prevent it having one for purposes of attachment.

3. Where, in a suit against a nonresident, jurisdiction is obtained over him, the rule of law, that a state statute has no extraterritorial force, will not operate to relieve a debt due the defendant by a resident under a foreign contract, and payable in a foreign state, from being subject to trustee process.

4. Pub. St. c. 208, § 15, authorizing a trustee to satisfy a final judgment to the amount of the attached property in his hands, and providing that such payment shall be a discharge of the debt as to plaintiff and defendant, does not, in so far as it affects debts due nonresidents, deprive them of property without due process of law.

5. Nor is it, in so far as it affects debts due nonresidents, an impairment of the obligation of contracts.

6. Under Judiciary Act, c. 32, § 14, authorizing the attachment of defendant's property in the hands of another as the trustee of defendant, and chapter 33, § 20, providing for the service of the writ in trustee process on a nonresident, a debt due a nonresident defendant is subject to attachment.

7. Insolvency proceedings in one state against a debtor do not deprive the courts of another state of jurisdiction of the debtor's property within the latter state in an action to subject it to garnishment.

8. A debt payable without contingency at a future date is subject to trustee process before maturity.

9. The holder of negotiable paper indorsed to him for collection can sue thereon in his own name.

10. One who, after service of trustee process on him, continues to hold and use the money due the principal defendant is liable to plaintiff for interest on the amount of the debt from date of service of trustee process.

11. A refusal to enter judgment against a person as garnishee is proper, where it appears that such person is liable as garnishee in other suits for amounts exceeding the value of the property held by him as trustee.

12. Judiciary Act, c. 34, § 18, and chapter 36, § 20, provide that the court, in rendering judgment against a garnishee, must determine the amount with which he is chargeable, and require such amount to be entered in the execution issued on the judgment. *Held*, that judgment cannot be entered against a garnishee, where it appears that he is liable as garnishee in prior suits not yet determined.

13. The contingent interest which a creditor has in dividends which may be declared by his insolvent's estate is not subject to trustee process.

14. The word "trustee," as used in statutes relating to garnishment, is limited in its ap-

plication to the debtor or agent of the principal defendant, against whom an action *ex contractu* at law only might be maintained in favor of such defendant.

15. A motion to summon in an attachment suit, by trustee process, prior attaching creditors, to have their rights determined in the action, cannot be sustained.

16. A motion to summon in an attachment suit, by trustee process, one who is prosecuting an action in trover against the principal defendant for the attached property, to have his rights determined in the action, cannot be sustained.

17. It is within the discretion of the court to allow a claimant of attached property to amend his affidavit of disclosure by a supplemental affidavit, though it appears on the face of the affidavits that the amendment was made at the instance of, and in collusion with, the garnishee.

18. A refusal to allow plaintiff in attachment to give evidence in support of allegations and interrogatories filed, which would in effect be to try in the action the rights of prior attaching creditors, is proper.

Action by John A. Cross against Brown, Steese & Clarke, on their promissory notes, payable at Boston. Trustee process served on the Lippitt Woolen Company, the Riverside & Oswego Mills, and the Wanskuck Company, corporations of this state. Theophilus King intervened, claiming the debts due defendants by trustees first and last above named by virtue of transfer thereof by the assignee in insolvency of defendants under the Massachusetts statute. Bullens & Sawyer intervened, claiming the debt due by the second trustee above named. There was a judgment for plaintiff for the amount of the notes, and holding the first trustee for the amount of the debt, with interest, and discharging the other garnishees. Motions for new trial,—one by plaintiff, and another by King and the first trustee. Denied.

James Tillinghast, for plaintiff. W. G. Roelker, for Lippitt Woolen Co. John C. Coombs, Charles H. Hanson, and Robert W. Burbank, for Theophilus King.

TILLINGHAST, J. This is assumpsit upon two promissory notes made by the defendants, at Boston, in the state of Massachusetts, on the 9th day of April, 1889, and the 7th day of May, 1889, respectively, and payable to the order of the International Trust Company, at its place of business in said Boston, and by said International Trust Company indorsed and delivered to the plaintiff. The said International Trust Company is a Massachusetts corporation. The writ, wherein John A. Cross, of Providence, was plaintiff, and Gideon P. Brown, of Boston, Edward Steese, and Amasa Clarke, of Brookline, all in the state of Massachusetts, co-partners under the firm name of Brown, Steese & Clarke, were defendants, was sued out of the court of common pleas, in the county of Providence, August 13, 1889, and was served by trustee process, on the same day, upon the Lippitt Woolen Company, the Riverside & Oswego Mills, and the Wau-

skuck Company, each being a corporation of this state, and was also further served, on August 15, 1889, by trustee process upon the assignees of said Riverside & Oswego Mills, and by sending a copy of the writ by mail to the address of each of the said defendants. At the time of the commencement of said suit, and of the insolvency proceedings hereinafter mentioned, the defendants, Brown, Steese & Clarke, were creditors of said Lippitt Woolen Company, the Riverside & Oswego Mills, and the Wanskuck Company. The indebtedness of the Lippitt Woolen Company was on a contract for the sale of wool, made in Boston, where the wool was delivered, and where the purchase price for the same was payable when it should become due. At the time of the alleged garnishment, however, said indebtedness had not become due and payable, and did not until September 12, 1889. Subsequent to the service of said writ on the Riverside & Oswego Mills, but on the same day, this corporation made a general assignment of all its property to Charles D. Owen, of Rhode Island, Chester A. Braman, of the city and state of New York, and James B. Case, of Webster, in the state of Massachusetts, in trust for the equal benefit of all its creditors, excepting its employes, the wages of whom, for labor performed within six months prior to said assignment, not exceeding however the sum of \$100 to any one person, were preferred. January 7, 1890, the defendants appeared and pleaded the general issue, and, on trial to a jury, on March 20, 1890, a verdict was rendered for the plaintiff for \$41,534.27, which verdict this court, on a petition for a new trial subsequently filed, refused to disturb.¹ Said Brown, Steese & Clarke failed in the early part of August, 1889, and on the 12th of the same month two members of the firm applied by a voluntary petition to the judge of the court of insolvency in and for the county of Norfolk, Mass., setting forth their inability to pay all their debts and their willingness to assign all their estate and effects for the benefit of their creditors, and praying that such proceedings might be had as were provided by chapter 157, Pub. St. Mass., viz. the insolvency laws of that state. Section 46 of such chapter provides as follows: "The assignment shall vest in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned or conveyed, or which might have been taken on execution upon a judgment against him at the time of the first publication of the notice of issuing the warrant in case of voluntary proceedings, and at the time of the first publication of notice of the filing of the petition in cases of involuntary proceedings, and shall be effectual, subject to the provisions of the following section, to dissolve any attachment on mesne process made not more than four months prior to the time of the first pub-

lication aforesaid. The assignment shall vest in the assignee all debts due to the debtor or any person for his use, and all liens and securities therefor, and all his rights of action for goods or estate, real or personal, and all his rights of redeeming such goods or estate." The first publication of notice of the insolvency proceedings referred to was made on August 23, 1889, and on September 4, 1889, the assignment was made by the judge of insolvency under the provisions of said law. No assignment was made by the insolvents themselves. The assignees of Brown, Steese & Clarke, by virtue of the assignment to them, as aforesaid, and of the provisions of said insolvency laws of Massachusetts, duly purported to sell and assign the claims of said firm against the Lippitt Woolen Company and the Wanskuck Company to Theophilus King, a citizen and resident of Massachusetts, who, as shown by the duly-authenticated record, as such purchaser, and under and by virtue of section 109 of said chapter 157 of the Massachusetts statute, brought suit in his own name in that state against the Lippitt Woolen Company on its obligation under said contract, setting forth the fact of the sale, and of the purchase by him, in the writ, and recovered judgment against the Lippitt Woolen Company, notwithstanding said company appeared and fully set out in said proceedings the garnishment proceedings in the case now before us. Under and by virtue of chapter 433 of the Public Laws of Rhode Island, the said King was allowed to become a party to this action as adverse claimant, which he did, setting up the insolvency laws and proceedings thereunder in Massachusetts, and the assignment to him thereunder, as aforesaid, and also setting up his judgment against the Lippitt Woolen Company. He also offered to show that this is not a suit brought in good faith by a citizen of Rhode Island for his own benefit, but that it is colorable only, and in the interest, for the benefit, and in behalf of the International Trust Company of Boston. Bullens & Sawyer were also allowed to become parties to the suit as the claimants of all the property and estate of the defendants in the hands of the Riverside & Oswego Mills, they claiming said property by virtue of an assignment to them from the assignees in insolvency in Massachusetts of said Brown, Steese & Clarke. The various parties served with copies of the writ, for the purpose of attaching by trustee process the defendants' property in their hands, filed disclosures in said court of common pleas and in the common pleas division of the supreme court, which took cognizance of the case after the passage of the judiciary act, which disclosures will hereinafter be considered. Numerous interrogatories and cross interrogatories were filed and answered in connection therewith. Said claimants of the property attached were fully heard, and the

case as a whole was tried at great length, and finally, after diligent consideration thereof by Rogers, J., presiding in said division, a decision was rendered charging the said Lippitt Woolen Company as garnishee in the sum of \$11,938.39, the same being the amount disclosed in its affidavit, together with interest thereon from September 12, 1880; and declining to charge the other garnishees. The case is now before us on two petitions for a new trial,—one being filed by the plaintiff, and one by the said Lippitt Woolen Company, trustee, and Theophilus King, as adverse claimant. The plaintiff's petition is based upon certain alleged erroneous rulings of the court in regard to the admission and rejection of evidence, in the admission of supplemental affidavits or disclosures by the garnishees, in admitting said Theophilus King and Bullens & Sawyer, respectively, as claimants of the property attached, and as parties to the case upon their intervening petitions therein filed, in refusing to summon in the prior attaching creditors of the property in question, in declining to charge the assignees of the Riverside & Oswego Mills as trustees, and in declining to charge the Wanskuck Company and the Riverside & Oswego Mills as garnishees. The numerous grounds of the petition of said Lippitt Woolen Company and of Theophilus King, adverse claimant, for a new trial, briefly stated, are that the common pleas division erred in charging said Lippitt Woolen Company as trustee, and, even if chargeable at all, in charging it with interest on the amount disclosed, in its rulings as to the admission and rejection of evidence, and in its rulings and decisions as to the faith and credit to be given to the record and proceedings of the Massachusetts court of insolvency, and also of the superior court of that state. We will consider both of said petitions together.

The first question which logically presents itself in connection with the petition for a new trial, filed by said Lippitt Woolen Company and said claimant, is that of jurisdiction over the fund or property in question; for it is clear that jurisdiction over the principal defendants was obtained by their voluntary appearance in the case. The answer to this question depends upon the situs of the property sought to be attached. If it was in this state, as contended by the plaintiff, the court obtained jurisdiction, but if it was in Massachusetts, as contended by the Lippitt Woolen Company and the claimant, then the court did not obtain jurisdiction; for it is an elementary principle of law that jurisdiction, to be rightfully exercised, must be founded upon the presence of the person or thing in respect to which the jurisdiction is exerted within the territory. *Plimpton v. Bigelow*, 93 N. Y. 597. In order to make a valid seizure, then, by process of attachment, whether of tangible or intangible property or interest, the res must be within the territorial

jurisdiction; that is, if the res consists of visible and tangible property, it must be found and seized within the state, and if it consists of a mere debt or chose in action, then its situs must be there. Now, it is evident that a chose in action, being an intangible chattel, cannot, strictly speaking, have a physical location. Its locus or situs is, therefore, a legal fiction, and, being so, it may have a different situs for different purposes; that is, a conventional situs. Thus, the situs thereof for the purposes of taxation is the domicile of the creditor or payee of the debt. For the purposes of administration, so far as the nonresident creditor is concerned, it is also at his domicile. But, so far as the remedy of the creditors of the payee of the debt is concerned, the authorities are very uniformly to the effect that the situs of the debt is at the domicile of the debtor, and that wherever the creditor might maintain a suit to recover the debt, there it may be attached as his property, provided the laws of the forum authorize it; or, as said by Shiras, J., in *Mason v. Beebee*, 44 Fed. 559, "the situs of property for the purpose of jurisdiction is one thing, and its situs for the purposes of determining the right of the parties thereto is another, and the two are not necessarily the same." In a late case decided by the supreme court of Minnesota, this doctrine is thus concisely stated by Mitchell, J.: "While, by a fiction of law, a debt, like other personal property, is for most purposes,—as, for example, transmission and succession,—deemed attached to the person of the owner, so as to have its situs at his domicile, yet this fiction always yields to the laws for attaching the property of nonresidents, because such laws necessarily assume that the property has a situs distinct from the owner's domicile. For such purposes a debt has a situs wherever a debtor or his property can be found. Wherever the creditor might maintain his suit to recover the debt, there it may be attached as his property, provided, of course, the laws of the forum authorize it." *Harvey v. Railway Co.*, 50 Minn. 406, 52 N. W. 905; *Blake v. Williams*, 6 Pick. 285-315; *Lewis v. Bush*, 30 Minn. 247, 15 N. W. 113; *Drake*, *Attachm.* § 597.

In *Neufelder v. Insurance Co.* (Wash.) 33 Pac. 870, the court say: "Although the situs of intangible personal property may be at the domicile of the creditor for the purpose of taxation or distribution, yet, for the purpose of collection, a debt is ambulatory, and accompanies the person of the debtor." While, therefore, it is a general rule that personal property follows the person of the owner, and is governed by the laws of his domicile, yet this rule is subject to certain exceptions, and one of these exceptions is that the *lex rei sitæ* regulates the legal remedy. *Blanchard v. Russell*, 13 Mass. 5. Attachment laws, as said in *Green v. Van Buskirk*, 7 Wall. 139, "necessarily assume that property has a situs entirely distinct from the

owner's domicile. The plaintiff occupies, as against the garnishee, the position of the defendant, with no more rights than the defendant had, and liable to be met by any defense which the garnishee might make against an action by the defendant." See, also, *Strong v. Smith*, 1 Metc. (Mass.) 476; *Campbell v. Nesbitt*, 7 Neb. 300; *Drake, Attachm.* (6th Ed.) 452. If this be so,—and we see no reason to doubt its correctness,—it follows that, as the defendants *Brown, Steese & Clarke* could have maintained an action against the garnishees in this state for the recovery of the debts in question, then said debt was within this state, and subject to an attachment here. See, also, *Bragg v. Gaynor*, 85 Wis. 468, 55 N. W. 919; *Manufacturing Co. v. Lang* (Mo. Sup.) 29 S. W. 1010; *Berry v. Davis*, 77 Tex. 191, 13 S. W. 978; *Harwell v. Sharp*, 85 Ga. 124, 11 S. E. 561; *Hull v. Blake*, 13 Mass. 153; *Insurance Co. v. Portsmouth M. R. Co.*, 3 Metc. (Mass.) 420; *Insurance Co. v. Chambers* (N. J. Ch.) 32 Atl. 663; *Mason v. Beebe*, 44 Fed. 556; *Railroad Co. v. Crane*, 102 Ill. 253.

Nor is it material, in a proceeding of this sort, where the creditor's remedies are concerned, that the debt is payable at the domicile of the payee, it being well settled that, "where the garnishee is indebted, it will not vary his liability that his contract with the defendant is to pay the money in another state or country than that in which the attachment is pending." *Drake, Attachm.* 597, and cases cited. The debt of the garnishee to the defendants in the case at bar, although payable in Massachusetts, was yet a debt everywhere, in whatever country its person or property might be found; and hence a suit for the recovery thereof, as we have already said, could have been prosecuted in the courts of this state. See *Sturtevant v. Robinson*, 18 Pick. 175; *Nichols v. Hooper*, 61 Vt. 295, 17 Atl. 134; *Leiber v. Railroad Co.*, 49 Iowa, 688. The counsel for the said garnishees and claimant, while they have not furnished us with much judicial authority to the contrary of the foregoing doctrine, have presented a very elaborate and learned argument in support of their contention that said debt or pecuniary obligation could not be made the subject of a proceeding quasi in rem in this state, (a) because it had no situs at the domicile of the debtor, and was not property here over which the legislature and courts of this state had dominion and control; and (b) because, if it had been property here, the court could not have discharged the debt as against the nonresident owners, not personally subject to the control and jurisdiction of the court, without impairing the obligation of contract. In support of their contention that the situs of the debt was not here, but was at the domicile of the payees thereof, counsel have cited and elaborated numerous cases on taxation, both in the state and federal courts, which hold with great unanimity that, for the purposes of taxation, personal property of the kind in question fol-

lows the person, and has its situs at his domicile, and that only the tangible property of a nonresident is subject to the taxing power of a state. And they earnestly argue that these cases are directly in point, and decisive of the question at issue, the sovereign power of a state being best illustrated and most accurately defined by cases on taxation. It is undoubtedly true that the jurisdiction of the state, for purposes of taxation, cannot be held to extend to the property which a nonresident has in a debt which he holds against a resident. For, as said by Judge Cooley in his valuable work on Taxation, "the state has no jurisdiction to assess a tax as a personal charge against a nonresident; neither can the personal estate of a nonresident be taxed unless it has an actual situs within the state, so as to be under the jurisdiction of its laws. The mere right of a foreign creditor to receive from his debtor within the state the payment of his demand cannot be subjected to taxation within the state. It is a right that is personal to the creditor where he resides, and the residence or place of business of his debtor is immaterial. The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though, as applied to them, the taxation may be exercised in a great variety of ways. * * * The creditor cannot be taxed, because he is not within the jurisdiction; and the debts cannot be taxed in the debtor's hands, through any fiction of law which is to treat them as being, for this purpose, the property of the debtors. They are not property of the debtors in any sense. They are the obligations of the debtors, and only possess value in the hands of the creditors." Cooley, *Tax'n* (2d Ed.) 21, 22. But, conceding that the state has no power to tax a mere chose in action belonging to a nonresident, does it therefore follow that it cannot authorize an attachment thereof by process of garnishment? Or, in other words, may not the debt, which is an intangible thing, have a situs at the domicile of the creditor for the purpose of taxation, and also at the domicile of the debtor for the purpose of attachment? We see no reason why it may not, and the authorities above cited, together with many others which might be added, fully support the view that it may. Moreover, for us to hold that a debt due to a nonresident is not attachable by trustee process here, would be both to render our statutes relating to foreign attachment largely null and void, and also to overrule the settled practice of the court from time immemorial. Indeed, until a comparatively recent date, an action could not be commenced by garnishment, unless the defendant was out of the state. *Cottle v. Screw Co.*, 13 R. I. 627.

But the counsel for said trustees and said claimant further urge, in support of their contention that said statute is unconstitutional, that the statute of the state, being without force in any other state, cannot discharge a debt held by a citizen of another state. And in this connection they have referred us to numerous cases bearing upon the question of the effect of discharges in insolvency under state insolvency laws. The general doctrine for which counsel contend is this: That the insolvency laws of one state have no effect against the citizens of another state holding claims that follow the person of a creditor, no matter where the debt was contracted or where it was made payable, unless they place themselves under the jurisdiction of the law by voluntarily becoming parties to the insolvency proceedings. That the statute laws of a state can have no extraterritorial operation or force is everywhere admitted; for it goes without saying that, each state being an independent sovereignty, subject only to the limitations of the constitution of the United States, no state can legislate with regard to the rights of citizens of another state, except and in so far as such citizens or their property are found within the territorial limits of the state where the law is passed. See *Gilman v. Lockwood*, 4 Wall. 409; *Denny v. Bennett*, 128 U. S. 489, 9 Sup. Ct. 134; *Green v. Sarmiento*, Fed. Cas. No. 5,760. We fail to see the pertinency of this doctrine, however, to the case before us; for here, as we have already seen, the debt sought to be affected is within the jurisdiction of this court. The res is here, and this is a proceeding, quasi in rem, to reach and appropriate that res to the payment of the judgment debt of the defendants. In a word, it is compelling the payment of the defendants' debt out of their property found in this state.

As to the second point made by the counsel for said trustees and the adverse claimant, viz. that, if the debt was property here, the court could not discharge it, as against the nonresident owners thereof not personally subject to the jurisdiction of the court, without impairing the obligation of contract. The position thus taken, as we understand it, amounts to this, viz. that our statute (Pub. St. c. 208, § 15), which provides that "any trustee, after final judgment or decree against the defendant, may satisfy such judgment or decree, or any part thereof, to the amount of the estate attached in his hands, before any suit shall be brought against him therefor; and such payment shall avail for his discharge, as against both plaintiff and defendant, for the amount thereof,"—is unconstitutional, in so far as it affects debts due to nonresidents, in that it deprives the owners of their property in the debt without due process of law. But what is due process of law, except the observance of those general rules established in our system of jurisprudence for the security of private rights.—i. e., a trial or proceeding in which the rights of

the parties, after notice and opportunity to be heard shall have been duly given, shall be decided by a tribunal appointed by law and governed by the rules of law previously established? *Kilbourn v. Thompson*, 103 U. S. 197; *Hagar v. Reclamation Dist.*, 111 U. S. 708, 4 Sup. Ct. 663. For, as forcibly stated by Mr. Webster, in the famous *Dartmouth College Case*, 4 Wheat. 581, "by the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." A valid attachment by trustee process creates a lien upon the debt in the hands of the trustee in favor of the attaching creditor. *Blake v. Williams*, 6 Pick. 303. See, also, *Eddy v. O'Hara*, 132 Mass. 56; *McConn. Trustee Process*, § 297, and cases. And where such trustee is compelled by due process of law to pay a debt, due to A., his creditor, to B., a creditor of A., who had thus attached it in his hands and possession, such payment operates as a full discharge of the debtor's liability, to the extent of the amount paid, and is everywhere pleadable in bar of any suit which the creditor might subsequently bring for the recovery of such debt. As said by this court, in *Alves v. Barber*, 17 R. I. 714, 24 Atl. 528, regarding the effect of a judgment charging the garnishee, "it practically divested the title of the defendant in that suit, the present plaintiff, to the money in the hands of the trustee, and transferred it to the plaintiffs, so that, in legal contemplation, it was applied to the payment of the plaintiffs' judgment against the defendant, the trustee being authorized to pay it over to the plaintiffs and be discharged as against both plaintiffs and defendant for the amount so paid." See, also, *Abbott v. Davidson*, Index LL, 84, 25 Atl. 839. Indeed, it has been held that, where there is a subsisting judgment against a trustee, it constitutes a good defense for him, in an action by his principal against him for the same cause of action without proof of satisfaction. See *McAllister v. Brooks*, 22 Me. 80, and cases cited. A chose in action is arrested by this process of garnishment, and made to answer the debt of the principal.

But how does our statute, above quoted, relating to the discharge of the debt due from the garnishee to the principal defendant, impair the obligation of contract? And, in this connection, it may be useful to inquire what the contract in question was. It was this: The principal defendants sold and delivered wool in Boston to the Lippitt Woolen Company, the payment thereof to be made in Boston. Before the time for payment had arrived, the plaintiff attached the debt by trustee process, and is seeking to compel payment thereof to him as a creditor of the principal defendants, instead of making such payment to them. That is, he is seeking, in effect, by operation of law, to transfer the indebtedness of the trustees from the principal defendants to him. Now, suppose that to be

done, as it practically is when the trustee proceedings are regular, and a judgment is obtained against the trustee for the amount of the debt in his hands. Is it not perfectly obvious that a satisfaction of that judgment ipso facto discharges the obligation of the trustee, who is the debtor, to the principal defendants? The judgment, if binding on the trustee, is also binding on the principal defendants, and all parties in privity with either. And the satisfaction of the judgment against the trustee is an extinguishment of his debt to his principal creditor, and has precisely the same effect as if it were paid to the creditor directly. As stated in 2 Wade, Attachment, § 503: "The question to be determined is whether the debt has been satisfied, and the extent of such satisfaction, and it matters not by whom it has been paid, nor to whom paid, provided it be to one who is entitled to receive it from the one who pays it. Hence, where one of several joint debtors in the garnishment proceeding has paid the debt for which the judgment was obtained, it will be for the benefit of his co-debtors, each of whom may rely on it as a defense to a subsequent action by the original creditor." Said statute, then, in so far as it provides that the trustee, after final judgment against the defendant, may satisfy the same, and that the payment thereof shall discharge him from his debt to the principal defendant, is simply declarative of the legal status of the parties to the contract out of which the original indebtedness arose, after such change of title to it has been effected by the process of garnishment, and it bears no analogy to the provision for the discharge of a debtor under state insolvency laws as affecting nonresident creditors. In other words, it is not the statute which discharges the debt due from the trustee to the principal defendants at all; but it is the payment of the debt to the attaching plaintiff, in satisfaction of his judgment against the principal defendants. This is what works a discharge of the debt. See *McConn. Trustee Process*, §§ 295-297, 483, and cases cited. And if it be an impairment of the obligation of contract in this case to compel the debtor to pay the debt in question to the attaching plaintiff, instead of to the principal defendants, to whom the contract made it payable, and upon such payment to be discharged from its obligation to the said defendants as to the amount so paid, then we do not see why all foreign attachment laws, whereby a debtor is compelled to pay a debt, due to a nonresident creditor, to the attaching plaintiff in a proceeding of this sort, are not unconstitutional and void. In the leading case of *Embree v. Hanna*, 5 Johns. 101, Chief Justice Kent said: "Nothing can be more clearly just than that a person who has been compelled by a competent jurisdiction to pay a debt once should not be compelled to pay it over again. It has accordingly been a settled and acknowledged principle in the English courts that, where a

debt has been recovered of the debtor, under this process of foreign attachment, in any English colony or in these United States, the recovery is a protection in England to the garnishee against the original creditor, and he may plead it in bar. * * * If, then, the defendant would have been protected under the recovery had by virtue of the attachment, and could have pleaded such recovery in bar, the same principle will support a plea in abatement of an attachment pending and commenced prior to the present suit. The attachment of the debt in the hands of the defendant fixed it there in favor of the attaching creditors, and the defendant could not afterwards lawfully pay it over to the plaintiff. The attaching creditors acquired a lien upon the debt binding upon the defendant, and which the courts of all other governments, if they recognize such proceedings at all, cannot fail to regard." See, also, *Jarvis v. Mitchell*, 99 Mass. 531.

But the counsel for said Lippitt Woolen Company further contend that, even if the legislature of this state might, for the purpose of attachment, change the ordinary situs, and establish a local situs at the domicile of the debtors, within the state, for a debt due to a nonresident who is not subject to its jurisdiction or control, the attachment laws of the state have nowhere declared, or attempted to establish, any such local situs, or to change the ordinary situs of such debts, nor do they purport to authorize an attachment of property which a nonresident has in a debt which he holds against a resident. It is true that we have no statute which, in express terms, authorizes an attachment against a nonresident. But we think there can be no question that our attachment laws are broad enough to include attachments of this sort. Section 14, c. 32, of the judiciary act provides that "an original writ commanding the attachment of the real or personal estate of the defendant, including his personal estate in the hands or possession of any person, copartnership or corporation, as the trustee of the defendant, and his stock or shares in any banking association or other incorporated company, may be issued from the common pleas division of the supreme court or any district court, whenever the plaintiff in the action to be commenced by such writ, his agent or attorney, shall make affidavit," etc. Section 20, c. 33, provides for the manner of service of the writ, including the service upon a nonresident defendant; and section 2, c. 19, of said act provides for the continuance of a case commenced by foreign attachment, where the defendant is a nonresident, and fails to answer within the regular time limited therefor. With these provisions in view, taken in connection with the settled and heretofore unquestioned practice of the court thereunder, it is hardly necessary to argue in favor of the authority to attach a debt due to a nonresident.

Another question, and one of vital impor-

tance, is raised by the counsel for said Lippitt Woolen Company and for the claimant King, viz. as to the effect of the said insolvency proceedings in Massachusetts. It is strongly urged that the rulings of the common pleas division, fixing August 23, 1889, the date of the first publication of notice in said proceedings, as the date decisive of the question of the effect on the debt in question of the Massachusetts assignment, are erroneous. The contention is that, by filing the voluntary petition, hereinbefore referred to, on August 12th, one day before the issuing of the writ in this action, the defendants submitted themselves and their property to the jurisdiction of the court of insolvency at that time. The first inquiry which logically arises regarding this branch of the case is, did this court or the Massachusetts court first obtain jurisdiction of the debt in question? For it is undoubtedly the law that whichever first obtained general jurisdiction will hold the same to the exclusion of the other. Under the Massachusetts statute, hereinbefore quoted, the insolvency proceedings date from the first publication of notice. The notice in the proceedings instituted by the defendants was first published on August 23, 1889. But 10 days prior to that time, viz. August 13, 1889, the said debt had been attached here, and our courts had thereby obtained jurisdiction over it.

But the counsel still further urge that, even conceding that the date of the assignment itself, which was September 4, 1889, is the date which is to be decisive on the question of jurisdiction, still the Massachusetts court first obtained it, because, in so far as said debt was property, it was property exclusively within the dominion and jurisdiction of the legislature and courts of Massachusetts. As we have already decided that this position is not tenable, we need not consider it further. But, independent of the fact that the attachment preceded the first publication of notice, and also the making of the assignment, and even though the insolvency proceedings, as finally consummated, shall be held by relation to have taken effect as of the 12th day of August, 1889, the day on which said petition was filed, still we do not think that said proceedings can be held to so affect the debt in question as to take away the jurisdiction of this court; and, primarily, for the reason that said assignment was not the personal act of Brown, Steese & Clarke. In other words, notwithstanding the fact that the said insolvency proceedings were set in motion by a part of the debtors, viz. Brown and Steese, or even by all of them, yet said proceedings are to be regarded as involuntary; the test being whether the insolvency system provides for compulsory proof of the debts, under penalty of losing them by the discharge of the debtors from all liability therefor. And this the Massachusetts statutes clearly require. Admitting that the general rule is that a transfer of personal property by the owner thereof is

governed by the law of the domicile of the owner, and also that this rule applies to voluntary assignments for the benefit of creditors, and that the title of the assignee thereunder, if valid by the law of the domicile, will prevail against the lien of an attachment made in another state, subsequent to such assignment, in favor of a creditor there, upon a debt belonging to the assignor and embraced in the assignment (*Noble v. Smith*, 6 R. I. 447), yet this rule, as said by Andrews, C. J., in *Barth v. Backus*, 140 N. Y. 235, 35 N. E. 425, "is subject to a qualification, established in the jurisprudence of the American states, that a title to personal property acquired in invitum under foreign insolvent or bankruptcy laws, good according to the law of the jurisdiction where the proceedings were taken, will not be recognized in another jurisdiction where it comes in contact with the rights of creditors pursuing their remedy there against the property of the debtor, although the proceedings were instituted subsequent to and with notice of the transfer in insolvency. This exception proceeds upon the view that, to give effect to such a transfer arising by operation of law, and not based upon the voluntary exercise by the owner of the *jus disponendi*, would be to give the foreign law an extraterritorial operation, which the rule of comity ought not to permit, to the prejudice of suitors of another jurisdiction." Insolvency proceedings similar to these in the case at bar have repeatedly and almost uniformly been held not to affect an attachment made subsequent thereto in another state. See *Goodsell v. Benson*, 13 R. I. 225; *Sturtevant v. Armsby Co.* (N. H.) 23 Atl. 368; *Rhawn v. Pearce*, 110 Ill. 350; *Townsend v. Coxe* (Ill. Sup.) 37 N. E. 689; *Felch v. Bugbee*, 48 Me. 18; *Dunlap v. Rogers*, 47 N. H. 281; *Harrison v. Sterry*, 5 Cranch, 289; *Reynolds v. Adden*, 136 U. S. 348, 10 Sup. Ct. 843; *Paine v. Lester*, 44 Conn. 197; *McClure v. Campbell*, 71 Wis. 350, 37 N. W. 343; *In re Waite*, 99 N. Y. 433, 2 N. E. 440; *Crapo v. Kelly*, 16 Wall. 610; *Fox v. Adams*, 5 Greenl. 245. We are therefore of the opinion that said insolvency proceedings in Massachusetts did not take away or have any effect upon the jurisdiction of the courts of this state over the debt in question. And, being of this opinion, it obviously becomes unnecessary for us to consider the title to said debt which is set up by the adverse claimants, as their title is based solely upon said insolvency proceedings and the conveyances made thereunder. It also becomes unnecessary, for the same reason, to consider the question, which was very learnedly argued by counsel, as to the "full faith and credit" to which the judicial proceedings in the superior court of Massachusetts, hereinbefore referred to, are entitled in this state.

The counsel for said Lippitt Woolen Company and the adverse claimant further contend that said debt was not attachable because, by the terms of the contract out of which it arose, it was not due and payable at the date of such

attachment, and that, as the principal defendants had no present right of action in Rhode Island against their debtors, the trustees, to hold that a garnishment can be maintained would be to place the plaintiffs in a better position than the principal defendants occupied. It is doubtless true, as a general rule, that the plaintiff in trustee process is not to be placed in a better position than the principal defendants with regard to the debt in question. *Waldron v. Wilcox*, 13 R. I. 518; *Brown v. Collins*, Index MM, 9, 27 Atl. 329. But this rule, like most others, is subject to several exceptions (2 Wade, Attachm. § 327), one of which is that, where the trustee owes a debt to the principal defendant, which debt is not subject to any contingency, it is liable to attachment by trustee process, notwithstanding the fact that it is not then due and payable, so as to enable the owner thereof to maintain a suit for its recovery. That is, if the debt is payable absolutely, it may be attached though "solvendum in futuro." This doctrine is so well established everywhere, excepting perhaps in the state of Tennessee (see *Childress v. Dickins*, 8 Yerg. 113; *McMinn v. Hall*, 2 Tenn. 328), as hardly to call for the citation of authorities in support thereof. If any are necessary, however, see *Smith v. Millett*, 11 R. I. 535; *Stone v. Hodges*, 14 Pick. 81; *Telles v. Lynde*, 47 Fed. 917; *Fulweller v. Hughes*, 17 Pa. St. 447; *Sayward v. Drew*, 6 Me. 263; *Drake*, Attachm. (5th Ed.) §§ 541, 557, and cases cited; 2 Wade, Attachm. § 484.

Another point upon which counsel for the adverse claimant King rely is that the common pleas division erred in ruling out the evidence offered by him for the purpose of showing that this is not a suit brought in good faith by a citizen of Rhode Island for his own benefit, but that it is colorable only and in fact in the interest of the International Trust Company of Boston. To this it may be replied—First, that it is wholly immaterial whether the plaintiff was in fact the owner of the notes upon which the suit was based, or simply had them in his hands for collection, for, being negotiable promissory notes payable to said trust company, and by it indorsed and delivered to the plaintiff, he unquestionably had the right to sue thereon (*Bank v. Senior*, 11 R. I. 370); and, second, that the common pleas division had no jurisdiction to inquire into the bona fides of the said suit at law, for the very conclusive reason that all questions relating to said notes and the plaintiff's right to sue thereon had become *res judicata* by the proceedings hereinbefore referred to, and therefore to have admitted the evidence offered by the claimant would have been, in effect, to allow a stranger to the suit to impeach the judgment rendered therein.

The last ground upon which said Lippitt Woolen Company and the claimant King ask for a new trial is that the common pleas division wrongfully charged said Lippitt Woolen Company, as garnishee, with interest on the amount of its indebtedness to the principal defendants. The argument in support of this

contention is, in substance, that the Lippitt Woolen Company had no specific moneys in its hands belonging to the principal defendants, either in trust or on special deposit, or otherwise, but that it was simply indebted to them for the wool it had purchased; that any money with which it might satisfy said indebtedness was its own money, and if it is chargeable with interest, it is simply because it has detained the debt since it became due and payable. The facts relating to this branch of the case, as shown by the sworn answers of said Lippitt Woolen Company, are that it has never made any special deposit of the amount disclosed in its original affidavit, as due from it to the principal defendants, that it has never set apart said sum, that it is impossible to state how its use of the money due from it, as aforesaid, has been changed in consequence of the service of the plaintiff's writ upon it, that it has used all its money as it has seen fit, from time to time, without distinction, and that, at the time of the service of the writ in this case, its moneys were in various banks, and in the hands of various individuals, and have fluctuated in amount from time to time since then, according to the necessities of its business. The question as to whether the garnishee shall be required to pay interest on its debt due to the principal defendant during the time he is restrained by the attachment from paying the debt, is one which has been much discussed, and upon which the decided cases are not in accord. One line of authorities holds that, where the garnishee is indebted to the principal defendant upon a demand where interest would be recoverable by the principal defendant only as damages for breach of contract, interest will not be deemed to accrue during the pendency of the trustee process. The reason ordinarily given in support of this view is that the garnishee, having been restrained by the garnishment from paying his debt, is in no fault for not paying, and hence there is no wrongful detention and consequently no liability for damages. See *Prescott v. Parker*, 4 Mass. 170; *Irwin v. Railroad Co.*, 43 Pa. St. 488; *Adams v. Cordis*, 8 Pick. 260; *Machine Co. v. Partridge*, 25 N. H. 380. Another line of authorities holds that, as interest is the mere incident to the debt arising from the defendant's use of the money, the attaching plaintiff is as much entitled to recover the one as the other,—in other words, that he is entitled to claim and recover all that the principal defendant could claim and recover from his debtor, the garnishee. *Woodruff v. Bacon*, 35 Conn. 97. See, also, *Templeman v. Fauntleroy*, 3 Rand. (Va.) 447; *Smith v. Bank*, 60 Miss. 73, 74; *Candee v. Webster*, 9 Ohio St. 452. We are inclined to adopt the latter view of the garnishee's liability rather than the former. We can see no sufficient reason for holding that a garnishee, who continues to hold and use the money in his hands after it is due and payable, should not be chargeable with interest thereon, notwithstanding he is prevented by the attachment from paying it over to the

principal defendant. If he wishes to avoid his liability to pay interest, he can set the fund apart, or so deposit it that it will draw interest, or, being a mere stakeholder, he can pay it into the registry of the court, where interest will accrue for the benefit of the party or parties finally held to be entitled thereto. Indeed, one of the presumptions upon which the first class of decisions, above referred to, seems to rest, is that the garnishee keeps the money by him, set apart for the payment of the claim of the attaching creditor. Moreover, the injustice which would result in the present case, both to the principal defendants and also to the attaching plaintiff, by exonerating the garnishee from the payment of interest, is a strong argument in favor of the position we have taken. The situation is this: The plaintiff has recovered a final judgment against the principal defendants in the sum of \$——. The disclosure of said trustee shows that the sum of \$11,938.39, belonging to the principal defendants, is in his hands. Now, suppose it to be charged with only this latter amount as garnishee. The result is that, upon payment of said sum, its entire indebtedness to the principal defendants is discharged, notwithstanding the fact that it has had the use and benefit of said large sum in its business for upwards of five years. The principal defendants get no benefit from the use of said money by their debtor, the garnishee, by way of a reduction of their indebtedness to the plaintiff, on the one hand; and the plaintiff gets no benefit of said use by way of the satisfaction of his judgment against the principal defendants, on the other. In short, the result would be that the garnishee will have had the use and benefit of said large sum of money for the length of time aforesaid, without being liable to anybody therefor. If it be argued that the said Lippitt Woolen Company has been necessarily subjected to trouble and expense, as it apparently has, in the employment of counsel to properly protect its rights in the premises, and in answering the numerous interrogatories propounded in behalf of the plaintiff, and that for this reason it ought not to be compelled to pay for the use of the money in its hands, it is sufficient to reply that it is within the power of the court to allow it such costs and charges as are reasonable in the case, under the provisions of the Judiciary act (chapter 34, § 29).

We will now consider the grounds upon which the plaintiff asks for a new trial. And, first, with regard to the refusal of the court to charge the Riverside & Oswego Mills and the Wanskuck Company as garnishees. The facts upon which the common pleas division refused to charge these garnishees are as follows: (1) The disclosure of the Riverside & Oswego Mills shows a very complicated state of affairs existing between it and the principal defendants, so that the balance due from it to them is very difficult, if not, indeed, impossible, to determine in a proceeding of this sort. It also shows that, at the time of the service of the plaintiff's writ upon it, all of

the property of said principal defendants in its hands and possession had already been attached, in suits brought against said principal defendants by the Industrial Trust Company and the Hollis Dressed Meat & Wool Company, the aggregate amounts claimed in which suits exceeded the amount of the defendants' property in the hands and possession of said Riverside & Oswego Mills. (2) The Wanskuck Company's disclosure shows that it had in its hands and possession, at the time of the service of the plaintiff's writ upon it, \$28,923.80, due to the principal defendants; that a part thereof, viz. \$3,808.23, was the price of 82 bags of wool bought by it of said principal defendants July 26, 1889, under the supposition that said bags of wool were the property of said principal defendants, but that, after the purchase of said wool, the Massachusetts Loan & Trust Company, of Boston, notified it that said wool was its property, and not the property of said defendants, and that said defendants had no right or authority to sell the same, and that said Massachusetts Loan & Trust Company would look to said Wanskuck Company for the purchase price thereof. It also appears that said Massachusetts Loan & Trust Company now has a suit in trover pending in said common pleas division against said Wanskuck Company for the value of said 82 bags of wool. (3) Said Wanskuck Company's disclosure also shows that, at the time of the service of the plaintiff's writ upon it, all the property of said principal defendants in the hands and possession of said Wanskuck Company had already been attached, in suits brought against said principal defendants, by the Hollis Dressed Meat & Wool Company, the Industrial Trust Company, and the Massachusetts Loan & Trust Company, which suits are still pending, the aggregate amounts claimed in the same exceeding the amount of the defendants' property in said Wanskuck Company's hands and possession. In view of these disclosures, the common pleas division held that it could not enter a charging order against the Riverside & Oswego Mills and the Wanskuck Company, for the reason that, until it shall be ascertained by the disposition of the pending suits, wherein said garnishees have been previously served with trustee process, it is impossible to determine whether either of said garnishees are chargeable, and, if chargeable, to what extent. We think this ruling was correct. For, while the statute clearly recognizes the possibility and the right of successive attachments of the same property (Judiciary Act, c. 33, § 32, and c. 34, § 1), and the right of the plaintiff to share therein after judgment, in the order of his attachment, as contended by plaintiff's counsel, yet we do not see how the court could enter a charging order in this case until the disposition of said prior suits, for the reason that the whole fund in the hands of said garnishees may be absorbed in the payment of the judgments which may be obtained in the

prior actions. And when the question as to whether a garnishee should be charged is involved in litigation in this manner, with the result necessarily problematical and in doubt, the court will not enter a charging order. Moreover, said statute (Id. c. 34, § 18) provides that the court, in charging a garnishee, must determine the extent to which he is chargeable, and also that the execution which issues upon the judgment shall have the amount for which he is charged inserted therein (Id. c. 36, § 20); and until the amount due upon said prior attachments shall have been determined, it is impossible to say whether any amount will remain to be applied under this attachment. The proper course for the plaintiff to have taken, in these circumstances, was to ask for a continuance of the case until said prior suits were disposed of. *Cutter v. Perkins*, 47 Me. 557; *Prentiss v. Danaher*, 20 Wis. 311; *Brickley v. Davis*, 9 Ill. App. 362; *Drake, Attachm.* (6th Ed.) § 630. Indeed, the common pleas division repeatedly suggested the difficulty aforesaid, and offered to hold the case until the determination of said prior suits, but the plaintiff insisted upon an immediate determination by the court of the liability of said garnishees. He has no occasion, therefore, to complain of the situation in which he is placed by its refusal to charge said garnishees.

The next question, in point of importance, which is raised by the plaintiff's petition for a new trial, is whether the assignees of the *Riverside & Oswego Mills* are chargeable as garnishees. We are clearly of the opinion that they are not, and that the common pleas division was right in discharging them. In order to charge a garnishee, it is necessary (1) that he shall have personal property in his possession belonging to the defendant, capable of being seized and sold on execution, or (2) that he be liable *ex contractu* to the defendant, whereby the latter has at the time of the garnishment, a legal cause of action, present or future, against him. In other words, in order to a recovery against a garnishee, it must be shown affirmatively, either by his answer or by evidence aliunde, that he has property of the defendant in his possession of a description which will authorize his being charged, or that he is indebted to the defendant. *Drake, Attachm.* § 461; *Smith v. Millett*, 11 R. I. 535; *Insurance Co. v. Weeks*, 7 Mass. 438, 439; *Field v. Crawford*, 6 Gray, 116. These garnishees, at the time of said service upon them, had no personal property in their possession belonging to the principal defendants, capable of being seized and sold on execution, nor had the principal defendants any legal cause of action against said garnishees. The trusts of the assignment, which they had assumed, were still in process of administration, and no dividend had been declared; and even if, as *cestuis que trustent*, entitled to participate in the benefits of the assigned estate in the hands of the assignees, the principal defendants could

have compelled, in equity, the execution of the trust, and also an accounting, yet this merely equitable right was not attachable by trustee process. See *Perry v. Thornton*, 7 R. I. 15; *Clarke v. Farnum*, Id. 174; *Waldron v. Wilcox*, 13 R. I. 520; *Bank v. Bullock*, 120 Mass. 86; *Nims v. Ford*, 159 Mass. 575, 35 N. E. 100; *Hoyt v. Smith*, 13 Vt. 129; *Hassie v. Congregation*, 35 Cal. 378; *Drake, Attachm.* §§ 457, 511. Again, the debt for which an attachment in trustee process may issue must possess an actual character, and not be merely possible or probable even, depending on a contingency which may never happen. In the case at bar there was no debt owing from the assignees to the principal defendants at the time of the garnishment, and whether there ever would be depended upon several contingencies. The expenses attending the execution of the assignment, which were first to be paid, might exhaust the property. So might the payment of the preferred claims of the employees. And the mere fact that, long subsequent to the service of said writ on the assignees, it turned out that said estate was sufficient to pay a dividend, and that a dividend of 62½ per cent. was declared by the assignees, makes no difference. For, even admitting that an action at law will lie against them for the amount of a dividend after it is duly declared, and also that they would be liable to trustee process in such circumstances, yet at the time of the service of the writ in this case there was no dividend, and hence there was no debt.

In support of its contention that said assignees were properly chargeable as garnishees, counsel for the plaintiff commends to our attention the case of *Irwin v. McKechnie*, 59 N. W. 987, recently decided by the supreme court of Minnesota, in which the receivers of a railroad, although officers of the court, are held liable to the process. An examination of that case, however, shows that, under the statute of that state styled the "Removal Act," passed March 3, 1877, receivers are subject to suit in respect to any transaction of theirs in operating the road placed under their control by the court. But, while admitting that this was so, the counsel for the garnishees in that case took the point that the money sought to be reached was in *custodia legis*, and hence not subject to garnishment. The court said: "No one will question the correctness of the proposition that property in the hands of receivers appointed by the court is in *custodia legis* and not subject to levy or garnishment. This doctrine receives additional force in this case from the rule of judicial comity between state and federal courts, by which each will refuse to interfere with property in the custody of the other,—a rule which we are always solicitous to observe. But in this case it will be noticed that what is sought to be reached by garnishment is the property, not of the railway company, but of the defend-

ant, viz. a debt due him from the receivers. Moreover, while garnishment of a debt is often called a mode of attachment, yet it does not effect a specific lien on any property of the garnishees, such as is acquired by the actual seizure of property. The effect of the judgment is merely to determine the existence and amount of the debt, and to substitute the plaintiff for the defendant as the person to whom it is payable. The judgment against the receivers would not be against them personally, but against them officially. No executory process could be issued on it, for that would interfere with the control of the property in the custody of the federal court. The manner in which the judgment so rendered shall be paid must be under the exclusive control of that court. It can only be satisfied as other demands may be satisfied, viz. by an application to the court in which the receivership proceedings are pending for an order directing its payment in the due order of the settlement of the affairs of the insolvent company by that court. Under the removal act the defendant himself could have sued the receivers and recovered judgment, and we are unable to see why the plaintiff may not, through garnishee proceedings, recover judgment against them for the same claim, or why a judgment in his favor interferes with property in the custody of the federal court any more than would a judgment in favor of the defendant for the same claim. We understand that the order of the court appointing these receivers is even broader than the statute, and authorizes suit to be brought in any court of competent jurisdiction on claims against the company which accrued before the receivership, as well as those subsequently incurred by the receivers. We only refer to this as showing that the federal court does not consider such suits as at all interfering with its jurisdiction over the receivership, or with the property in its custody. In view of the fact that the receivers of railway companies, as ancillary to winding up the insolvent estate for the benefit of creditors, are authorized to operate the road in lieu of the directors, sometimes for years, any other rule would work great injury, and would often leave the creditors of the employes of the receivers remediless." This case, therefore, as we view it, is clearly against the position taken by the plaintiff's counsel, instead of being an authority in support of it. But it is urged that the word "trustee" in our statute, relating to persons who may be garnished, is broad enough to include one holding property in trust for the benefit of another, and particularly for the reason that the statute in which the phrase, "the attorney, agent, factor, trustee, or debtor," appears was in force as early as 1774, when and for a long time afterwards our courts had no chancery jurisdiction over private voluntary trusts, and the creditor had no other means of reaching his debtor's property held under it than that by this process.

It is true that the word "trustee," taken by itself, is broad enough to include, and does include, an assignee; for an assignee is the trustee, both for the creditors of the assignor, and also for the assignor himself. Said word must not be taken out of its setting, however, and simply its abstract or technical meaning determined; but it must be considered in its collocation, and also with reference to the process of garnishment provided for by our statutes relating to that subject. And (1) it may be observed that the proceeding itself is denominated "trustee process" in the statutes. This is the term generally employed in the Northeastern states to designate the proceeding. See Judiciary Act, c. 34, § 24. In some states it is called "factorizing." In the one case the party in possession is called the "trustee"; in the other, the "factor." But, after all, it is but another mode of effecting the same general purpose. (2) The form of writ prescribed by our statute commands the attachment of the personal estate of the defendant in the hands or possession of —, as "trustee" of the defendant. It is the "trustee" who is to make the disclosure provided for (Judiciary Act, c. 34, § 10), and it is the "trustee" who is authorized to satisfy the judgment against the defendant in all cases (Judiciary Act, c. 34, § 15). It is the "trustee" who, in case the property in his hands does not consist of money, but of specific articles, is authorized, after judgment against the principal defendant, to surrender such articles to the officer charged with the service of the execution. Id. § 16. In short, the word "trustee," as used in the various provisions of the statutes relating to trustee process, manifestly denotes the debtor or agent of the principal defendant, i. e. the person against whom an action *ex contractu* at law only might be maintained in favor of the principal defendant, and is not used in its technical sense. (3) It was evidently never intended that the trustee process provided for in our statutes should be an equitable proceeding, but strictly a proceeding at law. See *Raymond v. Tinware Co.*, 14 R. I. 810. As pertinently stated by the plaintiff's counsel himself, in his brief, "trustee process is statutory, and the rights legal rights." If the general assembly had intended that assignees in insolvency, or even voluntary assignees, should be liable to trustee process, it is reasonable to suppose that the necessary legal machinery for bringing in all the parties in interest, the taking of an account, etc., would have been provided. The furthest our statutes have gone in the direction of making trustee process an equitable proceeding is by letting in adverse claimants to the fund in dispute (*Pub. Laws R. I. c. 433*), and thereby to some extent making it answer the purpose of a bill of interpleader (*Institution v. Barr*, 17 R. I. 133, 20 Atl. 245; *Hanaford v. Hawkins*, Index NN, 60, 28 Atl. 605; *Jenness v. Wharff* [Me.] 32 Atl. 908). Nor does the fact,

suggested by plaintiff's counsel, that, at the time when our statute relating to trustee process was first enacted, the court had no chancery jurisdiction, enlarge the scope of said act. For it does not follow that, because the law fails to provide a remedy in a given case, some other remedy may be employed. See *Goddard v. Pierce*, 13 R. I. 532. We may also add that, notwithstanding the great length of time that said word "trustee" has been used in our statutes relating to trustee process, no case has ever arisen, so far as we are aware, in which an assignee has been held chargeable as trustee thereunder, at least until after a dividend has been declared, nor has it ever been considered at the bar that he could be so held. See *Conway v. Armington*, 11 R. I. 116. In *Perry v. Thornton*, 7 R. I. 15, in which it was attempted to reach an annuity in the hands of the guardian by trustee process, Ames, C. J., said: "It is very plain that he was not her debtor for her annuity, nor, in the sense of the statute, her trustee, of the rents and profits of the estate of his wards."

Again, the plaintiff asks for a new trial because the common pleas division overruled his motion to reopen the case and summon in the prior attaching creditors as parties thereto. The object of this motion, as stated therein, was "that they [said prior attaching creditors], and each of them, may show to this court, and that the court may examine and determine the validity and amount of such their respective alleged prior attachments and pledge; the said plaintiff denying that said parties, or either of them, now have any valid claim upon or to either said attached fund or any property or any part thereof." This was clearly an attempt to force the prior attaching plaintiffs to try their cases in the bowels of the one now before us. We do not think this can be done. The prior attaching creditors are already in court, in the cases before referred to, and clearly have the right as suitors to try their own cases in their own way. If they should be summoned into this case, there would then be two suits pending to determine the validity of each of their claims against the defendants, and endless confusion and difficulty would arise in finally settling the relative rights of the parties in interest, if indeed it were possible to settle said rights in this way. In short, to have granted the plaintiff's motion would have been, in effect, to allow him to intervene in said prior suits, which this court has already decided cannot be done. See *Cross v. Brown*, 17 R. I. 568, 23 Atl. 761. And, as said by the court in that case, "the orderly way in law is for each one to pursue his own rights in his own action, and if, in so doing, another seeks to circumvent him by fraud, the existing remedies are ample." This statement also applies with equal force to the trover suit of the Massachusetts Loan & Trust Company against the Wanskuck Company, in which it was sought to recover damages for the conversion

of a part of the property which the present plaintiff claims to hold under his attachment. The case of *Hanaford v. Hawkins*, Index NN. 58, 28 Atl. 605, upon which the plaintiff's counsel mainly relied in support of the motion now under consideration, disclosed a very different state of facts from that which exists in this case. There it simply appeared, from the disclosure of the garnishee, that he had received a letter from one John A. Hawkins, prior to the garnishment, stating that he had purchased the judgment, the amount of which the garnishee had collected, and had in his possession, but that the garnishee knew nothing of the truth of the alleged fact of an assignment of said judgment. It did not appear, however, in that case, that any suit was pending in favor of such alleged claimant, or that he had taken any steps to recover said fund except the giving of said notice to the garnishee. Nor did it appear, even, that said alleged claimant had had any notice of the garnishment, so that he might appear if he saw fit, and be heard on the question of title to said fund. In these circumstances, we held that the alleged claimant should be summoned in and made a party to the suit, before determining as to the liability of the garnishee. In order that both his (said claimant's) rights, as well as those of the attaching plaintiff in said fund, might be fully protected.

Still another ground upon which the plaintiff asks for a new trial is the admission of certain supplemental affidavits or disclosures by the garnishees. We think it was clearly within the discretion of the court to allow such supplemental affidavits to be filed. *Bank v. Adams*, 97 Mass. 110; *Collins v. Smith*, 12 Gray, 433-435; *Hovey v. Crane*, 12 Pick. 166; *Soule v. Ice Co.*, 85 Me. 166, 27 Atl. 92. The propriety of allowing a garnishee to amend his affidavit or disclosure, when requested by him, is generally recognized. "There may be cases," as said in *Drake, Attachm.* § 650. "where the garnishee discovers new facts, or finds that he has made an imperfect or erroneous statement; and there seems to be nothing in principle to prevent him, before final judgment, from making a more complete, perfect, and correct answer, being responsible, as in all other cases, for its truth. The only objection which could arise is that a garnishee might be induced, by new suggestions and new views, to put in an answer varying from his first answer, and not true in itself. But when it is considered that, by any mode of administering the law, the garnishee might employ his own counsel, and make such answer as he will, there seems to be no more danger of falsification in one case than in the other." If, as suggested by the plaintiff's counsel, it appears by the record itself, in the case at bar, to be perfectly evident that all of said supplemental affidavits were made at the instance of and in collusion with the claimant King, that certainly cannot prejudice the plaintiff's rights, the rule being that evasive answers by the garnishee will be treated as nul-

lities (*Scales v. Swan*, 9 Port. [Ala.] 163; *Parker v. Page*, 38 Cal. 522), or, if not so, they will be construed most strongly against him (*Crain v. Gould*, 46 Ill. 293; *Keel v. Ogden*, 5 T. B. Mon. 362). And any equivocation will subject the entire answer to suspicion.

With regard to the point taken by the plaintiff's counsel, that the overruling by the common pleas division of his motion to strike out certain portions of the affidavits of the garnishees was error, we have to say that we do not think it should be sustained. It was a motion which addressed itself to the sound discretion of the court, and hence, unless it is shown that the overruling thereof was clearly an abuse of such discretion, it is not a proper subject of review. An examination of the affidavits in question does not satisfy us that said ruling was improper. For, while some of the matter objected to is manifestly irrelevant and impertinent, and, as remarked by Rogers, J., in his opinion, "as such, when offered by the claimants as mere testimony, was not admitted, but when presented and sworn to by the garnishees in their affidavits was allowed to be filed, such permission was granted because, in the opinion of the court, the rights and liabilities of garnishees and claimants are very different. A garnishee is involuntarily summoned in. If he fails to answer fully, he does so at the peril of being obliged to pay twice. If he makes a false answer or affidavit, he is liable to an action for damages which may result to the plaintiff from such answer or affidavit. The sworn answer of the garnishee shall be considered true in deciding how far said garnishee is liable, though either party to the suit, or any claimant of the estate so attached, may allege and prove any facts not stated or denied by said garnishee or trustee that may be material in so deciding. While, in the case of an ordinary witness, testimony deemed by the court to be irrelevant will not be admitted to take up the time of the court, yet, in the case of garnishees' affidavits, as the matter disclosed is deemed by the garnishee necessary for his protection, it would seem to be the better course to let them stand, and, upon consideration of the case, to reject irrelevant parts, than to suppress and strike out such parts, as in the former case the appellate division, if the case should be taken up to it, would have the full and undisturbed garnishees' disclosures before it, and could also reject what it deemed irrelevant."

As to the contention of the plaintiff that he should have been permitted to offer evidence in support of his allegations filed February 27, 1894, we are of the opinion that it cannot be sustained. Said allegations, or rather allegations and interrogatories combined, for such they in fact are, related (1) to the acts of the prior attaching plaintiffs in proving the debts on which said prior actions were based, in the insolvency proceed-

ings in Massachusetts, and also in receiving dividends thereon; (2) to the discharge of said defendants in said insolvency proceedings; (3) to the fact that the *Riverside & Oswego Mills*, or any of its directors or officers, never made and filed in the city clerk's office of the city of Providence any return, under the statute in such case provided, to exempt its stockholders and directors from personal liability for its debts; (4) to the question as to how said trust company originally came into the possession of the notes, drafts, and obligations of the defendants, referred to in the affidavit of the *Wanskuck Company*, and for and to whom the same and their proceeds were originally discounted and paid, and what, if any, collaterals were held by said trust company for the same, and the disposition thereof, and what payments said trust company has received upon the said notes and obligations, either from such collateral or otherwise, and what disposition it has made of the said notes, drafts, and obligations, and which of the same it now holds, and what is the present condition of, and who now holds, or is really entitled to, the same; (5) to the question as to what, and for what, was the indebtedness of the defendants to said trust company, sought to be enforced in said attachment suit against the defendants, referred to in the affidavits of said *Wanskuck Company*, and what collaterals were held by said trust company for the same, and as to what disposition has been made of said collaterals, and what payments said trust company has received upon said indebtedness, either from such collaterals or otherwise, and what disposition of said indebtedness, or the evidences thereof, has been made by said trust company, and what or which of the same it now holds, and what is the present condition of, and who now holds, or is really entitled to, the same; and (6) as to what was the indebtedness of said defendants to said *Hollis Dressed Meat & Wool Company*, sought to be enforced in its attachment suit aforesaid, and what, if any, collaterals were held by said *Hollis Dressed Meat & Wool Company* for the same, and the disposition which has been made of said collaterals, and the payments which have been received upon said indebtedness, either from such collaterals or otherwise, and what disposition of said indebtedness, or the evidences thereof, has been made by said *Hollis Company*, and what or which of the same it now holds, and what is the present condition of, and who now holds, or is really entitled to, the same. It will thus be seen at a glance that to have allowed the evidence offered would have been, in effect, to try the cases of the said prior attaching creditors in the bowels of the one now before us, besides converting the whole proceeding into a bill in equity, neither of which, as we have already seen, can be done.

Finally, we are therefore of the opinion

that neither the plaintiff's petition for a new trial, nor that of said Lippitt Woolen Company and Theophilus King, adverse claimants, should be granted. Said petitions are therefore denied and dismissed, and the case remitted to the common pleas division for further proceedings.

HALL v. PERRY.

(Supreme Judicial Court of Maine. May 14, 1895.)

WILL — TESTAMENTARY CAPACITY — EXPERT EVIDENCE.

1. To establish a will, contested on the ground of the want of testamentary capacity, it must appear that the testatrix was a person of "sound and disposing mind"; that she had mental capacity sufficient to enable her to understand the business in which she was engaged. A "disposing mind" involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds. It exists when the testator can recall the general nature, conditions, and extent of his property, and his relations to those to whom he gives as well as to those from whom he withholds his bounty. There must be active memory enough to bring to mind the nature and particulars of the business to be transacted, and mental power enough to appreciate them, and form some rational judgment in relation to them.

2. But mere intellectual feebleness must be distinguished from unsoundness of mind. A person may be incapacitated by age and failing memory from engaging in complex and intricate business, and yet be able to give simple directions for the disposition of property by will. Great age may raise doubt of capacity so far as to excite the vigilance of the court, but it not only does not constitute testamentary disqualification, but rather calls for the protection and aid of the court to further its wishes. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attention due his infirmities.

3. In this case, a woman 78 years of age made a will giving her homestead to her adopted son. The will was contested by her daughter and only child. *Held* that, after a careful examination of all the evidence, it is the opinion of the court that the mental capacity of the testatrix was not devoid of any element requisite to make a valid will. The internal evidence afforded by the will itself is not only no impeachment of her testamentary capacity, but rather a confirmation of it. The leading provision of the will, in which she gives the homestead to her "adopted son," appears to have been in conformity with a desire which she had long cherished, and a purpose which she had declared long before the execution of the will. She may have been childish, changeable, impatient, and sometimes inconsiderate, her judgment in relation to the value of property may not have been the most reliable, and her mind may not have been vigorous enough to grasp all the features of a complicated transaction; but all this may be said of multitudes of elderly people whose competency to manage simple and ordinary kinds of business is never questioned by their acquaintances.

4. It is proper for the family physician to express an opinion upon the actual condition of his patient's mind, but not competent for him to give an opinion upon the direct question of her capacity to make a will. An expert should not

be required thus to invade the province of the court and jury. Capacity to make a will, what in any case shall be the standard of legal capacity, is a question of law.

(Official.)

Appeal from supreme judicial court, Knox county.

Arthur O. Perry offered the will of Margaret B. Perry for probate. From a judgment approving and allowing the will, F. A. Hall appeals. Affirmed.

C. E. & A. S. Littlefield, for appellant. A. A. Beaton and R. R. Ulmer, for appellee.

WHITEHOUSE, J. This is an appeal from the decree of a judge of probate approving and allowing the will of Margaret B. Perry, of the following tenor:

"Know all men by these presents, that Margaret B. Perry of Rockland, Knox county, Maine, being weak in body, but of sound and perfect mind and memory, do make, publish, and declare this, my last will and testament, and herein dispose of all my world estate in manner following, to wit:

"First. I order and direct my executor hereinafter named to pay all my just debts and funeral charges as soon as may be after my decease.

"Second. I give and devise to my adopted son, Arthur C. Perry, for and during the term of his natural life, the homestead upon which I now live, situate on Ocean street, in the city of Rockland, Maine, to have and to hold the same to him and his assigns, with all the appurtenances thereto belonging, for and during the term aforesaid. And I request that said Arthur C. Perry, if ever disposed to sell his right in the house and lot aforesaid, give the first refusal of the same to my daughter, Mrs. Hezekiah Hall.

"Third. I give and bequeath to my daughter, Frank, wife of Hezekiah Hall, the sum of three hundred dollars (\$300.00).

"I also give and bequeath to my said daughter, Frank, the furniture now in the parlor and bedroom in my said house, together with the carpet now on the parlor floor of said house.

"Fourth. I give and devise to my grand daughter, Emma Perry, one of the children of said Arthur C. Perry, the reversion of the said house and lot hereinbefore devised for life to said Arthur C. Perry; my intention being that on the death of said Arthur C. Perry that said house and lot shall go to said Emma Perry, should she then be living. If she should not be living, then I devise said reversion to the heirs of the said Arthur C. Perry.

"I also give and bequeath to the said Emma Perry the furniture now in the front chamber in my said house.

"Lastly. I give, bequeath, and devise to my said adopted son, Arthur C. Perry, his heirs and assigns forever, all the rest, residue, and remainder of my estate, real, personal, mixed, wherever found and however situate, and I do hereby appoint the said Arthur C.

Perry sole executor of this, my last will and testament, hereby revoking all former wills by me made."

One of the reasons originally assigned for the appeal was that the will was the result of undue influence on the part of Arthur C. Perry, but it is not seriously urged that there is sufficient evidence to establish this ground of appeal as an independent proposition.

The principal contention now is that the testatrix was not of sound and disposing mind at the time of the execution of the will admitted to probate. This objection is also duly set forth in the reasons of appeal, and the question is now to be determined by the law court, without the aid of a jury trial, upon the evidence adduced at the hearing before the judge of probate, or so much thereof as may be deemed legally admissible, with certain additional facts agreed upon by the parties and presented in the report as a part of the evidence.

The burden is upon the proponent to prove that the testatrix, at the time of the execution of the will, had mental capacity requisite to make a valid will. It is incumbent upon him to show that August 24, 1892, Margaret B. Perry was a "person of sound and disposing mind"; that she had a mind sound enough properly to devise and bequeath her property; that she had mental capacity sufficient to enable her to understand the business in which she was engaged when she made the will.

A "disposing mind" involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds; and a disposing memory exists when one can recall the general nature, condition, and extent of his property, and his relations to those to whom he gives, and also to those from whom he excludes, his bounty. He must have active memory enough to bring to his mind the nature and particulars of the business to be transacted, and mental power enough to appreciate them, and act with sense and judgment in regard to them. He must have sufficient capacity to comprehend the condition of his property, his relations to the persons who were or should have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. See *Robinson v. Adams*, 62 Me. 369; *Barnes v. Barnes*, 68 Me. 286; *DeLafield v. Parish*, 25 N. Y. 9; 1 Redf. Wills, 121-135; *Schouler, Wills*, § 68.

But mere intellectual feebleness must be distinguished from unsoundness of mind. The requirement of a "sound and disposing mind" does not imply that the powers of the

mind may not have been weakened or impaired by old age or bodily disease. A person may be incapacitated by age and failing memory from engaging in complex and intricate business, and incapable of understanding all parts of a contract, and yet be able to give simple directions for the disposition of property by will. Great age may raise doubt of capacity so far as to excite the vigilance of the court, but it does not alone constitute testamentary disqualification. On the contrary, as stated in *Maverick v. Reynolds*, 2 Bradf. Sur. 360: "It calls for protection and aid to further its wishes, when a mind capable of acting rationally, and a memory sufficient in essentials are shown to have existed, and the last will is in consonance with definite and long-settled intentions, is not unreasonable in its provisions, and has been executed with fairness."

When the mental capacity of Margaret B. Perry is subjected to these recognized and familiar tests, it is the opinion of the court, after a careful examination of the evidence reported and of the elaborate arguments of counsel, that it was not devoid of any element requisite to make a valid will. The internal evidence afforded by the will in question executed by her August 24, 1892, is not only no impeachment of her testamentary capacity, but rather a confirmation of it. The leading provision of the will, in which she gives the homestead to her "adopted son," Arthur C. Perry, during his life, and the remainder to his daughter, whom she mentions as her "granddaughter, Emma Perry," appears to have been in conformity with a desire which she had long cherished, and a purpose which she had explicitly declared long before the execution of the will. It is the uncontradicted testimony of two witnesses that two years and a half before the will was made she stated to them that she "intended for Arthur to have the house," and that it was her husband's wish that Arthur should have it when they were done with it. Nor is there anything in the evidence tending to show that the disposition of her property according to the terms of this will was unreasonable or unnatural. It nowhere appears that the "adopted son" was in any respect unworthy of the benefit bestowed upon him; and it may properly be inferred from the evidence that, as her daughter, Mrs. Hall, was happily married, and provided with a comfortable home, the testatrix considered her situation in life so fortunate as to place her beyond any need of her mother's bounty. The request that Mrs. Hall should have the refusal of Arthur's right in the house in the event of a sale, with the bequests to her of the parlor furniture and the sum of \$300, was a kindly remembrance, apparently evincing not only natural affection, but a sense of justice towards her daughter. And all the provisions of the will, examined without the aid of extrinsic evidence, would seem to indicate an active memory on the part of the testatrix, and a rational comprehension of the condition of her

property and her relations to the beneficiaries named in the will.

The physical condition, manner of life, and general conduct of the testatrix about the time of the execution of the will, and the particular circumstances attending it, all strengthen the proponent's view of her testamentary capacity. True, the will was made less than four months before her death, when she was nearly 78 years old, with some of the infirmities of age upon her; but she was then living in her own house, and was deemed capable of managing her own household affairs, receiving such kindly assistance as might be rendered from time to time by her daughter, who lived next door, and by the school teacher, who boarded with her for two years immediately preceding her death. She appears to have visited the office of the attorney who drew the will two or three times before it was executed; but it was drawn in accordance with directions given by her two weeks before, and again read to her in presence of the subscribing witnesses.

Two of these attesting witnesses give positive and unqualified testimony that they considered her of sound mind at that time, while the third, though not asked to state the opinion which he formed at that time, gives a circumstantial and detailed account of what transpired in his presence, from which it would appear that the conduct of the testatrix was entirely consistent, regular, and natural.

The testamentary capacity of the testatrix being presumptively established, the proponent rested, and thereupon the contestant introduced eight witnesses, including the daughter who contests the will, her husband, and her sister-in-law, the most of whom had been intimately acquainted with Mrs. Perry for many years, and all of them during the later years of her life.

They represent her, respectively, as childish, forgetful, and subject to dizzy spells; or as impatient, inconsiderate, and unreasonable, as indicated by her urging Dr. Cole to hasten the removal of a sick niece from her house, by her exaggeration of the amount of labor she performed in her daughter's household, and by her complaints that her aged sister, whose mind was very much impaired, "tired her all out"; as changeable, forgetful, and liable to have "peculiar ideas," as instanced by her belief that Arthur Perry was able to hire a place at a large rental; as not sleeping well one night after talking with Arthur Perry; or as excitable, and subject to headache and dizziness, or as breaking down in consequence of the severe illness of her husband, 11 years before; or again as growing more feeble, childish, and weak-minded during the last year of her life, her mind falling with her body. On cross-examination, however, one of these witnesses thought Mrs. Perry's condition was "about the same as other old ladies of her age."

The contestant also attaches great significance to the fact that, while there is in the will a bequest of "the sum of three hundred

dollars" in favor of the daughter, in addition to the gift of the furniture in the parlor bedroom and of the parlor carpet, the schedule of assets appraised discloses a total value of \$141.16, of which only \$11.66 is money. Two of the subscribing witnesses to the will received the impression that she had \$300 in some bank, but it appears from the testimony of the contestant and her husband, Capt. Hall, that, although the personal property inventoried all came into the possession of Capt. Hall, and was found in his hands after the death of Mrs. Perry, no money or other property was found anywhere except that named in the inventory. It is therefore earnestly contended that Mrs. Perry was laboring under the delusion that she had \$300 deposited in some bank, and attempted to bequeath that amount to her daughter, when in fact she was not possessed of a single dollar outside of the real estate devised to Arthur C. Perry and his daughter, valued at \$800, and her household goods, and \$11.66 in money, appraised at \$141.16. It appears that her taxes were abated, and that her only means of support were derived from a pension of \$12 a month during the later years, and \$8 a month during the earlier years, following her husband's death, with such sums as she may have received from boarders; and, while it does not seem from the evidence highly probable that she had \$300 in money at the time of her death, it is not conclusively established that she did not have it at the time she made the will. Again, it is not an extraordinary hypothesis to assume that she greatly overestimated the value of her household furniture and other personal effects, and believed that at least \$300 would be realized from the sale of these after the specific bequests to the daughter and Emma Perry had been set apart. The apparent inconsistency is susceptible of other plausible explanations, but the existence of the discrepancy is not so indubitable that it can safely be accepted as conclusive proof of an insane delusion; and, in any event, its significance would not be so strong that it might not be overcome by the great weight of other evidential facts and circumstances tending strongly the other way.

Nor do we think that the testimony of Dr. Estabrook, who was called as the family physician of the testatrix, and allowed to give his opinion as an expert respecting her competency to make a will, is entitled to the weight which the contestant would give it. It appears that he was not consulted by her professionally for more than a year prior to the execution of the will; but he states that "she has been a feeble woman, suffering from uterine trouble peculiar to women," and was "in a feeble condition of mind." When required in direct examination to state if she had "sufficient intelligence to make a will," he says: "I don't know as I can. I am not quite prepared for it, coming in that shape." And when pressed to answer, assuming her condition

to be as he had described it, and that she had undertaken to dispose of property that she did not possess, he properly replied in substance that he did not understand "what the condition of a person's mind should be to be rendered competent to make a will." The learned counsel thereupon stated some of the principal requisites of testamentary capacity, and the witness answered: "If she should give away somebody else's property, or property that was not her own, I should say she was not competent." The counsel then said: "The question is, taking all these things into account, with your knowledge of her, her condition when you saw her, what the witnesses say of her loss of memory, her increased impatience, her treatment of her daughter, and her frequent dizziness, now whether, taking all those facts into account, she had such competency as I have described, and was capable of making a will. Answer. I think not."

It is plain, however, that if the element of "giving away property not her own" be eliminated, there are no facts stated by this witness in his description of Mrs. Perry's physical and mental condition that will warrant his conclusion that she did not have mental capacity to make a will.

But though the witness was authorized, as a family physician, to express an opinion upon the actual condition of his patient's mind (*Fayette v. Chesterville*, 77 Me. 28), it was not competent for him to give an opinion upon the direct question of Mrs. Perry's capacity to make a will. A question calling for a direct expression of opinion from an expert, whether a testator had "sufficient intelligence" or "mental capacity" or was "competent" to make a will, is not the appropriate form of inquiry to elicit opinion evidence which will most satisfactorily enlighten and assist the court and jury in determining that issue. An expert should not be required thus to invade the province of the court and jury. What is sufficient capacity to make a will is not simply a question of fact; it is rather a conclusion which the law deduces from certain facts proved or admitted as premises. As stated by the court in *Fairchild v. Bascomb*, 35 Vt. 398: "A witness may not correctly apprehend the rule of law, and, if he uses such expressions, may be misled himself, or may mislead the jury. Hence the question should be framed so as to require him to state the measure of the testator's capacity in his own language, and by such ordinary terms or forms of expression as will best convey his own ideas of the matter;" or, to use the language of the court in *Crowell v. Kirk*, 3 Dev. 358, "to state the degree of intelligence or imbecility the best way he can." So in *Kempsey v. McGinnis*, 21 Mich. 123, the court, by Christlancy, J., use this language: "Capacity to make a will, or what in any case shall be the standard of legal capacity, is always a question of law. The

physical or mental condition from which that capacity may be deduced is a question of fact which may be shown by evidence of physical or mental manifestations, and the opinions of professional witnesses as inferences of fact thereon. There has been some looseness in the courts in permitting opinions to be given upon a testator's capacity, * * * but that mode of putting the question is objectionable."

In *May v. Bradlee*, 127 Mass. 414, it is said the court "might properly refuse to allow the question to be put in that form, because it called for an opinion upon a mixed question of law and fact, and not upon a question of medical science only. What degree of mental capacity is necessary to the making of a will is a question of law, which was not to be determined by the witness, and as to which he could not be assumed to be informed, unless the legal requisites of testamentary capacity were stated in the interrogatory, or otherwise explained to him." But it is obvious that, even with such an explanation, incomplete as it would ordinarily be, when hastily given under such circumstances, a medical expert could not instantly grasp and fully appreciate all of the legal requisites of testamentary capacity, and that form of inquiry would still be objectionable. The more simple and better form of inquiry "relates to mental soundness or unsoundness, with reference, as near as may be, to the particular act or kind of act in dispute." *Schouler, Wills*, § 208. See, also, *Lawson, Exp. Ev.* 137, case IV.

But the proponent presents in rebuttal nine witnesses, neighbors and friends of Mrs. Perry, and, with one exception, all disinterested, and not related to either of the parties.

Their combined testimony covers a period of nearly 30 years prior to her death, and comprises the condition, conduct, and habits of life of Mrs. Perry in their varied relations with her of a business and social character during all this time. They discovered no material change in her appearance or manner, and no peculiarities in her conversation or conduct. One witness set out blackberry bushes in her garden late in the fall after the will was made in August. She waited upon him, "got the things" for him, and directed him how to perform the work, and he followed her directions. None of them observed anything "particular" or "peculiar" in her habits not characteristic of other ladies of her age and experience in life. She may have been more forgetful of the present than of the past, and may frequently have forgotten what she had just before said or done. She may have been childish, changeable, impatient, and sometimes inconsiderate. Her judgment in relation to the value of property may not have been the most reliable, and her mind may not have been vigorous enough to grasp all the features of a complicated transaction;

but all this may be said of multitudes of elderly people whose competency to manage simple and ordinary kinds of business is never questioned by their acquaintances and friends. "Weakness of memory, vacillation of purpose, credulity and vagueness of thought, may all consist with adequate testamentary capacity under favorable circumstances." Schouler, Wills, § 70. "It is one of the painful consequences of extreme old age," says Chancellor Kent, "that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attention due his infirmities." *Van Alst v. Hunter*, 5 Johns. Ch. 148.

Appeal dismissed. Decree of probate court affirmed.

JOHN BIRD CO. v. HURLEY.

(Supreme Judicial Court of Maine. May 21, 1895.)

PARTNERSHIP BETWEEN HUSBAND AND WIFE— EVIDENCE.

1. Much more evidence is necessary to establish the existence of a business partnership between husband and wife than between persons not in that relation.

2. Acts of a wife in assisting or advising her husband in business, such as keeping the books, making purchases and sales, examining, paying, or contesting bills, advising for or against particular transactions, etc., and her frequent use of pronouns in the possessive case when speaking of the business, are not of themselves sufficient to establish her actual partnership interest against her explicit denial.

(Official.)

Assumpsit by the John Bird Company on an account annexed to the writ, in which the balance claimed is \$552.19.

The action was originally against William P. Hurley and Frances E. Hurley, copartners under the firm name of the Rockland Lime Company. The defendant William P. Hurley having been adjudged an insolvent debtor, and the insolvency proceeding being still pending, the plaintiff discontinued as to him.

Frances E. Hurley, the other defendant, pleaded the general issue, and filed an affidavit in due form denying the copartnership.

Verdict for plaintiff. Motion to set aside. Granted.

C. E. & A. S. Littlefield and Mervyn Ap Rice, for plaintiff. W. H. Fogler, for defendant.

EMERY, J. Some person or persons were carrying on a lime-burning and general store business on certain premises in Rockland, under the business name or style of the "Rockland Lime Company," at the time the plaintiff sold to him or them the bill of goods sued for in this action. William P. Hurley was admittedly carrying on that business under that name, either alone or with a

partner or partners. He ordered these goods for use in the business, and they were charged upon the plaintiff's books to the "Rockland Lime Company." Afterwards William P. Hurley, upon petition of the plaintiff and other creditors, was adjudged an insolvent debtor, and his business affairs were wound up in the insolvency court. The plaintiff's claim there was the same as sued for here, and was duly proved against William P. Hurley in that court. Later still, the plaintiff claimed to have discovered that one Frances E. Hurley, a woman, was in fact a partner with William P. Hurley in the business at the time the latter ordered the goods, and this suit is brought against her as such partner.

It nowhere appears in the evidence that the plaintiff or its selling agent, at the time of the sale, supposed Frances E. Hurley to be a partner in the business, or sold the goods upon her credit. Whatever testimony was offered in support of that proposition was ruled to be incompetent. It had not been shown that any of the plaintiff's agents at the time of the sale were informed of any circumstances tending to prove her partnership interest. The plaintiff, therefore, could recover only by proving that Frances E. Hurley was in fact such partner.

The evidence introduced by the plaintiff upon this issue of actual partnership tends to prove many and various circumstances, notably acts and declarations of Frances E. Hurley, which are claimed by the plaintiff to be sufficient to establish her partnership interest. She was the owner of the real estate used in the business. She mostly kept the books. These books showed a personal expense account of William P. Hurley, and one of Frances E. Hurley. She was often about in the store, on the wharf, and at the kiln. She often expressed her opinion as to the expediency of different transactions in the business. She personally directed matters at times, as by ordering material for the business or selling the product. She occasionally questioned bills presented, and assumed to adjust claims for or against the business. She was personally urgent that there should be a union of the lime burners. She indorsed with her individual name several notes given in the business. She often signed the business name to letters, checks, and receipts, sometimes with her initials added, and sometimes without. She commonly, if not always, when speaking in or of the business, used the first person singular or plural; but there was no evidence that she ever said she was a partner, or said that she had any direct pecuniary interest in the business. It may be fully conceded, however, that enough circumstances, in kind and quantity, were shown to amply prove that Frances E. Hurley had a partnership in the business, in the absence of any other relation between her and William P. Hurley which would equally well explain all these circumstances.

But Frances E. Hurley was all this time the wife of William P. Hurley, who admittedly was engaged in the business, and who had purchased these goods. We think that all she is shown to have said and done as to the business may have been evoked by a strong, but exclusively wifely, interest in her husband's affairs. Her various expressions of interest, and even proprietorship, were no more than are commonly used by farmers' wives when speaking of the farm or dairy. As his wife, she was naturally interested in his business conduct and success. This interest would be excited, not only by wifely sympathy, but also by the fact that her own well-being would be affected by his business success or failure. If she was, as appears in this case, a woman of energy and business capacity, she would naturally advise, check, and assist her husband, and even carry on more or less of the work herself. All that she did in this way would not alone raise a presumption that she was in his regular employ, and entitled to salary or wages (*Holmes v. Waldron*, 85 Me. 312, 27 Atl. 176); nor any presumption that she was entitled to a share of the product (*Sampson v. Alexander*, 66 Me. 182; *Berry v. Berry*, 84 Me. 545, 24 Atl. 957).

The law cherishes the marriage relation. It recognizes the deep interest the wife should and does take in the business carried on by the head of the family. It regards and commends this interest as arising naturally from marital affection and duty rather than from any partnership in the business. This wifely interest is essential to the completeness of the marriage relation. Its quick and ample manifestation should not be restrained by any fear of danger therefrom to the wife or her separate estate.

Frances E. Hurley was a witness, and she explicitly and emphatically denied any partnership interest. Against her denial, the plaintiff's evidence falls far short of proving that she was a partner.

In Massachusetts, in 1861, under statutes generally similar to our present statutes, it was held that a business partnership between husband and wife was not contemplated by the statute, and could not be formed so as to bind the wife. *Lord v. Parker*, 3 Allen, 127. But, as this question was not raised nor argued here, we do not consider it.

Motion sustained. Verdict set aside.

GRANT v. BRADSTREET et al.

(Supreme Judicial Court of Maine. July 18, 1895.)

SPECIFIC PERFORMANCE—EVIDENCE OF PAROL CONTRACT—TRUST EX MALEFICIO.

1. The respondent, W. B., promised his brother, P. B., that if the brother would refrain from making a will, and thus leave the respondent, as heir and next of kin, the sole inheritor of all his brother's estate, he, the respondent, would pay a certain annuity out of

such estate to a certain relative of the two parties. *Held*, that such a promise, if acted upon, may be enforced in equity, the court abiding by the case of *Gilpatrick v. Glidden*, 16 Atl. 464, 81 Me. 137.

2. The promise, however, must be proved by clear and convincing evidence, especially where the proof is oral, and not in any part written.

3. The ground upon which equity obtains jurisdiction in such a case is that it would be a fraud for a party to avoid such a contract merely because it is not attended with the usual legal formalities, when the promise may be as certainly and safely proved in equity without such formalities.

4. In no ordinary case would the court be satisfied to rely on the oral evidence of one witness as sufficient to establish such an alleged promise, especially against the positive denial of the respondent, unless the testimony of the single witness be supported by a considerable amount of direct or indirect corroboration.

5. It was admissible for the complainant to show, in support of such a promise, that the donor, shortly before his death, and prior to the occasion when the promise was made, said to another person that he should direct the respondent to make a donation to the complainant; and such testimony has a very strong probative force, in aid of other evidence to prove the complainant's contention.

Gilpatrick v. Glidden, 16 Atl. 464, 81 Me. 137, affirmed.

(Official.)

Exceptions from superior court, Kennebec county.

This was a bill in equity by William S. Grant, in which the plaintiff claimed that the late Peter G. Bradstreet, of Gardiner, Me., died intestate, but before his death instructed his brother, William W. Bradstreet, who, in case of such intestacy, would be the sole heir to the property of the deceased, that an annuity of \$1,000 annually, to be paid according to the terms set forth in the bill in equity, was given to the plaintiff out of the property of the intestate's estate, and that the defendant Bradstreet promised the deceased that if he would refrain from making any will he would see this annuity paid to the plaintiff out of the estate of the deceased; that in consequence of such promise the deceased did refrain from making his will, but that the said defendant, notwithstanding his promises, has fraudulently refused to pay the annuity aforesaid. This bill in equity was brought against the defendant and the administrators of Peter G. Bradstreet to compel such payment.

All these allegations were denied by the defendants. An issue of fact was framed at the request of the plaintiff, and submitted to a jury, who found for the plaintiff upon the issue submitted. Defendants appeal. Affirmed. The issue submitted was as follows:

"Did William W. Bradstreet promise Peter G. Bradstreet that if he, the said Peter, should die intestate, and he, the said William W., should succeed to the said property as the sole heir and next of kin, then he, the said William W., would, out of said property, pay to the plaintiff the sum of one thousand

dollars a year during the natural life of the said plaintiff, in quarterly payments of two hundred and fifty dollars each, the first payment to be made December 1, 1889, and thereafterwards every three months? Answer. Yes."

"(Bill.) To the Supreme Judicial Court, in Equity:

"William S. Grant, of Aberdeen, in the state of Washington, complains against William W. Bradstreet of Gardiner, in the county of Kennebec, and state of Maine, and also against Weston Lewis and Everett L. Smith, both of said Gardiner, administrators upon the goods and estate of Peter G. Bradstreet, deceased, late of said Gardiner, and says:

"(1) That on the 13th day of September, A. D. 1889, Peter G. Bradstreet was a resident and inhabitant of said Gardiner, and possessed of a large estate, the amount of which the plaintiff is unable to state; but he is informed and believes that said Peter was then possessed of real estate of the value of fifty thousand dollars, and personal property of the value of at least two hundred and seventy-five thousand dollars.

"(2) That on said 13th day of September the said William W. Bradstreet was the brother of said Peter, and, inasmuch as the said Peter had had no issue, and then had no wife, father, mother, sister, nieces, nephews, grandnieces, grandnephews, or brothers other than the said William then alive, the said William W. was then his expectant heir at law and next of kin, and in the event of the death of said Peter would have succeeded to all of his real estate in the state of Maine, and to all of his personal property.

"(3) That on the said 13th day of September the said Peter was suffering from a mortal sickness, and was then conscious of the fact that he could not recover therefrom, and that his death must soon take place. When so conscious and apprehensive of his early death, the said Peter, on said 13th day of September, gave to the said William W. directions as to what he desired the said William W. to do with his property in case he should die intestate, and the said William should succeed to the same as sole heir at law and next of kin. And the plaintiff says he is informed and believes that the said William W., among other things, promised the said Peter and gave him to understand that if he, the said Peter, should die intestate, and he, the said William W., should succeed to the said property as sole heir and next of kin, then he, the said William W., would, out of said property, pay to the plaintiff the sum of one thousand dollars a year during the natural life of the said plaintiff, in quarterly payments of two hundred and fifty dollars each, the first payment to be made December 1, A. D. 1889, and thereafterwards every three months as aforesaid.

"(4) And the said Peter, relying on the aforesaid promise and undertaking of the

said William W., thereafterwards refrained from making a will, and on the 17th day of September, A. D. 1889, died intestate, leaving, as the plaintiff is informed and believes, real estate of the value of fifty thousand dollars, and personal estate of the value of at least two hundred and seventy-five thousand dollars; to all of which real estate the said William W. then succeeded as sole heir at law, and to all of which personal property, subject to the payment of the funeral charges, expenses of last sickness, debts, and expenses of administration, the said William W. then became entitled as sole next of kin.

"(5) At a term of the probate court held at Augusta, within and for said county of Kennebec, on the second Monday of October, A. D. 1889, Weston Lewis and Everett L. Smith were duly and legally appointed administrators upon the goods and estate of the said Peter G. Bradstreet, and thereafterwards accepted said trust, and qualified by giving bonds as the law directs. Although more than two years have elapsed since said appointment and qualification, the said administrators have filed no inventory and no account. But the plaintiff says he is informed and believes that the said administrators have paid large sums of money and delivered large amounts of securities to the said William W. on account of his distributive share of said estate, in all amounting to one hundred thousand dollars, and that, after the payment of all debts and lawful charges, there remains in the hands of said administrators personal property of the value of at least one hundred thousand dollars, to all of which the said William W. is entitled by law as next of kin.

"(6) The plaintiff says that the said William W. succeeded to all of said real and personal estate charged with the trust of paying to the plaintiff the sum of one thousand dollars a year in the manner and at the time aforesaid, and that he obtained and accepted title and right to the same subject to the fulfillment and performance of said trust, and now holds the same, and will hold said property now in the hands of said administrators, with the trusts imposed thereon by reason of the aforesaid promise and undertaking of him, the said William W.; yet the plaintiff says that he has requested the said William W. to pay to him the amounts so by said William W. to be paid as aforesaid quarterly from and after December 1, A. D. 1889, but the said William W. has refused so to do, and further refuses to fulfill said trust in the future, or to make the plaintiff any payment thereunder now or in the future.

"The plaintiff prays as follows:

"(1) That it may be declared that all of the estate of said Peter G. Bradstreet by said William W. Bradstreet heretofore or hereafter received, and all of said estate in the hands of the administrators thereof to

which the said William W. Bradstreet is now, or may hereafter be, entitled as sole heir and next of kin, is and shall be charged with a trust in favor of the plaintiff for the payment to him of the sum of one thousand dollars a year, in quarterly payments, beginning December 1, 1889, with interest on all overdue payments, to the date of the decree herein, and thereafter during the natural life of the plaintiff.

"(2) That the said William W. Bradstreet may be decreed to pay to the plaintiff the several sums due to him under the aforesaid trust, being two hundred and fifty dollars due December 1, A. D. 1889, with interest thereon, and a like sum, with interest thereon, at the end of each period of three months thereafter.

"(3) That it may be decreed that the plaintiff is entitled to have paid to him out of the estate of Peter G. Bradstreet received and to be received by the said William W. Bradstreet the sum of one thousand dollars a year in quarterly payments of two hundred and fifty dollars each, beginning December 1, A. D. 1889, for and during the natural life of the plaintiff, with lawful interest on such of said payments as are now overdue.

"(4) That the defendant William W. Bradstreet may be ordered and decreed to execute such deed or deeds of covenant, and give such security for the performance thereof, as shall insure to the plaintiff the payment of the aforesaid annuity of one thousand dollars a year in the manner and at the times aforesaid, for and during the natural life of the plaintiff.

"(5) That the defendants Weston Lewis and Everett L. Smith may be enjoined and restrained from making any further payments from the estate of Peter G. Bradstreet to the said William W. Bradstreet, until the said William W. Bradstreet shall perform the trusts hereinbefore set forth, and as shall be by this honorable court declared.

"(6) That for the purposes all necessary or proper accounts may be taken, inquiries made, and decision given, and that the plaintiff may have his costs of this suit.

"(7) That the plaintiff may have such further or other relief as the nature of the case may require and to this honorable court shall seem fit and proper.

"Wherefore the plaintiff further prays that each of said defendants may be required to make full, true, and perfect answer, but not upon their oaths, answers under oath being hereby specially waived, to all and singular the matters hereinbefore stated and charged as fully and particularly as if the same were hereinafter repeated, and they were severally and distinctly interrogated in relation thereto.

"And further, that this honorable court will issue its temporary injunction commanding the said Weston Lewis and Everett L. Smith to make no further payments of money or de-

liveries of property from the estate of said Peter G. Bradstreet to the said William W. Bradstreet, his heirs, executors, administrators, attorneys, agents, or assigns, during the pendency of this complaint, etc.

"William S. Grant.

"Dated November 2, A. D., 1891.

"Heath and Tuell,

"Complainant's Solicitors."

Exceptions.

As bearing upon the issue submitted to the jury, the plaintiff introduced as a witness one William G. Ellis, who testified as follows:

"Q. Now, whether or not shortly before the death of your cousin, Peter Bradstreet, you had a conversation with him in regard to William Grant, and, if so, when was it? A. It was the Friday week before he died Tuesday,—that is, eleven days before.

"Q. State what the conversation was. (Objected to, and admitted subject to exception.) A. He said he was going to tell William Bradstreet to look out for Peter Grant and William Grant and Eliza.

"Q. Did he state the amounts or sums? Was the statement any more specific than you have given it? A. No, I had no other talk with him after that in regard to that."

To the admission of this evidence the defendants seasonably excepted. Upon the testimony of Miss Fairbanks, the presiding justice charged the jury in part as follows:

"Did she hear what she says she did? And if she did, what was the nature of that transaction? Was it the intention of Peter Bradstreet to leave it entirely to the discretion of William whether he should have it or not? Or was it a request, like all the others, which William had cheerfully assented to and offered to carry out, if no will was made? As bearing upon this proposition, what was the real intention of the parties, if you find there was a reference made to the name of William Grant, as testified to by this witness? The testimony of William Ellis was received of what he heard Peter say eleven days before that, tending to illustrate the intention and characterize the reference to the name of William S. Grant, if made as claimed by Augusta Fairbanks. William Ellis says that eleven days before Peter Bradstreet said to him: 'I am going to tell William to look out for Eliza and Peter and William Grant.' You will have a right, I say, to consider that as tending to illustrate the nature of the transaction which Augusta Fairbanks testifies to. Would it tend to show that he was going to tell him to do it, as he did the others? or was he to leave it entirely to his discretion, and he might do it or not, as he saw fit? It would have some tendency to illustrate the nature of that transaction. This class of testimony in kindred inquiries is uniformly received. Questions often arise with reference to gifts made in contemplation of death, gifts of personal property which may be absolutely delivered at the time. Ques-

tions arise whether a given transaction, claimed to amount to a perfected gift, was or not intended as an absolute gift by the alleged donor; and in reference to such inquiries his previous declarations, and letters written by him, showing an intention to make provision for the alleged donee, have uniformly been received. So here, after hearing the testimony of the defense, to which I shall more particularly call your attention,—after hearing the testimony of William Bradstreet as to what he said to his brother when first they had their interview in regard to these bequests, when he said that he told him he would do whatever he wished him to do, provided no will was made to interfere,—you have a right to inquire what was the relation of those parties, what was the state of mind of Peter Bradstreet in regard to his brother. Did he have the utmost confidence that his brother would carry out any such request, so that in his mind any request of his was substantially the same as a gift? If you find that to be so, then I say to you, you would have a right to consider this evidence of William Ellis as having some tendency to establish the issue in this case, if you believe it to be true; because the situation would be closely analogous to the case of an ordinary gift depending wholly upon the express wish of the alleged donor.

"It would have no necessary tendency, of course, in an ordinary case, to show that the conversation did take place; because a person may express a desire or intention to do a thing and entirely change it within the next eleven days; but when you find, if you do find, that the relation between them was such that any wish expressed by Peter Bradstreet would be carried out, and was so understood by the parties, fully and freely, as fully as could be expressed, that there was that confidential relation between them, you would have a right to consider this as having some tendency to show what the intention of Peter Bradstreet was. But, as I say, what tendency it does have is entirely for you, or what probative force it shall have is entirely for you, because parties have a right to change their minds, and may have done so."

To this portion of the charge the defendants seasonably excepted.

After the verdict of the jury, the presiding justice, without argument, ordered a pro forma decree for the plaintiff, and the defendants filed exceptions, and also seasonably appealed from the pro forma decree.

H. M. Heath and O. A. Tuell, for plaintiff.
Orville D. Baker and L. C. Cornish, for defendants.

PETERS, C. J. On the trial of this cause in equity the jury found as a matter of fact that the respondent William W. Bradstreet verbally promised his brother, Peter G. Bradstreet, during the last sickness of the latter, and but a few days before his death, that, if

Peter should die intestate, leaving him, William, as his sole heir and next of kin to succeed to all of Peter's estate, he would pay, out of the estate so to be inherited by him, to William S. Grant, the complainant, \$1,000 annually during the complainant's natural lifetime.

That such a promise, if fully and absolutely proved, may be enforced by a court of equity as a charge upon the estate of the intestate, however hazardous or impolitic such a precedent may to some minds seem to be, is an established doctrine in this state, as carefully elucidated and maintained in the late-important case of *Gilpatrick v. Glidden*, 81 Me. 137, 16 Atl. 464. Evidently the risk of accepting and acting upon such doctrine consists mainly in the temptation which judges and juries are subjected to through sympathy or misunderstanding to allow these irregular dispositions of property to be established upon untrustworthy and insufficient evidence.

Therefore, when those legal formalities which are usually observed for conveying or transmitting property are to be dispensed with in favor of equitable rules on the subject, the facts upon which the equitable superiority is to be allowed should be established by clear and indubitable evidence. And this requirement applies with great force in the present case, where the complainant's claim could be legally proved only by a will signed by the donor and attested by three witnesses, while it is proposed to be equitably proved mainly by the testimony of a single witness, without being evidenced by any writing whatever. Equity herself assures us that in such a case the evidence must be strong and certain enough to produce conviction in every reasonable mind. The very ground upon which equity obtains jurisdiction in this class of cases is the plea set up by her that it would be unjust and fraudulent to require that parol gifts shall fall of effect merely for want of legal formalities to uphold them, when in equity procedure the necessary facts can be just as surely, though differently, proved. The argument in behalf of the equitable jurisdiction is that the only object of strict legal forms is to attain a high degree of certainty in such important matters, and that just as much certainty can be assured in equity as by the legal requirements.

Whether the evidence adduced in support of this claimant's case can stand the test which we make the standard for judging this case and all such cases is the question here. The complainant is obliged to rely greatly on the testimony of Augusta Fairbanks, who undertakes to reproduce the substance of a part of a conversation between the two Bradstreets, which she overheard when in a room adjoining the one they were in at the time referred to. Most of the circumstances attending the situation of the parties at the time are not disputed.

The interview between the brothers took

place Friday forenoon, September 13, 1889; Peter's death occurring on the Tuesday next afterwards. William was then 72 years old. Peter was the elder of the two, and never was married. He died intestate, leaving his brother the inheritor of all his property. They had been partners in business for nearly a lifetime, and had acquired large estates, both jointly and individually. They had the confidence of the community as business men, and each had an unlimited confidence in the integrity and business ability of the other. The complainant was a second cousin of Peter Bradstreet, as also was Peter Grant, whose name will appear hereafter. Another prominent figure in the sketch was Eliza Ferguson, who had been a faithful and trusted housekeeper for Peter Bradstreet for many years.

Miss Fairbanks, the witness, a resident of West Gardiner, and evidently a person of mature character, and of more than ordinary intelligence and education for one in her station in life, commenced to do housework for Peter in February, 1889, continuing in that employment exclusively until Peter was taken sick, about three weeks before his death, when she took charge of him as his nurse, and continued in that capacity until he died. On the morning of the day in question William came to his brother's room, as he was in the daily habit of doing, and left word that his brother should see no callers that morning, as he was to do some business with him, which would require all his brother's strength. Miss Fairbanks thereupon bolstered up the sick man with pillows under his head, in readiness to see William, and she then retired to her own room in the rear of the sick room, not seeing William when he came in the room, nor during the time he was there, but hearing him. She left the doors open between the two rooms, so that she could hear if she should be called for anything, and was lying, during the conversation between Peter and William, on her back upon her own bed, for the purpose of obtaining rest.

The house is an old-fashioned two-story dwelling, facing the Kennebec river, in the city of Gardiner, with four rooms both above and below, and Peter's bed was in the southeast corner of the front room upstairs, the corner furthest off from the passageway between his room and the room of Miss Fairbanks. Her bed was in the southwest corner of her room, in the rear of his, being the corner of her room the most distant from such passageway. So that the whole distance between the two beds was the greatest attainable in the two rooms, excepting that neither bed was exactly in a corner, as a space was left between the bed and the walls in either room wide enough to allow a person to get around the beds. The rooms were of rectangular shape, his measuring 15 feet 4 inches by 14 feet 1 inch, and hers measuring 15 feet 4 inches by 12 feet 10 inches. The space or passageway between rooms measures about

3 feet in length. A light stand in his room, mentioned in the testimony, was about 3 feet by 18 inches.

The foregoing statement leads up to the testimony of Miss Fairbanks touching the main issue in the case, and we quote from her direct examination:

"Q. Just before William returned to the room, did Peter give you any directions as to where to go, or what you should do? A. Yes, sir; he did.

"Q. In consequence of the directions that you received from him, then, what did you do, and where did you go? A. I went into my room, and laid down on the bed, ready if he called me to go in, as I expected he would.

"Q. While you were lying down on the bed, who came into Peter's room, if anybody? A. William Bradstreet.

"Q. And what, so far as you know, did he first do when he went into the room? A. First I remember of his moving a stand out, and heard him handling paper on the stand, and he sat down and talked with Peter Bradstreet for some time. I heard him call several names, but I did not hear the first part of the conversation, because I did not interest myself in it. I could not repeat it.

"Q. What was the first conversation that you recollect and that you noticed? A. First I heard them talking about having Mr. Ellis come down that day; telegraphing for him to come down. That is the first thing I remember of their saying.

"Q. What next do you recollect? A. Then the next I took notice of was when he spoke of Miss Ferguson, providing for Miss Ferguson. Knowing her, I was interested in the talk, and noticed what was said.

"Q. What did you hear said about Miss Ferguson? A. I heard the request that Peter Bradstreet made, what they decided on, the amount to be left her, and the way it should be left, and heard considerable talk made in regard to her. Peter Bradstreet was very anxious that she should be provided for. (Objected to.)

"Q. State the substance of what you can recollect that Peter said about Eliza Ferguson? A. I cannot repeat the conversation of both. He said he wished her to have an income, a quarterly income of four dollars a week, and he proposed some way that it should be left her, and something was said about its being left to her in trust, a certain income being drawn from a certain amount, and that he wanted a special provision made for her. Spoke of certain amounts, and finally decided on a certain amount.

"Q. What was the amount they finally decided upon? A. Eighteen dollars a week. Took several amounts, and he finally decided on eighteen dollars a week,—special provision made for her.

"Q. What was said next? A. After they talked about that—it was some little time—Peter Bradstreet said he wanted to provide for William Grant. Said perhaps he had bet-

ter leave it to him the same way he did for Eliza, pay it to him quarterly.

"Q. What did William say to that? A. He thought it was a good idea, and agreed to it. Seemed to think as he did about it,—that it had better be paid in that way,—and Peter said William Grant he would leave a thousand dollars a year, payable quarterly, commencing the first of December.

"Q. What did William say in the talk? A. They spoke of what this income should be taken from, and from their conversation he agreed to carry out the request.

"Q. State, as nearly as you can, just what William said; not the exact words, but the substance of it, as you can best recollect it. A. The exact conversation I did not remember, but I knew what they meant when they were talking, and understood it at the time they were talking. I heard it at the time, but I forget the exact conversation between them.

"Q. Do you mean to say you have stated the substance of it as you recollect it? A. Yes, that is the substance. The exact language I do not undertake to recall.

"Q. Was any one talked about after completing the talk about William Grant? A. Then he said he wanted to provide for Peter Grant, and thought he would leave that in the same way he did Mr. William Grant's. He said he wished to give him five hundred dollars a year, payable quarterly, commencing the first of December.

"Q. What did William say in respect to that? A. He thought favorably of it, and agreed to carry out the request.

"Q. Was anything said in the conversation about this being safe? What was there about that? A. Yes, when providing for Miss Ferguson. He said he wanted her provided for so that nothing ever would happen that she would be dependent, and he proposed some way that it should be left to her, or William spoke of some way that it should be left to her, and Peter Bradstreet seemed to feel a little doubtful about it, and Mr. Bradstreet said it was safe, there never would be any trouble or danger; that she was safely provided for, as safe as could be at all."

By the Court:

"Q. How much did you say was agreed upon for her? A. Four dollars a week, her regular income at first.

"Q. What about the eighteen dollars? A. That seemed to be a special provision made for her."

Direct:

"Q. After this, did you have any talk yourself with Peter about William? A. No. I also never had any talk with William Bradstreet about it.

"Q. And after Peter's death, did you have any communication of any kind with the plaintiff, Mr. Grant, in regard to the matter? A. No, sir.

"Q. How long after his death, before you

spoke of it to anybody? A. The first of November I spoke of it first.

"Q. When in November? A. It was the first week in November. I could not state the date. It was in 1889, about six weeks after he died.

"Q. Now, do you know what the relations were existing between Peter Bradstreet and William Grant, or did you know, during the life of Peter Bradstreet? (Objected to, and admitted.) A. I did, in a measure, know."

To Mr. Baker: "William Grant was not at the house at any time when I was there.

"Q. State from whom your information came in regard to their relations? A. Mr. Peter Grant." (Peter Bradstreet?)

We quote also from the cross-examination of Miss Fairbanks:

"Q. Then what did you hear next? I heard him move a stand out, and rattle paper on the stand, and sit down and get up.

"Q. Where was this stand kept that you speak of? A. Right next to the chair. From the hall door to the door of my room was a commode and the stand and a chair.

"Q. That would be along the north wall of the sick room? A. Yes, sir. I heard him move the stand from there out towards the center of the room.

"Q. You could distinguish the direction in which it was moved by your mere sense of hearing? A. No, I could not tell just the direction, but it was moved out.

"Q. How much of a stand was that? A. Two feet wide and three feet long. It was just a light stand.

"Q. Now, after you heard the stand moved out, as you say, towards the center of the room, you heard the rattling of paper did you? A. Yes, sir.

"Q. What sort of sound of paper, newspaper or writing paper, or what? A. It was writing paper that is always on the stand there.

"Q. Ordinary note paper in size, or what kind of paper? A. I could not say what kind of paper. I don't remember. I heard the paper being rattled.

"Q. And that was just before you heard the stand moved was it? A. Yes, sir.

"Q. Was there pen and ink there in the room to do this writing with which you speak of? A. I don't think there was.

"Q. You were not requested to bring any, and did not bring any? A. No, sir; not at that time; not while William Bradstreet was there.

"Q. Then did you hear the sound of writing after you heard the paper rattle and the stand moved out? A. I did after a while, but not directly after.

"Q. How loud a noise was this sound of writing that you heard, quite distinct and loud? A. No, loud enough so I could hear it. I heard it during his interview with him.

"Q. Across your room and through the passageway and across his room you heard readily the sound of writing? A. Yes, sir.

"Q. Was it writing with a pen or pencil that you heard? A. I don't think it was with a pen and ink.

"Q. You could distinguish at that time, and noted it, that this sound of writing you heard was pencil writing? A. No, it was not from the sound that I judge from.

"Q. It did not make a sound as of pen and ink you say? A. I did not judge from the sound that I heard.

"Q. I did not ask you that, but simply whether it did make the sound of pen and ink writing? A. I don't remember about that. I don't remember what I judged from.

"Q. But you heard the sound of the writing? A. Yes, sir.

"Q. And that was distinct? A. Yes, sir.

"Q. And you concluded it was lead-pencil writing? A. I didn't think anything about it at the time, whether lead pencil or what it was.

"Q. If you didn't think anything of it at the time, when did it afterwards become important for you to remember? A. In thinking it over, I judged it was lead pencil, because—

"Q. I don't ask you your reasons, but simply when it first came into your mind to distinguish between the sound of pen and pencil in writing in that room. How long after was it? A. I don't remember; some time after. I had occasion to think of it, and from certain reasons I judged it was a pencil.

"Q. How long a time did you hear the sound of this writing of pencil across those two rooms and passageway? A. At different times during the time he was there.

"Q. And was this sound of lead pencil writing usually followed by the rattling of paper? A. Yes, sir.

"Q. And those different noises, the man sitting down and writing with a lead pencil, you distinguished while you were lying on the bed across the two rooms and passageway, did you? A. Yes, sir. * * *

"Q. Did you hear writing done during the conversation as to the Grants, or either of them? A. I could not say that I remember any special time that I heard it, but I heard it after that several times.

"Q. Either during or immediately after the conversation that you thought you heard with reference to William Grant, the plaintiff here, did you hear this sound of writing and the rattling of paper? A. I presume I did. I could not say for certain. But I heard it directly after that. I heard the writing all the time, or occasionally during the interview.

"Q. So that the sounds of writing ran right along with the conversation? A. Oh, no. The writing was at different times in the conversation."

It certainly gives weight to her testimony that Miss Fairbanks, in the foregoing sketch of important events, shows her possession of a strong intelligence, and it adds still more weight to her statement that her character for integrity cannot reasonably be questioned. Upon the most careful scrutiny of all the evi-

dence, no motive is seen that would be likely to induce her to suppress or pervert the truth. She stood virtually in the attitude of a stranger to all the parties interested in her testimony. The most that can fairly be urged against the literal truthfulness of her narrative is that in her description of the movements in the sick room she possibly may have been unconsciously led into some exaggeration of certain of the less important particulars, influenced as she naturally would be by her own inferences as to the purposes of such a meeting.

And still we should be averse to accepting her testimony, or that of any other single witness, upon which to establish such an important result as the complainant claims, unless the testimony of the single witness be supported by a considerable amount of direct or circumstantial corroboration. Such a heavy structure may not be so safely sustained by a single column, however sound its material may be, as it would be with the aid of other, even much less substantial, supports. And especially should this caution be adhered to in the present case in view of the positive denial of the complainant's contention by the principal respondent, the only other living witness who was present on the occasion described by Miss Fairbanks. Happily, however, the present case discloses important evidence in corroboration of the story of the principal witness for the complainant.

William G. Ellis, a second cousin of the Bradstreet brothers, and also of the complainant, testifies that Peter Bradstreet, just 11 days before his death,—and that would be just a week before the interview testified to by Miss Fairbanks,—told him at his bedside that he should tell his brother William to look out for William Grant, Peter Grant, and Eliza Ferguson. Ellis further testifies that the relations between Peter Bradstreet and William Grant (complainant) were very friendly, and that he had written during the last few years of Peter's lifetime many letters from Peter to him. That Ellis correctly reports what Peter said to him is not questioned, but it is contended by the defense that the evidence is not admissible. We are confident that the evidence was not only admissible, but that it has great probative force as clearly indicating the disposition and intention of Peter. It prevents the defense from setting up any argument of improbability. It would ordinarily take much less evidence to prove that an act has been done by a person if such person has previously expressed his intention and desire to do the act. A man is very likely to do any reasonable thing which his heart strongly inclines him to do, and especially if the performance of the act imposes no unwilling burden or responsibility upon himself. These propositions are very strong in the present case, because the circumstances are exceedingly favorable for their application. There seems to be an unnaturalness in a gift from Peter

Bradstreet to Peter Grant and none to William Grant, the one being as needy and deserv- ing as the other, and William being with the donor evidently his favorite of the two.

Other corroboration of the testimony of Miss Fairbanks will be noticed when we come to an examination of certain papers introduced by the defendants as a part of their case.

The complainant invokes in his behalf the favorable verdict of the jury, and, inasmuch as the question submitted to that tribunal was not in its nature difficult or involved, but consisted of the simple proposition whether the witness for the complainant heard, as she said she did, a direction from the one brother to the other to make the alleged pecuniary provision for the complainant, we think that the conclusion arrived at by the jury on that question should have great weight at our hands. And of still more consequence is the verdict to our minds, because it has been virtually approved by a decree in affirmance of it by the presiding judge.

We notice on the record that the counsel consented that the decree filed by the court should be regarded as merely formal, a proceeding which, if full effect be given to it, deprives the sitting justice of any opinion at the hearing in the first instance, and, by statutory provision, of any vote at the appellate hearing. Still we cannot very easily free our minds of the conviction that the learned justice, who so generously allowed the case to pass by him without more than a formal assent to the verdict of the jury, never would have filed such a decree in such a case if he thought it to be wrong upon the law and evidence.

William W. Bradstreet, the principal respondent, testifies that he used no light stand in his interview with Peter, and no writing materials beyond two bits of paper, writing upon them with a pencil there, and immediately afterwards partially with pen and ink; and that he sat at the time by Peter's bedside, making just as little conversation with him as they could get along with. And he produces from his possession, in confirmation of his statement, two small papers, which read as follows:

Defendants' Exhibit 2.

"Sept. 11-1889

Peter wants Ben M. Bradstreet to have \$5000.00 right out

Eliza to have an income of \$4 to 18 per week as she may need for her support and comfort, commence 1st week Decr.

P. Grant say \$5 to 10 per week

Wm Peacock \$100.00 right out

W. G. Ellis \$10.000

P. Grant 500 per year & if necessary up to \$1000

"W. Lewis has \$5.000 East Side R R bonds in his hands belonging to P. G. B.

"1100 Gardner N Bk stock in P G Bs name

belonging to the daughter of Uncle Chas Bradstreet cannot be transferred to him without the consent of his daughters

"Bills of sale of vessels from Geo. O. Morrell to P. G. B. not signed

"Sept. 13-1889

"Peter told me this morning that whenever Jos or Fred had approached him in regard to the Roach river land he always avoided saying anything that might affect my rights & also said that he had no reason to change his opinion which he had namely that Father furnished his part of the money for his interest in the land W. W. B."

(Part italic is in pencil, other in ink.)

Defendants' Exhibit 3.

"1100 Gardin Bk Stock in P G. B name belongs to uncle Chas daughters cannot be transferred to uncle Chas with the consent of his daughters

P Grant 500 per year more up to 1000

1st week in Decr.

\$5000. East side R. R. bonds in W. Lewis hands

Eliza 4 up to 18 per week 1st week in Dec W. G. Ellis 10

1, oz sub Nitrate of Bismuth" (a)

(a) All in pencil except last item.

Defendants' Exhibit 3 is made on an envelope directed to "Mr. W. W. Bradstreet Gardiner, Maine."

Printed on envelope: "Return to Brewster Cobb & Estabrook, Boston, Mass., if not delivered within 5 days."

Post mark, "Boston, Mass., 1889."

One of these papers, as before indicated, is a letter envelope which had been previously used as such, and the other, of about the same size is evidently a leaf from a small pocket memorandum book. The two pieces have the appearance of having been used together, the items commencing upon one and being continued on the other. Mr. Bradstreet's memory had become very confused and unreliable at the time of the trial, and he seemed unwilling or unable to state any details or particulars without being guided by the papers above transcribed. Still he says he could at any time have told the names of those who were to be the recipients of Peter's bounty, and the amounts they were to have.

Each side in the controversy claims favorable inferences to itself from these papers. They are the only written memoranda produced, and even these, so far as in ink, were not written at the bedside of the sick man but at some other place soon afterwards. The indications on their face that William Bradstreet had not a methodical memory, and that he did not confidently rely on such memory as he had.

Bearing in mind that Miss Fairbanks testified before these papers were produced, and at a time when she had not known or heard of them, it will be noticed how completely in some respects and partially in other respects her testimony is sustained by them; the principal

and important difference between the papers and her testimony being that the former nowhere thereon contains the name of William Grant. She understood that Peter Grant was to have \$500 per year, while Bradstreet gets it upon the papers that he was to have that sum, and up to \$1,000 if necessary. She says Eliza was to have \$4 per week, and \$18 per week besides, if she needed it. He gets it \$4 up to \$18 a week, according to her necessities; not a strange difference of understanding that matter.

In other particulars her statements are in closer accord with the items appearing on the manuscripts, and sometimes substantially, if not exactly, coincident with them. She says Peter was anxious that there should be no failure in the provision for Eliza, and that he several times repeated his wishes in regard to it. Does not William, perhaps unconsciously to himself, transcribe the same idea in his own words when he adds to the gift to Eliza, the words, "for her support and comfort"? The witness says there was considerable talk over the question of creating trusts for the security of the gifts to be made, and, while the word "trust" does not appear on these papers, it is implied by them; and William subsequently created trusts of the kind that was talked about. She says Eliza was to have an income, payable quarterly, commencing first week in December, and the papers disclose as much in a very brief way, and the trusts were created by William accordingly. She says that Ellis was to be immediately summoned by telegraph, and it appears that he was sent for, and that he came; also that he was to be the recipient of \$10,000 of Peter's bounty; and these papers as well as other evidence prove that to have been true.

It is urged against the consistency of Miss Fairbanks' testimony that, while these memoranda do show that other subjects besides those named were talked over in the interview between the brothers, she does not recollect any of them. But she says that other matters were talked about, and that she does not remember them, for the reason that they were of no interest to her. She did not then personally know William Grant, and only knew of him through the regard manifested by Peter Bradstreet for him in the frequent conversations with her about the family. There is no doubt whatever in our minds that she heard much of a conversation or of conversations between Peter and William concerning the distribution of Peter's property. She told the story of it to different reputable persons soon after Peter's death, when she had neither seen the complainant nor received any communication from him, he then, as now, residing in a distant state.

The question finally for our determination seems to be whether Miss Fairbanks or William Bradstreet makes the mistake as to a direction by Peter Bradstreet for the payment of an annuity to the complainant, William

S. Grant. Hers would be a mistake of commission,—an imaginary recollection; his, one of omission. She is in no way interested as a witness. He is deeply interested as a witness and party. No class of men know better than judges how much interest may unconsciously warp an honest mind. It would not be at all surprising if the respondent, who relied so much on written notes to guide him, and who made such brief ones for his purposes in these matters, through forgetfulness and mistake honestly omitted to take down the name of William Grant when it should have been upon his memorandum. It will be noticed that the name of "P. Grant" appears three times on the papers produced by Mr. Bradstreet and twice on one of them. May it not be that the letter "P" was at least once written when the letter "W" was intended?

We are not unmindful of the frequent cautions which have been expressed by courts in relation to the weight to be given to the evidence of verbal declarations. But in the present instance we do not see that the caution is applicable. The defense does not take the position that the conversation was heard, but misunderstood, but that such a conversation was not heard. Had the respondents taken the position, and it were supported by evidence, that, although William Grant's necessities were discussed, and the conclusion was against an allowance to him, or that at first an allowance was determined upon and afterwards retracted, or, if any explanation were given why he was named by Peter as an object of his bounty and his name should be omitted from the final list, we should have been strongly inclined to accept any such explanation as not inconsistent with the account of the interview given by Miss Fairbanks. But the proposition of the defense, and really also the substance of William Bradstreet's testimony, was to the effect that the name of William Grant was not even mentioned by Peter in the presence of his brother William in any interview shortly prior to Peter's death. Upon that issue we feel clear that the contention of the defendants cannot be sustained.

Among other matters in evidence for the defense, of no material consequence on the present issue, is the testimony of Joseph E. Bradstreet to the effect that in a conversation with Miss Fairbanks she said she may have got names mixed, and she would not swear that she heard William Grant's name mentioned in the interview testified to by her. This impresses us as a reckless and unreliable statement, designed by the witness for purposes of his own. Miss Fairbanks indignantly denies it, and explains what she did say. Mr. Cornish, of counsel for the respondents, heard the conversation testified to, and could have given his recollection of it, but saw fit not to do so. It does not appear that she made any doubtful or equivocal statement to any other person, even to the wife of Joseph E. Bradstreet, to whom she first told her story.

The complainant offered himself as a witness, and upon the objection of the defense, whether correctly or not, was excluded from testifying.

Although we have hesitated for some time to announce our conclusion in this case, for fear of some possible error on our part, and because of the high degree of proof required in such a case, still our constantly increasing belief that the verdict of the jury was a just one, and authorized by the proof, requires us to sustain the bill. No other result would be satisfactory.

Decree below affirmed, with costs.

RING et al. v. WALKER et al.

(Supreme Judicial Court of Maine. May 10, 1895.)

DEED—EASEMENTS—EXCEPTIONS AND RESERVATIONS—LOG SLUICE—TRESPASS.

1. An easement that is strictly appurtenant to other land of the grantor is incapable of existence separate and apart from the particular land to which it is annexed, there being nothing for it to rest upon.

2. But an easement that is not appurtenant to other land, such as may be held or conveyed independently by the owner of it, and without reference to other land of the grantor, may be regarded as a right or interest capable of being transmitted by deed.

3. The fact that the language of an exception or reservation in a deed contains no words of inheritance, such as "heirs," is not necessarily the criterion by which to determine whether the rights thus excepted or reserved are for the life of the grantor only.

4. The distinction between an "exception" and a "reservation" is frequently obscure and uncertain, and the two expressions have to a great extent been indiscriminately employed.

5. Whether a particular provision is intended to operate as an exception or reservation is to be determined by the character rather than by the particular words used.

6. A permanent easement, which may be construed as an "exception" from the thing granted, needs no words of inheritance.

7. The following language appeared in deeds from a grantor to his grantees, viz.: "Reserving, however, the right of erecting a log sluice and flume between my mill and the mills of said grantees, and of planking against their said mill to form one side of said log sluice and flume." "Also excepting and reserving the right of running logs through the premises from the river, and of erecting and maintaining a log sluice from the mill pond, parallel and contiguous to the said granted mill and the said Treat's Mill, about 5 feet in width, on the east side of said granted mill." *Held*, that this language, taken in connection with the facts and circumstances surrounding the case, constituted an exception rather than a reservation; that it was not a mere personal right, or easement in gross, but an interest retained in the grantor which he could legally convey, and which was good without words of inheritance being mentioned in the exception. It was a right inheritable and transferable, and not one limited to a lifetime.

8. The same rules of construction apply to a reservation or exception in a deed as to an express grant.

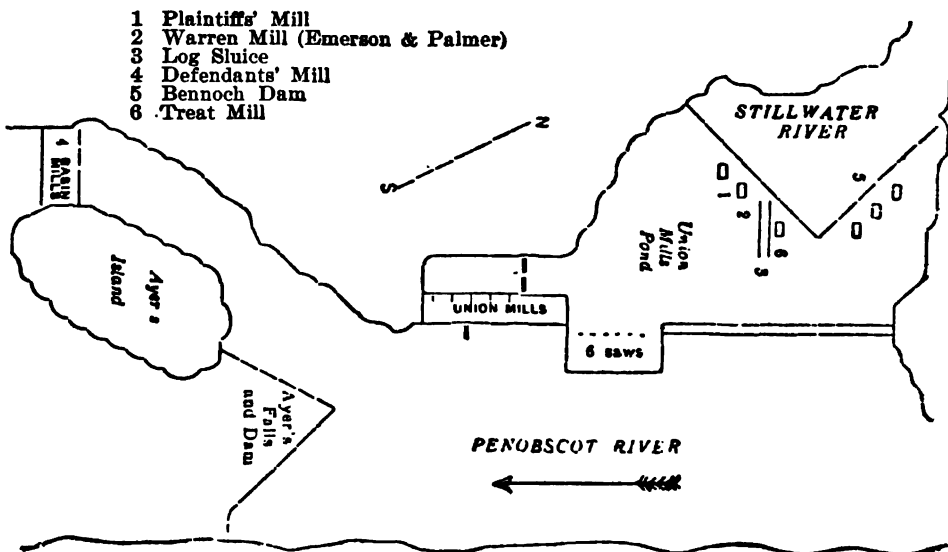
9. And a grant of a principal thing carries with it everything necessary for the beneficial enjoyment of that which was granted.

10. In the case at bar, the right reserved was to erect and maintain a sluice 5 feet wide, and to plank onto the side of one of the mills to form one side of the sluice. When the mills were burnt, it was found "necessary" to lay a foundation 10 feet wider than the original sluice in order to support a sluice of the width mentioned in the exceptions in the deeds. *Held*, that in doing this the defendants could not be held in trespass, as they did no more than was reasonably necessary for the enjoyment of their rights.

(Official.)

Action of trespass by Andrew G. Ring and another against James P. Walker and another. Heard on agreed statement. Judgment for defendants.

Following is the plat used on the trial:



C. A. Bailey, for plaintiffs. F. A. Wilson and C. F. Woodard, for defendants.

FOSTER, J. This is an action of trespass, brought to determine the legal rights of the parties in relation to a log sluice through what is called the "Bennoch Dam," on the Stillwater river at Orono, and the sluicing of logs through the same.

The plaintiffs are the owners of all the mills and mill privileges on that dam on the west side of the river. The defendants are the owners of "Basin Mills," so-called, on the Penobscot river, about a mile below the junction of the Stillwater with the main Penobscot river.

The log sluice is through and over the plaintiffs' premises, and is maintained and used by the defendants to get their logs, coming down the Stillwater river, through the plaintiffs' premises, and on towards their own mills below, about one mile from the Bennoch dam.

The plaintiffs deny the right of defendants to incumber their property with this sluice, or to drive logs through their premises.

The defendants claim this right, not by reason of any public right or use of the stream, but by virtue of a right vested in them under certain deeds of conveyance whereby this right has been reserved to them and those under whom they claim.

In order to obtain a proper understanding of the case, and as bearing upon the legal rights of the parties, it becomes necessary to state, somewhat at length, the following facts:

In 1829, William Emerson was the owner of two mill sites on the Bennoch dam, and also another mill site or privilege a little lower down the Stillwater river, and extending to its junction with the Penobscot river. On October 20, 1829, he conveyed to Nathaniel Treat and others one of these mill sites, and in his deed, after a description of the premises, is the following: "Reserving, however, the right of erecting a log sluice and flume between my mill and the mills of said grantees, and of planking against their said mill to form one side of said log sluice and flume."

On November 1, 1830, he conveyed to John Warren and another the other mill site on this dam, and in his deed conveying the same was the following: "Also excepting and reserving the right of running logs through the premises from the river, and of erecting and maintaining a log sluice from the mill pond, parallel and contiguous to the said granted mill and the said Treat's Mill, about 5 feet in width on the east side of said granted mill."

On June 15, 1833, the said Emerson conveyed to R. M. N. Smyth the mill privilege lying lower down the Stillwater, and in his deed conveying this privilege appears the following: "Also hereby quitclaiming all my right of running logs through the premises conveyed to Warren from the river above, and of erecting and maintaining a log sluice from the mill pond about 5 feet in width on the east side of said Warren's Mills, said

sluice to be parallel with and contiguous to said Warren's Mills and Treat's Mills."

In the year 1834, said Smyth built a log sluice through the Bennoch dam between the Warren and Treat Mills, according to the grant of the right in Emerson's deed to him. This sluice was wholly within the bounds of the premises conveyed by Emerson to Warren and another, except that the easterly side of it was formed by planking against the Treat Mill. This sluice was used by the defendants, and those under whom they claim, by putting logs through it and running them to the Basin Mills from 1834 to the present time.

While the two mills stood, the log sluice was between them, and was planked up against each, the space being about 5 feet in width. In 1887, after these mills were burned and could no longer support the sluice, the defendants, against the protest of the plaintiffs, put in a log foundation about 15 feet wide, and extending 5 feet each side beyond the original sluice onto land which had heretofore been covered by the mills, and this structure has been continued by them ever since with the sluice resting upon it. The interior width of the sluice is now about the same as when the mills were standing, or about 5 feet. The rest of the 15 feet now occupied by the sluice is necessary for the foundation to support the walls of the sluice since the mills or their foundation were destroyed.

The trespass complained of is in relation to the 5 feet upon each side of the original sluice, in building and maintaining the foundation which is necessary to support the sluice.

The question involved is whether or not the defendants have the right to use and maintain this sluice.

The plaintiffs have the same comprehensive ownership that Emerson had before he parted with any of his mills or mill privileges, excepting such rights as the defendants may have.

The Basin Mills were never owned by Emerson. They were erected by said Smyth on a lot about a mile below the Bennoch dam. There is nothing in the case to show in what year these mills were erected, although it must have been long after Smyth's purchase from Emerson of the other privilege, and long after the sluice was built.

In 1845, Courtlandt Palmer, of New York, became the owner of the Basin Mills property, and he, and his brother after him, continued to own the same, with Gideon Mayo, of Orono, as resident agent, until sold to Samuel Veazie, April 27, 1863.

August 1, 1870, the heirs of Veazie conveyed the Basin Mills property to James Walker, the defendants' ancestor, under whom they claim.

On January 22, 1852, the title to the Warren Mill, subject to the exceptions and reservations in Emerson's deed of November 1, 1830, came, through sundry conveyances, to said Gideon Mayo, who was at that time the resident agent of the Basin Mills property and of

its owners. At about the same time Mayo became the owner of the other mill privilege and water rights lying between Bennoch dam and the Basin Mills, and through which the sluice extended for the purpose of conveying logs through the Bennoch dam to Basin Mills.

On May 1, 1860, Mayo conveyed the Warren Mill and privilege to one B. B. Farnsworth and another, closing the description as follows: "Being the same premises conveyed by William Emerson to James Huse and Nathaniel and John Warren, November 1, 1830, * * * together with all the other privileges and appurtenances of said mill and water power conveyed by said Emerson's deed, and subject to all the reservations and conditions thereof," but "reserving, however, the rights as now had and enjoyed of sluicing logs through the pond to the Basin Mills to said Mayo or his assigns."

On June 9, 1862, Mayo conveyed to Palmer, who then owned the Basin Mills, the following: "Rights of flowage of dam on Ayer's Falls, near the mouth of Stillwater river; also the log sluice and all rights, privileges, and appurtenances connected with and belonging to the same, commencing at the 'Bennoch Dam,' so called, and running thence through the Union Mills' pond into the basin."

In Palmer's deed to Veazle of the Basin Mills property those same rights were transferred to the said Veazle, and by his heirs to Walker, defendants' ancestor, in which deed appears this clause: "Ninth. Also the log sluice commencing at the 'Bennoch Dam,' so called, and running thence through the Union Mills' pond into the basin, with all the rights and privileges thereof, and the right to maintain the same."

Now the contention of the plaintiffs is that the reservations or exceptions which were made in and by the deeds of William Emerson to Warren and another, and to Nathaniel Treat and others, in and of themselves, conferred no right upon anybody to build and maintain a sluice at the place designated, for the purpose of putting logs through the same and thence to the Basin Mills; that the rights secured by these reservations or exceptions, being without words of inheritance, should be held as an easement in gross, limited to the lifetime of the grantor, or, at most, as an easement appurtenant to the other mill privilege owned by Emerson at the time of making these conveyances, lower down on the Stillwater, and subsequently conveyed by him to said Smyth.

If these exceptions and reservations are to be considered as strictly appurtenant to the lower mill privilege, they would, of themselves, confer no right to the defendants or their predecessor in title to put logs through this sluice to the Basin Mills. For an easement that is appurtenant is incapable of existence, separate and apart from the particular messuage or land to which it is annexed, there being nothing for it to rest upon. But if these rights and privileges were such as Emerson could convey independently of his lower mill-site privilege then owned by him, then it follows that they

were conveyed by him to Smyth, and through Smyth, as well as Mayo, and have come to these defendants.

It will not be necessary to consider whether these rights, under other and different circumstances, might or might not be held to be appurtenant to this other mill site or privilege, inasmuch as we think they were such as Emerson had a right to convey, independently of such privilege, either as an exception of a part of the thing granted, or an interest in land for profit, commonly termed in the books, "profit à prendre in alieno solo," as in *Engel v. Ayer*, 85 Me. 448, 27 Atl. 352.

The fact that the language of the reservations and exceptions contains no words of inheritance, such as "heirs," is not necessarily the criterion by which to determine whether these rights were for the life of the grantor only. It is a well-settled rule of the common law, it is true, that, to create an estate of inheritance in land by deed to an individual, it is necessary, as a general rule, to use the word "heirs," and that no other words will supply the place of that. *Curtis v. Gardner*, 13 Metc. (Mass.) 459. But this rule is not applicable, and has never been properly applied, to an "exception," in the correct sense of the term, to an easement appurtenant to other land of the grantor, or to a right of profit-in land. *Engel v. Ayer*, supra, and cases cited. The distinction between an "exception" and a "reservation" is frequently obscure and uncertain, and has not always been observed, and the two expressions have to a great extent been indiscriminately employed. Moreover, a reservation is often construed as an exception, in order that the obvious intention of the parties may be subserved. *Winthrop v. Fairbanks* 41 Me. 307; *Smith v. Ladd*, Id. 316; *Bower v. Conner*, 6 Cush. 132. Whether a particular provision is intended to operate as an exception or reservation is to be determined by the character, rather than by the particular words used. *Perkins v. Stockwell*, 131 Mass. 529, 530.

As the technical words of inheritance were not used in the reservations and exception mentioned in the deeds from Emerson to Warren and Mayo, it by no means follows that the interest or easement created thereby did not extend beyond the lifetime of the grantors. If, in construing the reservations in question we lay out of view the technical rule, and take into consideration the intention of the parties as disclosed from the facts and circumstance attending the transactions, as well as the objects to be accomplished, the language discloses a clear and unmistakable intention to except a perpetual right, inheritable and transferable, and not an easement in gross, or one limited to a lifetime.

The right to continue the use of the sluice was an almost absolute necessity, not only to the grantors, but to all subsequent owners of the premises. These rights were a part of the grantor's full dominion over the premises conveyed, and not, in effect, to be conferred on them by the grantees, as in *Ashcroft v. Rail*

road Co., 126 Mass. 198. They were something which these reservations in effect excepted from the operation of the grant. In such cases, the rule is well settled that a permanent easement may be made without words of inheritance. *Engel v. Ayer*, supra.

In *Kennedy v. Scovil*, 12 Conn. 326, the deed contained these words, "Always provided that this deed is given on condition that the grantors are to have and retain the privilege of conveying water from said dam similar to the one now in use," etc., without words of inheritance or limitation. The court said: "What did the parties intend by the reservation in question? And for the purpose of ascertaining the intention, it is proper to take into consideration the condition of the property, and the circumstances of the parties in relation thereto. * * * The objection is that the use is reserved to them without naming heirs and assigns. * * * It is true that the right is reserved to them without words of inheritance, and without naming their assigns. But it becomes material to inquire for what purpose the reservation was made."

The rule that the intention shall prevail over mere words is sustained by authority and good sense. In adopting and applying this rule, courts have frequently, in effect, treated such "reservations" as if they had been "exceptions," in the proper sense of the word. As before stated, the words "reserve" and "reserving," and "except" and "excepting," in deeds, are often used interchangeably, and it is oftentimes difficult to determine which was intended, except by a reference to the subject-matter and the surrounding circumstances. *Barnes v. Burt*, 38 Conn. 542. And this depends more upon the nature and effect of the provision itself than upon the words employed. *Gale v. Coburn*, 18 Pick. 397, 400. A way, or a right of way, reserved, has often been treated as if it had been "excepted" out of the grant, and on principle we see no reason why this should not be done in the present case, to effectuate the plainly manifested intent of the parties. *Winthrop v. Fairbanks*, supra; *Smith v. Ladd*, supra. In *Bowen v. Conner*, 6 Cush. 132, *Shaw, C. J.*, says: "Upon principle, it appears to us that this right, plainly intended to be secured to the plaintiffs, can be legally secured in the manner adopted in this deed, treating the right secured as an 'exception.'"

In *Winthrop v. Fairbanks*, supra, it was said "that, in giving constructions to instruments in writing, the intention of the parties is to be effectuated, and if a deed cannot effect the design of them in one mode known to the law, their purpose may be accomplished in another, provided no rule of law is violated. Hence, the distinction between an exception and a reservation is so obscure in many cases that it has not been observed; but that which in terms is a reservation in a deed is often construed to be a good exception, in order that the object designed to be secured may not be

lost." *Wood v. Boyd*, 145 Mass. 176, 179, 13 N. E. 476; *Stockwell v. Couillard*, 129 Mass. 231, 233.

Can there be any doubt that, in the light of the facts stated, it was the intention of Emerson, and so understood by his grantees, to retain a permanent easement or interest in the premises granted, as distinguished from a mere easement in gross, temporary and personal? His subsequent conveyance of this easement to Smyth is indicative of the intention with which it was created. Moreover, in his deed to Warren and another, the language used is, not only "excepting and reserving" the right, but of "erecting and maintaining" the sluice.

Whatever may be said as to the intention of Emerson in reference to excepting these rights from his grant, with still greater force may it be applied to the conveyance from Mayo, wherein he conveys to Farnsworth "subject to all the reservations and conditions" named in Emerson's deed, and "reserving, however, the right, as now had and enjoyed, of sluicing logs through the pond to the Basin Mills to said Mayo or his assigns."

The right as then had and enjoyed is the same which the defendants and their predecessors have exercised. This right was not only to Mayo, but to his assigns. And here, in ascertaining the intention of the parties, the circumstances of the case are to be taken into consideration, the use made of the property, the condition as well as the situation of the Basin Mills property, and its dependence upon this right to obtain a stock of logs.

With all these facts and circumstances considered, the "reservation" should be considered in the nature of an exception, retaining in the grantor something out of the thing granted which remained in him, a right inheritable and transferable, not a personal easement limited to a lifetime, nor one strictly appurtenant to other property of the grantor, and existing only in relation to it,—a right which was subsequently conveyed by him to the owners of the Basin Mills property by his deed to Palmer of June 9, 1862, wherein he conveyed the log sluice, and all rights, privileges, and appurtenances connected with and belonging to the same, commencing at the Bennoch dam and thence running through the Union Mills pond into the basin.

As a reservation, in the strict sense of the term, it would have died with the grantor; but the necessities of the Basin Mills property would still continue, notwithstanding his death. What reason, therefore, in view of that necessity, should the parties have had in making the existence of this easement dependent upon his life, and not upon the continuance of the necessity so long as that might last, and whoever might become the owner of the Basin Mills?

It might afford some light upon the intention of the parties were we to consider the use made of this sluice, not only by the prede-

cessors in title of the defendants, but of all parties affected by such use, and owning the property through which it ran.

From 1854 down to 1887, when the Warren and Treat Mills were destroyed by fire, this sluice was used in the same manner as it had been by the defendants' predecessors, without any question on the part of anybody.

As was remarked in *Smith v. Ladd*, supra, "the intention of the parties to the deeds containing the reservations mentioned is too manifest to be misunderstood." *Moulton v. Trafton*, 64 Me. 218.

The case finds that the mills which existed when the log sluice was built, and which supported it on each side, were destroyed by fire in 1887, and that the defendants have necessarily had to build a foundation about 10 feet wider than the original sluice, overlapping the space reserved for the old sluice 5 feet on either side, and this is the trespass complained of.

The justification which they present is that, in the original reservation or exceptions of Emerson, the right retained by him was to erect and maintain a sluice, and that it has become necessary, as the case shows, to take this amount of space, since the destruction of the mills, to "maintain" the sluice.

It is undoubtedly familiar law that the same rules of construction apply to a reservation or exception in a deed as to an express grant. *Blake v. Madigan*, 65 Me. 522, 529; *Ashcroft v. Railroad Co.*, 126 Mass. 193, 199.

Moreover, it is an established rule of construction that the grant of a principal thing shall carry with it everything necessary for the beneficial enjoyment of that which is granted. *Hammond v. Woodman*, 41 Me. 177; *Gray v. Power Co.*, 85 Me. 528, 530, 27 Atl. 455; *Butler v. Huse*, 63 Me. 447, 453. Thus, the grant of a "mill site" conveys, by implication, the water power, and the right to maintain a dam for the beneficial appropriation of the water. *Stackpole v. Curtis*, 32 Me. 383. So, where the use of a thing is granted, everything essential to that use is granted also, and there is an implied authority to do all that is necessary to secure the enjoyment of such easement. *Pomfret v. Riccroft*, Wms. Saund. 323, note 6; *Prescott v. Williams*, 5 Metc. (Mass.) 429; *Prescott v. White*, 21 Pick. 341; *Warren v. Blake*, 54 Me. 276, 286.

The case of *Prescott v. White*, supra, was where the owner of a mill to which there had been attached a raceway or artificial canal for conducting off the water, and without the free and unobstructed current of which the mill could not be worked, and such canal passed through the land of another, it was held that the owner of the mill had the right to enter upon the land through which the raceway passed, and to clear out the same, doing no unnecessary damage. The language of Shaw, C. J., in delivering the opinion of the court, is this: "When the use of a thing is granted, everything is granted by which it may be enjoyed. It follows, as a necessary

consequence, that the nonappearing grant carried with it to the grantee the right to do as necessary and proper acts to keep the raceway in a condition fit for the purposes for which it was intended. If it passes through the grantor's land, it carries an implied authority and license to enter upon the land to examine and clear the canal, in a reasonable and proper manner, and of what is reasonable the usual and customary mode is good evidence." As bearing upon this question, the following authorities may be cited: *Richardson v. Bigelow*, 15 Gray, 154, 157; *Baker v. Bessey*, 73 Me. 472, 478; *Prescott v. Williams*, 5 Metc. (Mass.) 429; *Hammond v. Woodman*, 41 Me. 177, 203.

It is a rule of law that the one who enjoys the benefit of an easement in the premises of another must be at the expense of maintaining it. Easements impose no obligation, as a general rule, upon those whose lands are thus placed in servitude, to do anything. *Taylor v. Whitehead*, 2 Doug. 745; *Richardson v. Bigelow*, 15 Gray, 154.

In the present case, the destruction of the mills which formed one of the chief supports of the sluice was in no way attributable to the defendants or their predecessors in title. Nor is there any intimation, from the facts disclosed, that, in building the present foundation, anything more was done than was reasonably necessary to support the sluice, which is of the same interior dimensions as the one mentioned in the deeds to which we have referred, or that it was done in an unreasonable manner (*Richardson v. Bigelow*, 15 Gray, 154, 157); but, on the contrary, the case shows that the extra five feet in width upon each side were "necessary for the foundation to support the walls of the sluice since the mill or their foundations were destroyed." No illegal invasion upon the property of the plaintiffs is shown.

Judgment for the defendants.

STATE v. BECKER.

(Court of Oyer and Terminer of Delaware.
Dec. 2, 1885.)

HOMICIDE—MALICE—MANSLAUGHTER—DEFENSE OF PROPERTY—ACCIDENTAL KILLING.

1. A killing is malicious if defendant's act was reckless, wicked, or depraved, although there may have been no previous hatred, and depravity may not have been defendant's general characteristic.

2. Provocation, to reduce a killing to manslaughter, must bear a reasonable proportion to the act of killing, and there must not have been sufficient time after the provocation to allow the passion to cool and reason to resume her sway.

3. To justify a killing in defense of the possession of land, the trespass or intrusion must be into a dwelling house, and not a mere entry upon land, and every other means must have failed to expel the intruder.

4. To justify an acquittal of one charged with murder on the ground of death by accident, the act resulting in death must have been

awful in itself, and done with reasonable care and due regard for the lives and persons of others.

5. A killing with a deadly weapon raises the legal presumption of malice, and casts upon the accused the burden of showing that it was accidental or excusable.

Indictment against one Becker for murder. Verdict of manslaughter.

John Biggs, Atty. Gen., for the State. Levi L. Bird and Andrew E. Sanborn, for defendant.

COMEGYS, C. J. (charging jury). The indictment in this case charges the prisoner, Becker, with the crime of murder of the first degree. As there are in law other kinds of homicide, it is proper that I should inform you what they are, and also that, though you should not be able from the testimony to convict the prisoner of murder of the first degree, should the evidence be sufficient to convict him of murder of the second degree, you may find him guilty of such degree; and if it be not sufficient for that, then, if the killing was wrongful, being neither excusable, justifiable, nor accidental, you may find him guilty of manslaughter simply. But it is also my duty to say to you, and I do it now in the outset, that it is not your province to decide, of your own mere pleasure, whether you will, upon an indictment for murder of the first degree, and proof of a felonious homicide, convict of one grade of that crime or another, but it is your duty, upon such an indictment, to determine the grade of crime by the law and the evidence only. Therefore, where it is said that the jury, in trying an indictment for murder of the first degree, may convict of murder of the second degree, or of manslaughter, nothing more is meant than that the jury, if they find the specific charge not supported, may award to the offense committed a verdict of murder of the second degree, or of manslaughter, respectively, as the evidence shall determine the grade. The jury's right should not be exercised capriciously, but be warranted by the proof submitted to them. Of course, if there be not evidence before the jury justifying any adverse verdict, they may and should acquit altogether. There is a very erroneous idea prevailing that jurors can do as they please in a capital case. They have the mere power of course to do so, and so far the notion is correct; but they have no right to do so, for that would be to make the oath they take to render a true verdict according to the evidence a mere form, which it by no means is, but a very solemn obligation, binding in law, a breach of which the conscience can never condone. However unpleasant the duty devolving upon a jury by the qualification administered to them by the court's order, it may not be avoided or evaded; and where the honest rendition of it involves the loss of his life by one accused of a capital crime, those who give it have but said, after all, by their ver-

dict of guilty, that the charge has been proven. The community where the law exists has provided the punishment for crimes; no jury fixes it.

Murder is, in brief, the killing of one person by another, with malice aforethought, or preconceived. The term "malice" does not mean simply revengefulness, or hatred, but a depraved state of the heart; wickedness. This depravity may not be a characteristic of the slayer, who may, in fact, be in general a man of good, and not bad, heart; but if act or conduct of his, to the injury of another, is a wicked act, or act denoting depravity at the time, it is a malicious act in law. If a man should recklessly fire off a gun in a crowded place, and some one, though a perfect stranger to him, should be killed thereby, the act would be a wicked act in fact and in law, and therefore malicious. Where the person who slays another does it deliberately,—that is, with a design to kill him, and without the existence of any circumstances which in law are a justification or excuse,—he is guilty of murder of the first degree. He is said to have acted with express malice. Where one lies in wait for another, and kills him; where there is a grudge on his part towards his victim; where he deliberately prepares poison for him, which kills him; or where, in attacking him, he deliberately selects a deadly weapon,—all these things are the evidence of malice, and are said to be express, though not a word may ever have been uttered by the prisoner against him whom he slew. Every grade of homicide which does not descend to that of manslaughter is murder. That which has characteristics such as some I have pointed out, is murder of the first degree. But there are many malicious homicides which are not murder of the first degree. Such are murder of the second degree. This offense differs from the other in two respects: First, it is now punished differently; and, second, there is no express malice, but malice is implied in law. One of the instances of this crime is where a man recklessly shoots into a crowd, or rides or drives furiously into it, so that some person is killed; another is where a person is guilty of a deliberate cruel act likely to produce death, but without actual design to take life, and death follows; another is where one is engaged in committing or attempting to commit any felonious act whatever, and some one is killed by it. An example of the latter is where one shooting at poultry with intent to steal it, misses his aim, and kills a human being. Here he is guilty of murder of the second degree, because the larceny of the poultry would be a felony. Manslaughter is where, according to the general acceptance of the term, one kills another upon sudden provocation, in the heat of blood. This is not called a "malicious" homicide, because of the heat of blood which negatives the idea of premeditation, or general depravity of heart; but it is by law felonious, because neither

justifiable nor excusable. A familiar example of this offense is where two men suddenly fall out and fight, and one in a transport of passion kills the other. The law, having regard to the infirmities of men's tempers, adjudges the crime to be manslaughter only. So, where provocation of a grievous kind is given by one man to another, calculated to arouse him, and which does then excite him to madness, dethroning for the moment his reason, so that he is incapable of controlling his passions or governing himself, killing by the person offended, under such circumstances, is manslaughter. But it is not every provocation that will reduce homicide from murder to manslaughter. It must bear some reasonable proportion to the act of killing. It is a serious provocation, unquestionably, to be publicly abused by false and offensive epithets or charges, or be stigmatized as having been guilty of a degrading crime; but the law will not allow the abused to strike the other for that, with his fist even, for no mere words whatever will justify an assault; nor will a threat, unless accompanied by evidence of a present purpose to carry it into execution. And, however great or enormous the provocation may be, if there be time for the passion to cool, and reason to resume her sway, the act of killing will be murder, and of the first degree, because done under the influence of a spirit of revenge, which is always express malice.

A common example of justifiable homicide is where the law requires of a man that he take the life of another,—as of a sheriff that he hang a condemned prisoner. Excusable homicide is either in defense of one's own person, or that of some member of his family, or in defense of his possession of real estate. Where it is in defense of one's own self it must appear that the slayer had no other means of protecting his own life. The law is very tender of human life, and will not allow a person assailed to slay his adversary, until he shall have resorted to all other means at hand to protect himself. And the protection must be to his life, or against some enormous bodily harm then threatening him; something impending, which, if not averted, will either kill him, or wound him grievously. Unless this state of things exist, the killing would be murder. The slayer must be in actual present danger of life or limb. It is not sufficient that he insist upon his trial that he was so according to his belief. He must have been so in fact, in the judgment of the jury, upon considering the proof of the surrounding facts. The doctrine that every man is to form his own judgment of when his life is in danger is not a sound one, as it would substitute the slayer's judgment in every case for that of the jury; but the true doctrine is that he shall submit his conduct to the test applied to that of all oth-

er reasonable men placed under similar circumstances. The facts must exist which show that the slayer had no other way to protect his life than by taking that of another, or he must be held guilty of crime.

With regard to homicide claimed to be excused on the ground of protection to one's possession of real estate, I have to say to you that the law is very much like that of defense of the person. Life is not to be taken until other means of expulsion have failed to rid the possessor of the intruder upon his possession. And it must be a trespass into one's dwelling house that will excuse homicide if the intruder cannot be otherwise expelled. A simple entry upon land is not to be treated as like that into a dwelling house, so as to justify the taking of life. A mere trespass on property will not justify a homicide.

Death by accident is where one is engaged in doing a lawful act, and unfortunately kills another. A familiar example is where a person is using a hatchet in a lawful manner, and it flies off the handle and kills another. This is pure accident, and not punishable. To justify a verdict of not guilty on the ground of accident, it must appear to the jury, from the proof before them, that the act done was the unfortunate result of a perfectly lawful act in itself, done with reasonable care, and regard for the lives and persons of others. If there be any negligence or want of proper care, the loss of life or injury to the person cannot be said to be purely accidental, but partly the consequence of the default of the individual killing the other, and therefore subjecting him to indictment for the casualty.

Another word. In case of indictment for murder the ingredient of malice (as I have defined it to you) is a necessary element of the crime, to be alleged in the indictment and shown to the jury; but whenever a homicide is committed with a deadly weapon, or instrument likely to produce death, the law adjudges that the act was a malicious, and therefore murderous, one, unless the accused can show that it was purely accidental, or excusable on the ground of self-defense or defense of one's habitation, or done in the heat and excitement of uncontrollable passion, not out of proportion to the provocation given, and which the slayer was powerless to resist.

Though not asked to do so, I say to the jury that no party charged with crime is to be convicted unless the jury are satisfied beyond a reasonable doubt that he is guilty. But the doubt must not be a vain or frivolous one, but such as grows out of the testimony in the case, and one that a reasonable mind, acting in the discharge of a high, legal, and conscientious duty, is constrained by the evidence to entertain.

Verdict, manslaughter.

STATE v. TALLEY.

(Court of Oyer and Terminer of Delaware.
Feb. 13, 1886.)

HOMICIDE—SELF-DEFENSE—DUTY TO RETREAT.

1. One attacked by an armed assailant cannot kill his adversary in self-defense without attempting to escape, unless the assault is of such a nature that it could not be escaped from without imminent peril of life or great bodily harm.

2. Where deceased was entitled to pass over defendant's lands because of an obstruction in the highway, and defendant armed himself to resist such passage, he cannot justify killing deceased in the difficulty that ensued, on the ground of self-defense.

Isaac S. Talley was indicted for murder. Acquitted.

John H. Paynter, Atty. Gen., and John Biggs, Dep. Atty. Gen., for the State. George Gray and Levi C. Bird, for defendant.

COMEGYS, C. J. (charging jury). Where there is a deliberate intention to do, unlawfully, any bodily harm to another, this is malice in fact,—express malice. "The evidence of such malice must arise from external circumstances discovering the inward intention; such as lying in wait, antecedent threats, former grudges, deliberate contrivances, and the like, which are various, according to variety of circumstances." Where such malice prompts the act of violence which results in the death of another, the slayer is said to have acted with express malice aforethought, and to be guilty of murder of the first degree. Every homicide, or killing by one man of another, which is done with a deadly weapon, or one likely to do great bodily harm, is in law presumed to be a malicious homicide, and is murder of the first or second degree, unless done under the influence of sudden and immediate passion, or heat of blood, or in the lawful defense by the slayer of himself, his family, or his habitation. There are homicides justified by law, as the hanging of a prisoner by a sheriff in the course of his duty, etc., but it is not necessary to speak further of such. Wherever homicide with a deadly weapon cannot be excused on the ground of self-defense, or justified by the defense of family or habitation, or shown to have been committed in heat of blood arising in a sudden and unexpected affray or from such provocation as an ordinary person is incapable of enduring, it is a malicious homicide, and murder of one or the other of the degrees thereof.

I have already stated to you what the law calls malice. It is a state or condition of the mind and heart most commonly shown by acts of revenge or of cruelty. This condition is innate wickedness. A man who has it is said to be bad-hearted, dangerous, revengeful. A good-hearted man is one without this state of the heart. You say of such a one as the latter, he doesn't bear malice. There's

the distinction between the two,—the one is malicious, in the sense of being revengeful or cruel; the other is not. This kind of malice is that which prompts him who has it to lie in wait for one who is the subject of his vindictiveness, to assail him with a deadly weapon; to prepare and lay poison for one, or give it to him in his food, etc. It is express malice aforethought,—a preconceived, predetermined purpose to kill another, or to do him some enormous bodily harm. Where the circumstances of the death disclose such purpose, then the conclusion cannot be resisted that the crime is murder of the first degree.

Murder of the second degree is where there is no actual intention to kill the party slain, and yet the act that did it was a deliberate, cruel one, or performed while the accused was committing or attempting to commit a felony in law. In these cases the homicide is a malicious one, for it shows that depravity of the heart which is maliciousness; but, in the absence of evidence of preconceived design to take the life destroyed, it is not by law murder of the first degree, but is murder of the second degree.

I have given you, along with the definition of murder, sufficient, I think, to enable you to distinguish between the different degrees of that crime, and also to understand that malice is wickedness,—the kind of wickedness that can compass or intend the death of another, and adopt the means to bring it about, which is express malice; or do some cruel or felonious act, from which death ensues, which is implied malice.

I will now speak of manslaughter, and the law of self-defense. Manslaughter is the unlawful killing of another without any malice whatever. The common description of the offense, or rather example of it, is where two men fight upon a sudden affray, and one kills the other with a deadly weapon, in the heat of blood, occasioned by the encounter. In such case, the law, taking account of the infirmity of human nature, treats the offense as of less grade than either of the degrees of murder. But it in no sense excuses the offender; he is still amenable to severe punishment by fine and imprisonment. But, if there be anything in the conduct of the slayer which shows that the killing was not from the passion excited by the conflict, but that such conflict was made the occasion or was sought for the purpose of enabling him to be revenged upon his opponent on account of some prior difficulty, then the offense would not be manslaughter, but murder, and that of the first degree. If there be a long-standing quarrel or grudge between two men, and they accidentally meet, and have a fresh quarrel, with which the old one has no connection, and one slay the other in the heat of the strife, it is but manslaughter; but, if the old grudge had anything to do with the quarrel, the homicide would be murder, and of

the first degree, because the old grudge was malice, which found expression in the slaughter. The stroke or shot connected itself with the grudge, and was malicious. It was part, at least, of the passion of rancor that caused the death, and that is enough. Again, where, by arrangement, two men meet to fight each other, and one is killed, the other is guilty of murder of the first degree, because the fight was premeditated; and, as both had gone to it prepared to use deadly weapons, it makes no difference who struck the first blow. Duels are of this class.

All homicides are by law presumed to be malicious where done with a deadly weapon; therefore, in case of a homicide, where the prisoner is shown to have used such a weapon in producing the death of the victim, his guilt of the crime of murder is complete unless he can show—and the duty to do it is at once cast upon him—that the killing was in the heat of blood in a mutual combat between his adversary and himself, or that he was obliged to slay him to protect himself from being slain or receiving great bodily harm, or to render the same kind of protection to some member of his family, or defend his habitation against violent and felonious invasion by the deceased. This he must do, although no evidence has been given of any express malice, such as hatred, grudge, or revenge. Where, however, there is such evidence of a previous quarrel between the parties, producing standing ill feeling,—a condition of hostility,—if there be proof of facts or circumstances to show that such ill feeling or hostility was an element of the contest, or was influential in promoting the slaying, the offense would be murder. The question in such case would seem to be, would the prisoner have killed his enemy if there had been no previous hostility between them? If the answer should be "No," then it was not heat of blood produced by the fight that caused the death, but the old grudge. The fight was made the occasion of gratifying previous ill will or hatred.

The law of defense is shown by a common example or illustration, thus: If one be suddenly attacked by another with a deadly weapon or other instrument likely to cause death or some great bodily harm, or he is so situated that he has no other means of escaping the fury of his adversary than by taking his life, he may take such life; in other words, he may save his own life or limb at the expense of the life of his assailant. This is the law of necessity,—the supreme right which all men have of self-protection, and which overrides all the law against taking life.

It has, doubtless, been seen that, before this paramount right can be lawfully exercised, it must be made appear that there were no other means of security. If there were, then the slayer would be guilty of crime. If he can retreat from his adversary, he is bound to do it, and he may not turn upon and kill

him until retreat will no longer be availing. A man is not to be allowed to kill another because that other is endeavoring to kill him, unless his life cannot be protected otherwise. He must endeavor, in the best manner the circumstances allow, to escape him before he can kill him. When one has retreated as far as he can, and effort to do more would endanger his life, he may then become the assailant in his turn, and may slay his enemy. If one endeavor to assail another with a club, or other like weapon, dangerous or deadly, the party attacked, if there be space about him to do so in, should get out of the way. This is very hard for a spirited man to do, but the law requires of him, before taking life, that he shall do so if he can; it taking no account of the difference between men in point of spirit or bravery or their sensitiveness to insult, but requiring of all alike that they shall not kill unless life is incapable of being protected or the body secured against great bodily harm in any other way. The law is very tender of human life, and will not allow that of an assailant even to be taken, except under such necessity as has been described. This law of self-defense supposes that the attack was unexpected by the slayer; for if, in case of combat, the slayer went into it voluntarily, expected to meet his opponent, and prepared himself beforehand with the means to contend with him, the conflict cannot be distinguished from that of a duel, where, if one party be killed, the other is guilty of murder. So much for the law of self-defense. If the law were otherwise, then revenge or resentment would take the place of self-defense, and homicidal crimes would be common; so strong are the passions of men when avenging the insult of attack. The penalties for homicides are the best protection yet discovered for the security of society. Not all the influence of moral training—nay, of religion itself—would be found so adequate and sufficient for that purpose as the terrors of the law; so deeply rooted in the hearts of men is the spirit of revenge, which, at some time or other, has been aroused in most of them. Though crimes of extreme violence, such as homicide, are apparently on the increase at this particular time, yet there are fewer by far in proportion to population than there were in times past. The strict administration of the law by courts and juries still continues; and, while such remains the rule, we may reasonably look forward to the time when human life can be said to be safe in Delaware from personal violence. A strict enforcement of the law is the best security to the people of the state.

The law with respect to defense of property is this: When a man is in his own habitation or dwelling place, and is there violently attacked by one who intends to kill him or do him some grievous bodily harm, he need not take any steps to get out of his way. As every man's dwelling house is also his castle

of defense, in the eye of the law, he need not retreat at all (he being, in contemplation of law, in the same situation as one attacked elsewhere than in his own house who has retreated until he can do so no further, by reason of a wall or other obstruction that prevents him), but may slay his adversary thus attacking him. But where the trespass of the wrongdoer is not to the habitation or dwelling, but upon or to the land only, there the law is different. Before he can use any violence to the trespasser,—much less resort to a deadly weapon,—he must, if he wishes to get rid of him, endeavor to do so by the use of gentle means, such as persuasion or moderate application of force. Should resistance be offered, he has the right to oppose that resistance and use sufficient force to overcome it, but never resort to the use of a deadly or dangerous weapon until it is absolutely necessary to defend himself against such in the hands of the wrongdoer.

An attempt at a forcible entry for a felonious purpose into a dwelling house may be resisted at once by killing the offender if that be necessary to the defense of it; but a forcible entry into a tract of land, by opening a closed gate or pulling down fence bars or cutting through a hedge or breaking a wall, as it does not denote of itself an intention to do any act of personal violence, does not warrant the possessor in resorting to any violence to expel the intruder incommensurate with or out of just proportion to that used or threatened. The law furnishes an adequate remedy for this offense, in punishing such a trespasser, not only with the actual damages the plaintiff has suffered by his wrongful act, but will also authorize a jury to give exemplary damages, or damages by way of punishment for his violent entry, where it has been attended by circumstances indicating a purpose on the part of the aggressor to create terror in the mind of the occupier by show of arms, etc. The law requiring one to avoid contact with an infuriated assailant by retreating from him, if he can, before taking his life, or keeping out of the way of one who intends to attack feloniously, applies also to the occupier of land, be he owner or tenant, upon which a trespass is made, with this qualification: that in the case of an occupier of land there would be a direct insult given by the act of one entering with arms, which, if resisted by the use of a deadly weapon, would be placed upon a different footing from that of the other cases supposed. Much is allowed to the weakness of human nature, as I have before pointed out, in giving way to gross provocation or insult. This is the law with respect to unauthorized entry upon another's land, and entry attended by circumstances of great aggravation, as a display of arms, etc. In case of a mere trespass,—that is, where no violence by the intruder is done or offered, and there is no reason to apprehend any,—killing the intruder would be murder,

and of the first degree, if facts could be shown that the slayer armed himself to repel the trespasser, and used his arms without any serious resistance on the trespasser's part. The fact of arming would show expectation of a deadly combat; and where one has reason to expect a dangerous attack, and takes no steps to avoid it, but prepares himself for it, and especially if he put himself in the way of it, and then kills his adversary who attacks him, he is not only not justified or excused in so doing, but is punishable for willful murder.

But there are circumstances under which, when they exist, a man has the right to go upon another's land. Suppose one traveling along a highway or a street (which is a highway) is suddenly attacked by a ferocious animal, and can only protect himself by entering upon another's land, or into his dwelling house through an open door, or should so enter to avoid the danger of a runaway horse or team upon the highway; the law would protect him in so doing, upon the ground of the existing necessity. Suppose, also, by some natural occurrence, a public highway should be obstructed,—as, for example, by trees blown across it by a tempest, by a great flood which has submerged or drowned it, or by a heavy fall of snow which has filled or blockaded it; in such cases travelers along such highways have now, and always have had, the right to enter upon and travel across the adjoining lands, whether inclosed or not, in the pursuit of their lawful business, on occasions. This right is called a "way of necessity," to which the private right of exclusive possession must yield the whole of the adjoining land, so long as the necessity exists. During the continuance of such necessity,—that is, so long as the highway shall remain obstructed,—the right of travel, or way of necessity, exists, and may be used by wayfarers without molestation from the occupier. But this right must be exercised so as not to do any wanton or unnecessary damage to him or his crops, though it is not for him to say what the route of the public travel across his land shall be. Highways "are for the public service," as was said by a great judge, "and, if the track be impassable, it is for the general good that people should be entitled to pass in another line." It is upon that consideration that the trespass is justifiable. But suppose the owner or occupier of the land should forbid the public from using his land as a way of necessity in case of obstruction of the regular highway; are the public bound to heed him? Certainly not; no more than they would be to obey his order that, in traveling along the public highway bounding his land, they should travel on the other side of the middle line of it, and not on his side, where his right of soil is. Such right extends to the middle of the highway, subject to the public easement or right of travel, with which he has no authority to interfere. The way of necessity, then, as I have described it, across or over a private owner's land, being the same for the public

as that they enjoy upon or over the public roads or highways, it is evident that the right to forbid the use by the public or some member of it no more exists in the one case than in the other.

It follows, then, that if such owner should, though upon his own land at the time, undertake to prevent any one who had occasion to travel the obstructed highway from entering upon and using his land to avoid the obstruction, he would be willfully endeavoring to hinder or impede such a one from exercising and enjoying a common right, to which, as a part of the public, he was entitled. During the continuance of the obstruction to the public road, the owner's land, or such part of it as is necessary to be used in lieu of such road, becomes a public highway, like the other. When, therefore, he attempts to impede any one in using it, he is a wrongdoer; and, if such attempt is manifested by personal acts,—for example, laying his hands upon him to prevent his going upon the land, or stopping him while being there in course of travel, or resisting the other's effort to open a gate across or at the entrance of the way thus made necessary, or to let down the bars at an outlet,—he is the aggressor, and must take the consequences of anything that befalls by reason of his unauthorized act. I do not mean to be understood to say, of course, that the party resisted (that is, the traveler) would have the right to kill him instantly, or do him great bodily harm with a deadly weapon. But I do mean to say that the party resisted would have the right to oppose any force used towards him by his opponent, and to use all necessary means to overcome it; and, if his life were attempted in the conflict, he would have the right, in his own defense, to take that of the aggressor; and if such aggressor had gone into the conflict unarmed, and the supposed trespasser, having arms, sought to slay him, he might slay the other if he could, and protect himself under the plea of self-defense. But if he had prepared himself beforehand with arms, and had gone to the place where the traveler would enter to enjoy the way of necessity, for the purpose, if necessary, of using such arms in any conflict that might arise between them over the right, and such conflict had arisen, and he had used them to the destruction of the traveler, the slaying would neither be justifiable nor excusable, nor would it be manslaughter, because of the wrongful act of the owner or occupier in resisting another in his right, and the use of the deadly weapon in the conflict which he apprehended. There is no law that shields a man from legal punishment who is the aggressor in a combat, and is armed for it, and who kills his contestant in the course of it. Though his adversary is also armed, he has provoked the contest by his own unlawful act. But for such provocation, there would have been no bloodshed. He, himself, brought it on by his inexcusable conduct,—the very condition of things which led to his killing that adversary

The law of self-defense does not apply to any such case.

The propositions on which Senator Gray, for the defense, requested the court to charge the jury, were then taken up, as follows:

"First. If, upon a calm review of all the testimony, and regarding it alone, the jury have in their minds a reasonable doubt, such as honest and intelligent men may entertain in this case of the guilt of the prisoner,—that is, as to whether he fired the fatal shot under a necessity to save his life, or to prevent the infliction of enormous bodily harm,—he is entitled to the benefit of that doubt, and should be acquitted."

To this the court said: "That it is a correct statement of the law. Apply it to the present case by adding: 'That if the jury, after a calm review of all the testimony, and regarding it alone, have in their minds a reasonable doubt, such as honest and intelligent men may entertain in this case of the guilt of the prisoner,—that is, as to whether he fired the fatal shot under a necessity to save his own life, or to prevent the infliction of enormous bodily harm,—he is entitled to the benefit of that doubt, and should be acquitted.' While this answer to the instructions prayed for is given, the jury must not forget what I have before said about the duty upon a party assailed feloniously to escape from his adversary, if he can, before he takes his life.

"Second. That retreating to the wall is not demanded by the law, in order to enable the defendant to avail himself of the plea of self-defense when his assailant is armed with a deadly weapon, or when the attack upon him is manifestly with deadly purpose."

The answer to this was that it is not the law of this state that a man can take the life of an armed assailant in self-defense if he can in any other way—as, for instance, by retreating from him—escape the danger of the assault; but, if the assault is of such a nature that it could not be escaped from without imminent peril of life or great injury to the person, no attempt at escape need be made, but the assailant may be instantly killed.

"Third. That if the deceased had the technical legal right to drive his wagon through that field, and the prisoner was mistaken in supposing that he had a right to say by which road deceased should cross his land, still, if the deceased attempted in the first instance to enforce his supposed right by violence and a deadly weapon, and thus put the prisoner's life in danger, or threatened him with enormous bodily harm, then the prisoner had a right to slay the deceased to save his own life from apparent and imminent danger or avert the infliction of enormous bodily harm."

"This proposition is answered by that portion of the charge I have already given you. But I will say, further, that the deceased had no right to exercise his authority, in common with others of the public, in a violent manner, as by show of arms and threat to use them if resisted. But, supposing he had such right, the prisoner had none to interfere with him in any way; and if he voluntarily went in his way and opposed him, being armed himself, he cannot justify taking the other's life on the ground of self-defense, because of his unlawful preparation for a contemplated conflict of his interference."

"Fourth. That if the jury shall believe that the prisoner was first attacked by the deceased with a deadly weapon, whether club or gun, whereby his life was placed in imminent danger or enormous bodily harm threatened to his person, he was justified in killing the deceased, if such killing was reasonably necessary to save his life or avert an enormous bodily harm."

This was answered: "If the jury believe that the deceased was the assailant, and had no right to enter upon the prisoner's land as a wayfarer, and yet intended to force his way through it with his team, and opposed, to the reasonable resistance of the prisoner, the use of a deadly weapon from the effect of the use of which the prisoner would have had no means of escape, he had the right to kill him to protect his own life or his body from grievous harm."

"Fifth. That the right of the deceased to pass over the land at all depended upon the impassability of the highway, and that the right to such passage began at the place where such impassability existed."

This proposition was assented to, with the qualification that the adjoining land should be accessible from such place; if not, the obstruction may be considered up to the point where the adjoining land could be entered upon.

"Sixth. That the deceased had no absolute right to pass over any part of the prisoner's land that he chose when the prisoner had opened a way that was reasonably passable, and he had indicated and invited both the deceased and others to use it."

The court assented to this proposition.

"Seventh. That the right in case of an obstruction to a highway, in the public, to pass over adjoining land, is qualified by the obligation to do the owner of such adjoining land the least possible harm."

This was also assented to by the court.

The charge was concluded by the Chief Justice instructing the jury that, if they found

the prisoner guilty of any crime whatever, it could not be for murder of either the first or second degree.

Verdict: "Not guilty."

CAREY v. ALLEMANIA FIRE INS. CO. OF PITTSBURG.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

INSURANCE—PROOF OF LOSS—WAIVER—CONDITION AS TO OWNERSHIP.

1. A condition in a policy that proof of loss be furnished the insurer within a certain time is waived where, within that time, the company's agent and adjuster requested and obtained from insured a written statement under oath in relation to the fire, etc., and a list of the articles destroyed, with an estimate of the value of each, and then said there was nothing more for insured to do.

2. A policy providing that insured shall be the sole and unconditional owner of the property is not void though insured had not paid all the purchase money, and had bought it under a contract providing that failure to make a payment when due should be a forfeiture of the contract.

3. Where a policy requires proof of loss to be furnished within 60 days after the fire, and it is not furnished till 96 days thereafter, a delay of over a month to object that it was furnished too late does not warrant a conclusion that the 60-days limit was waived.

Appeal from court of common pleas, Luzerne county.

Action by Bryan Carey against the Allemania Fire Insurance Company of Pittsburg. Judgment for plaintiff. Defendant appeals. Reversed.

The part of the charge of the court below referring to the question of ownership of the insured property was as follows: "It is also claimed as a defense by the company that because the policy provides that the insured shall be the sole and unconditional owner of the property, and that at the time the insurance was effected Mr. Carey was not the sole and unconditional owner in fee, he is not entitled to recover. It seems that Mr. Carey, by agreement entered into between him and John Cavanaugh, purchased this property on the 1st of December, 1887, for the sum of \$650. By the terms of the agreement \$150 was to be paid down, and the balance \$6 a month, with interest. The contract contains a confession of judgment by Bryan Carey for the sum of \$650, waiving inquisition upon real estate and the benefits of all exemption laws, as collateral security for the payment of the purchase money. The agreement refers to an amicable action of ejectment in case the purchase money was not paid, but that agreement has not been signed by the defendant. It also provides that: 'It is hereby expressly understood and agreed that the payment of the said installments as the same severally fall due is made material, and that failure to pay any one of them on the day when the same falls due shall be an absolute forfeiture of the con-

tract; and the said party of the first part, his heirs, executors, administrators, and assigns, shall thereupon have the right to re-enter and repossess the said lot of land with the appurtenances. Time, therefore, in reference to each and every one of the payments, as above stated, being hereby expressly material, failure to pay in accordance with the dates as fixed and agreed upon above shall work an absolute and unconditional forfeiture of this contract.' The defendant claims that by reason of that provision in the contract Mr. Carey was not at the time of the insurance the sole and unconditional owner of the property in fee, and therefore the policy was void, and Mr. Carey cannot recover in this action. The law abhors forfeitures, and justly so. It believes in giving every man what may be called a fair deal or fair play. John Cavanaugh was the vendor in this contract. He sold to Carey. It is possible (I do not say that it is the law) that Cavanaugh would have had the right, after failure of some of the payments, to have proceeded upon this contract, and forfeited the title, and taken possession of the land; but he did not do it. Carey paid \$150 down, if the evidence is believed; and he paid considerable more, amounting in all to \$270. He paid at different times, as he had the money. Cavanaugh, for whose benefit this clause was put into the contract, accepted the money, and did not forfeit the contract, but permitted Carey to pay in that way, and to keep the premises without proceeding against him until the 19th of August, 1892, at which time he did not proceed to oust Carey from the property, but he did have judgment entered in this court upon that contract as collateral security for the payment of the balance of the money. If he were in a court of equity or a court of common pleas in an ejectment proceeding, asking to have this contract forfeited, and to take possession of the land, the court would probably give him judgment; on condition, however, that if Carey paid the balance of the purchase money, he should have the title. The insurance company, therefore, stands in no better position than Cavanaugh,—I am of the opinion in not near so good a position,—but at least in no better position than Cavanaugh stood."

W. W. Watson, for appellant. William R. Gibbons and William S. McLean, for appellee.

MCCOLLUM, J. The insurance company rests its defense to this action on two grounds. The first ground is that the proofs of loss were not furnished within the time allowed by the policy, and the second ground is that, when the policy was issued, the plaintiff was not the sole and unconditional owner of the building insured. The policy required that the proofs of loss be furnished to the insurer within 60 days after the fire, while the fact is that they were not furnished until 96 days after that time. Compliance with this requirement of

the policy was a condition precedent to suit upon it, and the failure to furnish the proofs within the stipulated time is, standing by itself, and unexplained, a sufficient answer to the plaintiff's demand. But it is alleged that the company waived the stipulation in regard to the proofs in what was said and done by its agent and adjusted in the interviews he had with Mr. and Mrs. Carey soon after the fire. It appears that on the 12th of June, 1893, he obtained from the plaintiff a written statement under oath in relation to the fire, the size of the house, the nature of the business carried on in it, and the title to the lot on which it was erected; and that two days thereafter he procured from him a list, prepared by his wife, of the articles destroyed, together with an estimate of the value of each of them. The statement and list were furnished to the adjuster on his request, and, after they were delivered to him, he said, in substance, that there was nothing more for the insured to do. Neither the plaintiff nor his wife saw or heard from him again before the time allowed by the policy for furnishing the proofs expired. The learned court below instructed the jury that they might find from the evidence of what was said and done by the agent in the interviews referred to that the company waived, or was estopped from asserting, its right to stand upon the stipulation in the policy in regard to proofs of loss. The company denies the alleged waiver and estoppel, and insists that there is no evidence in the case which warrants an inference of either; but our examination of the evidence has failed to convince us that the court erred in submitting these questions to the jury.

The second ground of defense to the action is not tenable, and the contention based upon it is sufficiently answered in the charge of the learned judge, and by the decision of this court in *Insurance Co. v. Dunham*, 117 Pa. St. 460, 12 Atl. 668. Before this suit was brought, the plaintiff was notified that the company denied its liability on the grounds above stated and considered. The jury, however, were instructed that if the company received formal proof of the loss on the 24th of August,—96 days after the fire,—and did not object until October that it was furnished too late, they might conclude that the 60-days limit was waived. The instruction was broad enough to allow the jury to find a waiver from the single circumstance mentioned in it, and in this case they may have based their verdict upon it. If the plaintiff lost his right to maintain an action on the policy by his neglect to furnish the proof of loss within the time stipulated in it, something more was required to reinvest him with that right than the delay referred to. It is sufficient on this point to cite *Beatty v. Insurance Co.*, 66 Pa. St. 9. We discover nothing else in the case which calls for a reversal or requires discussion. We therefore sustain the seventh specification, and overrule the others. Judgment reversed, and venire facias de novo awarded.

CITY OF ALTOONA v. BOWMAN.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

ORDINANCES — PASSAGE — PAVING — NATURE OF WORK — QUESTION FOR JURY.

1. Act May 23, 1889 (P. L. 282), referring to city councils, and providing that "no bill shall be passed finally in either branch upon the same day on which it was introduced or reported," prevents the passage by one branch of an ordinance on the same day that it is reported to it by the other branch.

2. The same presumption does not exist as to the regularity of the passage of an ordinance as in the case of an act of the legislature.

3. In a proceeding to enforce a municipal lien for paving, there being testimony justifying the presentation of the point that if any work was done on a certain day it was in the alteration or repairing of work recently done, and was not work embraced in the completion of the original or main work, it was error to deny it, on the ground that the question involved was for the court, and not the jury.

Appeal from court of common pleas, Blair county; Martin Bell, Judge.

Scire facias by the city of Altoona against James B. Bowman to enforce a lien for paving, filed June 1, 1891; the work having been completed December 1, 1890, as claimed by plaintiff, but before that, as claimed by defendant. Judgment for plaintiff. Defendant appeals. Reversed.

Aug. S. Landis and Greevy & Walters, for appellant. Wm. A. Ambrose and Daniel J. Neff, for appellee.

STERRETT, C. J. The first specification charges, in substance, that the ordinance under which the paving was done is illegal and void, in that it was acted on and passed by the common council on the same day that it was sent to that body by the select branch, in violation of the positive mandate of section 3, art. 4, of the act of May 23, 1889 (P. L. 282), which declares, *inter alia*, that "no bill shall be passed finally in either branch upon the same day on which it was introduced or reported." There is no question as to the facts of which this alleged illegality is predicated. It is conceded that the bill in question was introduced in select council on March 27, 1890. On that day it was referred to the committee on highways and sewers, composed of members of both branches of council, and ordered to be printed. On March 31st following it was favorably reported back to select council, and on same day it was considered and finally passed by that body, and forthwith messaged to the common council, which on same day took up and finally passed the ordinance. It thus appears that the bill, originating in select council, was properly referred, favorably reported, etc., and afterwards, on the fourth day after its introduction, taken up and finally passed by that body. In this there was no want of compliance with the letter as well as the spirit of the act; but as to the proceeding in common council it was

very different. On the same day that the ordinance was messaged or reported to that body it was taken up, considered, and finally passed. This was done in manifest disregard of the legislative mandate that "no bill shall be passed finally in either branch upon the same day on which it was introduced or reported." This mandate applies with equal force to both branches of council,—that in which a bill has been first introduced as well as the other branch to which it has been messaged or reported after it has been finally acted on by the former. Any other construction of the clause would ignore the plain intent thereof, as clearly expressed in unambiguous words, and defeat the manifest purpose of the act, which was to prevent hasty, inconsiderate, and vicious legislation. In employing the language above quoted the legislature evidently intended to absolutely prohibit the final passage of any bill or ordinance by either branch of councils on the same day upon which it was introduced or reported in said branch. The wisdom of the prohibition or limitation on the authority of councils has been demonstrated by experience, and the law should be rigidly enforced, notwithstanding the alleged fact that councils, in this case, may have acted on erroneous advice as to the scope of their power in the premises. No such saving clause can be found in the act, and its interpolation, by strained construction or otherwise, would be not only unauthorized, but exceedingly dangerous.

We cannot assent to the suggestion that the almost conclusive presumption in favor of the constitutional regularity of proceedings of the legislative department of the government is equally applicable to the regularity and legality of municipal corporation proceedings. The cases are widely different. In the consideration of acts of assembly, etc., emanating directly from the lawmaking department, courts, as members of the judicial department, must necessarily presume that every constitutional requirement in the enactment of such laws has been observed. A proper degree of deference is due by each department to each of the others. The limited power and authority with which municipal corporations, as agencies of the state, are invested, must be exercised strictly within the lines and limitations prescribed by the lawmaking power.

In defendant's ninth point it requested the court to say: "If work was done on December 1, 1890, it was in the alteration or repairing of work done recently, namely, straightening the curb which had been previously set, but had settled out of line, and it was not work which was embraced in the completion of the original or main work; and this is a question for the jury." The testimony was sufficient to justify the presentation of this point, and it should have been affirmed; but the learned judge, holding that the question involved "is for the

court, and not for the jury," denied the request. In this there was error. It is unnecessary to pursue the inquiry further. The ordinance under which the paying was done and proceedings had is illegal and void, and that leaves nothing on which to rest the plaintiff's claim. Judgment reversed.

COMMONWEALTH v. HICKEY et al.
(Supreme Court of Pennsylvania. Nov. 4, 1895.)

RECOGNIZANCE—EXECUTION.

A recognizance, though signed by one as surety, is not binding on him, he not having been before the magistrate who signed it as having been taken and acknowledged before him.

Appeal from court of common pleas, Armstrong county; Calvin Rayburn, Judge.

Action by the commonwealth against James Hickey and John Boyle. There was judgment for defendant Boyle, who alone was served with process, and plaintiff appeals. Affirmed.

H. N. Snyder, Floy C. Jones, and W. D. Patton, for the Commonwealth. Austin Clark and McCain & Christy, for appellee.

GREEN, J. This was an action upon a recognizance for the appearance of Hickey to answer a criminal charge in the quarter sessions. On the trial the plaintiff made various offers of proof to support the allegation that Boyle, the responsible defendant, had actually entered into the recognizance upon which the action was founded. The affidavit of defense denied in the most absolute and positive terms that Boyle had ever, at any time, entered into any recognizance before C. A. Scott, Esq., who, it was alleged in the plaintiff's claim, had taken the recognizance, for the appearance of James Hickey, and denied also that he had ever authorized any one to sign his name to any such recognizance. The affidavit further averred that such a recognizance was brought to his residence, and he was asked to sign it, but that he positively refused to do so, and did not authorize any one to sign it for him. It was further alleged in the affidavit that Boyle was never before Justice C. A. Scott relative to the case of *Commonwealth v. Hickey*. The plaintiff was therefore put to proof of the fact of Boyle having actually entered into the recognizance in question. To support the plaintiff's claim, a recognizance purporting to be signed by Hickey and Boyle was offered in evidence, attested as being taken and acknowledged October 7, 1893, before C. A. Scott, Justice of the peace. But the offer was simply of the paper, without any proof of the fact of the signing or the acknowledgment. Objection being made on that ground, the offer was properly rejected. An offer was then made to prove by Hickey's mother that she was present and saw Boyle direct his son to sign

the name of John Boyle to the instrument. To this it was objected that the subscribing magistrate was the best witness, and therefore he should be called, and also that the offer was incompetent because it did not state that the magistrate was present and took the acknowledgment. It was then proposed to supplement the offer by proof that C. A. Scott, the subscribing magistrate, was not present at the execution of the instrument. As a matter of course, if the magistrate was not present, he could not have taken the recognizance, and the offer was properly rejected. A final offer was made to prove by Mrs. Hickey that she and the defendant Boyle went to the jail; that Hickey there signed the obligation, and that Boyle directed his son to sign his (defendant's) name to the instrument, and that that was done; that afterwards the obligation was taken to C. A. Scott, a justice of the peace, who signed the acknowledgment, as follows: "Taken and acknowledged before me, this 7th day of October, A. D. 1893, C. A. Scott, Justice of the Peace,"—and that, after it was so signed, Hickey was released, and subsequently escaped. This offer was also objected to and rejected. As the release and escape have nothing to do with the obligation of the defendant, they contribute nothing to the admissibility of the offer. The other portion of the offer is a proposal to prove that the magistrate never did take the recognizance of the defendant, but signed it as if he had done so. This, of course, invalidated the whole transaction, and hence the proof could not be received. The magistrate could not certify that he had done an act which he had not done, and, as that act was essential to any obligation of the defendant, there was nothing to support the action. The docket of the justice was not offered, and hence there was nothing to show any actual recognizance. Judgment affirmed.

SECOND NAT. BANK OF ALTOONA v. GARDNER.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

SUMMONS—SERVICE BY LEAVING AT RESIDENCE—ACTION FOR MONEY TAKEN BY CASHIERS—STATEMENT OF CLAIM.

1. Where defendant had gone away, leaving his family in his residence, service of summons on him by leaving it at the residence cannot be set aside on the ground that he had no intention to return; the only negation of that intention being in the statement of his wife (who expressly admitted that she had no information from him on the subject) that he had left home two months before, and that, from charges which she had heard from other persons relative to his connection with the office of cashier of plaintiff bank, she believed that when he left it was to abandon his place of residence.

2. The statement of claim of plaintiff bank, alleging that defendant, while cashier of it, "took for his own use, out of moneys of and belonging to the said bank," a certain sum, and that no part of it "has ever been paid by the defendant to the plaintiff, and the same is owing, unpaid, and due from the defendant to

the plaintiff," states a prima facie cause of action, plaintiff not being obliged to negative possible defenses.

3. Such statement of claim is not bad because it alleges that defendant deposited tickets and memoranda (copies of which are annexed to, and made part of, the statement) showing, and charging himself with, the amounts taken from time to time, though the tickets do not of themselves import any liability on the part of defendant. The copies being merely matter of evidence.

Sterrett, C. J., dissenting.

Appeal from court of common pleas, Blair county; Martin Bell, Judge.

Action by the Second National Bank of Altoona against Harry A. Gardner. The rule to set aside service of the summons was discharged, and there was judgment for want of a sufficient affidavit of defense. Defendant appeals. Affirmed.

To the summons the sheriff made return as follows: "Served * * * by leaving a copy thereof at the dwelling house of defendant, with the wife of the defendant, Mrs. Julia O. Gardner, an adult member of the defendant's family; and that the defendant could not be conveniently found."

The affidavit of defendant's wife to set aside the service was as follows: "Personally appeared before me, A. B. Over, a notary public in and for said county, Mrs. Julia O. Gardner, who, being duly sworn according to law, says: She is the wife of Harry A. Gardner, the defendant in this suit, and she is the person with whom the sheriff of the county left a paper purporting to be a writ of summons against her husband in the above-entitled suit. That at the time the said writ was left with her, to wit, 15th October, 1894, Harry A. Gardner was not a resident of the county, and was not an occupant nor inmate of her dwelling house. That he had left his home and said dwelling house on the 6th August, 1894, or thereabout, and has not since returned. That when he left he did not inform her where he was going, but at the time of his leaving he had, for a number of years, been the cashier of the plaintiff bank; and from what she has since learned, from statements and charges made against him in connection with his office, by those connected with the bank, she believes, when he left, it was to abandon his then place of residence, and that it was not his purpose to return to it. That at present, and on the said 15th October, 1894, he was no longer a resident of the county, and he could not have been 'found' at all, 'conveniently' or otherwise, by the officer who came with the writ; nor could she, for him, make answer to the complaint in this writ, as she has no knowledge touching the law."

The following is the statement of claim: "The plaintiff, the Second National Bank, of Altoona, Pa., a corporation chartered under the laws of the United States, doing business in the city of Altoona, in said county, claims of the defendant, Harry A. Gardner, the sum of two thousand and ninety-eight and 18-100

dollars, with interest thereon from the 6th day of August, A. D. 1894, which is justly due and payable to the said plaintiff by the said defendant upon the cause of action, whereof the following is a statement: The defendant was elected cashier in the said plaintiff bank in the month of August, 1882, and then and there entered upon, and assumed and discharged, the duties of cashier of the said bank, from that time until the 6th day of August, 1894, continuously. That from the 1st day of January, 1889, to the 6th day of August, 1894, the said Harry A. Gardner, as cashier of said bank, took for his own use, out of the moneys of and belonging to the said bank, the said sum of two thousand and ninety-eight and 18-100 dollars, and, in lieu of the said sum of money, deposited in the cash item account, which he, as cashier of said bank, kept, tickets and memoranda (copies of which are annexed to this statement of claim, and made a part of it) showing, and charging himself with, the amount and amounts taken from time to time as aforesaid. That the sum or amount of these tickets and memoranda deposited by the said defendant in the said cash item account kept by himself as aforesaid, as cashier of the said bank, is two thousand and ninety-eight and 18-100 dollars, on which interest is owing from the 6th day of August, A. D. 1894. That no part of the said principal sum has ever been paid by the defendant to the plaintiff, and that the same is owing, unpaid, and due from the defendant to the plaintiff. And that the whole amount of said indebtedness was contracted by the said defendant with the said plaintiff since the 1st day of January, 1889, and prior to the 6th day of August, 1894."

The affidavit of defense was as follows: "Personally appeared before me Mrs. Julia O. Gardner, wife of defendant, who, being duly sworn according to law, says she makes defense for her husband in above action as follows: She is informed by counsel there can be no recovery upon the plaintiff's statement filed, for the following reasons: (1) Whilst it is alleged in plaintiff's statement, during the time from 1st January, 1889, to 6th August, 1894 (more than 5½ years), that defendant took, for his own use, at different times, sums equal, in the aggregate, to \$2,098.18, it is not alleged that he wrongfully or improperly took the same, nor that the same was not accountable on, or due for, his salary and compensation which, during that period, he had earned, and which would amount to a sum very much more than \$2,098.18, nor that he was not authorized in some way to take and use the said sum, as he was the cashier, and in the legal control of the funds and assets, of the bank. This, the sole averment of the plaintiff's statement, she is informed, does not of itself form the foundation of an action. (2) This averment of the plaintiff is not helped by the production of so called memoranda, copies of which are annexed to the statement.

The memoranda are merely blank pieces of paper (unused checks), with no words of writing, and which indicate nothing. They bear no date. They do not say he, nor any one, promises to pay the same, nor any of them. They do not say he was to pay them to the bank, nor to any one else. Nor is there on them the slightest evidence of any undertaking or promise on the part of him, or any one, either for his own benefit, or against him, as to any matter. They are not such evidence of debt by him to the bank, as she is informed, upon which an action can rest, and certainly not such *prima facie* evidence of debt upon which plaintiff would be entitled to a judgment, under the rules, without the addition of more."

Aug. S. Landis and Thos. H. Greevy, for appellant. William S. Hammond and Daniel J. Neff, for appellee.

MITCHELL, J. The sheriff's return was in the form prescribed by the statute, and therefore, by its terms, showed a good service. But, if it were traversable, it was good, on the facts, so far as they appear. The defendant had gone away, leaving his family in his residence, and there was no evidence of his intention to acquire a new domicile; certainly, none that he had acquired one. The only negation of intention to return is by an inference from the circumstances, drawn by his wife, who expressly admits that she had no information from him on the subject.

On the other branch of the case, the plaintiff's statement contained the averment that the defendant "took for his own use, out of moneys of and belonging to the said bank," the sum, etc., and that no part of the said sum "has ever been paid by the defendant to the plaintiff, and that the same is owing, unpaid, and due from the defendant to the plaintiff." This states a good *prima facie* cause of action. The plaintiff was not bound to go further, and negative possible defenses.

The averments in the statement as to the tickets or memoranda deposited by the defendant in the place of the money he took, and the copies of such tickets, attached to the statement, are in compliance with the act of 1887. The tickets do not of themselves import any liability on the part of the defendant, and would certainly not comply with the rule under the old affidavit of defense law, that required the instrument sued on to be such as could go to the jury to establish, unaided by other evidence, the liability of the defendant. But this rule, and the cases of *Harblson v. Hawkins*, 81 Pa. St. 142, and *Wall v. Dovey*, 60 Pa. St. 212, cited by appellant, were under the former statutes, by which the affidavit was made to the instrument sued on. All the cause of action that the court had before it on the rule for judgment was the copy filed. Under the practice act of 1887, however, the affidavit is to a defense against the statement, and the copy

of the instrument attached to the latter is merely a matter of evidence, in aid of that precision in setting forth the cause of action, which it was probably perceived, would be likely to be wanting in the rambling story which the act invited plaintiffs to substitute for a declaration in the scientific and approved forms.

The circumstances are such that there may be hardship in the case, and if defendant, or his counsel, can produce any evidence to cast a doubt on the amount, or on the merits, in any way, he will have a good standing to have the judgment opened; but, on this record, we find no error in entering it. Judgment affirmed.

STERRETT, C. J., dissenting.

LOUX et al. v. FOX et al.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

CASE STATED — PAYMENT BY CHECK — DILIGENCE IN PRESENTING CHECK FOR PAYMENT.

1. Under a case stated, it cannot be held that defendant's acceptance of plaintiff's check was absolute payment or satisfaction of rent due, and therefore a waiver of right to distrain therefor; there being no averment of fact or admission to that effect, but it being merely alleged that the "check was accepted by him [defendant], and a receipt in regular form given therefor."

2. Where a check was received after banking hours, and on the following day the payee, in the usual course of business, deposited it in the bank in which he kept his account, and on the next day it was presented for payment to the drawee bank, at its place of business, during banking hours, but after 11:30 a. m., at which time the drawee failed, the payee is not chargeable with lack of diligence in presenting it for payment.

Appeal from court of common pleas, Philadelphia county.

Replevin by S. A. Loux and another, trading as S. Loux & Son, against Samuel T. Fox, landlord, and William Jones, constable. Judgment for plaintiffs. Defendants appeal. Reversed.

Charles Francis Gummey, Jr., and M. Hampton Todd, for appellants. John D. Carlile, for appellees.

STERRETT, C. J. The facts upon which judgment of the court below was asked appear in the case stated, and need not be repeated at length. In substance, it appears that the plaintiffs, being indebted to their landlord (one of the defendants) for a month's rent, due in advance, sent him a check on the Penn Safe-Deposit & Trust Company for the amount thereof, on May 6, 1891, after 3 o'clock p. m., which was after banking hours of the company on which the check was drawn. The "check was accepted by him, and a receipt in regular form given therefor." On the following day, "in the usual course of business," he deposited the check in the Penn National Bank, where he kept his banking account; and on

the next day, May 8, 1891, it was presented for payment to the drawee bank, at its place of business in Philadelphia, during banking hours, but after 11:30 o'clock, at which hour the drawee failed and ceased to do business. When defendant received the check, and thereafter, until the drawee failed, the plaintiffs had on deposit with it, to their credit, more than sufficient funds to pay the dishonored check. Plaintiffs having refused to make good their check, the defendant landlord distrained for the month's rent, and thereupon the goods were replevied, etc. After reciting the facts agreed upon, of which the foregoing is merely an outline, the case stated provides: "If the court be of opinion that the said check was a payment of the rent so due as aforesaid, * * * then judgment for the plaintiffs; otherwise, judgment for the defendants," etc.

It is claimed by plaintiffs that, upon the facts presented in the case stated, the acceptance of the check by defendant was absolute payment or satisfaction in full of the rent, and therefore a waiver of the right to distrain therefor; but, if this position is not sustained, they further claim that due diligence was not exercised in presenting the check for payment.

As to the first proposition, it is sufficient to say that the case stated contains no averment of fact or admission to the effect that the defendant landlord accepted the check as unconditional payment, and in satisfaction of the rent, or in any manner waived his right of distress. A case stated is in the nature of a special verdict, and is subject to the same rules. It is well settled that a special verdict must set forth facts, and not the evidence from which facts may be inferred. *Kinsley v. Coyle*, 58 Pa. St. 461. All the facts must be distinctly and unequivocally set forth, and nothing left to inference. Whatever is not expressly and distinctly agreed upon, and set forth as admitted, must not be taken to exist. *Diehl v. Ihrie*, 3 Whart. 143; *Seiple v. Seiple*, 133 Pa. St. 471, 19 Atl. 406; *Railroad Co. v. Waterman*, 54 Pa. St. 337; *Berks Co. v. Pile*, 18 Pa. St. 493; *Mutchler v. Easton*, 143 Pa. St. 441, 23 Atl. 1109. It therefore follows that the only question properly presented by the case stated is whether due diligence was exercised in presenting the check for payment. If it was not presented and payment demanded in due time, the plaintiffs should not be visited with the loss resulting from failure of the bank on which it was drawn.

Where the facts are admitted the question of reasonable time is one of law, for the court. *Morse, Banks*, 389; 3 Kent, Comm. 91; *Rosenthal v. Ehrlicher*, 154 Pa. St. 399, 26 Atl. 435. It is admitted that the check in question was received by defendant on May 6, 1891, after banking hours of the drawee bank. If the customary hours of banking may be considered in passing on the question of due diligence,—and there appears to be no reason why they should not,—it is very evident that nothing could have been done with the check on the day it was received. The banking day of the

6th had already ended, and, for all practical purposes, it was the same as if the check had been received before banking hours on the 7th, instead of after banking hours on the 6th, because no effective step towards presentation for payment could have been taken earlier than commencement of banking hours on the 7th; and it is conceded that, if the check had been received on that day, it was presented within a reasonable time. In sending their check after close of banking hours on the 6th, the plaintiffs certainly knew that it could not be presented before banking hours on the next day. Considering the hour of the day when the check was delivered to defendant, it is practically the same as if, in express terms, it had been made payable on the following day. There is therefore no good reason why it should not be treated as received on the 7th, instead of the 6th, of May, 1891. Plaintiffs mainly rely on the authority of *Bank v. Well*, 141 Pa. St. 457, 21 Atl. 661, in which this court (adopting the opinion of the learned trial judge) held that "a check on a bank, where all the parties are residents of the same city, must be presented on the day upon which it bears date, or on the next day, and, if not so presented, the risk of insolvency of the drawee is upon the payee." In that case the learned judge, referring to the check then in controversy, said: "Nor is any reason suggested why it could not have been presented at once, or anything connected with the transaction to indicate to the drawer that it would not be presented at once. If presented on the day of its receipt, it would have been paid. If deposited by him in a city bank on the day of its receipt, it would have been presented on the next day, and paid." And he accordingly applied the rule above stated, because, as he says, there was "no circumstance" to exempt the case "from its operation." That case proceeds upon the assumption of what was doubtless a fact in the case, viz. that the check was received long enough before the close of banking hours of the day of its date to have enabled the payee to present it for payment, or deposit it for collection, on the same day. In that respect it differs materially from the case at bar, and that difference is, in our opinion, a circumstance which justifies us in holding that there was no unreasonable delay in depositing the check for collection on the day after it was received, and presenting it for payment on the next day thereafter. As we have seen, it was simply impossible either to present the check in question for payment, or to deposit it for collection, on the day it was received. In every large commercial metropolis like Philadelphia, in which clearing houses are established, the customary mode of collecting checks drawn on banking institutions therein is by depositing them in bank for collection, etc. According to the ordinary course of business, checks thus deposited are presented for payment on the next ensuing business day. That appears to have been the course pursued by the defendant in this case; and unless the

rule above quoted from *Bank v. Well*, supra, is restricted in its operation to checks received during banking hours, and a sufficient time before the close thereof to enable the payees either to present them for payment, or to deposit them for collection, on the day they are received, the usual course of business will be most seriously disturbed. Such limitation is fully warranted by the facts of that case, as we understand them.

We are of opinion that, upon the facts as presented in the case stated, there was error in entering judgment for the plaintiffs. Judgment reversed, and judgment is now entered in favor of the defendants, and against the plaintiffs, for \$40, with interest from May 1, 1891, and costs, including the costs of this appeal.

ARMSTRONG COUNTY v. McKEE et al.
(Supreme Court of Pennsylvania. Nov. 4, 1895.)

COUNTY AUDITORS—FILING REPORTS—TIME FOR APPEAL.

Under Act 1834, requiring county auditors to adjust the accounts of various county officers, and providing that the auditor's report shall be filed among the records of the court of common pleas, and from the time of being so filed shall have the effect of a judgment against the real estate of an officer thereby appearing to be indebted to the county, the report having been given by the auditor to the prothonotary, and by him marked, "Filed," and entered in the court, the filing is complete, and the time for appeal begins to run without any action by the court; and the running of such time is not affected by an individual thereafter procuring an order of the court for the filing of the report.

Appeal from court of common pleas, Armstrong county; Calvin Rayburn, Judge.

Issue between the county of Armstrong, as plaintiff, and T. V. McKee and others, on appeal by plaintiff from report of county auditor on the accounts of defendants as county commissioners. Judgment for plaintiff. Defendants appeal. Reversed.

J. B. Neale and M. F. Leason, for appellants. D. L. Nulton, J. M. Galbreath, and J. W. King, for appellee.

WILLIAMS, J. The duties of county auditors are defined by the act of 1834 and its supplements. They are required to audit, settle, and adjust the accounts of the county commissioners, the county treasurer, the sheriff, and the coroner, and make report thereof to the court of common pleas of such county. The fifty-fifth section of the act of 1834 directs the manner in which the report must find its way into the records of the court by the provision that "the report of the auditors shall be filed among the records of the court of common pleas of the respective county and from the time of being so filed shall have the effect of a judgment against the real estate of the officer who shall thereby appear to be indebted either to the commonwealth or to the county." All parties interested must take notice of the time when the report is

filed, and the time allowed for an appeal runs from that date. The court, as such, has no function to perform, so far as the account is concerned, unless an appeal be taken from the settlement made by the auditors, and shown by their account. But to make the balances shown by the report against any of the accounting officers a lien against the real estate of such officer, such balance must be indexed in the judgment docket. Appeal of Snyder Co., 3 Grant, Cas. 33. If the auditors do not file their report with the prothonotary, their performance of their official duty may be quickened and compelled by a writ of mandamus; but until it is filed by them it remains in their own hands, or under their own control, and no other person who may obtain possession of it has any right to represent them, or to act for them, in regard to it. If an attorney or any other person obtains possession of the report without the consent of the auditors, this fact clothes him with no power to act for them, or to bind them in any manner. He would have no right to file it, or to ask the court to order it filed; and, if such an order should be made without first giving notice to the auditors, and affording them an opportunity to come in and take charge of their own report, it would be ex parte, and would conclude neither the auditors nor the officers whose accounts appeared upon the report. The auditors are responsible for the discharge of all the duties the law places on them, including not only an examination of the accounts of the county officers, but the tabulation of their work in a report made for the information of taxpayers, and the placing of that report "among the records of the court of common pleas of the respective county," so that all who desire to do so may examine it. The facts presented in this case are peculiar. The auditors examined the accounts of the several officers, prepared their report, and then actually lodged it in the hands of the proper officer, the prothonotary of the court of common pleas of Armstrong county, on the 13th day of February, 1891. The same person was also clerk of the court of quarter sessions, and he seems to have entered the report first in the sessions and afterwards in the common pleas; but the report was marked "Filed" by him on the day on which he received it, and it remained in his custody down to the June term following. At that term an attorney obtained it from the prothonotary, took it into court, and moved the court for an order directing it to be filed. This order was made, and, so far as the record indicates, without any rule to show cause or notice to the auditors or the officers to be affected. On the 8th of August this appeal was taken on behalf of several taxpayers. Was this appeal in time? That depends on whether the time is to be computed from the day when the auditors filed their report and procured the date of filing to be noted thereon by the prothonotary, or from the

day when it was placed for the second time in the hands of the prothonotary under the ex parte order of the court. We are of opinion that the computation must begin with the 13th day of February, the day on which the auditors took their report to the proper officer, and caused the date to be indorsed thereon by him. They had then discharged their duty. If the docket entries of the officer were incorrect, the court could have directed their amendment. If he had given a wrong number to his entries in the records of the common pleas, or made any other mistake, the court could have corrected it; but the fact that the auditors had filed their report with the proper officer was beyond doubt. If the appellants had alleged that by reason of the neglect of the officer to make the proper docket entries they had been misled, and their search after the report had been ineffectual, so that they were unable to appeal within the time fixed by law, counting from the date of filing, they might have applied to the court for such relief as it was possible to give upon the facts so stated; but the expedient resorted to was novel, and, if successful, would have made it possible for the appellants to have secured their appeal as readily at the end of three years as of three months. The time for taking an appeal had expired when the order of the court below was made. The report was no doubt taken from its resting place "among the records of the court of common pleas" into the court room, and a motion made for an order directing that it be filed, in order to secure a new date from which to count. The motion could have had no other purpose. The court below was of opinion that a new date from which to compute the time for an appeal was thus obtained. We do not think so. The order, if not an absolute nullity, was, to say the least, a piece of supererogation. The report was filed with the proper officer by the auditors themselves, and the right to an appeal must be computed from the day on which this was done. This disposes of the case, and renders an examination of the several items of surcharge unnecessary. It is possible, if the appeal had been in time, that some portions of the last four items of surcharge might have been sustained; but it is needless now to inquire. As to the larger part of the sum surcharged, we should have been unable to concur with the court below. The judgment is reversed, and the appeal from the report of the auditors is now dismissed.

COLLIER v. COLLIER.

(Court of Chancery of New Jersey. Nov. 8, 1895.)

BILL FOR EQUITABLE RELIEF—DISMISSAL.

Where a complainant presents matters which are purely equitable, and others purely legal, and prays for relief against an action at law, and fails in those matters which are equitable—

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ble, his bill will not be retained as to those which are legal.

(Syllabus by the Court.)

Bill by Andrew M. Collier against John J. Collier for injunction and to correct deed. Dismissed.

Samuel G. H. Wright, for complainant.
Abel I. Smith and Mr. Mabon, for defendant.

BIRD, V. C. The defendant in this case having instituted an action in ejectment to recover possession of certain lands, and the complainant coming into this court alleging a mistake in one of the deeds of conveyance under which the defendant claims title, and that the deed which conveyed the title directly to him was procured by fraud, and that the certificate of acknowledgment thereto was illegal, and praying that the former deed might be corrected, and that the latter might be declared null and void because of the fraud and of the illegal acknowledgment, and that the defendant might be enjoined from prosecuting his said action at law; and, failing to establish either the mistake or the fraud, the complainant insists that, since the court had jurisdiction of the questions of mistake and fraud, it has also jurisdiction of the question raised respecting the legality of the acknowledgment, and should therefore proceed to determine that question, notwithstanding the question of the pendency of the action at law. The legal title of the land in question was at one time in the name of the complainant. He conveyed it to his mother. By his bill of complaint he alleges that there was a mistake in this deed, in that the words "heirs and assigns" were inserted, thereby conveying an estate in fee simple absolute, when it was the intention of the parties that only a life estate should be conveyed to the grantee. In this respect he prays that this deed may be reformed. He also alleges that his mother became weak and feeble in mind, and that by fraud and undue influence she was prevailed upon to execute a deed of conveyance for the same premises to the defendant,—another of her sons. For this reason the complainant asks that the last-named deed may be declared void. It is also alleged that when the commissioner of deeds who took the acknowledgment examined the grantor he did not take her examination separate and apart from her husband, and that, consequently, the acknowledgment is ineffectual, and that the deed is likewise void for this reason.

The effort to establish the mistake or the fraud because of the weakness of the mother, or of undue influence in procuring the conveyance to the defendant, has not been successful. Failure in these important particulars, I think, terminates the right of this court to proceed. In other words, when an action at law is sought to be restrained by suit in equity, and part of the grounds upon which the bill rests are purely of equitable cognizance, and part, when considered separate-

ly, are strictly of legal cognizance, and the proofs do not establish the allegations which are of purely equitable cognizance, a court of equity has not jurisdiction to further restrain the action at law, and proceed to determine the legal rights of the parties. There is, doubtless, abundant authority for the proposition that, whenever a court of equity properly acquires jurisdiction of matters which may be settled by equitable rules, and grants any relief respecting such matters, it may then proceed to determine the whole controversy, even though one or more of the issues, when independently considered, may be of purely legal character. Pom. Eq. Jur. §§ 223-225, 227, 231; Brown v. Edsall, 9 N. J. Eq. 256. But the rule is not so broad in case the complainant who seeks to change the forum by filing a bill in equity fails in obtaining any relief with respect to those matters that are of purely equitable cognizance. Brown v. Edsall, 9 N. J. Eq. 256. In this case the chancellor said: "The bill must show a case of manifest propriety in this court's retaining the cause where a suit has been commenced at law, and the party seeks to change the forum of litigation, and prays for relief as well as discovery." The learned chancellor also said: "The court of chancery in this state has never adopted the principle that, because its jurisdiction has once rightfully attached, it will retain the cause as a matter of right, for the purposes of complete relief." See, also, Little v. Cooper, 10 N. J. Eq. 273; Chase's Ex'r v. Chase, 50 N. J. Eq. 143, 24 Atl. 914; Jewett v. Dringer, 29 N. J. Eq. 174; Red Jacket Tribe v. Hoff, 33 N. J. Eq. 441. In this case the court held that it had jurisdiction to reform the bond by adding the seals to the signatures of the obligors, but denied the prayer for relief as to the amount due thereon, upon the ground that the remedy in a court of law was adequate for that purpose. Iszard v. Water-Power Co., 31 N. J. Eq. 511, to the same effect, in which case a bill was filed for the specific performance of a contract, with a prayer for relief as to damages. It was held that, even though the relief was obtained upon the first issue in this court, it was denied as to the latter, because that was relievable at law. To the same effect are Perry v. Van Winkle, 2 N. J. Eq. 269; Trotter v. Heckseher, 40 N. J. Eq. 612, 4 Atl. 83. A moment's reflection will satisfy every one that nothing could be more mischievous than the adoption of the principle contended for by the complainant. In such case it would only be necessary for the defendant in an action at law to make some pretense of claim against the plaintiff in such action of fraud, mistake, accident, or right to an account, in order to change the forum of litigation, and to compel the determination of questions purely legal in a court of equity. It may be said that in this case the only remaining issue is the legality of the acknowledgment, and that a court of equity can determine that as well as a court of law. If such were to be admit-

ted, it does not in any way change the fundamental principle which lies at the very foundation of the discussion, and which indicates the different planes in which the two systems move. I will advise that the bill be dismissed, with costs.

CARR et al. v. HERTZ et al.

(Court of Chancery of New Jersey. Oct. 24, 1895.)

POWER OF PARTNER—MORTGAGES—EXECUTORS.

1. The implied power of one partner to mortgage firm property is revoked by a dissent of his copartners, known to the mortgagee when he takes his mortgage.

2. One of two executors to whom property is left in trust to carry on a partnership business cannot, without the assent of his coexecutor, execute a series of mortgages upon all the trust property for the purpose of finally distributing the same among certain firm creditors.

3. It seems that one partner of a firm, not engaged in the business of dealing in real estate, cannot execute a mortgage upon the firm real estate, unless such power is expressly conferred upon him, or the title is vested in him.

(Syllabus by the Court.)

Bill by Martha Carr and another, executrices, against Isaac Hertz and others, to annul a series of mortgages. Decree for complainants.

The bill is filed by two partners to annul a series of mortgages made by a third person, as partner, upon all the firm property, to certain of the firm creditors. All these partners were executors or executrices of deceased persons who had by will left that part of their estate theretofore invested in the business still in the business, with power to their personal representatives to continue the said business. To understand the questions raised, it is essential that the evolution of the partnership which existed at the date of the execution of these mortgages should be exhibited in detail as well as the transactions which preceded and attended the making of these instruments. In 1883, there was a firm in the city of Newark carrying on the business of tanners and dealers in leather. The firm was composed of Joseph W. Carr, John W. Carr, and Louis M. Smith. Joseph W. Carr died in 1884. By his will he gave to his wife the use of all his estate during her widowhood, with remainder over to her children. The will contained the following provision: "My desire is that the interest which I now have as partner in the leather business conducted in the said city by the firm of Smith & Carr shall remain undisturbed, and that my widow shall, at the expense of my estate, employ some person who shall be acceptable to the surviving member of the said firm to represent her." Martha Carr, the widow, was appointed sole executrix. She, having drawn as much of her husband's interest as was in excess of that of the other partners, left the balance of the estate which had been invested in the business still in the business. The business was thereafter conducted by her and the surviving partners un-

February 19, 1886. At that time the interest of Louis M. Smith was bought out by John W. Carr and the executrix. Thereafter the business was continued in the firm name of "John W. Carr & Co.," or, as indicated on some of the bill heads, "John W. Carr & M. Carr." John W. Carr was the managing member of the partnership. One Charles Wenzel was in his employ; and upon John W. Carr's absence in California, by reason of his sickness, Wenzel was given a power of attorney to transact the business and sign the firm name. John W. Carr died, leaving a will dated December 5, 1887, in which will he gave his wife a certain portion of his property, and then gave the residue of his estate, real and personal, to his executors and the survivors of them, in trust for the following purposes: "To continue the business of the firm during the lifetime of his wife if it should be found profitable and his executors should deem it best to do so." He authorized his executors to enter into any arrangement or agreement, as they saw fit, to continue and carry on the said business, with or without the present partner, and to use the residue of the estate as they may see fit, and to manage and conduct the business for his said interest therein, in all respects according to their judgment, until the death of his wife, or until such time in her lifetime as the said executors should see fit to discontinue the same. He empowered his executors to sell, in their discretion, any part of his real estate which was not embarked in the said business, and also the proceeds of such business upon the discontinuance thereof. In this will, the testator's wife, Caroline, and Charles Wenzel, were appointed executors. No arrangement was entered into by the said executors with the partner Martha Carr in respect to the continuation of the business, nor was any agreement or understanding entered into between Caroline A. Carr and Charles Wenzel in respect to the carrying on of the firm business. The business, however, went on as usual. The two ladies were entirely unfamiliar with the practical operation of the business, and the business was continued on the same line and under the same management as it had been conducted prior to John W. Carr's death, with the exception that checks and notes and evidences of indebtedness were required to be signed by Martha W. Carr; and, although the bank seems to have recognized some signatures of the firm name made by Charles Wenzel, the agreement of the copartners was that the firm name should be signed only by Martha W. Carr. After the probate of the will, Wenzel was urged to have an inventory of the estate of his testator made, which would have necessitated an investigation into the affairs of the partnership. This he, on one excuse or another, postponed from time to time, and it was in fact never made. On various occasions and to different persons, he repeatedly remarked that he was not interested in the concern individually. According to Mr. Wenzel's testimony, the firm had met with a loss

previous to the death of John W. Carr; and some time in October, 1891, the attention of the two ladies was called to the fact that the estate was in an embarrassed condition. The two executrices called a meeting of the creditors of the firm on November 23, 1891. At this meeting the authority of the executrices was practically turned over to the creditors. They were empowered to inspect and protect the firm property. The creditors appointed a committee, which committee went to the factory, and were refused admittance by Mr. Wenzel. Subsequently, the committee gained access to the factory, made an inventory and appraisal of the personal property, and put a keeper in charge, and continued the work of tanning. On November 30th, another meeting of creditors was held, at which the executrices, through their counsel, offered to turn over all the assets of the firm to two trustees for the creditors, and hold the proceeds until all the creditors signed a certain paper which allowed the widows to retain their homes. On the same day, the executrices executed an assignment of all the firm property to two trustees to carry out this purpose, but said assignment did not become effective, because some of the creditors refused to accede to the condition. Charles Wenzel refused to take any part in the proposed action of the executrices, but, beginning on December 1st, he, between that date and December 13th, inclusive, made a series of mortgages, which practically exhausted the entire firm property. He made two mortgages on December 1st to Isaac Hertz,—one upon the hides in process of manufacture, to secure \$775.49; the other upon all tools, fixtures, accounts receivable, two horses, carriages, wagons, and harness, to secure the sum of \$850.15. On December 2d, he made a mortgage upon all the property covered by the second Hertz mortgage, as well as upon the 628 hides, to the Newark Bark Company, to secure the sum of \$2,320. On December 3d, he made three concurrent mortgages upon the hides, accounts receivable, tools, fixtures, all their business assets,—one to Cornelius Fitzpatrick and John Doolan, to secure \$1,118.70; another to Charles Smythe, to secure \$3,337.63; and still another to secure Levi R. Barnard the sum of \$1,277.15. On December 13th he made three real-estate mortgages, covering all the interest of the firm in certain designated property. One of these mortgages was made to Cornelius Fitzpatrick and John Doolan, to secure \$1,118.70; another, to Charles Smythe, to secure the sum of \$3,337.63; and one to Levi R. Barnard, to secure \$1,277.15. These mortgages were concurrent.

James E. Howell, for complainants. Chandler W. Riker, for defendants.

REED, V. C. (after stating the facts). As already stated, this bill is filed by Caroline A. Carr, executrix of John W. Carr, and Martha Carr, executrix of Joseph W. Carr, attacking several mortgages made by Charles Wenzel.

The authority of Mr. Wenzel to execute those mortgages, if it existed at all, must rest upon an implied authority residing in him as a partner. It is clear he did not become a partner in the business by any conventional arrangement between Caroline A. Carr and himself. His right to rank as a partner resulted entirely as an inference of law, from the fact that he had carried on, with the property of his testator, the business as a firm business. But inasmuch as his coexecutor, while having no voice in the active transaction of the business, seems to have acquiesced in its continuance, the law would seem clearly to clothe Wenzel with the authority of a partner in the business. Assuming, therefore, that he possessed the power and authority of a partner, the question supervenes: Did the implied authority with which a partner is invested authorize him to execute, under the circumstances of this case, the series of mortgages now attacked? It is entirely settled that a partner has the implied authority to sell any portion of the firm property. He possesses that power although the sale may be made to pay an antecedent debt, and although the sale itself may lead to the insolvency of the firm. So may he pledge or mortgage a part or all of the firm property for the purpose of raising funds to carry on the partnership business, or to pay some one or more of the outstanding debts of the firm. All this power is conceded to a partner so long as his acts are bona fide. But, in gauging the power of the partner, it is uniformly held that it is limited to such transactions as come within the scope of the partnership business. The moment an act of his, in dealing with partnership property, is to be ranged outside of the legitimate business of the partnership, his authority to bind the other partners of the firm ceases. So it is held in numerous and weighty authorities that the disposition by one partner, without the consent of his copartner, of all the property of the firm in the way of a general assignment for the benefit of creditors, is beyond the ability of any person as partner. The reason assigned for this limitation upon his power is that such an assignment is not an act done in the transaction of the business of the firm, but it is an act directly dissolving the partnership, closing its existence, and finally distributing its property. If the evidence was more convincing that this series of mortgages made by Mr. Wenzel was part of one scheme, by which these mortgagees and Wenzel concerted to transfer in this method practically all the property of the firm to prefer the mortgagees as creditors, I should regard the question as directly involved whether a general assignment for the benefit of creditors is within the power of one partner without the assent of his copartners; for it cannot be doubted that such a scheme is, in respect to this question of power, exactly equivalent to a general assignment. But I am not clear that at the

time the first mortgage was made to Mr. Hertz, or at any other particular period between December 1st and December 13th, there was a general scheme in the minds of the parties to transfer all the property by way of preference to the creditors named. Therefore, I am not willing to regard these mortgages as standing upon the same footing as would a general assignment for the benefit of creditors.

But it seems to me that the case presents another question, which is whether the power of Wenzel, if it would otherwise have existed, was not in this instance limited by the known dissent of the other partners to his act. It is entirely settled that, while third persons dealing with the firm will not be affected by any limitation upon the authority of partners contained in the articles of copartnership, yet, if a person dealing with one partner has notice of this limitation, he cannot hold the firm if the partner's act is violative of the limitation. 1 Lindl. Partn. p. 170. And knowledge of restrictions upon the power of a partner may be established by circumstantial evidence, as well as by direct proof of notice. 17 Am. & Eng. Enc. Law, p. 996. It is equally well settled that in respect to those implied powers with which a partner is invested, if a party dealing with such partner receives notice of the dissent of his copartners from any act of such partner, the third party cannot hold the firm by reason of such act. The apparent implied authority is revoked by dissent coupled with the notice of dissent. Id. p. 997; *Gallway v. Mathew*, 10 East, 264; *Willis v. Dyson*, 1 Starkie, 164; *Monroe v. Conner*, 15 Me. 178; *Matthews v. Dare*, 20 Md. 248; *Knox v. Buffington*, 50 Iowa, 320; *Wilcox v. Jackson*, 7 Colo. 521, 4 Pac. 966. In most cases where the occasion for the application of this rule has arisen, either a direct notice of the dissent was given to the person dealing with the partner, or a general notice of which he has knowledge. The question, however, is not in respect to the form of the notice, but whether there was notice, and circumstances may speak as forcibly as words. *Wilcox v. Jackson*, supra. Now, in view of these well settled rules, how do these mortgagees stand? It is in evidence that the two executrices, on November 23, 1891, called a meeting of the firm creditors, at which meeting their intention was manifested to devote the property to the payment of all the firm creditors. This purpose still more clearly appeared by the transactions which occurred at and which followed the meeting of November 30th. At this meeting it was proposed to turn the property over to trustees, who were to take charge and sell the same, and pay the creditors pro rata. There was, indeed, a condition annexed that the homes of the executrices should be left intact; but that the intention, and sole intention, of these executrices, was an equal distribution of the firm property among the creditors, is unmistakable.

able. Now, at this meeting of creditors all the mortgagees were present. They all knew that, so far as the two executrices were concerned, they intended this disposition of the property, and that they intended no other. Wenzel himself, of course, knew the intention of the executrices. He knew that they had refused to make mortgages to other firm creditors. He himself asserts that, inasmuch as they chose to adopt their method, he concluded that he would adopt his. He knew that the trustees representing the creditors were in possession of the factory, and I have no doubt that the mortgagees knew the same. Now, on the heels of the meeting of November 30th and the action of the trustees taking possession of the factory, these mortgagees hastened to Wenzel, and, on the 1st, 2d, and 3d of December, induced him to make the chattel mortgages. They knew—no reasonable person could have failed to know—that the two executrices were opposed to any action upon Wenzel's part, and certainly of his execution of any mortgages. Now, if it be true that these mortgagees, as well as Wenzel, had notice of the antagonism of the two executrices to the execution of any mortgage to any of the creditors, the rule applies that the implied power which he may have had to dispose of the property by way of mortgage was revoked by the circumstances just mentioned.

Again, it seems to me that there is another feature in this case which leads to the same result. It will be recalled that Mr. Wenzel was one of the two personal representatives of a deceased partner. These two represented a single interest in the firm, the other interest being represented by Caroline A. Carr, the other executrix. Now, while one of two executors or administrators has the power to sell, in the course of administration, any of the property belonging to the estate, yet the property that these personal representatives held at the time of these mortgages was trust property. The will of John W. Carr impressed all the property that had been invested in this business with an express trust. It seems entirely clear that, in executing the discretionary power with which they were invested by the will in dealing with this property, they could only act jointly. Thus, the power to continue the property in the partnership business, if they should deem best to do so; the power to enter into some arrangement to carry on the business either with or without Caroline, the surviving partner; the power to sell the real estate upon the discontinuance of the business,—all these powers were confided to joint trustees, and required joint execution. So far as respected the conduct of the business, Mr. Wenzel was probably, by virtue of his legal character as partner,—certainly by the authority which was conferred upon him by the permission of the other partners,—entitled to buy and sell and conduct all the current business of the partnership as any other partner; but when he attempted to

dispose of all the property of the firm, and therefore all of his trust property, not as an act done in transacting the current business of the partnership, but after admitted insolvency, as a final disposition of all the property, it seems to me that the trust restriction upon his separate power comes into play. Now, that he was not partner, save by virtue of his position as executor, was well known to all the creditors of the firm. They knew that, on the winding up of the business, anything that might remain belonged to the two trust estates; that this trust estate was represented by two trustees; and yet, by the act of one against the dissent of another, they accepted these mortgages, which admittedly extinguished the trust property entirely. For the reasons stated, I think that the whole series of mortgages should be declared void.

In respect to the real-estate mortgages, they seem to be inefficacious to bind the firm property upon another ground. As a general rule, one partner, without the assent of his co-partners, cannot bind them by any act which requires a seal. *Ellis v. Ellis*, 47 N. J. Law, 70. And as a mortgage requires a seal, or what in this state stands for a seal, its execution by one partner is within this restriction. For this reason, and because each partner is a tenant in common, the general rule seems to be that real estate belonging to a firm, not engaged in the sale of real estate, cannot be conveyed or incumbered by a mortgage made by one partner, unless such power is expressly conferred upon him or the title is vested in him. 1 *Lindl. Partn.* p. 137; *T. Pars. Partn.* 337; Chief Justice Shaw, in *Tapley v. Butterfield*, 1 Metc. (Mass.) 518.

There should be a decree for the complainants.

STATE (BALDWIN, Prosecutor) v. BOARD OF FREEHOLDERS OF MIDDLESEX COUNTY.

(Supreme Court of New Jersey. Nov. 7, 1895.)

COUNTIES—INVESTIGATION OF FINANCES—COMPENSATION.

In an investigation ordered to be made into the financial affairs of a county under and in pursuance of the act in the Supplement to the Revision, p. 723, the expenses of the investigation must be paid under the order of the chief justice. The board of chosen freeholders has no power to order money to be paid by the county collector to associate counsel who appeared for them.

(Syllabus by the Court.)

Certiorari by the state on the relation of Henry R. Baldwin, prosecutor, against the board of freeholders of Middlesex county, to set aside a resolution adopted by them. Resolution set aside.

Argued June term, 1895, before VAN SYCKEL and LIPPINCOTT, JJ.

Roderick Byington, for plaintiff. W. H. Vredenburg, for defendant.

VAN SYCKEL, J. The prosecutor seeks to set aside a resolution of the board of freeholders directing the payment by the county collector to W. T. Hoffman, Esq., of \$400 on account of services rendered by him as associate counsel to the board in the investigation ordered by the chief justice under and in pursuance of the act in the Supplement to the Revision, p. 723.

1. There is no authority given the board to employ associate counsel in this summary investigation. So far as it was an investigation into the conduct of the members of the board as individuals, they clearly had no right to defend themselves at the public expense. So far as it was intended to expose the unlawful acts of others, the act under which the proceeding was taken imposed upon the chief justice the duty of providing at the public expense the necessary aid to investigation.

2. The act expressly provides that the costs of the investigation shall be taxed by the chief justice, and paid under his order. The proceedings were to be conducted under his general supervision and control, and the expenses attending the examination were to be kept within such reasonable limit as he, in his discretion, should approve. The word "costs" in the statute manifestly means "expenses," as there is no fee bill which will apply to such a case. The chief justice, by the terms of the act, must tax all the expenses; not part of them only; there is no exception. He has made no order, either for employment or payment of the associate counsel, to the board of freeholders, and therefore the payment to him under the order certified will be without authority. It was not intended that persons investigated should be at liberty to impose a burden, at their own discretion, upon the taxpayers of the county. If they could do it in this case, they would have like power where it was shown that they had participated in defrauding the public. The provision in the act that the chief justice shall tax the costs is a wise safeguard. The board of freeholders acted without authority in making the order certified, and it should therefore be set aside.

CAMDEN & A. R. CO. v. CITY OF ATLANTIC CITY.

(Supreme Court of New Jersey. Nov. 8, 1895.)

TAXATION OF RAILROAD PROPERTY.

The Camden & Atlantic Railroad Company operates a steam railroad between the cities of Camden and Atlantic City. Its railroad tracks are upon certain highways of Atlantic City, and are still used occasionally for railroad purposes. The railroad company also owns a power house, dynamos, poles, cars, and other equipment of an electric railway, which it operates over the same tracks. *Held:*

(1) That the tracks and franchises of the railroad were lawfully assessed by the state board of assessors.

(2) That the corporeal property that constituted the equipment of the line of electric cars was lawfully assessed by Atlantic City, as property not used for railroad purposes.

(Syllabus by the Court.)

Motion by the Camden & Atlantic Railroad Company against the city of Atlantic City to determine the character of property assessed for taxes.

Argued June term, 1895, before VAN SYCKEL, LIPPINCOTT, and GARRISON, JJ.

The Attorney General, for state board of assessors. S. H. Grey, for Camden & A. R. Co. A. B. Endicott, for Atlantic City.

GARRISON, J. Under the 188th section of the statute concerning taxes (Supp. Revision, p. 1010), this court is required to determine whether certain property of the Camden & Atlantic Railroad Company is used for railroad purposes. The property upon the character and use of which judgment is to be passed consists of certain railroad tracks in the highways of Atlantic City, and a lot of land and other property, including dynamos, electric wires, poles, occupancy of streets, cars, etc. The jurisdiction of this court arises from the fact that the property in question has been assessed by the state board of assessors as property used for railroad purposes, and that the electric system has been also assessed by Atlantic City as property not used for railroad purposes.

Regarded historically, the tracks and occupancy of the roadbed by the Camden & Atlantic Railroad, including the franchise to operate its railroad thereon, must be deemed railroad uses, which the testimony shows are still maintained by occasional freight trains and steam engines. The electric system, however, has no such history, and must be judged in the light of its admitted character, irrespective of its ownership. The power house and lot of land, the dynamos, poles, wires, and cars of this trolley line, possess no feature that can distinguish them from any other electric system of street railways. The fact that they are the property of a railroad company, and that they are run over the tracks of such company, while suggestive of certain legal questions, cannot obscure the patent fact that it is a street railway, pure and simple, with which we have to deal, whose passengers are such by independent contract, and whose mechanical operation is that of all of its class. The application of any practical test discloses the independent character of this class of property. Thus, supposing the steam-railroad company should sell the disputed property to a street-railway company, what railroad purpose would thereupon cease to be subserved?

Passengers who now take the surface lines to reach the railroad are obliged to pay ordinary car fare. The surface line is not operated in connection with one railroad more than another, nor with a carrying company

more than with places of amusement or other points of destination.

On the other hand, supposing the present owner should cease to operate its railroad to Atlantic City, what change would be effected in the purposes to which its electric railway would be put?

It would carry passengers throughout the city for profit, as it now does, the only conceivable difference being a change in the destination of a certain number of its patrons.

No other conclusion seems possible than that the tangible property in question was properly taxed by Atlantic City as property not used for railroad purposes.

Upon one point there is obscurity in the testimony that should not lead to misunderstanding. I refer to the "occupancy" of the streets referred to in the city assessment.

If that be an attempt to assess a franchise to operate a street railway, it is improperly included, inasmuch as there is no proof of any such franchise.

License fees and special charges for municipal privileges are one thing, but city ordinances cannot create property that shall be capable of general taxation.

Our conclusion is that the tracks, ties, and the franchises enjoyed under its charter were lawfully assessed to the railroad company by the state board, and that the power house and lot and other corporeal property that enters into the operation of the line of electric cars were lawfully assessed by the city.

STATE (MOWBRAY, Prosecutor) v. ALLEN et al.

(Supreme Court of New Jersey. Nov. 8, 1895.)

LOCATION OF HIGHWAY.

Where the courses and distances of the return of the surveyors lay a public road through dwelling houses, the proceeding is hopelessly defective, notwithstanding the map of the surveyors shows the road to be to one side of the dwellings.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of Annie M. Mowbray, against Amos G. Allen and others, to set aside a return of a public road. Return set aside.

Argued June term, 1895, before VAN SYCKEL, LIPPINCOTT, and GARRISON, JJ.

A. E. Johnston, for prosecutor. I. W. Carmichael, for defendants.

GARRISON, J. This writ is prosecuted to set aside the return of a public road.

One of the reasons relied upon is that the road, by said return, is laid through several dwelling houses. This is the admitted effect of following the courses and distances of the return.

The answer is that there is a mistake of 99 feet in one course, which makes the next course run through a row of houses; and

the suggestion is that this error be corrected by the map, which shows a line running to one side of, instead of through, the dwellings.

A map may be corrected by the return. *State v. Miller*, 23 N. J. Law, 383.

Or the return may receive support by reference to the map. *Carpenter v. Brown*, 53 N. J. Law, 181, 20 Atl. 738.

Where, however, a prosecutor is injured by an unlawful return, it is no answer to say that the map does him no injury. This proceeding brings up, primarily, the return, and if it, on its face, discloses illegality, such that the road should not be left to depend upon it, the proceeding is hopelessly defective.

Let the return be set aside, with costs.

BELLINGHAM v. PALMER et al.

(Court of Chancery of New Jersey. Oct. 24, 1895.)

EQUITY—JURISDICTION—ACCOUNTING.

Improved methods of procedure in courts of law will not strip a court of equity of its jurisdiction in matters of account; but where there is no trust relationship involved, and jurisdiction rests solely upon the ground of complicated accounts, the present method of procedure in the law courts will be regarded, in deciding whether the accounts are so complex that such courts cannot try them.

(Syllabus by the Court.)

Bill by Henry Bellingham against T. J. Palmer and Ebenezer A. Smith for an accounting. Dismissed.

This bill is filed to compel the defendants to account. Bellingham engaged with the defendants to make sole and heel tops for the latter, and he was to receive a certain price per 100, each. He worked with his own servants, in his own buildings, with his own machinery. He commenced in September, 1889, and continued four years and four months. His business habit was to take an account of the week's work on each Saturday, and deliver it to the defendants. He has a complete account of the amount of his own work for the whole period. He was not paid in full each Saturday. By an arrangement between himself, the defendants, and the lessor of the building occupied by the complainant, the defendants paid the rent, and charged it up to the complainant. By an understanding between the parties, also, all bills incurred by the complainant for repairing his machinery were paid by the defendants, and charged up to the complainant. There were charged against Bellingham, therefore, the sums he received in cash, and the amount paid by the defendants, on Bellingham's account, for rent, and for repairs upon his machinery. In addition to this charge against Bellingham, there was one for loss on account of damages claimed by customers, to whom two boxes of goods manufactured by Bellingham had been shipped. One of these boxes was returned, and the other not. The claim was on account of defective goods. There was also

a charge for twine furnished to Bellingham. The right to charge the two items last mentioned, viz. for defects in goods, and for twine, was in dispute. I find that there was no undertaking by the defendants, as charged in the bill, that the defendants should keep the accounts of the dealings between the parties. The defendants kept such accounts, in the ordinary course of their business, but they made no promises that they should be regarded as the accounts of both parties. I find that, during the four years and four months during which this business relation continued between Bellingham and the defendants, the former, once or twice a year, inquired how his account stood, and the balance was stated to him. He never asked for a detailed account until after the dissolution of the partnership theretofore existing between the defendants, and after this dissolution he demanded a detailed statement. His lawyer, also, in an interview with Mr. Smith, one of the former partners, requested such a statement. Mr. Smith says that he offered to accord to the complainant the privilege of examining the books and the vouchers in a room in defendants' place of business. This offer was refused, and a statement of the account was demanded. This statement of Mr. Smith is not denied, and, I think, is substantially true. After this interview the bill in this case was filed.

Charles Borchering, for complainant.
Thomas Anderson, for defendants.

REED, V. C. (after stating the facts). The question is whether the facts are such as to warrant this court in assuming jurisdiction in this contest, and directing the defendants to account in a court of chancery. The equitable jurisdiction to compel an account rests upon three grounds: First, the existence of a fiduciary or trust relation; second, the complicated character of the accounts; and, third, the need of discovery. No fiduciary or trust relation is exhibited in this cause. Therefore the right to an account cannot be rested upon that ground. Nor is the bill one purely for discovery. The discovery asked is only incidental to the main relief sought, namely, an account. The bill, therefore, cannot be supported as one for discovery, and must rest upon the right to an account; for the rule is entirely settled that where discovery is sought as a mere incident to some other main relief, and if the principal relief is denied, the suit must be dismissed. *Railroad Co. v. Hoppock*, 28 N. J. Eq. 261; *Jewett v. Bowman*, 29 N. J. Eq. 174; *Foley v. Hill*, 2 H. L. Cas. 28-37, 42. Jurisdiction, therefore, if it exists at all, must rest upon the complicated character of the accounts, and the intricate character of the accounts must be such that, if the case is tried at nisi prius, it cannot be tried with any certainty that an accurate result would be reached. *Bliss v. Smith*, 34 Beav. 508; *Railway Co. v. Nixon*, 1 H. L. Cas. 111; *Fo-*

ley v. Hill, 2 H. L. Cas. 28; *Crane v. Ely*, 37 N. J. Eq. 564. What will constitute this complexity of accounts is a matter on which little light can be obtained from an examination of the English reports. Every case seems to rest upon its own special features. It is impossible, said Lord Collingham in *Railway Co. v. Martin*, 2 Phil. Ch. 758, with precision, to lay down rules or establish definitions as to the cases in which it may be proper to exercise jurisdiction. The criterion is whether the degree of intricacy is such as to deprive a court of law, by reason of its method of procedure, of the ability to properly investigate and decide. In applying this test, I think, regard should be had to the alteration in the method of trial in a court of law. When equity first assumed jurisdiction of complicated accounts, there was in a court of law no power to examine a party, to obtain discovery before trial, or to have an account stated by a referee. Now, it is true that in those instances where a court of equity has acquired jurisdiction over a class of cases, by reason of the absence of a legal remedy, it will not be deprived of such jurisdiction, either by the operation of a statute conferring similar jurisdiction upon the common-law courts, or by the adoption by the common-law courts of the principles and practice of the courts of equity. *Frey v. Demarest*, 16 N. J. Eq. 236. Therefore, in cases of account between persons holding a fiduciary relation, the right to an account in equity exists unchanged, although a court of law has now improved methods of procedure, by which some of those matters can now be tried, and would exist unchanged, although the jurisdiction of courts of law should become complete in its procedure, and suitable for the trial in such cases. But in cases of account, other than those just mentioned, the jurisdiction of the court of chancery is a discretionary jurisdiction. The superior right of a court of law is admitted, so long as that court can properly deal with the matters litigated.

Now, in determining whether a court of law can adequately deal with an account, I do not perceive why the present, and not the past, method of legal procedure should not be regarded. This is the rule in regard to bills for new trials exhibited in the court of equity. The propriety of such bills is not tested by the restricted power of courts of common law to grant new trials at the time when such bills were first entertained, but is tried by the present liberal practice of the court in this respect. As was observed in *Executors of Powers v. Administrator of Butler*, 4 N. J. Eq. 465, "upon examination of the numerous authorities, it will be seen that as the courts of law have extended their jurisdiction over those subjects the courts of equity have withdrawn their jurisdiction from them." This remark was reiterated in the case of *Hannon v. Maxwell*, 31 N. J. Eq. 318-329, decided by the court of appeals. So it seems to me that the question is whether a court of law can now adequately

deal with the account. The question is simply adequacy of the remedy, and that should be decided by the present processes of legal investigation. As already remarked, these processes have become radically changed; so changed, in fact, that the remarks of Judge Finch, in his opinion in the case of *Marvin v. Brooks*, 94 N. Y. 71-80, are almost as pertinent here as in the state of New York. Speaking of the jurisdiction of a court of equity in matters of account resting upon their complexity, and also for discovery, he observed "that the necessity for a resort to equity is now very slight, if it can be said to exist at all, since a court of law can send to a referee a long account, too complicated for the handling of a jury, and furnishes, by the examination of the adverse witnesses before trial, and the production and deposit of books and papers, almost as complete a means of discovery as can be furnished by a court of law." The power to refer, the power to previously examine witnesses, and the power to obtain an inspection and copies of books and papers in actions at law, must be taken into account, when the question of equity jurisdiction rests upon the single ground of the inadequacy of a court of law to reach satisfactory results in the trial of a legal cause of action. These improved methods of procedure do not strip this court of jurisdiction in instances of complicated accounts; but, when the degree of complexity which will put the case beyond the capacity of the law court to try is to be ascertained, then the present mode of trial is certainly a factor of importance. There are still many cases in which a court of equity and a master can afford a fuller measure of relief than can a court of law dealing with the report of a referee; but there are also cases, of which courts of equity would once have assumed jurisdiction, which I think should now be remitted to the legal tribunals. In my judgment, the present account is not one for equitable cognizance. As already observed, the quantity of manufactured goods that was furnished by the complainant is entered in complainant's own books. The cash paid to him each week was within his own cognizance, and could have been, but was not, entered on his books. So of the rents, the amount of which he knew. So of the repairs which he had had made. These are entered upon defendants' books, and, so far as appears, are all entered. So far, the account appears to be one of great simplicity, involving the simple addition of the sums charged. The only contested items involve purely legal questions—First, whether, under the contract between the parties, the complainant was to pay for the twine used by him; second, whether there was an assent by complainant to the charge for damages for defective goods, or a right to make such deduction, arising from the contract between the parties. I see no difficulty in trying the case at law. Indeed, if sitting at circuit, I would not, as matters now appear, order a reference. If the complainant can compel these defendants to account, I see

no reason why each one of 500 employes to whom wages have been paid on account cannot compel the employer to do the same, or why any person, after a few weeks' dealing with a grocer on credit, has not the same privilege. There is characteristic force in the remarks of Chief Justice Marshall in his opinion in *Fowle v. Lawrason's Ex'r*, 5 Pet. 495, that "It cannot be admitted that a court of equity may take cognizance of every action for goods, wares, merchandise sold and delivered, or of money advanced, where part payments had been made, or of every contract, express or implied, consisting of various items, for which different sums of money have become due, and different payments have been made. Although the line may not be drawn with absolute precision, yet it may be safely affirmed that a court of chancery cannot draw to itself every transaction between individuals in which an account between parties is to be adjusted. In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted. But, in transactions not of this peculiar character, great complexity should exist in the account, or some difficulty at law should interpose, some discovery should be required, in order to induce a court of chancery to exercise jurisdiction." I am constrained to hold that there should be a decree denying the accounting.

STATE (BERRY, Prosecutor) v. CRAMER
et al.

(Supreme Court of New Jersey. Nov. 7, 1895.)

CONSTITUTIONAL LAW — INTOXICATING LIQUORS —
LICENSE FEE.

1. The fourth section of the act of March 20, 1889 (Pamph. Laws, p. 77), is unconstitutional.

2. Under that section, if valid, a license fee cannot be fixed by popular vote at so great an amount as to be, beyond question, prohibitory of license.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of Abel J. Berry, against Isaac Cramer and others. Proceedings set aside.

Argued June term, 1895, before VAN SYCKEL, MAGIE, and LIPPINCOTT, JJ.

Wm. E. Potter, for relator.

VAN SYCKEL, J. This writ is prosecuted to test the legality of the proceedings taken by the voters of the township of Stafford in the county of Ocean under the fourth section of the act to regulate the sale of spirituous, vinous, malt, and brewed liquors, passed March 20, 1889 (Pamph. Laws 1889, p. 77). This act fixes a minimum license fee in respect to population. It gives a discretion to courts and other bodies empowered to grant licenses to fix a greater fee; and the fourth section provides "that upon application by a petition signed by at least one-fifth of the

legal voters voting at the last previous gubernatorial election for governor, of any township, town, borough or city wherein licenses are required to be granted by the court of common pleas of the county, being made to the law judge or circuit judge in and for the county wherein said township, town, borough or city may be located, setting forth the desire of such petitioners that not less than a certain sum of money, to be named and specified in such petition, be charged and paid for licenses thereafter to be granted to sell the liquors aforesaid or any of them, by less measure than one quart, within such township, town, borough, or city," it shall be the duty of such judge to order an election at which the legal voters shall determine by ballot whether any license shall be granted for any sum less than that specified in such petition.

The first objection to the validity of the proceeding is the radical one that this section of the act is special and local, and therefore unconstitutional. The provisions stated all come within the title of the act, because all tend to regulate the traffic. By the fourth section, elections can be held only in townships, towns, boroughs, and cities wherein licenses are required to be granted by the court of common pleas. The act, therefore, does not apply where licenses proceed from other authorities. This limitation of the exercise of the right to voters in those localities wherein licenses are to be granted by the court, in our judgment, localizes and specializes this provision; for in this respect it is impossible to discover in the characteristic differentiating them from other localities—viz. license by the court—any distinction which will make this legislation germane to them and inappropriate to others. Even if we could take a different view of this question, a very recent decision of this court constrains us to pronounce the act in this respect to be in contravention of that provision of the state constitution that "the legislature shall not pass private, local or special laws regulating the internal affairs of towns and counties." The case referred to is *Loucks v. Bradshaw*, 56 N. J. Law, 1, 27 Atl. 939, in which the validity of the act entitled "An act to create county boards of license commissioners, and to define their powers and duties," was challenged. That act provides for the appointment of boards of license commissioners by the governor of the state, whose powers are thus defined: "They shall have general supervision and control of the wholesale and retail sale of spirituous, vinous and malt liquors, except where license for the sale thereof has been or may hereafter be granted by a court in their respective counties." The chief justice, who delivered the opinion of the court, holding that act to be unconstitutional and void, says: "It is now contended that, by this exceptive clause, the operation of the act is confined to certain localities, and is therefore unconstitutional; and this court is of opinion

that this position is well taken. It is obvious that there is nothing in the subject-matter of this legislation that, from its inherent nature, would make it apposite to some counties, and not to others. The fact that in some counties licenses of the kind in question are granted by a court, and in others proceed from other authorities, is a purely arbitrary distinction, and, as such, cannot be laid as the basis of a classification for the purposes of legislation regulating the internal affairs of our counties. This principle has been so often and fully expounded in the decisions of this court that all discussion on the subject would be superfluous." This case is directly in point, and must rule this controversy. A further act, passed in 1889, provides that the other provisions of the act of March 20, 1889, shall not be tainted by the infirmity in the section involved in this case. Pamph. Laws 1889, p. 360.

A further reason relied upon to vacate the certified proceedings is that they are not authorized by the fourth section of the act of 1889, under which they purport to have been taken. The grant to the voters of the township is not of power to make a law, but simply to exercise a discretion as to the amount of the license fee. The population of Stafford township is 1,089. The minimum license fee fixed by the voters is \$2,000. The case shows beyond controversy that such a license fee practically prohibits license, and there can be no doubt that those who voted for it intended to make it prohibitory. The act of 1888 (page 142) was a local option law, expressly authorizing license to be prohibited at the option of the voters. The act of 1889 was passed to repeal that feature of the act of 1888 which enabled the people to secure the prohibition of license by a majority vote, and to substitute high license as a regulation of the liquor traffic. The act of 1889 does not contemplate prohibition. It is a license law, and not a prohibitory enactment. The fourth section expressly provides that a minimum fee may be fixed, which shall thereafter be charged and paid for licenses. There is nothing in the language of the act itself, or in the course of legislation on this subject, which indicates an intention to submit to the popular vote the question of prohibition.

The courts, in their discretion, in granting licenses, may exact a fee greater than the minimum fixed by the law; but the court that required a fee so large that, by common consent, the sale would be conceded to be prohibited, would exercise an arbitrary power not conferred upon it, and not a legal discretion, within the contemplation of the law. No wider range can be claimed for the discretion confided to the voters of the township. They did not exercise a discretion in respect to license in voting for a license fee of \$2,000, for that plainly prohibited any license. The maximum amount which may be voted in any given case cannot be determined by any abso-

lute standard. That is a difficulty which arises in many cases where discretion is to be exercised. Cases of doubt would properly be solved in favor of the popular will; but in an instance like this, where the line is so clearly overstepped, the proceeding can, without hesitation, be pronounced to be unauthorized. In 1888 the legislature declared that the sale of ardent spirits might be prohibited by the popular vote. In 1889 that law was repealed, and in its stead was substituted a law providing that, by the popular vote, a minimum license fee might be established, thereby manifestly withdrawing the right to prohibit. The distinction between license and prohibition is too wide and too well understood to be the subject of doubt or discussion. The power exercised in this case cannot be upheld without subverting the well-settled rules of statutory interpretation. It is not the province of a court to declare what, in accordance with a wise public policy, the law should be. Its simple duty is to expound the law as it has been promulgated, and to determine the extent of the power which the legislature has committed to the political subdivisions of the state. In this case that power has been clearly exceeded, and the proceedings certified are therefore without a legal basis to support them. The case of *Middleton v. Robbins*, 54 N. J. Law, 506, 25 Atl. 471, was disposed of on technical grounds, without adverting to the questions involved in this case. *Loucks v. Bradshaw* is a later case, and must be accepted as the law of this court. In our opinion, the proceedings under review must be set aside, but without costs.

LA FOUCHERIE v. KNUTZEN et al.
(Supreme Court of New Jersey. Nov. 7, 1895.)

MECHANICS' LIENS—FILING OF CONTRACT AND SPECIFICATIONS.

1. When it appears by the contract that the builder is to do all the work and furnish all the materials necessary for the construction of a building, it is not necessary to file the specifications with the contract in order to protect such building from the liens of mechanics and material men under the provisions of the second section of the mechanics' lien law.

2. The amendment to the second section of the mechanics' lien law, passed March 29, 1892, makes it necessary for the owner of a building to file his contract for its erection at or before the time when such building is begun, in order to have it exempted from the liens of mechanics and material men.

(Syllabus by the Court.)

Case certified from circuit court, Essex county; Childs, Judge.

Action by John C. La Foucherie against George Knutzen and Rudolph W. Sheffer and others to enforce a mechanic's lien. Heard on case certified. Judgment for plaintiff.

On October 5, 1892, Knutzen, one of the defendants, entered into a contract with Sheffer, the other defendant, to erect for him

a dwelling house at Nutley, in Passaic county. The contract was not filed in the clerk's office until November 14, 1892, and no specifications were filed, either with the contract or at any other time. Subsequent to the making of the contract, but before it was filed, the plaintiff, La Foucherie, entered into a subcontract with the defendant Knutzen to do the mason work on said building for \$555, payable as follows: \$200 when the building was raised, \$50 when the chimneys were up, \$200 when the scratch coat was on, and the remainder when the work was completed. The plaintiff commenced work under his subcontract about October 20, 1892, and on the 26th of November following was paid in full for all work done and materials furnished by him up to that time. Before the building was completed, however, Knutzen, the builder, abandoned his contract, and on April 24, 1893, Sheffer, the owner, gave him notice that he would, pursuant to the contract, cause the building to be completed at his cost and expense, and deduct such expenses from any moneys which might be due or unpaid on the contract. The work was so completed, and the whole balance of the contract money not paid to Knutzen before his abandonment of the work was exhausted in such completion. There remaining due and unpaid to the plaintiff on his subcontract the sum of \$225, he, on November 10, 1893, and within the statutory period, filed a lien claim for the amount.

Under this state of facts two questions have been certified to this court for its advisory opinion: First, whether the plaintiff is entitled to file and enforce a mechanic's lien against the building and curtilage of the defendant Sheffer for work done and materials furnished by him upon such building subsequent to the filing of the contract between the defendants Knutzen and Sheffer, by reason of the fact that the said defendants failed to file with their contract the specifications for the building referred to therein; and, second, whether the plaintiff is entitled to file and enforce such lien because such contract was not filed until after the plaintiff had begun work upon said building in execution of the subcontract made between him and the defendant Knutzen.

Argued June term, 1895, before BEASLEY, C. J., and DIXON and GUMMERE, JJ.

John R. Hardin, for plaintiff. A. Q. Garretson, for defendants.

GUMMERE, J. (after stating the facts). The second section of the mechanics' lien law, as amended by the supplement of March 29, 1892 (Pamph. Laws 1892, p. 358), provides that, when any building shall be erected in whole or in part by contract in writing, such building, and the land whereon it stands, shall be liable to the contractor alone for work done or materials furnished in pursuance of such contract, provided such con

tract, or a duplicate thereof, be filed, etc. The answer to the first question certified to us therefore depends upon whether the filing of the contract without the specifications is a filing of the contract, within the meaning of the statute. The exemption from lien given by this section extends to work done and materials furnished "in pursuance of such contract," and the principal object to be accomplished by requiring the contract to be filed undoubtedly was to inform laborers and material men to what extent the building was exempt from liens, and how far they must look to the contractor alone for their pay. For this reason it has frequently been held in this state that the necessity of filing the specifications with the contract in order to gain the benefit of the statute depends upon whether or not it is necessary to resort to such specifications in order to ascertain how much of the building the contract covers; and that, when all the work is to be done and all the materials are to be furnished by the contractor, then the filing of the contract alone is sufficient to protect the building from liens; but that, where the contract is limited to a part of the work upon the building, which part can only be ascertained by an inspection of the specifications, then the specifications as well as the contract must be filed. *Ayres v. Revere*, 25 N. J. Law, 474; *Babbitt v. Condon*, 27 N. J. Law, 162; *Budd v. Lucky*, 28 N. J. Law, 484; *Pimlott v. Hall*, 55 N. J. Law, 192, 26 Atl. 94; *Freedman v. Sandknop* (N. J. Ch.) 31 Atl. 232. By the terms of the contract in the present case, Knutzen, the builder, was required "to provide and furnish all the supplies and materials, and to do or cause to be done all the work and labor, of every sort and description whatever, necessary to erect and finish complete" the building upon which the lien is claimed. A reference to the specifications, therefore, would afford no information as to what work the builder was to do which could not be obtained from an examination of the contract itself. It was, consequently, not necessary, under the law as laid down in the cases above referred to, for the defendants to file the specifications with their contract, in order to protect the building from liens for work done and materials furnished; and we advise the circuit court that the plaintiff did not acquire a right to a lien under the mechanics' lien law by reason of the failure to file such specifications.

The answer to the second question certified depends upon the construction to be given to the amendment to the second section of the mechanics' lien law, approved March 29, 1892, and how far it has altered the law as it stood before that amendment went into effect. The second section of the mechanics' lien law, before it was amended, provided that the building and curtilage should be liable to the contractor alone for work done or materials furnished, in case the contract was

filed before such work was done or materials were furnished. The amendment of 1892 also exempts the building and curtilage from liability to any one except the contractor for work done or materials furnished, in case the contract is filed, but fails to state when such filing shall take place in order to exempt the property from liens by mechanics and material men. By this section of the act, as it originally stood, mechanics and material men were required to ascertain, before each day's work was commenced, or each load of material was delivered, whether a contract had yet been filed. *Loan Ass'n v. Albertson*, 23 N. J. Eq. 318-321. And the omission by the legislature, in the supplement of 1892, of any mention of the time within which the contract should be filed, seems, therefore, to lead to one of two conclusions,—either that it was the legislative intent that the owner should have the right to file his contract at any time he should see fit, without regard to whether or not work had been done or materials furnished upon his building, or else that it was intended that the owner should file his contract at or before the time when the erection of the building was begun, if he desired to relieve it from liability to the mechanics and material men. Taking into consideration the object for which the mechanics' lien law was passed, as expressed in its title, namely, "to secure to mechanics and others payment for their labor and materials in erecting any building," it seems clear that the construction first suggested should not be given to this supplement, for to do so would enable the owner of the building, by keeping his contract off the file until the time for making the last payment thereunder had arrived, or until the building was completed, and then filing it, to deprive mechanics and material men of all the benefits which the act was designed to confer upon them. We are of opinion that, in order to give force to this section of the mechanics' lien law as amended by the act of 1892, it must be construed as making it obligatory upon the owner, in order to have his building exempted from the liens of mechanics and material men, to file his contract at or before the time when such building is begun; and the circuit court is so advised.

PROVOST v. ROBINSON'S EX'R.

(Supreme Court of New Jersey. Nov. 7, 1895.)

COMPETENCY OF WITNESS—TRANSACTIONS WITH DECEDENTS.

1. The provision in the act concerning witnesses disqualifying a party from giving testimony as to any transaction with or statements by any testator or intestate represented in said action has no effect but to exclude personal transactions with the testator or intestate.

2. A plaintiff, having proved a contract with the deceased, was then admitted as a witness to show what he had expended and what work he

had done out of the presence of the deceased. *Held*, such testimony was legal. (Syllabus by the Court.)

Case certified from circuit court, Somerset county, for advisory opinion; before Justice Magee.

Action by one Provost against Robinson's executor. Heard on cause certified for an advisory opinion.

Argued June term, 1895, before BEASLEY, C. J., and DIXON and GUMMERE, JJ.

Gilhooly, for plaintiff. Alvah A. Clark, for defendant.

BEASLEY, C. J. This was a suit brought by the plaintiff against the defendant, as executor, for certain work and labor performed and moneys expended for the deceased during his lifetime as architect and agent in the building of a house. The contract by virtue of which such services were rendered was fully proved by sundry witnesses, whose testimony was not questioned. At this stage of the trial, the plaintiff was called to the stand, and was, in the face of objection, permitted to prove his work and expenditures in pursuance of the authority thus given. The competency of this latter testimony is now drawn in question. It is insisted that the matters to which the testimony related were "transactions with" the testator, and that consequently their admission was prohibited by the express terms of our statute. The act thus involved is the supplement to the statute "concerning evidence," passed in 1880 (Supp. Revision, p. 287), and is in these words, viz.: "That in all civil actions," etc., "any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity: provided, nevertheless, that this supplement shall not extend so as to permit testimony to be given as to any transaction with or statement by any testator or intestate represented in said action." In its connection with the present case, the inquiry arises with respect to the scope of the meaning of the phrase "any transaction with the testator," etc. Manifestly, the work and expenditures in question were transactions for the testator, but in what way were they transactions with him? He was not present when such acts were performed, nor did he by deed, will, or presence participate in their doing. Such matters the deceased was interested in, but they plainly were not transactions with him. The statute qualifies the party to be a witness in some respects, but, if he is to be excluded from testifying with respect to the subjects here in question, it is difficult to see how his testimony could be in any case available. It would seem that he could testify only to transactions irrelevant to the issues. The statutory expression is indistinct, and must therefore be interpreted so as to effectuate the legislative purpose as indicated in the context, and that purpose was to in-

capacitate the living witness with respect to personal intercourse and conversation with the deceased. But it is not necessary to pursue the subject further if the interpretation thus signified was, in substance, the exposition of the clause recently adopted by the court of errors in the case of Woolverton v. Van Syckel, 31 Atl. 603. Let the circuit court be advised that, in the opinion of this court, the testimony in question was not erroneously admitted, and that there should not be a new trial on account of its admission.

MALLORY v. KIRKPATRICK.

(Court of Chancery of New Jersey. Oct. 15, 1895.)

INSOLVENT CORPORATION—PREFERRING CREDITORS—RIGHTS OF OFFICERS—CREDITORS' BILL.

1. A corporation organized under the laws of this state, which is in an insolvent condition, cannot prefer, as a creditor, one of its officers.

2. The president of a corporation in an insolvent condition, who is also its creditor to a large amount for cash advanced, brought suit against it on one day, resigned as president and director the next day, and on the third day the directors accepted his resignation, and authorized an attorney to give a cognovit, upon which judgment was at once entered. *Held*, that the creditor could not have a preference by virtue of such a judgment.

3. Other judgments had been recovered by outside creditors against the corporation in due course shortly before the judgment by cognovit, and under those all the property of the corporation was sold, leaving a surplus, which was paid by the sheriff to the ex-president under his judgment by cognovit. Subsequently another creditor brought suit, and recovered judgment, and filed his bill against the ex-president, praying that he be decreed liable to pay his judgment out of the surplus in his hands. *Held*: (1) That the ex-president held the money so received in trust for all the creditors; (2) that they could not be reached by the later judgment creditor for his own benefit, under the eighty-eighth and subsequent sections of the chancery act; (3) that they could be reached by a receiver appointed for the benefit of all the creditors.

4. Corporations are not liable to be proceeded against under the eighty-eighth and subsequent sections of the chancery act.

(Syllabus by the Court.)

Bill by Philander J. Mallory against Andrew Kirkpatrick to declare a judgment fraudulent as against complainant. Conditional decree for complainant.

This is a contest between two judgment creditors of the Newark Bark Company, a private corporation, organized under the general act. The judgment of the defendant was entered on the 13th day of June, 1894, for upward of \$15,000. Upon its execution was promptly issued, and all the property of the defendant corporation levied upon, sold, and purchased by the defendant. The sale was made not only under the defendant's judgment, but also under two other judgments previously recovered against the corporation, and the property produced a sufficient amount to pay the previous judgments and several hundred dollars on that of the defendant. About the time that the sale took place, a

plainant brought an action upon his claim against the corporation, and obtained judgment by default on the 3d of October, 1894, for \$605.85. The prayer of the bill is that the judgment recovered by the defendant may be declared to be fraudulent and void as against the complainant, and that the property, real and personal, sold under it to the defendant, may be decreed to be subject to the lien of the complainant's execution, and the sale under the previous judgment set aside, or, in the alternative, that the defendant pay the complainant's judgment out of the proceeds of the sale, which would otherwise go to satisfy his own judgment. The defendant was from the organization of the corporation, and up to the 12th of June, 1894, one of its directors and its president. On the day last named, it was indebted to him in about the sum of \$1,500 for money advanced to it, and he was an indorser on its notes for about \$7,500 more. The company was hopelessly insolvent, and two judgments, amounting to about \$3,000, had already been recovered against it. On the 11th of June, he commenced suit against the company, and on the 12th he resigned as president and director. At a meeting of the remaining directors held on the 13th, his resignation was accepted, and his son, Andrew Kirkpatrick, Jr., was elected a director in his place; and then, by a resolution of the board, an attorney of the supreme court, who was present, was authorized and directed to consent to a judgment in favor of the defendant in his suit just commenced. Immediately after receiving this authority, the attorney signed a *cognovit* actionem, and judgment was at once entered in the defendant's favor against the company for \$15,000 and upward. There is no dispute but that the whole amount was due.

T. N. McCarter, Jr., for complainant. P. Woodruff, for defendant.

PITNEY, V. C. The complainant attacks the defendant's judgment on two grounds:

First, he alleges and proves that his claim was due and should have been paid in the fall of 1893, and that it was placed by him in the hands of an attorney for collection, who called upon the defendant and upon one of the directors, who appeared to be active in managing the financial affairs of the company, and demanded payment; that they both told him that the company was in financial difficulties, and that it was trying to pay its debts, and they thought it would be able to do so if the creditors gave them time. The defendant also stated to complainant's attorney that the corporation was largely indebted to him, and, if the creditors attempted to force payment, he should attempt to secure himself. On the strength of this statement, complainant's attorney accepted part payments on the amount due, and took notes of the company for the balance. This was done on one or two occasions before the final collapse, part of the

amount due being paid in each instance. The precise point made by the complainant is that there was what amounted to a contract between him and the defendant, as president of the company, that, so long as the complainant granted renewals in part payment of his debt, the defendant would not take measures to secure himself. I think the evidence entirely fails to sustain the point. What the defendant promised was that, if all the creditors forebore to sue, the company would try to pay them all. This condition was not fulfilled. Two of them did sue, and obtained judgment and execution.

The second point relied upon by the complainant requires more careful consideration. It is that the corporation, being insolvent, had no right to prefer the defendant, who was its president, as its creditor; and he relies upon the very recent case of *Montgomery v. Phillips*, decided by the court of errors and appeals on the 20th of March, 1895, reported in 31 Atl. 622, and upon *Manufacturing Co. v. Hutchinson*, 11 C. C. A. 320, 63 Fed. 496. Against this, complainant relies upon *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514, and takes the additional ground that complainant has no standing in court to attack the judgment of defendant for his own benefit alone, but that it can only be done either by a receiver in insolvency, as in *Montgomery v. Phillips*, or by a bill in which complainant asks relief for himself and all other creditors who may come in and ask a benefit under the decree.

Before considering this question, it is proper to notice a further technical objection made by the defendant, viz. that the corporation should have been made a party. It seems to me that the point is well taken, and that, without the corporation in court, the complainant's proceedings are defective. But, as that is a matter which may be remedied by amendment, I will proceed to consider the merits.

I am unable to reconcile the case of *Wilkinson v. Bauerle* with that of *Montgomery v. Phillips*. The former case distinctly avows the doctrine (41 N. J. Eq. 643, 644, 7 Atl. 514) that an insolvent incorporated company may prefer its creditors generally, not excluding its president or other officers; and in that case one of the creditors preferred was the president of the company. In *Montgomery v. Phillips*, as I read it, the contrary doctrine is established; and it was distinctly held, upon review of all the authorities, that a corporation in an insolvent condition could not prefer one of its creditors who was an officer of the company, and a chattel mortgage given for that purpose was set aside at the suit of a receiver appointed by this court. At the same time an assignment of choses in action to a creditor at large, not an officer or stockholder, was sustained, though made when the company was insolvent. The bill in *Wilkinson v. Bauerle* was exhibited by a creditor who sued for himself and all others who might come in (41 N. J. Eq. 638, near bottom, 7 Atl. 514);

that in *Montgomery v. Phillips* was exhibited by a receiver appointed by this court. This difference is not material, because the object of the bill in both cases was precisely the same, viz. to bring about an equal distribution of the assets of the corporation among its creditors.

In addition to the direct bearing upon this case of the decision of the court of errors and appeals in *Montgomery v. Phillips*, there is the eightieth section of the corporation act, which declares that the funds of a corporation "shall be distributed among the creditors proportionally to the amount of their respective debts, excepting mortgage and judgment creditors when the judgment has not been by confession for the purpose of preferring creditors." A judgment by confession for the purpose of preferring a creditor is expressly excepted by Justice Magie in his opinion in *Wilkinson v. Bauerle*.

It is urged by the counsel for the defendant that his is not a judgment by confession, but I cannot adopt that view. The suit was commenced by a summons and declaration on the 11th of June. The defendant's resignation was dated on the 12th. The directors met on the 13th, and accepted the resignation, and elected his son a director in his place, and then authorized an attorney to consent to a judgment against the corporation, which the attorney did by an ordinary plea called a "cognovit," in which it acknowledges that the defendant did undertake and promise as the plaintiff in its declaration has alleged, and that it cannot deny that it owes and unjustly detains from the plaintiff the sum claimed by him in his declaration, and consents that judgment be entered against it for the sum of \$15,324.05. Now, if that is not a judgment by confession, I am unable to understand what a judgment by confession is. It is the ordinary form found in the books of precedents of a cognovit, and a cognovit is a confession. Its effect in hastening the judgment was precisely the same as if the corporation had executed a bond with a warrant of attorney to confess judgment. The defendant's contention that the language in the eightieth section of the corporation act—"when the judgment has not been by confession for the purpose of preferring creditors"—applies only to judgments by bond and warrant of attorney, cannot be maintained. The common-law practice of entering judgment upon cognovit actionem is old and well established, and a judgment so entered has always been known as a judgment by confession. *Stewart v. Walters*, 38 N. J. Law, 274, and cases there cited.

But the defendant's counsel further contends that this judgment was not confessed for the purpose of preferring his client. If it was not for that purpose, then I am unable to imagine for what purpose it could have been done. Two judgments were entered against the company, aggregating over \$3,000, on the 4th of June. The sheriff might, and undoubtedly would, proceed immediately to sell under them. If the property brought more than

the amount of these judgments, the surplus would, in the then condition of affairs, be paid to the company. The entry of these prior judgments made it possible and easy for any creditor, or any one of the stockholders of the company, to apply at once to the chancellor for a receiver and an injunction against any other suits. The result of that proceeding would have been to prevent any preference being made to the defendant. Hence it is palpable that the object of hastening his judgment was to give him a preference, and that is in accordance with his avowed declarations made to the attorney of the complainant a month before, and he frankly states in his evidence that he gave instructions to the attorney to proceed and secure his debt. And see *Stratton v. Allen*, 16 N. J. Eq. 229.

Again, it is urged that the defendant, at the time the judgment was confessed, was not an officer of the company, and therefore he is not within the letter and spirit of the decision in *Montgomery v. Phillips*. If his judgment be by confession for the purpose of giving him preference over other creditors, it is immaterial whether he be an officer or not, since that mode of obtaining preference is forbidden to all creditors; and the language of Vice Chancellor Van Fleet in *Bissell v. Besson*, 47 N. J. Eq. 580, 22 Atl. 1077, applies. But I am unable to accede to the view that defendant is not for present purposes to be treated as an officer of the company. I cannot admit that the resignation as president and director, and acceptance thereof, and the confession of judgment, all in one day, were efficient to alter his relations to the company. I am forced, therefore, to the conclusion that the defendant is entitled to no preference under his judgment against the other general creditors of the corporation.

That brings us to another point taken by the defendant, which is that the complainant's bill is defective, in that it does not declare that it is filed on behalf of himself and all other creditors of the corporation; and this is really the troublesome point in the case. The term "creditors' bill" was originally applied to those bills which were filed by creditors of the estate of a decedent against his personal representatives for the marshaling of the assets, and for the payment of the creditors according to their priority, and without any preference among those of equal degree. They were, strictly speaking, bills to administer the estate of the decedent. At the same time, all bills brought by creditors for the purpose of securing their debts are, in one sense, creditors' bills. Thus, a bill to set aside a fraudulent conveyance of land by a debtor to a third party, or to subject to the lien of a judgment land the title to which has been purchased with the funds of the judgment debtor, and the title placed in a third party for his benefit, is, in one sense, a creditors' bill. But the term "creditors' bill," as used in the standard treatises, was originally :

plied to bills for the administering of assets of the character just indicated. Such, in effect, were the bills in *Jones' Ex'rs v. Fayerweather*, 46 N. J. Eq. 237 (see page 248), 19 Atl. 729, though those bills had the additional element of seeking to establish the fraudulent character of the transfer of the property by the deceased in his lifetime to the defendant, his executor. See *Mitt. Eq. Pl. 166*; *Story, Eq. Pl. § 99 et seq.* Nevertheless, it is true that in that class of cases one creditor might bring a bill for his own individual benefit, without stating that it was for the benefit of all creditors; and, if the personal representative admitted sufficient assets to pay all the debts, a decree would go at once in favor of the complainant alone. 1 *Daniell, Ch. Prac. *235, *236.* But if, on the contrary, the personal representative denied sufficient assets, the result was a decree simply for an ascertainment of the value of the assets and amount of the debts, and an equal distribution among all; so that no priority by one creditor over another could be obtained by such a suit. For such bills no preliminary judgment was necessary; precisely as no judgment is necessary here in order to entitle a creditor to institute proceedings in insolvency against a corporation under the seventieth section of the corporation act. In creditors' bills based on the eighty-eighth and subsequent sections of the chancery act, which provide a mode of reaching choses in action, a creditor is not obliged, directly or indirectly, to sue for the benefit of all the creditors, although he may do so; and, however he frames his bill, he obtains a preference and priority of lien by filing his bill and getting his order. *Whitney v. Robbins*, 17 N. J. Eq. 360, 363. Such is the rule in New York under a statute from which our first statute was copied. *Corning v. White*, 2 Paige, 567; *Parmelee v. Egan*, 7 Paige, 610. Notwithstanding what was said by Justice Dalrymple in his judgment in *Tantum v. Green*, 21 N. J. Eq. 364, I must take it that the rule is as stated by Chancellor Zabriske, sitting as master, in *Whitney v. Robbins*,—that, in the absence of fraud, this court would not, before the legislation just referred to, aid a judgment creditor to obtain payment out of any particular asset of a chattel nature not subject to levy. See *Will. Eq. Jur. pp. 237, 238*; *Donovan v. Finn*, 1 *Hopk. Ch. 59.* The property sought to be reached in this case is not land or leviable chattels, for, before suit brought by complainant, the property of the defendant corporation had been sold under valid judgments and executions other than that of the defendant, and the only effect of the defendant's judgment was to give him the proceeds of the sale of the company's property over and above enough to pay those prior judgments. This surplus came into the hands of the defendant lawfully. His judgment was a lawful and valid judgment. He had a right to sue the company, and to ob-

tain judgment as soon as he could; but he had no right to make use of that judgment, when obtained by confession, to gain a preference over other creditors. As to creditors, he holds what he so obtained in trust for their equal benefit. The defendant, then, is lawfully in possession of the assets of the corporation as a trustee for all its creditors, and I am unable to see how the complainant is able to reach the funds in his hands under the provisions of the eighty-eighth and following sections of the chancery act. That act clearly applies only to natural persons as defendants who may be called upon to be examined under oath, and has no application to a corporation. As a bill to appropriate to himself exclusively an asset of the defendant corporation, I think the complainant's bill fails.

The question remains whether or not it can be made available for any purpose. The clear policy of our corporation act is that the assets of an insolvent corporation should be equally divided among its creditors. Its assets are to be administered in that regard like those of a decedent, and I am of the opinion that the only ground upon which the complainant's bill can be maintained is that it is a bill in the nature of a creditors' bill against the estate of a decedent to administer the estate of an insolvent corporation. Such a bill was maintained in *Wilkinson v. Bauerle*.

If, then, the complainant is willing to amend by making the corporation a party, and framing his bill for the benefit of all the creditors, I think he may be entitled to a decree declaring that the surplus brought by the property over and above a sufficient amount to pay the prior judgments shall be held by the defendant in trust for the benefit of all the creditors. But, in order to have the benefit of such a declaration, it seems to me that it is proper, if not necessary, that a receiver should be appointed. Whether the defendant should account for any profit he may have made upon his purchase of the company's property can be considered after such appointment.

MARLEY et al. v. STATE.

(Supreme Court of New Jersey. Nov. 7, 1895.)

CRIMINAL PROSECUTIONS—INSTRUCTIONS—ATTEMPT TO INCUR EXCESSIVE MUNICIPAL DEBT.

1. When a trial judge charges a jury that on the proofs before them they cannot convict of the crime charged in the indictment, but that they, if the facts warrant it, may convict of an attempt to commit the crime charged, at the same time he should instruct them to acquit of the crime charged in conformity with the statute, and an omission so to charge will be error.

2. Where a charge is made in the indictment of a certain crime, but the facts stated show that the charge is nugatory, a defendant cannot be convicted of such charge.

3. When the thing done is a nullity, and therefore is not adapted to do the thing intend-

ed. there can be no conviction of an attempt to do the thing intended.

(Syllabus by the Court.)

Error to court of oyer and terminer, Passaic county; Hopper, Ingalls, and Van Hogenburg, Judges.

Francis J. Marley and others, as members of the board of freeholders, convicted of incurring obligations on behalf of the county in excess of the limit of expenditures provided by law, bring error. Reversed.

Argued February term, 1895, before BEASLEY, C. J., and DEPUE, REED, GUMMERE, VAN SYCKEL, MAGEE, LIPPINCOTT, DIXON, and LUDLOW, JJ.

John W. Griggs, for plaintiffs in error. William B. Gourley, for the State.

BEASLEY, C. J. The plaintiffs in error were members of the board of freeholders of the county of Passaic, and are charged in the indictment before the court with incurring obligations on behalf of the county in excess of the appropriation and limit of expenditure provided by law, contrary to the provisions of the act of February 7, 1876, entitled "A supplement to an act entitled 'An act for the punishment of crimes.'" At the trial, after the testimony was closed, the justice who presided charged the jury that under the evidence the defendants could not be convicted of having incurred the obligations stated in the indictment. The charge then proceeded to instruct the jury that the inquiry they were to make was "whether any of these defendants be proved by the evidence to be guilty of an attempt to incur this obligation." We think this instruction was radically defective, and that it has resulted in an erroneous judgment. As the indictment is framed, the defendants could not, at the common law, have been found guilty of an attempt to commit the misdemeanor in question. As has been stated, the charge in the indictment is that the crime had been completed, and there is no charge of an attempt to commit it; consequently it is only by force of the statute of the state that a conviction of the uncompleted crime would be proper. The pertinent provision is to be found in section 52 of the "Criminal Procedure Act," which is in these words, viz.: "And whereas offenders often escape conviction by reason that such persons ought to have been charged with attempting to commit offences, and not with the actual commission thereof; for remedy whereof be it enacted that if, on the trial of any person charged with any felony or misdemeanor it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such per-

son shall be liable to be punished in the same manner," etc.; "and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried." The course to be taken in such a juncture as was presented at the trial of the present case is plainly marked out in the statutory section just recited. The jury could not convict of an attempt without acquitting the defendant of the misdemeanor charged, and consequently the judicial instruction should have manifested to them that their power in this particular was thus conditioned. The result has been that the jury has rendered a verdict that "the defendants, and each of them, are guilty of the premises in the within indictment named and specified, in manner and form as by the said indictment is charged against them." This conclusion was manifestly the effect of the incomplete judicial instruction. The jury, by force of the statutory regulation, could not legally convict of an attempt without finding the defendants were not guilty of the crime laid against them in the indictment, and consequently they should have been so informed by the court. This was not done, and the omission constitutes a legal error in the proceedings. On this account the judgment cannot stand.

And we think there is another flaw in this trial which is fundamental and fatal to the prosecution of this case. It has already been stated that the defendants were indicted for incurring an obligation on behalf of the county in excess of the legal limit. The indictment sets out in detail the several acts done by them to that end, and the proofs corresponded with such allegations. The case, therefore, that was made by the indictment was in all respects proved. In this situation the trial court concluded that the series of acts so done by the defendants were as a matter of law wholly nugatory; that such acts did not and could not impose any legal obligation on the county. This construction of the legal question thus involved having been adopted at the trial, the jury were then instructed, as we have seen, that, although they would not be warranted to find the defendants guilty of the crime thus charged, they still had the right, if the evidence established the fact, to find that they had attempted to commit it. This theory of the case we think is fallacious. It is demonstrably erroneous from two considerations. The first of these is that the decision of the trial judge that the facts proved did not show the imposition of an obligation on the county was tantamount to a decision that the indictment itself did not charge any offense, for the facts charged and the facts proved were identical. It would seem to me self-evident that, if the case made by the state was wholly established by the evidence, and the latter, from a legal point of view, was nugatory, it necessarily follows that the case as presented on this record was equally nugatory. Therefore, accepting the view of the judge at the trial

(and from which we do not dissent), it is an unavoidable corollary that the defendants could not be convicted of an attempt to commit a crime that was not charged. The statutory regulation in question is by its very terms applicable to this situation when the indictment exhibits on its face a criminal offense. In the present instance this essential is lacking, according to the view of the law taken at the trial. On this ground also the judgment is invalid.

The same result must obtain from another aspect of the case. It has been entirely settled by judicial decisions that the act which it is declared that these defendants attempted to do cannot be done by the method stated in the indictment. As the law has been expounded, the board of freeholders, to which defendants belonged, under the existent circumstances could not impose upon the county the obligation in question. *State v. Chosen Freeholders of Hudson Co.*, 39 N. J. Law, 632. And so far was this doctrine extended that 'n the circuit court of the United States, in the case of *Crampton v. Zabriskie*, 101 U. S. 601, it was held that where, when county bonds had been given for lands conveyed to the county, such bonds were in excess of the funds appropriated, such transaction in all its parts was and is utterly void, and a decree was accordingly made requiring the vendor of the property to accept a reconveyance, and to return the bonds so given in payment of the purchase money. This decree was affirmed in the supreme court of the United States on the ground that the board of freeholders could not, in the mode adopted, incur any obligation for the county beyond its income previously provided by taxation. And this, as has been shown, was the doctrine in accordance with which the present case was tried. Looking, then, to this datum, it is obvious that the defendants have been convicted of an attempt to commit a misdemeanor which was a legal impossibility, and which they knew to be such. Such a procedure would appear to be inconsistent with the fundamental principles of law applicable to the subject. An intent to commit a crime is not equivalent to an attempt to commit it, for the purpose must be accompanied with some substantive act or series of acts tending towards its accomplishment. Mr. Bishop, with his usual explicitness and clearness, says, "Another principle concerning attempt is that, whatever a man's intent may be, he is not indictable unless there is some adaptation, real or apparent, in the thing done to accomplish the thing intended." 1 Bish. Cr. Law, § 516. So, speaking of the intent: "Every one being conclusively presumed to understand the law, no man can legally intend what is legally impossible." Id. § 518. In the light of such a theory it becomes plain that these defendants, even if the intent to commit the offense charged can be imputed to them, did, in legal contemplation, no act towards the accomplishment of such purpose, for every act they did was in the eye of the law an absolute

nullity. Not one of them, therefore, could tend to carry into effect any criminal project. It should be noticed that the principle here introduced is to be distinguished from the rule that is applicable to the case of a person designing to perpetrate a crime when he cannot effect it by reason of the existence of some fact unknown to him at the time. The cases are collected as to the principle elucidated in the recent cases of *People v. Gardner* (N. Y.) 38 N. E. 1003; *State v. Wilson*, 30 Conn. 500.

As it may suggest itself to a person looking into the subject thus considered that the rule adopted by the trial judge in its application to the primary question before him is not consistent with the decision in *State v. Halsted*, 39 N. J. Law, 402, and 41 N. J. Law, 552, it is proper to say that subject was not discussed by counsel, nor was it considered or decided by the court. The proposition that the freeholders have not the power to create an obligation binding on the county by the method now in question has been established by more recent decisions. Let the judgment be reversed.

CUMBERLAND GLASS MANUF'G CO. et al. v. STATE.

(Supreme Court of New Jersey. Nov. 7, 1895.)

MASTER AND SERVANT—PAYMENT IN MERCHANDISE.

1. If a workman agree with his employer to take pay for his work in part in merchandise, the merchandise so furnished does not constitute a ground of set-off; it is a payment, and goes in diminution of the claim for work.

2. Such a bargain is in violation of the first section of the act to secure to workmen the payment of wages in lawful money (Supp. Revision, p. 771), and has no relation to the exceptive clause in the fourth section relative to set-offs.

(Syllabus by the Court.)

Error to court of quarter sessions, Cumberland county; Hoagland, Ludlum, and Hendee, Judges.

The Cumberland Glass Manufacturing Company and John F. Perry were convicted of unlawful payments to employes, and bring error. Retained for future consideration.

Argued June term, 1895, before BEASLEY, C. J., and DIXON and GUMMERE, JJ.

Wm. E. Potter, for plaintiffs in error. Wm. A. Logue, for the State.

BEASLEY, C. J. The defendants were convicted before the Cumberland quarter sessions upon an indictment charging them with being engaged in the manufacture of glass, and with unlawfully paying to one John M. Quigg, a workman in the employ of the corporate defendant, the sum of \$81.71 in store goods and merchandise, as and for the wages earned by him while in the employ of said corporation. At the trial it was shown that the workman above named, at the time of his engagement, entered into the following agreement, to wit: "Bridgeton, N. J., July 28, 1890. In consideration of the Cumberland Glass Manufacturing Company furnishing me with groceries, mer-

chandise, and money, I hereby agree to work for them at glass blowing for the blast of 1890 and 1891; and, should I fail to do so, I hereby waive any plea in defense of my obtaining goods and money under false pretenses." The work in question was done and the goods furnished under that contract.

The act alleged to have been violated was the statute entitled "An act to secure to workmen the payment of wages in lawful money," passed in 1890 (Supp. Revision, p. 771). The first section of this law makes it unlawful "for any glass manufacturer, iron master, foundry man, collier, factory man, employer, cranberry grower, or his agent or company, their agents or clerks, to pay the wages of workmen or employees by them employed in either store goods, merchandise, printed, written, verbal orders, or due bills of any kind." By the fourth section it is provided as follows, viz.: "That any glass manufacturer, iron master, foundry man, collier, factory man, employer or company offending against the provisions of this act, the same shall be a misdemeanor, and punishable by a fine of not less than ten dollars, or more than one hundred for each and every offense, or imprisonment not to exceed the term of thirty days, at the discretion of the court; but nothing in this act shall apply to or affect any private individual giving orders as aforesaid on a store in the business or profits whereof he has no interest, directly or indirectly, or to the offset of any debt due from such workman to any glass manufacturers, iron master, foundry man, collier, factory man, employer or company where the said debt is voluntarily contracted by the employee, or to the payment of any debt due from such workman to any glass manufacturer, iron master, foundry man, collier, factory man, employer or company." By an act approved March 13, 1888 (P. L. p. 174), the fourth section of the original was amended so as to eliminate from it the proviso or restrictive clause just recited; and it was the validity of this supplement that forms the topic of the discussion in the briefs of counsel. This argument proceeded on the assumption that the primary act conferred upon the defendants the right to set off merchandise that it had furnished to the employé, and that, if that provision was in force, the defendants were guiltless. But the court is of the opinion that this discussion is irrelevant to the case before us. As has appeared, the exceptive clause in section 4 of the original act relates to set-offs or debts due from the employé to the employer. In the present instance the merchandise furnished did not constitute offsets or debts. By force of the contract between the parties, they were payments, pure and simple. The legal doctrine on this subject is entirely clear. A set-off is a counter demand growing out of an independent transaction for which an action might be maintained by the defendant against the plaintiff. For a full collection of the decisions on the subject, see 22 Am. & Eng. Enc. Law, tit. "Set-Off," p. 211. As, therefore,

the defense in this case could not be successfully rested on the last clause of section 4 of the original act, it becomes of no importance for present purposes whether that clause has been repealed or not. It would be a pure waste of time for the court to supererogate on that subject.

Before closing this branch of the case, it is proper to say that we have found no ground on which the conviction of the defendant Perry can be rested. This man's only connection with the transaction is that he was the book-keeper and a stockholder of the glass company. On account of such relationship he is not responsible for the violation of the act in question by the company. It is section 4 that denounces the punishment, and, by its express terms, it is the act of the employer himself, and not the act of his agent, that is made the punishable misdemeanor. With respect to this party the judgment must be reversed.

These results dispose of the case so far as it is exhibited in the briefs of counsel; but there is another problem that must be resolved before the court can finally decide upon the alleged criminality of the defendant. That question is whether the legislature, in enacting the law of 1888, did not exceed its authority. It is obvious that the general effect of this statute is to prevent a workman who is entirely sui juris from stipulating as to the character of the compensation to be given to him for his work. The inquiry thus arising is one of great importance, touching, as it does, one of the essential rights of the citizen and the extent of legislative authority, and therefore should not be settled except upon the fullest consideration. The result is that the case will be retained, so that counsel can send in briefs on the point thus reserved.

BELL v. ATLANTIC CITY R. CO.

(Supreme Court of New Jersey. Nov. 7, 1895.)
MALICIOUS PROSECUTION — PROBABLE CAUSE — EXCESSIVE DAMAGES.

1. In suits for malicious prosecution, the question of the existence of reasonable cause—the facts not being in dispute—must be decided by the court. Error in that respect entitles the defendant to a new trial.

2. The verdict was plainly against the proofs, and the assessment of damages grossly excessive. On either ground it would be set aside.

(Syllabus by the Court.)

Action by Samuel H. Bell against the Atlantic City Railroad Company. On motion for new trial. Granted.

Argued June term, 1895, before BEASLEY, C. J., and DIXON and GUMMERE, JJ.

Willard Morgan, for the motion. Mr. Westcott, opposed.

BEASLEY, C. J. This suit is for a malicious prosecution, in causing the plaintiff's arrest for an imputed crime. The conclusion of the court is that the rule to show cause why a new trial should not be granted must

be made absolute. This opinion rests upon various grounds, which will be briefly indicated, so as to guide the cause in its future progress.

First, we think that the question of the existence of reasonable cause for the prosecution in question should have been decided by the court, and should not have been left, as it was, to the jury. The facts on which that question turned were not, as it seems to us, in any dispute, and when that is the condition of affairs the legal rule is that it is the function of the court to pass upon their effect in law. To omit such duty was to deprive the defendant of the important right of testing, in a definite form, by a bill of exceptions and writ of error, the legal value of the plaintiff's case, in its most important feature. In the presence of such a mistake as that, it is not possible to permit the verdict to stand.

In the next place, we have altogether failed to find anything in the case, from which the jury could rightfully conclude that the action of the defendant in that affair was the creature of malice. We have looked in vain for a single circumstance that would seem to show any purpose for this prosecution, other than a desire to vindicate the public law. There seems to be not the least trace of any other motive. The same criticism applies to the repudiation by the jury of the defense that the proceeding complained of was set on foot upon the advice of counsel. As the testimony is understood by us, it plainly shows that all the facts in the possession of the defendant were laid before counsel, and that his advice was that it was its duty to prosecute. In this respect we see no reason to doubt that a complete bar to the action was established. The rejection by the jury of so plain a defense as this can only be accounted for by the presence of that prejudice so strikingly exhibited in their assessment of damages. This case has been twice tried on substantially the same evidence; the former jury estimating the damages at \$4,000, while the present one has multiplied that sum by 5. In view of so absurd an estimate, the verdict loses all force with respect to the other particulars of the case; nor does the suggestion of the counsel of the plaintiff that the large amount they awarded was intended as a "deterrent" help the legality of the matter, for it places the action of the jury, in this respect, in hostility to the instruction of the court, which excluded everything in the nature of punitive damages. A new trial is ordered.

FAUGHNAN v. CITY OF ELIZABETH.
(Supreme Court of New Jersey. Nov. 7, 1895.)
JUDGMENT—VACATION OF SATISFACTION—ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY.

1. A satisfaction of judgment entered by the clerk by virtue of a warrant from the attorney

of record of the plaintiff will be vacated if the attorney was without authority to satisfy the judgment, and the defendant was not misled and other parties are not affected by the vacation.

2. An attorney of record has no power to satisfy a judgment upon receiving less than the amount due thereon, without the consent of his client.

3. An attorney of this court who removes his residence from the state cannot enter appearance and become attorney of record in any action thereafter, but he does not cease to represent his client in actions previously commenced, until his client has substituted another attorney in his place.

4. When an attorney of record receives from the defendant a sum less than the amount due on a judgment against the latter, and satisfies the judgment without the consent of his client, his satisfaction will only be vacated upon the terms that the plaintiff release and discharge the defendant from the judgment to the extent of the payment made to the attorney.

(Syllabus by the Court.)

Action by Thomas Faughnan against the city of Elizabeth. Heard on rule to show cause why satisfaction of a judgment for plaintiff should not be vacated. Rule sustained conclusively.

The judgment was recovered by Thomas Faughnan against the city of Elizabeth, January 8, 1882. On December 21, 1891, Thomas dike D. Hodges, the attorney of record for Faughnan, executed a warrant of attorney to the clerk requiring him to enter satisfaction of the judgment, which the clerk did on January 13, 1892, pursuant to section 24 of the act concerning judgments (Revision, p. 520). It appears by affidavits taken under the rule that Hodges delivered the warrant of attorney to satisfy the judgment to the comptroller of the city, who paid him a sum of money equaling 85 per cent. of the principal and interest then due on the judgment, and that Hodges has not accounted with his client for any part of the money so received.

Argued June term, 1895, before VAN SYCKLE, LIPPINCOTT, and MAGIE, JJ.

J. A. Beecher, for plaintiff. J. C. Connolly, for defendant.

MAGIE, J. A satisfaction of a judgment obtained by fraud or given by mistake will be vacated. *Keogh v. Delany*, 40 N. J. Law, 5. *Ackerman v. Ackerman*, 44 N. J. Law, 17. *Harrison v. Maxwell*, Id. 316. The contention in this case is that the satisfaction should be vacated, because the attorney had no power to execute the warrant by virtue of which the satisfaction was entered. When a defendant has not been misled by the attorney's apparent power, and no rights of third parties are affected, I see no reason why a satisfaction should not be vacated if wrong has been done by entry, even though it was not obtained by fraud.

It is not claimed that the attorney of record may not receive the money due on the judgment, and satisfy it. His power to do so was early settled in this state, and the legislature has prescribed the mode in which he may enter satisfaction upon the record either pers-

ally or by his sealed warrant directed to the clerk, and authorizing him to enter it. *Wyckoff v. Bergen*, 1 N. J. Law, 248; *Revision*, pp. 523, 524, §§ 22, 24. But the claim is that, when *Hodges* gave the warrant in this case, he had lost the power to give it, because he had then removed his residence from this state. This claim is put upon the provisions of the tenth rule of this court, which provides that "no attorney of this court not actually residing in this state shall appear to act as attorney on record in any case in any of the courts of this state." It is plain that this rule prohibits a nonresident attorney of this court from commencing any action or appearing to defend any action as attorney of record in this court. But if, while resident, an attorney of this court has appeared as attorney of record in an action, will his subsequent change of residence *ipso facto* revoke and annul his power to act for his client? I do not think the rule in question was intended to produce such a result. Its terms, properly construed, refer to the original appearance of the attorney by which he becomes attorney of record, and not to every subsequent act as such attorney. Removal of residence, therefore, does not deprive the attorney of the powers conferred by his original warrant of attorney until his client, of his own motion, or upon warning from his opponent under the provisions of section 6 of the practice act, substitutes another in his place as attorney. But, if I had taken a different view of the rule, I should still be of opinion that the plaintiff has not sustained his claim in this respect. He has made it appear that *Hodges* was a resident of this state when the action was commenced and judgment was obtained, and for a long time after. While his affidavits show that *Hodges* left the house in this state in which he had been residing before he executed the warrant to satisfy the judgment, yet they fail to show that he took up or acquired a residence elsewhere; and, until he did so, his residence in New Jersey remained. The result is that *Hodges* had authority to collect the judgment, and to satisfy it.

The question remains whether he had authority to satisfy the judgment upon the receipt of only a part of the amount due thereon. If *Faughnan* had received the 85 per cent. of the principal and interest due on December 21, 1894, and had himself executed a warrant directing the clerk to satisfy the judgment, it may be that his act would have operated to discharge the whole debt upon the payment of part thereof. *Beers v. Hendrickson*, 45 N. Y. 665; *Ackerman v. Ackerman*, *ubi supra*. But the question before us is as to the power of an attorney of record acting under the authority given by his employment. In *Wyckoff v. Bergen*, *ubi supra*, Chief Justice *Kinsey* expressed the opinion that the authority of such an attorney was so extensive as to permit him to acknowledge satisfaction of a judgment even though he had received nothing thereon. But it would seem that the case did not depend upon that point, but rather upon an im-

plied consent of the party to the satisfaction given by his attorney. A different view was taken in the courts of New York. *Jackson v. Bartlett*, 8 Johns. 281; *Kellogg v. Gilbert*, 10 Johns. 220 (per *Kent, C. J.*). This court has since held that an attorney of record cannot waive a substantial legal right of his client without the latter's consent. *Howe v. Lawrence*, 22 N. J. Law, 99. And the court of chancery has held that a solicitor cannot accept part of the sum due on a decree in payment of the whole without express authority from his client. *Watts v. Frenche*, 19 N. J. Eq. 407. It was also held in that court that an attorney cannot give up his client's security unless he receives actual payment therefor. *Terhune v. Colton*, 10 N. J. Eq. 21.

The true view, in my opinion, is that after judgment the attorney of record has no authority under his original retainer to satisfy the judgment upon receiving less than the amount due thereon, without the plaintiff's consent. When the plaintiff knows of and acquiesces in such an act of his attorney, and so induces the defendant to infer that the act is done with his consent, a different question would be presented. But there is nothing to show that the defendant in this case was thus misled. It is plain that the city officials assumed that the attorney possessed authority under his retainer to satisfy the judgment. Although this assumption was erroneous in point of law, their acting upon it was not fraudulent, nor should it deprive the city of the benefit of the payment then made to an attorney whom the plaintiff permitted to continue to represent him. No rights of third parties will be affected by the vacation of this satisfaction. Under all the circumstances, I think the satisfaction should be vacated; but, as the city has paid a large amount upon this judgment, *Faughnan* must execute and deliver to the city a sufficient release and discharge for the amount thus paid as of the date of payment. Upon delivering a release which will be satisfactory to the city attorney, he may enter a rule vacating the satisfaction, and may enforce the judgment for the amount not released. If the release tendered is not satisfactory to the city attorney, plaintiff may apply upon notice for leave to enter such a rule.

STATE (TIMS, Prosecutor) v. SPRAGG.
(Supreme Court of New Jersey. Nov. 7, 1895.)

DISTRICT COURT—JURISDICTION.

1. The district court of Newark has jurisdiction to maintain a suit to the extent of \$300, under the twenty-seventh section of the act concerning landlord and tenant (*Revision*, p. 575).

2. It is a private suit for a private wrong, and can be maintained only by the party injured, which distinguishes it from *Koch v. Vanderhoof*, 9 Atl. 771, 49 N. J. Law, 619.

(Syllabus by the Court.)

Certiorari to Newark district court; *Truedell*, Judge.

Certiorari by the state, at the prosecution of John Tims, against Henry Spragg. Writ dismissed.

Argued June term, 1895, before VAN SYCKEL and LIPPINCOTT, JJ.

John R. Hardin, for plaintiff. James N. Trimble, for defendant.

VAN SYCKEL, J. The subject of review is the judgment of the First district court of the city of Newark in an action of debt brought by Spragg against Tims to recover double rent for willfully holding over after the end of his term, under the provisions of the twenty-seventh section of the landlord and tenant act (Revision, p. 575). The section provides that the person so holding over shall, for and during the time he so holds over, pay to the person unlawfully kept out of possession, "at the rate of double the yearly value of the lands, for so long a time as the same are detained; to be recovered in any court of record in this state, by action of debt, whereunto the defendant or defendants shall be obliged to give special bail, and against the recovering of which said penalty there shall be no relief in equity." The only question to be decided is whether the district court had jurisdiction of the case. Several grounds are relied upon to show a want of jurisdiction.

1. It is insisted that the district court had no power to try an action for a penalty in excess of \$100. The act creating the Newark district court invested it with the civil jurisdiction of justices of the peace under the small cause act, under the supplement of 1847 to the landlord and tenant act, under the attachment act, and under the forcible entry and detainer act. Pamph. Laws 1873, p. 245. At the time this act was passed, the jurisdiction of justices of the peace in the court of small causes was limited to \$100, and the prosecutor argues that, notwithstanding the legislation of 1878 and 1882, the jurisdiction of the district court in suits for penalties has not been amplified, and that it was not competent to entertain this controversy. The act of 1878 (Supp. Revision, p. 265) extends jurisdiction of the district court to "every suit of a civil nature at law in which the debt or other matter in dispute does not exceed two hundred dollars." The act of 1882 (Supp. Revision, p. 261) enlarges it to \$300. In *Koch v. Vanderhoof*, 49 N. J. Law, 619, 9 Atl. 771, the judgment of this court was that in actions for penalties the jurisdiction of the district court was not extended by those acts beyond its original limit of \$100. Mr. Justice Dixon, in delivering the opinion of the court, said that, while the term "every suit of a civil nature" may be applied to the form of litigation in contradistinction to that which is criminal, and thus embrace an action for penalties, it may also with propriety be applied to the nature of the litigation, as growing out of the relations of citizens inter sese, rather than their relations to the state. From a

review of various statutes in which the words "suits of a civil nature" had been previously employed, he concluded that in the acts of 1878 and 1882 the legislature had in mind three classes of suits: (1) Private suits for private wrongs; (2) private suits for public wrongs; (3) public suits for public wrongs; and that "by suits of a civil nature" those acts were intended to include only those of the first class. *Koch v. Vanderhoof* was brought to recover a penalty of \$200, given by the oleomargarine act of 1885 to "any person who sued for the same." Under the test applied by Justice Dixon, he necessarily concluded that a penalty in excess of \$100 was not recoverable in such a case in the district court. It could not be classified with private suits for private wrongs, but was clearly in the second class, of private suits for public wrongs. The injury denounced by the act of 1885 was an injury to the public, and not an injury to the individual. It was to be redressed by the imposition of a penalty of \$200, to be recovered by any person who sued for it. The statute was designed to suppress the fraud upon the public. Reparation to the injured party was not within the purview. In the case before us the act provides that the tenant unlawfully holding over shall pay to the landlord, "at the rate of double the yearly value of lands, for so long a time as they are detained." The right to maintain the suit is in the landlord alone. It is a private suit for a private wrong. Its exclusive purpose is to redress the civil injury done by the tenant to the landlord, the measure of damages being fixed by the statute. Under the rule for interpretation established by *Koch v. Vanderhoof*, this case being within the first class specified by Justice Dixon, "a private suit for a private wrong," the acts of 1878 and 1882 are operative to bring it within the jurisdiction of the district court.

2. The statute provides that the damages for the injury shall be recovered in any court of record in this state by action of debt, whereunto the defendant shall be obliged to give special bail. Jurisdiction, it is contended, exists only in such courts as may hold the defendant to special bail, and it is denied that such power is vested in the district court. This is clearly an erroneous view of the law. The justice's court act gives to that tribunal power to hold to bail both in actions of contract and actions of tort. Revision, p. 540, § 13. That power was transferred to the district court by the act of 1873, and the act under which this suit was instituted expressly provides that the defendant shall be obliged to give special bail. The court below had jurisdiction to the extent of \$300, and it had power to take special bail. It was therefore a competent forum in the case.

The other reasons relied upon by the prosecutor are: (1) That the suit was commenced by summons. The defendant appeared without objection in the court below, and tried the cause. If, therefore, it could be maintained

that the suit must be commenced by warrant, it is too late to take advantage of an error in that respect. The object of process was accomplished by the appearance of the defendant, and his submission to the jurisdiction of the court without objection, so far as the mode of bringing him before the court was concerned. (2) The plaintiff recovered judgment for double the yearly value of the premises for 12 months. At the time suit was brought the tenant had held over for a few days less than 12 months, and the judgment is therefore in excess of what it should have been. This, however, is not jurisdictional, and it is an error which cannot be redressed on certiorari. The writ should be dismissed, and the judgment below affirmed, with costs.

**STATE (RIVERTON & P. WATER CO.,
Prosecutor) v. HAIG, Tax Collector.**

(Supreme Court of New Jersey. Nov. 7, 1895.)

**TAXATION—PROPERTY SUBJECT TO—CERTIORARI—
SPECIAL LEGISLATION CREATING TOWNSHIP.**

1. The power of the legislature to pass a special law creating a township will not be considered upon a claim of a borough of a right to tax lands which were formerly within such borough, but were included within the boundaries of the township as defined by such law.

2. A water company formed under the act of April 21, 1876 (Revision, p. 1365), and its supplements, has laid pipes under the public streets of the borough of Riverton, and erected fire plugs connected with the pipes. The pipes are used to convey water from its waterworks, which are erected and maintained in adjoining townships. *Held*, that such pipes and fire plugs, whether they are real or personal property, are properly taxable in the borough, for, if they are personal property, they are visible personal property found there, within the meaning of section 6 of the act of March 19, 1891 (Laws 1891, p. 189), and, if they are real property, they are found within that taxing district. The plant of which they are part does not fall within the provisions of that section of the act of 1891 providing for the taxation of farms or lots lying within different taxing districts.

(Syllabus by the Court.)

Certiorari in the name of the state at the suit of the Riverton & Palmyra Water Company against Charles R. Haig, collector of taxes, to review assessments of taxes imposed on the prosecutor for the year of 1894 by the borough of Riverton. Judgment for prosecutor.

The Riverton & Palmyra Water Company was incorporated July 20, 1888, under the "Act for the construction, maintenance and operation of water works for the purpose of supplying cities, towns and villages of this state with water," approved April 21, 1876 (Revision, p. 1365), and its supplements. In 1890 the company erected waterworks upon one tract, and a tank and tower upon another tract, of land belonging to it in the township of Cinnaminson, and laid water pipes therefrom into the villages of Riverton and Palmyra, in that township, and placed fire plugs along the same. In 1893 the borough of Riverton was incorporated, and the land where-

on the company's waterworks stood was included in that borough. By the "Act to establish a new township in the county of Burlington and state of New Jersey, to be known as the township of Palmyra," approved April 19, 1894 (Laws 1894, p. 587), and taking effect immediately, the legislature undertook to create the township of Palmyra out of the township of Cinnaminson and the borough of Riverton. The tract on which the company's waterworks are erected falls within the boundaries of the township of Palmyra. The tract on which the company's tower and tank are erected is still within the township of Cinnaminson. At the time for imposing taxes in 1894 the only property of the company within the borough of Riverton was the water pipes under the streets and the fire plugs connected therewith. The assessor of that borough assessed upon the company in that year the sum of \$50,000 as "paid-in capital," and imposed thereon a tax of \$1,004.20. The company appealed to the commissioners of appeal, claiming that it was not thus assessable. They did not set aside the assessment, but reduced it to \$30,000. Proceedings have been taken to enforce the tax.

Argued June term, 1895, before VAN SYCKEL, LIPPINCOTT, and MAGIE, JJ.

Mark R. Sooy, for prosecutor. Mr. Atkinson, for defendant.

MAGIE, J. (after stating the facts). The Riverton & Palmyra Water Company, the prosecutor, complains of a tax imposed upon it by the authorities of the borough of Riverton for its paid-in capital stock. This imposition is clearly erroneous. It is settled that such a corporation is to be taxed, not upon its capital stock, but upon its real and personal estate, as any individual person would be. Supp. Revision, p. 170, § 93; New Jersey Gaslight Co. v. Mayor, etc., of Jersey City, 46 N. J. Law, 194; Hedge Co. v. Craig, 51 N. J. Law, 437, 17 Atl. 941; Merchants' Ins. Co. v. City of Newark, 54 N. J. Law, 138, 23 Atl. 305; Id., 55 N. J. Law, 145, 26 Atl. 137; Society for Promotion of Learning, etc., v. City of New Brunswick, 55 N. J. Law, 65, 26 Atl. 683. The result is that the assessment upon prosecutor must be vacated and set aside so far as it exceeds the amount for which prosecutor might have lawfully been assessed; for by the act of March 23, 1881 (Supp. Revision, p. 602), this court is required to make an assessment upon prosecutor for the taxes of 1894, if it was then liable to be assessed in the borough of Riverton. Prosecutor was then liable to be thus assessed for taxation. Its real estate was to be assessed where found, subject only to the provision that an occupied farm or lot lying within two taxing districts is to be taxed in that district in which the owner's residence is. A corporation is thus taxable and its residence for taxing purposes is in the taxing district in which its principal office is. Re-

vision, p. 1153, § 65; Laws 1891, p. 189, § 6; *Manufacturing Co. v. Warford*, 37 N. J. Law, 397; *Manufacturing Co. v. Dalrymple* (N. J. Sup.) 28 Atl. 671. Its visible personal estate was to be assessed where found; its other personal estate at its residence. Laws 1891, p. 189, § 6.

The statement preceding this opinion asserts that prosecutor had no property in the borough of Riverton in 1894 except its water pipes under the streets and the fire plugs connected therewith. It is contended that this is an incorrect deduction from the stipulation of counsel. This contention is put upon the ground that the act of the legislature creating the township of Palmyra, and including therein a part of the borough of Riverton, in which prosecutor's waterworks stand, was within the prohibitions of the constitution, and therefore not within the power of the legislature to pass. The claim is that the borough of Riverton retained the right to tax all property within its original bounds notwithstanding the act. But it is obvious that the legal existence of the township of Palmyra cannot be thus collaterally attacked. From the stipulation of counsel it appears that that township exists de facto, for it has imposed a tax upon prosecutor in respect to its land. It would be extraordinary, indeed, if, under a claim of a right to impose taxes on private property, one municipality could question the legal existence of another municipality having at least a de facto existence, and that in a proceeding to which the latter is not a party. It results that we must restrict ourselves to the consideration of the water pipes and fire plugs in the borough of Riverton, and inquire whether prosecutor was taxable therefor in that borough in 1894. Counsel have fully discussed the question whether such property is real or personal estate. Pipes laid by a corporation under the soil, in which an interest had been acquired from the owner by grant, are held in this state to be taxable as real estate. *Pipe-Line Co. v. Berry*, 52 N. J. Law, 308, 19 Atl. 665; *Id.*, 53 N. J. Law, 212, 21 Atl. 490. The status of pipes laid for the purpose of carrying gas or water under the public streets seems not to have been considered here. In other states it has been much debated, and with variant results. In my judgment, it is quite unnecessary to the decision of the question before us to settle whether such pipes under public streets have the quality of real or personal estate, for in either case they were taxable in the borough of Riverton in 1894. If they are personal estate, they were then taxable as visible personal estate found in that borough, within the meaning of the act of March 19, 1891 (Laws 1891, p. 189, § 6). By that section a distinction is made for purposes of taxation between personal property which, like credits or choses in action, cannot be seen, but are only evidenced by acknowledgments, promises, or undertakings, express or implied, and personal property which can be

seen. The former is to be taxed at the residence of the owner; the latter is to be taxed where it is found. Personal property, to be included in the latter class, need not be actually seen by the assessor, but may be taxed by him if actually in his taxing district, and capable of being seen if obstacles are removed. If they are real estate, they were equally taxable there. It is true that they are connected with the waterworks, and form part of prosecutor's plant, essential to its business. They are not easements or appurtenances, but, if real estate, a part of the plant severed from it for the purposes of taxation by the fact that they are found in another taxing district. The reason which induced the legislature to enact that a farm or lot thus severed shall be assessed as a whole in the taxing district in which the owner resides may apply to this case. But the language of that enactment is incapable of being extended to it. The plant of a water company is neither a farm nor a lot. If policy requires the extension of this mode of taxation to such plants, it is to be extended by the legislature. From the provisions of a "general act concerning taxes," approved March 28, 1895, it seems that the legislature deems such mode of taxation not to be good policy, for it is thereby enacted that all real estate is to be assessed for taxation in the taxing district in which it is found. Laws 1895, p. 748. The result is that the pipes and fire plugs belonging to prosecutor and found in the borough of Riverton in 1894 were there assessable for taxation, and this court must impose an assessment on prosecutor therefor according to their value. If counsel cannot agree on their taxable valuation, there will be a reference to a commissioner to determine it. When determined either by stipulation or by reference and confirmation, this court will impose a tax thereon at the rate appearing in the case. The excess of the imposition upon prosecutor brought up by this writ will be set aside, and, as prosecutor sought every other mode of relief without success, the vacation will be with costs.

STATE (FOWLER, Prosecutor) v. LARRABEE et al.

(Supreme Court of New Jersey. Nov. 8, 1895.)

CERTIORARI—EXPLANATION OF RETURN.

Upon certiorari to review the proceedings had in a court of common pleas under the road act, the official return to the writ may be explained, modified, or contradicted by testimony directed to be taken for that purpose by a rule of this court, and not otherwise.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of Robert Fowler, against Albert S. Larrabee and others, to review appointment of surveyors of a highway. Proceedings affirmed.

Argued June term, 1895, before VAN SYCKEL, LIPPINCOTT, and GARRISON, JJ.

A. E. Johnston, for prosecutor. L. W. Carmichael, for defendants.

GARRISON, J. This certiorari brings up the appointment of surveyors of the highways for the alteration of a public road. The writ is addressed to the judges of the pleas of Ocean county, who have, in response thereto, duly certified their proceedings to this court. This official return is laid before us, accompanied by voluminous depositions taken upon notice, but without the special authority necessary to validate testimony by which it is sought to explain, modify, or contradict the judicial certificate. Such affidavits are without probative force, and will not be considered in disposing of the reasons by which the proceedings of record in the court below are here challenged. *Conover v. Bird*, 56 N. J. Law, 228, 28 Atl. 428, and cases there cited.

The remaining reasons divide themselves into two classes, viz. those that question the merits of the controversy submitted to the surveyors, and those that are based upon the alleged existence of certain facts dehors the record.

The questions raised by the first class of reasons are reviewable only by the statutory appeal, by caveat and application for the appointment of freeholders.

The reasons based on allegations of fact are that the road altered by the surveyors was a public street of a village, and that it crossed the tracks of a railroad company within 500 feet of another public road that crossed said tracks.

Neither of these allegations is sustained by the proofs.

The proceedings under review are affirmed, with costs.

STATE (JOHNSON, Prosecutor) v. HOOVER
et al.

(Supreme Court of New Jersey. Nov. 11, 1895.)

CONSTITUTIONAL LAW—SPECIAL ACTS—LIQUOR
LICENSES.

1. The act entitled "An act concerning licenses to keep inns and taverns and to sell ale, strong beer, lager beer, porter, wine and other malt liquors in the boroughs of this state," approved February 8, 1892 (P. L. 1892, p. 16), is special, and contrary to the prohibition of the constitution against private, special, or local laws for the regulation of the internal affairs of towns and counties.

2. The classification of boroughs into those where the power to grant licenses to keep inns and taverns, and to sell spirituous or malt liquors, is conferred solely upon the governing bodies of the boroughs, and those where such power is not so conferred, is not such a classification as bears such a natural relation to the subject-matter of the grant of such licenses as will sustain exclusive legislation in behalf of either.

(Syllabus by the Court.)

Certiorari to court of common pleas, Warren county; Morrow, Dawes, and White, Judges.

Certiorari by the state, on the prosecution

of Henry Johnson against Eliphalet Hoover and others, to review the granting of a liquor license. License set aside.

Argued June term, 1895, before VAN SYCKEL, MAGIE, and LIPPINCOTT, JJ.

Oscar Jeffery and S. C. Smith, for prosecutor. William A. Stryker, for defendants.

LIPPINCOTT, J. At the April term, 1895, of that court the common pleas of the county of Warren granted a license to Eliphalet Hoover to keep an inn and tavern in the borough of Washington, in that county. The prosecutor, with others, citizens and taxpayers in the borough, remonstrated against granting the license, and it is now sought by the prosecutor by this writ of certiorari to review and set aside the action of the court of common pleas, and the license thereby granted. The prosecutor has a standing in this court for this purpose. *Dufford v. Staats*, 54 N. J. Law, 296, 23 Atl. 667. The borough of Washington was incorporated by virtue of the provisions of an act of the legislature entitled "An act to incorporate Washington in the county of Warren into a borough or town corporate," approved February 20, 1868 (P. L. 1868, p. 76). By section 25 of this act the common council of the borough, or a majority of them, were vested with the sole and exclusive right and power of licensing and assessing every inn keeper, tavern keeper, and retailer of spirituous, malt, or vinous liquors within said borough, subject to the same provisions and in like manner as the same is or may be lawfully done by the courts of common pleas in this state. By this act the sole power to license inns and taverns in the borough was vested in the common council thereof. The defendants justify the action of the court of common pleas in granting this license upon the provisions of an act entitled "An act concerning licenses to keep inns and taverns and to sell ale, strong beer, lager beer, porter, wine and other malt liquors in the boroughs of this state," approved February 8, 1892 (P. L. 1892, p. 16). The first section of this act provides that "hereafter in addition to the power or authority to grant licenses to keep inns and taverns, or to sell ale, strong beer, lager beer, porter, wine and other malt liquors, that is or may be vested in the governing body of the boroughs of this state or any of them, the power to grant such licenses within and for such boroughs shall also be vested in the inferior court of common pleas of the county within which such boroughs is or are situate, such power to be exercised in accordance with the act of the legislature of this state entitled 'An act concerning inns and taverns,' approved April seventeenth, 1846, and the act entitled, 'An act to regulate the sale of ale, strong beer, etc., in the state of New Jersey,' approved April fourth, A. D. 1872, seventy two, and the several supplements to said act respectively." There are

boroughs in this state in which the governing body does not possess the power or authority to grant licenses of the character denominated in this act of 1892. To the borough of Washington, created by special statute, this power was given. An examination of the special statute passed previous to the year 1875 will show that in some boroughs created before that date the governing body did not possess this power, and that uniformity, in this respect, did not exist among these municipalities. No such power was conferred upon the governing body, which was the mayor and council, of the borough created and incorporated in accordance with the provisions of an act entitled "An act for the formation of borough government," approved April 5, 1878 (Supp. Revision, p. 44). Under this act many boroughs were constituted and incorporated in this state. By an act approved March 23, 1883, boroughs were divided into boroughs of the first, second, and third classes, according to the population thereof. P. L. 1883, p. 157. A supplement to the act concerning inns and taverns was also passed March 23, 1883 (P. L. 1883, p. 221). This supplement provided that in all boroughs of the third class each and every license to keep inns and taverns, ale and beer saloons, should be granted by the inferior court of common pleas of the county wherein the borough was situated. The classification of boroughs upon which this supplement of March 23, 1883, relating to licensing inns and taverns, ale and beer saloons, was based, was by this court adjudged illusory, and the statute was declared to be unconstitutional. *Borough of Hightstown v. Glenn*, 47 N. J. Law, 107. The borough of Hightstown was one in which the council had the exclusive right to grant licenses prior to the passage of the supplement of March 23, 1883. By an act entitled "An act concerning licenses in boroughs of the second class," approved March 9, 1891 (P. L. 1891, p. 118), it was by the first section thereof provided that "hereafter in addition to the power or authority to grant licenses to keep an inn and tavern or to sell ale, strong beer, lager beer, porter, wine and other malt liquors within the limits of the boroughs of the second class of this state, the power to grant the same shall also exist in the inferior court of common pleas of the several counties wherein such boroughs may be situated, such power to be exercised," etc. Then follows substantially the language of the act of 1892 in question in this case. This act has been under review in this court, and was decided to be a special law, in violation of the constitutional prohibition against private, special, or local laws for the regulation of the internal affairs of towns and counties, and that it was not distinguishable, with regard to the point of objection, from the supplement of March 23, 1883. By the twenty-sixth section of the act entitled "An act for the formation and government of boroughs,"

approved March 12, 1890 (P. L. 1890, p. 58) it was provided that it should not "be lawful for any person or persons to sell within the corporate limits of any borough incorporated under this act any spirituous or malt liquors in quantities less than five gallons without having first obtained a license therefor from the mayor and council of such borough or majority thereof in council convened, whom shall by this act be vested the exclusive right and power of granting the same, and imposing such restrictions and penalties as they deem necessary in relation thereto; provided, however that nothing in this section contained shall enable the borough councils of boroughs situate in counties of the first and second class to grant licenses for the sale of liquor." See, also, supplement to the act of 1878 (P. L. 1878, p. 94). Neither of these statutes refer specifically to the license to keep inns and taverns, and they are only cited to exhibit the want of uniformity which is revealed by the legislation on this subject of the power and authority to grant licenses of this character in the boroughs of this state. Under the act entitled "An act for the formation and government of boroughs," approved April 5, 1891 (P. L. 1891, p. 280), the boroughs created are without power in their governing bodies to grant licenses of the character in question in this case. Neither is any such authority vested in the commissioners as the governing bodies in boroughs formed under the act entitled "An act for the formation of borough commissioners," and the supplement thereto (P. L. 1882, p. 48; Supp. Revision, p. 56).

It will thus be seen that there are two classes of boroughs in this state in this regard. In one class the power or authority to grant these licenses is vested exclusively in the council or other governing body, and in the other class the authority in this matter is vested in the courts of common pleas or in some other tribunal. This statute of 1892 now upon review deals with this classification of boroughs as an appropriate one for the purposes of legislation, but, instead of establishing uniformity in respect to the object of the legislation, it is a marked degree increases the distinction between the two classes of boroughs. In the one class of boroughs the applicant for a license is still restricted to the governing body of the borough; in the other class he can exercise his choice of whether he will make application to the governing body or resort to the court of common pleas. No appropriate or natural reason whatever appears for this classification upon which this statute is based. The boroughs may be similar in every respect, with this one exception. This concurrent authority conferred by this act can only be operative when this special artificial quality of exclusive power of the governing body exists, and this distinction which is the essential feature of this statute

can be considered only as a purely arbitrary one. There are no substantial differences so marked as to call for or render necessary separate legislation. They are not distinguished by qualities and attributes which necessitate this legislation. The statute, in order to be valid, must embrace all, and exclude none, whose condition and wants render such legislation equally necessary or appropriate as a class. *Randolph v. Wood*, 49 N. J. Law, 85, 7 Atl. 286. In the case of *Loucks v. Bradshaw*, 56 N. J. Law, 1, 27 Atl. 939, the chief justice says: "The fact that in some counties licenses of this kind in question are granted by a court, and in others proceed from other authorities, is a purely arbitrary distinction, and as such cannot be laid as a classification for the purpose of legislation regulating the internal affairs of counties." The classification of townships into those "governed under or by a special charter" and those not so governed is not of such a nature as to require or sustain exclusive legislation for each class. *Goldberg v. Dorland*, 56 N. J. Law, 365, 28 Atl. 599. The mere fact that certain boroughs in this state have at some time in the past and by certain statutes obtained greater power and authority than other boroughs are possessed of is not the acquisition of such a substantial difference or characteristic as will serve as a basis of classification as requires or will sustain exclusive legislation in behalf of either class. The contention of the prosecutor that this statute is unconstitutional must prevail, and the proceedings of the court of common pleas in granting this license, and the license, must be set aside, with costs.

RYNO v. STATE.

(Supreme Court of New Jersey. Nov. 7, 1895.)

CONSTITUTIONAL LAW—TITLE OF ACT.

The object of a statute being to prevent the sale of intoxicating liquors within a distance of a mile from Wesley Lake bridge, at Ocean Grove and Asbury Park, and the title of such act being "An act to prevent the sale of intoxicating liquors within one mile of Ocean Grove and Asbury Park," held, that such act was void, because its object was not expressed in its title.

(Syllabus by the Court.)

Error to court of quarter sessions, Monmouth county; Conover, Higgins, and Morris, Judges.

John E. Ryno was convicted of a violation of the liquor law, and brings error. Reversed.

Argued June term, 1895, before BEASLEY, C. J., and DIXON and GUMMERE, JJ.

R. T. & W. B. Stout, for plaintiff in error. Charles H. Ivins, for the State.

GUMMERE, J. This writ brings up the record of the plaintiff in error upon an indictment framed under an act of the legisla-

ture approved February 26, 1874, and entitled "An act to prevent the sale of intoxicating liquors within one mile of Ocean Grove and Asbury Park, in Monmouth county, New Jersey." Pamph. Laws 1874, p. 199. The principal ground assigned by the plaintiff in error for setting aside this conviction is that this statute is unconstitutional, because its object is not expressed in its title, in accordance with the requirement of paragraph 4, § 7, art. 4, of the constitution, which declares that "every law shall embrace but one object, and that shall be expressed in the title." It has frequently been decided that the purpose of this constitutional provision is to require the title of an act to be such as will inform members of the legislature and the public of the object of the enactment; and that, although it is not necessary for it to indicate the methods by which this object is to be attained, yet, if the title does not fairly express such object, or is deceptive in its expression, the legislation is repugnant to the constitutional requirement. *Rader v. Township of Union*, 39 N. J. Law, 509; *Daubman v. Smith*, 47 N. J. Law, 200; *Mayor, etc., of Jersey City v. Elmendorf*, 47 N. J. Law, 283; *Lane v. State*, 49 N. J. Law, 673, 10 Atl. 360. Applying this rule to the present case, it is clear that this statute does not comply with the constitutional provision which has been invoked; for, while the title of the act expresses its object to be the prevention of the sale of intoxicating liquors "within one mile of Ocean Grove and Asbury Park," the body of the act makes it a misdemeanor for any one to sell such liquors "within a distance of one mile from Wesley Lake bridge, at Ocean Grove and Asbury Park." The district embraced in the title of the act differs materially from that described in its body. The title takes in an area extending a mile from the boundaries of Ocean Grove and Asbury Park, while the body of the act takes in a much smaller territory, and includes only an area of a mile from a point in the dividing line which separates one of these places from the other. The title to this act not only fails to express its object, but it actually misstates it, and is therefore unconstitutional and void. The conclusion reached upon this branch of the case makes it unnecessary to consider the other assignments of error. The judgment of the trial court must be reversed.

NATIONAL DOCKS & N. J. J. C. RY. CO. v. PENNSYLVANIA R. CO. et al.

(Court of Chancery of New Jersey. Oct. 22, 1895.)

EQUITY—RETAINING JURISDICTION—QUESTIONS DETERMINED—INJUNCTION—FINAL JUDGMENT.

1. Where the aid of the court of chancery is invoked to effect the crossing of one railroad by

another, and it appears that the right to cross has been duly condemned, and that the damages in condemnation have been based upon a manner of constructing the crossing proposed by the junior road, which is claimed to be unlawful, or at least unfair, this court will, incidentally to the exercise of its jurisdiction in the premises, determine the legality of the proposed manner of crossing.

2. A preliminary injunction will not issue where the right of the complainant is in doubt.

3. An order which finally disposes of all matters involved in the cause will ordinarily not be made until final hearing.

(Syllabus by the Court.)

Bill by the National Docks & New Jersey Junction Connecting Railway Company against the Pennsylvania Railroad Company and the United New Jersey Railroad Company & Canal Company. On order to show cause why injunction should not issue. Heard on bill, affidavits, and schedules thereto.* Injunction granted.

Gilbert Collins, Charles L. Corbin, and Charles D. Thompson, for the motion. James B. Vredenburg and R. V. Lindabury, opposed.

McGILL, Ch. The complainant insists that it acquired a right of railroad crossing under car yard of the defendants by means of an arched passageway of masonry, which cannot be constructed without temporarily cutting the railway tracks in the yard; and the object of the present application is to secure an injunction which will require the defendants to, from time to time, as the work of building the passage progresses, remove cars they may store upon their tracks in the line of crossing, and keep them removed, while the construction at each point of removal continues in accordance with a manner of construction declared by the complainant in its condemnation proceedings. The complainant is a railroad corporation organized under the general railway law (Revision, p. 925) and its supplements. As its name indicates, it will serve as a connection between the National Docks and New Jersey Junction Railways, which will be about half a mile in length, entirely within the limits of the city of Jersey City. Commencing at the southerly end of its route, and running northerly, the road starts at a point in the line of the National Docks Railway, and, crossing meadow lands and public streets for some 1,500 feet, reaches the car yard of the defendants, which has its southerly boundary upon the northerly side of a public street of Jersey City, called "Railroad Avenue," and is constructed upon an elevated plateau some 23 feet above the grade of the street. This yard is about 500 feet wide. North of it, the land is again low until the line of the New Jersey Junction Railway is reached. The complainant proposes to cross this car yard by the passageway already indicated, the construction of which will necessitate the temporary opening of the surface of the yard, a portion at a time, for its entire width, and thereby the disturbance at different times, but in all, of 21 railroad tracks of

the defendants, located and used over the line of the passageway.

Upon the trial of the appeal from the report of commissioners in the proceedings for the condemnation of the right to cross, the method of crossing the yard was, by an amendment to the petition, defined to be by the arched masonry passageway through a strip of land 55 feet wide, over which passageway, as the same should be completed, the car yard might be maintained and operated. The proposed manner of constructing that passageway was also defined at that trial. It was declared, by a writing filed with the clerk of the court to which the appeal was taken, that the complainant would commence work at the southerly side of the car yard, and progress in building northerly by sections, proceeding, as the language of the declaration states, as follows: "Second. The connecting company will remove from their right of way the three southerly yard tracks of said owners, being tracks one, two, and three, upon the commencement of their work, and thereafter will keep open, during the progress of their work across said yard tracks, three of the yard tracks of the said owners crossing the route of Connecting Company, which tracks shall be adjacent to each other; and the Connecting Company will complete their arch in sections, so that, when yard tracks of the owners in excess of three in number shall be removed from the route in the course of construction, an opportunity shall be afforded concurrently therewith to the owners to relay and restore therewith to use a like number of those previously removed across the complete section of the arch, so that said owners, during the construction of said arch, may at all times have the opportunity to maintain and use all their yard tracks except three. Third. The Connecting Company will support the sides and the north end of each section of their excavation, and, for the further protection of the yard track next north of and adjacent to each section excavated, will, upon beginning excavation in such section, place stringers under such track across the route of the Connecting Company, commencing with yard track four (4), and, when that track is taken up, will shift the stringers to the track crossing the route next north of the second section excavated, and so on across the yard; such stringers to be placed in the manner usual in such construction, and so that trains may be run over the track until such track shall be removed by the Connecting Company as above set forth, which stringers will be placed under each track in such manner as to leave it substantially at the elevation at which it may be found at the time the stringers are put in place. Fourth. The Connecting Company will locate the northerly line of the most northerly section but one of their excavation at least sixteen feet southwesterly from the nearest point of the southwesterly rail of the west-bound engine track, so that the east-bound engine track may be operated over said

space left between the excavation and the west-bound engine track; the center line of the east-bound engine track to be located not more than fourteen feet distant from the center line of the west-bound engine track across the route of the Connecting Company during the progress of the excavation in said section; and the Connecting Company will not remove said east-bound engine track over said location until the arch shall be constructed so far northerly that the east-bound engine track can be shifted and used by the owners across the completed part of the arch, if they desire so to do."

During the trial in the circuit court, the defendants insisted that the proposed manner of constructing the crossing by cutting their tracks would unnecessarily and unreasonably interfere with the use of their car yard while the work progressed, and they suggested a manner of construction which would involve the support of the tracks at all times, and urged that their plan is feasible, and, though perhaps more expensive to the complainant, will be attended with less damage and inconvenience to them. Their insistence was that the complainant must adopt that manner of construction which, being reasonable under all circumstances, will cause the least interference with the continued operation of the car yard. They offered to prove the utility of the manner of construction thus suggested, but the court overruled the offer, upon its conclusion that the complainant has the right to declare the manner of constructing the crossing for the purposes of the condemnation, and that the question whether that manner of crossing would be enforced would properly arise in this court if its aid should be invoked by either party. The trial then proceeded upon the complainant's plan of crossing, and prescribed manner of execution, and the damages were accordingly assessed by the jury. The amount found by the verdict of the jury has been tendered to the defendants, and they have refused to accept it, and it has been duly paid into court. The complainant has entered into possession and executed part of the work of construction of its crossing, and, upon coming to the first of the defendants' tracks, has been stopped by cars stored there and by other obstructions.

The jurisdiction of this court in the premises rests in the existence of mutual rights in the complainant and defendants in the use or easement of the strip of land in which the crossing is to be constructed, the appropriate enjoyment of which rights equity will control and regulate, upon being satisfied that the parties cannot agree with respect to the same. *National Docks, etc., R. Co. v. United Companies*, 53 N. J. Law, 217, 21 Atl. 570.

The complainant insists that the easement they have acquired is a crossing which has been defined in the condemnation proceedings, not only as to the character and loca-

tion of its structure, but also as to the manner in which it is to be constructed, and that both the character of the crossing and the manner of its construction are wholly within its discretion and beyond question by the defendants. I do not agree with this proposition. In *National Docks, etc., R. Co. v. United Companies*, supra, the court of errors and appeals held that a railway company condemning a crossing over another railroad might determine, by specification in its petition, where it would cross, and, "within lawful bounds," how it would cross, the senior road, the legality of the proposed crossing being by such specification made reviewable by certiorari prior to the conclusion of the condemnation; and the court took the precaution to add that if, when the easement of crossing should be acquired, conflict should arise as to its use, the intervention of this court could be invoked. That case recognizes the law to be in accord with the public benefit; that railroads, as quasi public institutions, designed to develop the country through facility in transportation, may be multiplied and maintained, to accomplish which result a new or junior railroad is permitted to cross its established senior, provided the crossing shall not destroy the ability of the senior to fully, fairly, and freely exercise its franchises; that by this is meant, not an ability of the senior to continue with the same appliances exactly located as theretofore, but an ability in it to freely and fairly exercise its franchises, substantially as theretofore, yielding to such reasonable changes and such reasonable temporary disturbance and consequent inconvenience as the necessities of the crossing and the work of its construction may occasion. The question what is a reasonable temporary disturbance and inconvenience arises upon the suggestion of the manner in which the work of building the crossing may be accomplished. If it is not raised by the petition in the condemnation proceedings, so that its legality may be considered upon certiorari, this court will determine it when it is appealed to by either party to regulate the use of the mutual easement, as a matter incident to the exercise of its jurisdiction in the premises.

The complainant now seeks the aid of this court to enforce its proposed manner of crossing. That manner will deprive the defendants of the use of three or more of their tracks at one time, for an indefinite period. Is such deprivation reasonably necessary? Will its enforcement amount to destruction or unlawful impairment of the ability of the defendants to fairly enjoy and exercise their franchises? These questions challenge the legality of the proposed manner of construction. *National Docks, etc., R. Co. v. United Companies*, supra. The defendants offer affidavits to show that the proposed manner of construction will be so far destructive of the reasonable, fair enjoyment of their car yard

as to be unlawful, or, though it be within legal bounds, it is yet so unreasonable and unfair that equity will not lend its aid to the enforcement of it; and they insist that the court will not require the defendants to submit to it until, after final hearing upon proofs regularly taken, it shall, with full deliberation, have passed upon those questions. It is apparent, if I now grant the injunction desired, that the complainant will proceed to complete its crossing pending final hearing, and do the very injury which the defendants deny its right to do. In such a situation a preliminary injunction should not issue. *Citizens' Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 304; *Hagerty v. Lee*, 45 N. J. Eq. 256, 17 Atl. 826. In the former application for injunction in this matter, upon a preliminary hearing, after argument upon facts presented by *ex parte* affidavits, following the precedent in *Jersey City, N. & W. Ry. Co. v. Central R. Co.*, 48 N. J. Eq. 379, 22 Atl. 728, I granted an injunction which, in effect, prescribed a method for the construction of this very crossing, no method having been declared in the condemnation proceedings, and my action was reversed by the court of errors and appeals, upon the point being made in that court that I had anticipated that which should not have been determined until after final hearing. Mr. Justice Gummere, who wrote the opinion of the court of errors and appeals in that matter, said upon this point: "Moreover, the order appealed from, although it purports to be a mere preliminary order, made in the inception of the case, and upon *ex parte* affidavits, is, in reality, nothing more nor less than a final decree; for it disposes absolutely and finally of every matter which is involved in this suit. An order or decree of this character can only be made upon final hearing had upon pleadings and proofs taken upon due notice, and in accordance with the rules and practice of the court." 32 Atl. 220. While I doubt not that the court of errors and appeals intended to decide that the order considered in the case before it wrongly anticipated that which should have been held undetermined until final decree, I am persuaded that it could not have meant to broadly hold, as the language of the opinion appears to imply, that cases may not arise in which a preliminary injunction may be allowed which, in effect, will decide all questions involved in the suit. An instance of the kind is suggested by Mr. Justice Magie in the opinion of the court of errors and appeals in *Delaware, L. & W. R. Co. v. Central Stock-Yard Co.*, 43 N. J. Eq. 605, 612, 12 Atl. 374, and 13 Atl. 615, in this language: "Circumstances may be presented of so extraordinary a character as to justify the issue of a mandatory injunction in limine. If the whole case be before the court, and the right to the injunction clear, and if no injury is done to the party enjoined by its issue, but, by its refusal, irreparable injury is done to the applicant, then it would not savor

of equity to deny the injunction." My understanding is that our courts have always recognized the right of a court of equity, in a proper case, to grant a mandatory injunction after preliminary hearing, even though that be the whole relief sought in the case. *Rogers Locomotive, etc., Works v. Erie Ry. Co.*, 20 N. J. Eq. 379; *Thropp v. Field*, 26 N. J. Eq. 83; *Railroad Co. v. Baker*, 27 N. J. Eq. 166; *Shivers v. Shivers*, 32 N. J. Eq. 578; *Wakeman v. Railroad Co.*, 35 N. J. Eq. 496; *Whitecar v. Michenor*, 37 N. J. Eq. 6; *Lord v. Manufacturing Co.*, 38 N. J. Eq. 452; *Delaware, L. & W. R. Co. v. Central Stock-Yard Co.*, 43 N. J. Eq. 75, 10 Atl. 490; *Id.*, on appeal, 43 N. J. Eq. 605, 12 Atl. 374, and 13 Atl. 615; *Hodge v. Glese*, 43 N. J. Eq. 342, 350, 11 Atl. 484; *Bailey v. Schnitzius*, 45 N. J. Eq. 178, 16 Atl. 680. I apprehend, then, that the court of errors and appeals meant to decide that the case considered, which in effect was designed to permit the removal of an obstruction to the enjoyment of an easement, did not present such features, including clear right and great hardship, as would justify the anticipation of final decree. So understood, I think it rules the present case.

I will deny the injunction so far as it is desired to put in force the complainant's declared manner of crossing the tracks of the defendant, but will grant it so far as it is necessary to protect the complainant's possession of the place of crossing up to the first track in the defendant's car yard, restricting such possession in use so that it will not disturb that first track.

GAMMELL v. ERNST et al.

(Supreme Court of Rhode Island. Nov. 4, 1895.)

WILL—CONSTRUCTION—ISSUE.

Where a will in one clause provided that on the death of the last of three daughters leaving issue "said issue to take the distributive share * * * of the trust capital belonging to his, her, or their mother, and the residue of said capital fund, if any, to be divided equally among the children of my said three daughters; * * * that is, my grandchildren to inherit in the right of their respective mothers," and a subsequent clause provided "that, should the last survivor of my said three daughters die without issue, then the capital of the trust fund shall be divided among the children and issue of said three daughters in the manner before stated," only the issue of said three daughters were entitled to inherit upon the death of their mother, or upon the death of the last survivor, and the issue of said issue were not so entitled.

Bill by Robert I. Gammell, trustee, against O. Herbert Ernst and others for the construction of a will.

Thomas C. Greene, for complainant. Robert W. Burbank and Samuel S. Durfee, for respondents.

MATTESON, O. J. This is a bill for instructions. The questions arise under the third clause of the will of Elizabeth Amory,

deceased, the material portions of which are as follows: "Third. I give, devise, and bequeath all and singular the rest, residue, and remainder of my estate, both real and personal, to my said son-in-law, Robert Hale Ives, before named, my executor, and to his heirs and assigns, in special trust for him to manage and improve, and to collect and pay over the rents, income, and profits thereof, equally to be divided to and among my following named children, to wit, Louise Morris Amory, one-third part thereof; Anna McLean Amory, one-third part thereof; and Helen Maria Lee, one-third part thereof. * * *

(a) On the decease of either of my said three daughters leaving issue, her distributive share or portion of the whole property composing the trust fund shall be paid over to the issue of such deceased daughter, to be and remain to such issue and his, her, or their heirs and assigns forever. (b) And on the death of either of my said three daughters without leaving issue, her share or portion of the profits and income of the trust fund, as it may then be, shall go to and be paid to the surviving sister or sisters before named, for her or their sole use and benefit. (c) The trust created by this item of my will to continue and remain in full force during the joint and several lives of my said three daughters. (d) On the death of the last of my said three daughters, if she leaves issue, said issue to take the distributive share and portion of the trust capital belonging to his, her, or their mother, and the residue of said capital fund (if any) to be divided equally among the children of my said three daughters before named in this item of my will; * * * that is, my said grandchildren to inherit in the right of their respective mothers. * * * (e) And should the last survivor of my said three daughters, to wit, Louise Morris Amory, Anna McLean Amory, and Helen Maria Lee, die without leaving issue, then the capital of the trust fund then in the hands of said trustee or his successor, however and wherever the same may be invested, shall be divided to and among the children and issue of my said three daughters * * * in the manner before stated. * * *

Louise M. Amory died, on or about April 10, 1893, without issue. Helen M. Lee died, on or about April 15, 1893, leaving a daughter, the respondent Elizabeth A. Ernst, wife of the respondent O. Herbert Ernst, and a son, the respondent Robert I. Lee. The respondents Helen A. Ernst and Elizabeth Lee Ernst are the only children of the said O. Herbert Ernst and Elizabeth A. Ernst. The infant respondents Helen A. Lee, Thomas A. Lee, and Anna Louise Lee are the only children of the said Robert I. Lee. Elizabeth A. Ernst and her two children, before named, and Robert I. Lee, and his three children, before named, are the only descendants now living of said Helen M. Lee. Anna McLean Amory died, without issue, on or about February 2, 1894.

The questions concerning which instruction is asked are: (1) Whether, upon the decease of said Helen M. Lee, her daughter, Elizabeth A. Ernst, and her son, Robert I. Lee, became exclusively entitled to one-third of the trust estate, or whether the children of said Elizabeth, to wit, Helen A. Ernst and Elizabeth Lee Ernst, and the children of said Robert I. Lee, to wit, Helen A. Lee, Thomas A. Lee, and Anna Louise Lee, also became entitled to an interest and share in said one-third of the trust estate; and, if so, in what proportions. (2) Whether or not, upon the decease of said Anna McLean Amory, the said Elizabeth A. Ernst and the said Robert I. Lee became exclusively entitled, in equal proportions, to the two-third parts of said trust estate, or whether the children of said Elizabeth and the children of said Robert became entitled to share and participate therein; and, if so, in what proportions.

The testatrix describes the beneficiaries who are to take the trust estate on the decease of the last survivor of her three daughters by the words "children and issue." In *Pearce v. Rickard*, Index LL, 130, 26 Atl. 38, after a full examination of authorities, we held that the word "issue," unrestricted by any indication of a contrary intention, is to be construed to include all descendants, and hence that it is necessary, in order to limit its meaning to children only, that the intention of the testator to do so should appear in the will. The question, therefore, whether, on the termination of the trust, the children of Mrs. Lee, to wit, Elizabeth A. Ernst and Robert I. Lee, became exclusively entitled to the trust estate, or whether their children, the grandchildren of the testatrix, also became entitled to share with them in the trust estate, depends on the construction to be given to the word "issue," as used by the testatrix, and this in turn depends on whether it was the intention of the testatrix to limit the meaning of the word "issue" to children in the first instance. For convenience of reference, we have designated the separate paragraphs of the will which we have quoted as (a), (b), (c), (d), and (e). We are of the opinion that the intention of the testatrix to make the children of the three daughters beneficiaries to the exclusion of their children, in the event that the daughters should leave children surviving at their decease, sufficiently appears. *Dexter v. Inches*, 147 Mass. 324, 17 N. E. 551. For, though in paragraph (a) the gift is to the issue generally of a daughter, on her decease, of her distributive share, in paragraph (d), after having directed in paragraph (c) that the trust should continue during the joint and several lives of the three daughters, the testatrix provides that, on the death of the last of the three daughters, leaving issue, the issue shall take the distributive share "belonging to his, her, or their mother," thus clearly indicating that the word "issue," as here used, is to be restricted to the children of the daughter. The same intention also clearly ap-

pears by the gift of the residue of the capital of the trust fund, if any, to be divided equally among the children of the three daughters, and by the explanatory phrase thrown in by the testatrix, "that is, my said grandchildren to inherit in the right of their respective mothers." *Buckle v. Fawcett*, 4 Hare, 536, 544; *Taylor v. Taylor*, 63 Pa. St. 481, 494; 11 Am. & Eng. Enc. Law, 875, and cases cited in note. In paragraph (e), though the direction is that, in the event that the last surviving daughter die without leaving issue, the capital of the trust fund shall be divided among the children and issue of the three daughters, yet that division is to be "in the manner before stated"; that is, as stated in paragraph (c), equally among the children of the three daughters in the right of their respective mothers; the more remote issue, if any, taking only by way of representation of a deceased parent. We therefore answer, to the questions submitted, that the children of Mrs. Lee, to wit, Elizabeth A. Ernst and Robert L. Lee, are alone entitled to the trust estate remaining in the hands of the trustee.

WHALEN v. BATES, City Treasurer.

(Supreme Court of Rhode Island. Nov. 7, 1895.)

CITIES—NOTICE OF CLAIM—CONDEMNATION PROCEEDINGS.

1. Notice of a claim addressed specifically to the mayor and one branch of the council of a city is not a presentation of the claim, within Pub. St. c. 34, § 12, making presentation of a claim to the council of a city a condition precedent to a suit on it.

2. A tenant whose name does not appear in the commissioner's report of condemnation proceedings against the land, because he failed to make known his interest to them, is not entitled to the personal notice provided in Pub. St. c. 64, § 35, requiring a city council in such proceedings to cause notice of the filing of such report to be served on persons named in the report.

Action by Michael E. Whalen against Frank M. Bates, city treasurer, on claim for damages sustained by taking of land for public use. On petition by defendant for a new trial. Granted.

Peter J. Quinn, for plaintiff. Thomas P. Barnefield, for defendant.

MATTESON, C. J. Pub. St. R. I. c. 34, § 12, requires every person who shall have any claim against a town to present to the town council, or, if it be a claim against a city, to the city council, of the city, a particular account of his claim, and provides that, in case just and due satisfaction is not made within 40 days after the presentment of the claim, he may commence his action for its recovery. The presentation of the claim to the city council, in case of a claim against a city, is thus made a condition precedent to the maintenance of an action against a city. In the case at bar, the plaintiff's claim was never presented to the city council of Pawtucket, but a statement of it addressed, not to the city council, but to the mayor and board of alder-

men (who constitute only one branch of the city council), was presented to the board of aldermen. We do not think that the presentation of the statement of the plaintiff's claim, restricted, by the terms in which it was addressed, to the consideration of the mayor and the board of aldermen, or one branch of the city council, can be regarded as a compliance with the statute.

We think that the common pleas division erred in its instruction to the jury that the plaintiff was not required to make known any claim that he had to the commissioners, nor to make known to them his relation to the property taken for the improvement, till he had received a notice specifically directed to him, and personally served on him by some proper officer, and that, if he was not so notified and served with notice of the proceedings, he was entitled to recover. The proceedings for the widening of the street in question were taken under Pub. St. R. I. c. 64, §§ 32-46. The only section of the statute which provides for personal notice is section 35. This requires that the town council or board of aldermen, as the case may be, shall within 14 days after the making of their report by the commissioners, cause personal notice to be served on all persons named in the report, residing in the state. As the plaintiff did not appear before the commissioners to make known to them his interest in the land damages for the taking of which he sues, his name is not included in the report, and hence there was no occasion for the service of personal notice on him of the filing of the report of the commissioners, directed by section 35. Sections 32, 33, and 34, which regulate the proceedings preliminary to the report of the commissioners, provide merely for notice to parties interested in the land. Section 43 directs that notice under these sections shall be given by publication each week for two succeeding weeks in at least two newspaper such as the town council or board of aldermen may order, and by posting three or more copies of the notice in conspicuous public places on or near the place of the proposed improvement. As the interest of a tenant in the land is created usually by an oral letting, and consequently does not appear in the land records, it would scarcely be practicable for a town council or board of aldermen, as the case may be, or for the commissioners to estimate and assessment, to ascertain the holder of such an interest, and to give him personal notice of the proceedings. The statute therefore, wisely provides merely for notice of the proceedings by publication and the posting of copies of the notice. Having given the notice prescribed by section 43, the commissioners were authorized to hear and determine the claims of all persons interested in the land sought to be appropriated, and opportunity was afforded for all such persons to appear and be heard. By the publication of the notice in the newspapers and the post-

of copies of it, as directed by the statute, the plaintiff had constructive, if not actual, notice of the meeting of the commissioners. It was his duty to have attended that meeting, and to have presented his claim. If he had done this, and the commissioners had disallowed his claim, and had reported its disallowance, he would have been entitled to personal notice of the filing of their report, provided for in section 35, and could have filed his notice of intention to claim a jury trial and his claim for such trial, and thus had his claim for damages passed on by a jury; or, if the commissioners had ignored his claim, and omitted it from their report, he would have been in a position, having first presented his claim to the city council, as required by the statute, to maintain an action of trespass on the taking of the land. *Pettis v. City of Providence*, 11 R. I. 372. But, having failed to appear before the commissioners in response to the notice, he cannot now be permitted to urge that the proceedings were unauthorized, and to assert a claim for damages, for the taking of the land. *Brown v. County Com'rs*, 12 Metc. (Mass.) 208.

Defendant's petition for a new trial granted, and case remitted to the common pleas division, with direction to render judgment for the defendant for costs.

MCCLOSKEY v. MOIES, Town Treasurer.

(Supreme Court of Rhode Island. Nov. 8, 1895.)

DEFECTIVE HIGHWAYS—NOTICE TO TOWN—QUESTION FOR JURY.

1. Under Pub. St. c. 65, § 1, requiring towns to keep their highways so that they will be "safe and convenient" at all seasons of the year, a town is liable for injuries from a fall caused by slipping on ice due to rain collecting during an unusually cold season in a defective depression in a sidewalk of a bridge, from which it could not escape, and freezing, when the accident would not have occurred had the defect not existed.

2. A formation of ice resulting from water collecting in a depression in a sidewalk of a bridge is not an obstruction caused solely by ice or snow, as contemplated by Pub. St. c. 65, § 1, exempting towns from liability for injuries resulting therefrom, unless proper notice of the obstruction has been given to the surveyor of highways.

3. The question whether or not a highway is defective, so as to render a town liable, is for the jury.

Action by Nicholas McCloskey against Charles P. Moies, town treasurer, for personal injury caused by a defective sidewalk. There was judgment of nonsuit, and plaintiff petitions for a new trial. Granted.

Hugh J. Carroll, for plaintiff. B. M. Bosworth, for defendant.

TILLINGHAST, J. This is an action of the case for negligence. The declaration sets out that the plaintiff, while crossing that part of the bridge at Valley Falls, on Broad street, which is situated in the town of Lincoln, being in the exercise of due care, slipped and fell on some ice which had formed on the sidewalk of said bridge, and was injured. It also alleges

that said bridge was out of repair, in that it had sagged at the place where the accident happened, causing a depression or hollow in the sidewalk thereof, by reason of which the water had collected there, and, becoming frozen, rendered said sidewalk slippery and dangerous to travelers, and that it had been in said defective condition and out of repair for a long time. At the trial of the case in the common pleas division, after the plaintiff had submitted his evidence, the court, on motion of the defendant's attorney, nonsuited him, on the ground that he had not first given the notice required by Pub. St. R. I. c. 65, § 15, and that he had not shown that the accident would have occurred if the ice had not been there; whereupon the plaintiff duly excepted, and the case is now before us on his petition for a new trial, on the ground of alleged error on the part of the court in entering the nonsuit.

The evidence offered shows that on the 17th of December, 1891, at about 6 o'clock in the evening, the plaintiff, while crossing said bridge on his way home from his work, slipped on some ice which had formed in a depression or hollow on the sidewalk, caused by the sagging of the bridge, and was seriously injured; that it was dark at the time; and that the plaintiff had no knowledge of the existence of the ice until he slipped and fell thereon. It also shows that the floor of the sidewalk where the accident happened was water-tight, and that the water which collected there could not flow off at the side of the bridge because of a plank which was nailed onto it, and which was two inches above the center of the depression or sag; that the ice covered a space variously estimated by the witnesses at from a yard square to a strip nine feet in length and fifteen inches in width, and from half an inch to an inch and a half in thickness; and that the water had collected from a recent fall of rain, and could not escape until it rose to a sufficient height to flow over the board or plank at the side.

In this state of proof, the plaintiff's counsel contends that the case should have been submitted to the jury upon the question as to whether said bridge was defective and out of repair by reason of said depression or sag, and also whether the same was not one of the proximate causes of the accident; and in this connection he argues that the action of the elements in the formation of the ice was a natural and probable result of the condition in which the bridge was allowed to remain by the town, and that the injury to the plaintiff would not have resulted but for said defect. The defendant's counsel, on the other hand, contends that, under the statute above cited, the liability of towns for injury to persons caused by ice obstructing a highway attaches only after notice of the particular obstruction has been given to the surveyor of highways in writing, and 24 hours have elapsed between the time of giving such notice and the time of the injury.

Pub. St. R. I. c. 65, § 1, imposes upon towns the duty of keeping their highways in repair

and mended, so that the same may be safe and convenient for travelers at all seasons of the year. By the term "safe and convenient" is not meant, however, that they shall be absolutely safe or free from defects, but reasonably so; that is to say, when the traveled way is without obstruction or structural defects which endanger the safety of travelers, and is sufficiently level and smooth to enable persons, by the exercise of ordinary care, to travel with safety and convenience, it is "safe and convenient," within the meaning of said statute, and the town has discharged its full duty in the premises. See Dill. Mun. Corp. (4th Ed.) § 1003. The mere fact that a highway is slippery from the presence of ice or snow thereon, so that a person may be liable to slip and fall upon it while in the exercise of ordinary care, does not constitute a defect under the statute, so as to render the town liable for an injury sustained, unless notice shall have been given as aforesaid. But, ordinarily, whether or not a given highway is defective, so as to enable a party injured thereon to maintain an action against the town, is a question of fact for the jury. See cases cited in 2 Dill. Mun. Corp. p. 1225, note 2. And, in determining this question, the location and use of the highway, the season of the year, the place of the accident, the time of day or night, the manner and nature of the accident, and all the other circumstances which throw light upon the happening thereof, should be taken into consideration.

We do not think the statute above referred to, relating to notice of an obstruction caused by snow or ice, is applicable to the case at bar, that statute evidently having reference to obstructions in the highway caused solely by the presence of snow and ice. Here it is alleged—and there is evidence tending to show—that the highway itself was defective; that the defect was one of the proximate causes of the accident; and that the accident would not have happened but for the existence of such defect. The case, therefore, falls within the decision of this court in *Hampson v. Taylor*, 15 R. I. 83, 8 Atl. 331, and 23 Atl. 732, in which it was held that where the injury results from a combination of two causes, both in their nature proximate,—one a defect in the highway, and the other a natural cause or a pure accident, for which neither party is responsible,—the town is liable, provided the injury would not have been sustained but for the defect in the highway. We are therefore of the opinion that the court erred in granting the nonsuit, and that the plaintiff is entitled to a new trial. Petition for new trial granted.

STATE v. GOODLEY.

(Court of General Sessions of the Peace and Jail Delivery of Delaware. Feb. 19, 1889.)

MANSLAUGHTER—POINTING PISTOL—EVIDENCE OF INTENT.

On an indictment for manslaughter under Act April 8, 1881, § 3, prohibiting the intentional

pointing of firearms at any person, and providing that, if death results from the discharge of such weapon, the person pointing the same shall be guilty of manslaughter, the state must prove affirmatively that the pointing was intentional.

Taylor E. Goodley was indicted for manslaughter. Acquitted.

Goodley, Turner, and several others were engaged in shooting at a target with a pistol. Goodley jestingly, and not knowing that the pistol was loaded, pointed it at Turner, saying that he would shoot him. The pistol was fired, and Turner dropped, mortally wounded. He died on the evening of the same day. Before his death Turner made a statement, saying that the shooting was accidental. Goodley was held by the coroner, and afterwards indicted for manslaughter.

John Biggs, Atty. Gen., and Thomas Davis, Dep. Atty. Gen., for the State. Benjamin Nields, for defendant.

COMEGYS, C. J. (charging jury). This is an indictment, the third count of which is upon the third section of a statute passed at the January session, 1881, of the general assembly, entitled "An act providing for the punishment of persons carrying concealed deadly weapons." That section provides as follows: "That it shall be unlawful for any person, either in jest or otherwise, intentionally to point a gun, pistol or other firearm at or towards any other person at any time or place. Any person violating any provision of this section shall, upon conviction thereof, pay a fine of not less than ten dollars nor more than one hundred dollars and the cost of prosecution, and should death result to any person by the discharge of such gun, pistol or other firearm while so pointed, the person pointing the same shall be guilty of manslaughter when such killing shall not amount to murder, and shall be punished accordingly." The indictment contains three counts or charges against the prisoner. The first is the usual common-law count. The second is one composed as the other, except that it embodies also the circumstances of this case and expressions of said section. The third is upon said third section entirely, introducing some language which has been objected to by the prisoner's counsel in your presence but which the court decided was properly used therein. The intent of the legislature in passing the said third section of the act (the one I have quoted), was to provide a statutory punishment for those who, by using firearms, in sport or jest even, cause the death of others, although it also includes every illegal use thereof. If no consequences result from the mere act of pointing firearms at or towards the person of another, and it be done jestingly or in mere sport or play it still is an offense by the said third section called a "misdemeanor," which, without this section, it would not be, because of the absence of intent to do a wrong. The mere pointing the weapon at or towards the person

of another intentionally, though without any design to do more, is therefore a misdemeanor. If death ensue from such act of pointing, it is manslaughter at the least, and murder if there be any facts or circumstances, established by proof, which indicate that the shooting was attended by those signs or indicia which, in law, show malice,—that is, for example, intent to take life, or reckless disregard of the lives of others amounting to felonious purpose.

This indictment has been tried upon the before-mentioned third count, and the defense has been made to it. The third section of the statute makes it unlawful for any person, in jest or otherwise, intentionally to point a gun, pistol, or other firearms, at or towards any other person, etc. There is no dispute about these facts: That the prisoner, at the time charged in the indictment, had in his hands and possession a loaded pistol, which he discharged, and that Harvey Turner was struck, by the ball shot forth, in the abdomen, and that he died of the wound soon afterwards. But the learned counsel for the prisoner, referring to the statute, claims that the state must show affirmatively that the act of pointing the pistol by the prisoner was an intentional act on his part, and that this has not been done. This contention is a proper one to be made in any case where intent is the essence of the offense charged, which it is here. The question then (and it is for you, and not be court, to decide it) is, did the prisoner at the bar point the pistol, which on that occasion he held in his hand, intentionally at or towards the person of Harvey Turner, the deceased? That is, did the prisoner purposely point the weapon at or towards (that is, in the direction of) Harvey Turner? The question is, not whether the prisoner, by the act of pointing, intended to discharge it against the deceased, but did he mean or intend to point it at the deceased? If you find, from the evidence before you, that the prisoner's act of pointing was an intentional act on his part, then it makes no sort of difference, under the law I have read to you, whether such act were entirely innocent in itself, or free from purpose of mischief to the deceased. The law has been violated, and the prisoner is guilty under the indictment. How is the intention of a party to do an act to be shown? By the expression of purpose to do that act, and also by acts and conduct which, of themselves, are inconsistent with any other theory than that he meant to do it. Now, it is for you to say whether the prisoner, having in his hand and under his control the pistol in proof before you, and which was discharged, while so in his hand, against the person of Harvey Turner, meant to point it at or towards him, said Turner. The simple question, I repeat, is not whether the prisoner intended the consequences which resulted from the pointing, but did he intend to point the pistol at or towards another's person, when he did so point it? If

you are satisfied, beyond a reasonable doubt, that the pointing was intended by the prisoner, then he is guilty, and your verdict should be accordingly. But, if there has been anything proved before you that raises in your minds a reasonable doubt of the intent to point, then the prisoner is entitled to the benefit of that doubt, and should be acquitted. But this doubt must be supported always, and in all cases of criminal charge, by actual proof of facts or circumstances from which a doubt may arise, and not made to depend in any way on mere belief, imagination, or conjecture.

In compliance with the request made by the attorney general, we charge you that, if you should be satisfied by the proof in this case that the prisoner is not guilty of manslaughter, as charged, you may convict him of assault merely, if you choose so to do.

Verdict, guilty of assault.

STATE v. WALKER.

(Court of Oyer and Terminer of Delaware.
Sept. 21, 1887.)

MURDER OR MANSLAUGHTER — PRESUMPTION OF MALICE—EVIDENCE.

1. Mere words or gestures, however offensive or insulting, will not reduce homicide from murder to manslaughter.
2. Where the killing is admitted, if a deadly weapon be used, malice aforethought is presumed, unless rebutted by defendant.
3. Proof of malice, expressed or implied, is necessary to a conviction for murder.
4. Killing in self-defense is justifiable only where every means of escape has been exhausted.

Jackson Walker was indicted for murder, and convicted of murder in the second degree.

John Biggs, Atty. Gen., and Thomas Davis, Dep. Atty. Gen., for the State. Austin Harrington, for defendant.

COMEGYS, C. J. (charging jury). All homicides, by the law of this state, are either justifiable, excusable, or felonious. Justifiable homicides are such as are authorized by law, familiar examples of which are the execution of a prisoner by a sheriff under legal sentence, the suppression by peace officers of a riot, when it cannot be put down otherwise, etc. Excusable homicides are those, not properly justifiable, but allowable under certain circumstances,—for example, defense of one's own person or that of some member of his household, as wife, children, servant. Felonious homicides, in their turn, are divided into such as are designated as malicious and not malicious. Homicides that are not malicious are manslaughters; those malicious, are murders. I will take these up in the order in which I have referred to them, and endeavor to give to you, in plain language, their several distinctions from each other, except that I shall not go further into the subject of justifiable homicides, as this is not one of them. It is claim-

ed by the prisoner's counsel to come strictly and fully within the class called "homicides in self-defense." The placing the prisoner's case upon this ground makes it necessary that I should go into the law of murder and manslaughter, not only to distinguish one from the other, and from the present defense, but also to enable you to understand the contention of the attorney general that the case is one of murder of the first degree, as charged in the indictment. I shall also instruct you sufficiently, I trust, in the law of self-defense, to enable you to determine whether this is a case of that kind.

Murder is the unlawful killing by one man of another with malice aforethought. Whenever one kills another, with a wicked purpose of taking his life or doing him some great bodily harm, it is murder, and murder of the first degree. Where, also, one, in endeavoring to perpetrate some crime punishable with death, kills another, he is guilty, by our statute, of murder of the first degree. Where one, in endeavoring to commit some felonious crime, kills a human being, or kills one in doing some deliberate, cruel act, he is also guilty of murder, but not murder of the first degree as our statute describes it, but is guilty of the crime of murder of the second degree under the statute. These are cases of malicious homicide, and without the ingredient of malice, there can be no murder. Now, what is malice, to make a homicide murder? Malice is a state and condition of the mind or heart, which is best understood as wickedness. Its existence in the case of a homicide is shown by the character of the act done. If there be preconceived purpose to take life, as shown by threats, lying in wait, the selection of a deadly instrument or weapon, likely to produce death, and use of it in pursuance of the threats, etc., it is called "express malice aforethought," and "murder of the first degree." Where such or the like circumstances do not exist, and yet the wantonness of the act done, as shooting or driving into a crowd, or its wickedness, in the deliberateness and cruelty with which it is perpetrated, evinces a depraved and vicious disposition, or, as it is sometimes expressed, a heart regardless of social duty and fatally bent on mischief, then there is malice implied in law, and murder of the second degree. These degrees were unknown to our law before 1852. Every malicious homicide was punishable with death down to that time. Now those of the second degree are punished by imprisonment for life.

Manslaughter is committed, generally, where two men fight upon a sudden affray, and, in the heat of blood, one kills the other. If the fight were originated between them with the purpose of taking life, and one were slain, it would be murder of the first degree. The mutual agreement to fight to the death if necessary would not remove such a homicide from the scope of murder of the first degree. Killing a man in a duel is murder of such

degree. The contest, to avoid a higher crime than manslaughter, must have been unpremeditated and sudden, and the slaying must have been under the influence of such a degree of heat or transport of passion as virtually to deprive the slayer of control over himself. If the jury do not find this to be the case, then they would be justified in believing that the slayer acted under the influence of preconceived malice or design, and availed himself of the occasion to exercise it, and therefore should find him guilty of murder of the first degree.

Self-defense, or killing another in defense of one's own person, is, mostly, where one is suddenly assailed by another without any fault on his part, and under such circumstances as to give him just and reasonable ground to believe that he is in danger of losing his life or suffering some great bodily harm, or, as oftentimes expressed, to indicate the degree of such harm, enormous bodily harm. In such case the assailed need not wait for the apprehended injury by his adversary, but may take his life if necessary to protect his own person. But, before he may do this, he must do all in the power of a reasonable man, similarly circumstanced, to avoid the assault of his adversary. If it be so suddenly made, and with such a weapon as is likely to produce death, or such enormous bodily harm as to imperil life, and the assailed cannot escape the fury of his adversary, he may slay his enemy. But, with whatever weapon the attack is made or attempted, if there are means of escape open to the assailed, he may not take the other's life until they have been tried, and failed to protect. In other words, he must retreat from his assailant or pursuer as far as he can, and never, until he has done this unavailingly, can he meet his opponent and slay him. This is illustrated by the familiar instance given of two men in a room, and one assailing another, to take his life or inflict upon him some great harm, as mentioned. In such case, the assailed must retreat as far as he can,—be driven to the wall, as we often say, figuratively, with respect to other pressure in life,—before he takes upon himself the final remedy for protection. If life or person can be protected in any other way than by taking life, it must be done, or the homicidal act will be treated in law as a malicious or murderous one. The law is so tender of human life that no man must take that of another man, even in the exercise of what is oratorically called the "sacred right of self-defense," unless he has no power reasonably within his reach, by retreat or otherwise, to save his own life, without doing so, or protecting his own person from great and dangerous harm.

Having now given you, I hope, all necessary instruction about the law of homicide I will turn my attention to the prayers of respective counsel in this trial. And I will take those of the attorney general first. T.

the first I answer in the affirmative; that is, that Barr's quarrel with the prisoner has, of itself, nothing to do with the case. But I think it proper to add that if, from the circumstances deposed to by the witnesses for the defense, if you believe their testimony with respect to them, and discredit that of the state's witnesses with respect to the matter, you think a reasonable man would have been justified in believing that Mulvey was advancing upon him as an accomplice or confederate of Barr, then the case is the same as if Barr had acted alone, and been where Mulvey was at the time of the fatal blow. Under such circumstances, whatever he could have done to Barr could have been done to Mulvey. I have already gone into the law far enough to point out to you that life cannot be taken, if adequate protection by retreat or otherwise can be secured otherwise. To the second I answer that no mere words or gestures will reduce homicide from murder to manslaughter, no matter how offensive or insulting they may be. If such excuse only exist for the use of a deadly weapon, the law affixes the term "malicious" to the act, and it is murder. To the third I answer that it is true that the natural and probable consequences of an act—that is, those that are likely to flow from it—are presumed, in law, to be intended by the actor, and the burden of showing the contrary is on him; and, further, that, where killing is admitted, it is presumed to be done with malice aforethought, if a deadly weapon be used.

With regard to the prayers of the prisoner's counsel, I answer: As to the first I answer that, to justify taking life by a person assailed, it must be to protect his own, or his person, from great bodily harm, and there must be no other way open to him, as a reasonable man, by retreat or otherwise, to do so. In such a dilemma any weapon of defense may be used. As to the second the law does not imply malice in any case where death ensues from the use of a weapon neither deadly nor dangerous in itself; but, whether it be dangerous or deadly is a question for the jury, upon satisfactory proof of what it was, or, if such cannot be made, of the effect it produced. Of course, no one can be convicted of murder without proof, express or implied, of malice. As to the third I repeat the substance of the charge in the Talley Case, 33 Atl. 181, upon this point of reasonable doubt,—that if you, gentlemen, after a calm review of all the testimony in this case, and regarding it alone, have in your minds a reasonable doubt of the guilt of the prisoner, a doubt growing out of the testimony before you, the prisoner is entitled to the benefit of that doubt, and ought to be acquitted in manner and form as he stands indicted, which is for murder of the first degree. But, if you so doubt, and yet believe, from the testimony before you, that he is guilty either of murder of the second degree or of manslaughter, as I have defined them,

respectively, to you, you may convict him, in your discretion, of that one of them which, in your judgment, the facts will support you in determining.

Verdict of murder in the second degree.

EICHMAN v. HERSKER. (No. 301.)

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

APPEAL—REVIEW OF FINDINGS OF REFEREE—MUTUAL INSURANCE COMPANIES—LIABILITY OF MEMBERS—PREMIUM NOTE—LIMITATION OF ACTIONS—ACCRUAL OF CAUSE—DECREE—COLLATERAL ATTACK—PARTIES—ESTOPPEL TO PLEAD FRAUD

1. The supreme court cannot go behind the findings of fact by a referee appointed under Act 1874, except where the assignment of error is such as could be heard if the trial had been according to common law before a jury.

2. Where a mutual insurance company borrowed money from banks to pay losses, and afterwards borrowed money from another to pay the banks, and confessed judgment in favor of the second lender, the members were liable for the debt represented by the judgment as for an original loss, though the directors also confessed judgment to the second lender as additional security.

3. The statute of limitations does not commence to run against a cause of action on a premium note given by a member of a mutual insurance company, providing for payment in such sums as the company may, for the purpose of paying losses, require, until an assessment is levied.

4. The fact that the company was dilatory in levying the assessment did not start the running of the statute.

5. A decree authorizing the receiver of an insolvent mutual insurance company to levy an assessment on the members to pay the company's debts could not be attacked by a member in an action against him for the assessment on his premium note.

6. A member of an insolvent mutual insurance company is not a necessary party to a bill by another member, who sustained a loss and obtained judgment thereon, against the company for the appointment of a receiver.

7. One induced to become a member of a mutual insurance company through false representations of an agent as to the number of members could not, in an action against him on his premium note to recover an assessment by a subsequently appointed receiver of the company, set up fraud in defense, where, after he discovered the fraud, he paid assessments, and other parties thereafter became members of the company.

Appeal from court of common pleas, Schuylkill county.

Action by John Eichman, receiver of the North Schuylkill Mutual Fire Insurance Company, against John Hersker, on a premium note to recover an assessment. From a judgment for plaintiff, defendant appeals. Affirmed.

A. W. Schalck and James Ryon, for appellant. Geo. J. Wadlinger, for appellee.

DEAN, J. On June 8, 1874, John Eichman, now the plaintiff, receiver, and 10 other citizens of Schuylkill county, secured a charter

for the North Schuylkill Mutual Fire Insurance Company of Mahanoy City. They at once organized the company, and commenced to solicit insurance, appointing Carl Scheuerman general agent. He, on 15th of July, 1874, called on the defendant, John Hersker, and urged him to take out a policy, representing that the company was doing a prosperous business, and had then issued about 525 policies. Hersker made application for a \$2,000 policy. The application is as follows: "For value received, and in consideration of a policy of insurance to be issued by the North Schuylkill Mutual Fire Insurance Company, of Pennsylvania, upon the approval of my application of insurance in said company of this date, I promise to pay the said company such sum or sums of money, and at such time or times, as the board of directors of said company may, for the purpose of paying losses by fire, and the necessary expense of said company, require; payable within thirty days after notice and demand. Carl Scheuerman, Agent. John Hersker, Applicant." The policy contains this stipulation: "In consideration of ——— dollars in hand paid, and hereby acknowledged, and an obligation to pay all such sum or sums of money, and at such time or times, as the board of directors may, for the purpose of paying losses by fire, and the necessary expenses of said company, require, do insure," etc. Hersker also delivered to the company his premium note. It appeared that Scheuerman, the agent, had falsely represented the number of policies then in force, to Hersker. Instead of about 525, Hersker's made the twenty-fifth; the first policy having been No. 501, instead of No. 1. Later, on December 8, 1874, Scheuerman solicited and obtained an application from Hersker for a second policy in the sum of \$2,200; the application and policy being the same in form as the first. Two assessments were made on these notes,—No. 1, October 6, 1875, of 1½ per cent.; No. 2, May 10, 1876, for a like percentage,—and both assessments were paid by Hersker. On May 17, 1876, a very destructive fire occurred in Mahanoy City, by which the company was a very heavy loser; but, notwithstanding this, a number of policies were taken out after that date, the last being No. 718. Nearly all the losses by fire occurred prior to the issuing of the second policy, No. 628; and a few before the issue of the first, No. 525. The losses, however, were so severe that property owners were greatly deterred from becoming members. As a result, the managers were discouraged; and on 6th of April, 1877, they resolved to issue no more policies, and, further, that all policies issued should terminate the 10th of May, 1877. At the same time they further resolved to surrender to the policy holders all premium notes on payment of all unpaid dues and assessments. So far as the record shows, none of the policy holders accepted this method of ending their relations with the company. On

December 21st, of same year, the company made an assignment to I. Y. Sollenberger, Esq., for the benefit of creditors. He accepted the trust, and performed his duties until 1st of September, 1884, when he filed his account and resigned. Before the assignment, the board of directors had laid two more assessments, each of 1½ per cent.,—the first, No. 3, January 11, 1877; and the second, No. 4, May 8, 1877. These Hersker also paid. But a small part of the last assessment was collected when the assignee assumed his duties. The aggregate of the four assessments was \$13,806.33, of which, owing to insolvency of members, only about \$8,000 was collected. By the account of Assignee Sollenberger, confirmed absolutely, there was a balance in his hands when he resigned of only \$781.18. William Krause, the holder of policy No. 533, issued 24th of July, 1874, for \$1,200, sustained a loss by fire of all the property insured under it on the 10th of October, 1875. Being indebted to Solomon Lowenstein, he assigned his policy and claim to him. Lowenstein brought suit against the company, obtained judgment for \$1,008.50, and issued execution, which was returned "No goods," the company having made assignment before writ came to sheriff's hands. The company, having borrowed money in bank, and being unable to take up its notes when due or when payment was insisted on, made a loan from John Phillips to take up this paper, and then confessed a judgment to him against the company for the amount of the loan, \$2,852.16. The company, besides the Lowenstein and Phillips claims, owed some smaller ones at the date of Assignee Sollenberger's resignation. The entire indebtedness then was \$4,660.22, to pay which it had in cash the balance due from the assignee, \$781.18. Lowenstein, as a judgment creditor, filed a bill for an injunction to restrain the officers from further management of the affairs of the company, and for the appointment of a receiver. The company, in answer filed, concurred in the prayer for a receiver; when the court, accordingly, on December 1, 1884, appointed John Eichman, this plaintiff.

On January 19, 1885, the receiver presented his petition to the court, setting out the financial condition of the company, as already noticed, and, further, stating that there remained only \$500 of the four assessments already made collectible, which added to the \$781.18 received from Assignee Sollenberger, made only \$1,281.18 available for payment of \$4,660.22 of debts, and leaving unprovided for \$3,379.04; that the amount of insurance held by solvent policy holders subject to further assessment was \$35,000, and that an assessment of 11 per cent. would realize sufficient to pay all debts as well as expense of collection. He therefore prayed the court to authorize an assessment of 11 per cent. On 19th of January, 1885, the court made a decree as prayed for; and afterwards, on application of the receiver, modified the order

so that the assessment would operate equitably on each policy according to the rate of insurance. At the instance of Jacob West, a policy holder, on the 17th of May, 1886, a rule was awarded on the receiver to show cause why the order for assessment should not be rescinded. On March 28, 1887, this rule was discharged. West, again, on December 3, 1888, petitioned the court to vacate its former decree and rescind the order for the assessment, and the prayer was refused. Thereupon West appealed to this court, and his appeal was quashed. See *Lowenstein v. Insurance Co.*, 132 Pa. St. 410, 20 Atl. 688. The court filed no reasons for quashing; but one—that the appeal was not taken in time—was so obvious and conclusive that the decree to quash was made at bar. The receiver levied the assessment of 11 per cent. in accordance with the order, and Hersker having refused payment, on the 1st of March, 1886, he brought suit in the common pleas. The defendant pleaded non assumpsit, payment, etc., with right to add special pleas. The case came on for trial, and was submitted both as to facts and law to the court, Judge Pershing sitting as trial judge. He found for plaintiff, and defendant appeals, assigning for error 16 findings of fact and 18 conclusions of law.

As to the findings of fact, there was evidence to support each of them. True, some of them were found on the testimony of interested witnesses. As to nearly all, there was contradictory testimony or testimony which warranted inferences more or less antagonistic, the truth depending in some measure on the character and appearance of the witness. An examination of the printed testimony, independent of the opinion of the learned judge of the court below, leads us to no certain conclusion. The argument of counsel on both sides is so clouded by accusation, irrelevant matter, and acerbity that it affords us but little aid in a review of the testimony bearing on the findings. As to some of them, taking the printed testimony before us, we would not, perhaps, have reached the same result; but we have decided, in effect, more than once that we will not set aside findings of fact merely because of doubts on our part as to their correctness. As is said in *Bradlee v. Whitney*, 108 Pa. St. 362, and repeated by the present chief justice in *Railroad Co. v. Moyer*, 125 Pa. St. 506, 17 Atl. 461: "The court cannot go behind the findings of fact by a referee, except where the assignment of error is such as could be heard and determined if the trial had been according to the course of the common law, before a jury. If the evidence is relevant and proper, and the findings of fact are reasonably inferred therefrom, we must, in the absence of fraud, accept the report as correct and true. We cannot consider the weight or the conflict of evidence, or the veracity of the witnesses." And the rule as to the findings of the court or referee under the act of 1874 is the same.

As to the legal conclusions of the court from the facts found, while not passing upon them in the order in which the errors are assigned, we will notice them briefly in the order in which they stand, in our judgment, in relation to the issue.

1. As to the nature of the indebtedness which the receiver sought to pay by the assessment: A large part of it the directors of the company were personally responsible for. The company had borrowed money from banks, which it could not pay. A loan was made from Phillips to pay the banks. Judgment was confessed by the company to Phillips, and the directors, also, as individuals, confessed judgment to him as additional security. Appellant seeks to draw a distinction between this debt and one owing directly by the company to policy holders. We can see none. The debt to the bank was created by borrowing to pay actual losses by fire in anticipation of payments on assessments. In making themselves individually liable, they are in equity substituted as creditors of the company in place of those who had suffered losses. No fraud is intimated. It is nowhere averred that the money was not borrowed to pay what the company actually owed, or that every cent of it was not used for that purpose. The debt is a valid one, and the company is as much bound in morals and law to pay it as if it represented a policy on a burned barn. As is ruled in *Orr v. Insurance Co.*, 114 Pa. St. 387, 6 Atl. 696: "The losses were paid to the persons entitled, soon after they became due, with money borrowed for the purpose. * * * The company still owes the money, and the defendant has not paid his proportion. Did the borrowing of money and paying the losses immediately discharge the members of the company from liability to pay assessments according to their contract?" It is decided in the negative.

2. As to the statute of limitations: The assessment was not made within six years from the date of the policies and the premium note, nor within six years from the date of the losses, the payment of which had created the debt now sought to be satisfied by assessment. As already indicated, this debt must be treated as if it were the original loss. No assessment was ever laid which paid it. The defendant's contract is: "I promise to pay the said company such sum or sums of money, and at such time or times, as the board of directors of said company may, for the purpose of paying losses by fire and the necessary expense of said company, require." The point is directly ruled by *Smith v. Bell*, 107 Pa. St. 352, and the many cases therein cited. It is said in that case: "A sufficient answer to the plea of the statute of limitations is that the note was not payable at once or on demand, but is payable by installments, upon the happening of a loss and assessments therefor; and so, until an assessment is made, the stat-

ute does not begin to run." Counsel for appellant attempt to draw a distinction between *Smith v. Bell* and the case on hand, in the facts, which renders the rule inapplicable. It is argued, that the company in that case was organized under the act of 1856, which makes all members liable for all losses and expenses; that the policy holder in that case gave no premium note, but only contracted to comply with the charter and by-laws. But we cannot see that the form of the obligation affects the application of the principle. The contract is the same, whether it be specified in and evidenced by a premium note or resort must be had to the charter and by-laws to ascertain it. Nor is it any answer to say that the company was dilatory in levying the assessment. Mere indulgence in levying the assessment will not bar the right; delay in enforcing collection after levy and demand would. As the suit was brought within six years from the date of the assessment to pay losses, the plea of the statute will not avail defendant.

3. It is urged that the decree authorizing the assessment did not conclude defendant; that he still had a right to go behind it, and make defense on the merits, by showing that the financial condition of the company did not warrant it. As to this, these facts are undisputed. Lowenstein, in his bill, averred that the company was insolvent. The company, in its answer, admitted it. The court, by the appointment of the receiver, adjudicated it. There was no appeal from this final judgment of a court of full jurisdiction. Then, in less than 60 days, on petition of the receiver setting out the debts and assets, and praying for authority to make an assessment of 11 per cent., the court made the decree as prayed for. Admit that a full exhibit in detail of the condition of the company, giving each policy holder by name, specifying the losses and every dollar that had ever been collected to pay them, should have been made as preliminary to a decree; the failure to do it could only have been taken advantage of on appeal from the final decree of the court, adjudging the company bankrupt, and authorizing the assessment. The evidence shows that afterwards, on the application of West, the court, in a prolonged hearing, heard evidence fully on the whole subject, and refused to rescind its decree; but, even if this had not been so, it would be intolerable to hold that the decree could be questioned in a collateral proceeding by every policy holder, when demand is made upon him for contribution towards losses; and such has been the law, in an unbroken line of decisions from the *Duchess of Kingston's Case* to one like unto this in its facts,—*Insurance Co. v. Langley*, 12 Md. Law R. 123. Nor does it affect the finality of the decree that the defendant was not made by name a party to

Lowenstein's bill in equity, and was not notified of the application for authority to lay the assessment. The court below properly decided that making the company a party was sufficient. Service on the proper officers of the corporation made every policy holder a party, and the answer of the company, not before decree dissented from, will now, after decree unappealed from, be deemed as concurred in by the policy holder.

4. It is maintained by defendant that the contract cannot be enforced, because it was induced by the false representations of the company. Hersker testifies that when Scheuerman, the general agent, solicited the application, he stated to him that the company was doing a prosperous business, and about 525 policies had been issued, when, in fact, the one then being solicited made only the twenty-fifth. Scheuerman being dead, and there being no other witness to what was said when the contract was made, the court found as a fact, on Hersker's testimony, that such false statement was made; but the court also found the fact that, after knowledge of this false statement, Hersker paid assessments, and did not repudiate the contract, and therefore he is estopped from now repudiating it, as the rights of third parties have intervened. Hersker's policies were issued in 1874. Other policies continued to be issued down to May 10, 1877. When he paid assessments levied after knowledge of the alleged fraud upon him, he held himself out to all who afterwards became his comembers of the company as one bound with them to share in the burdens of the company. They have a right now, and the receiver, as representing them, has a right, to insist he shall join with them in contributions. The case of *Dettra v. Kestner*, 147 Pa. St. 566, 23 Atl. 889, on the facts here, rule the point against the appellant. The opinion of Judge Endlich in that case is so full and conclusive as to the law that we can add nothing by way of reason or authority. This court, in affirming the decree, said: "The facts constituting the alleged fraud were substantially found by the court; but it was also found that the rights of innocent third parties afterwards intervened, and, for that reason, the learned judge, in his second conclusion of law, held that the fraud practiced on the defendant could not avail him in this suit. * * * The application of that principle to the facts found by the court practically disposed of the case." And the judgment was affirmed. It is argued that *Dettra v. Kestner* is not in point, because the "innocent third parties" are wanting here; but the facts as stated in the twentieth finding place the innocent third parties before us. It is further said that such finding was outside the legitimate functions of the judge, under the act of 1874. We think the functions of the judge were to find the facts

on which he must base his decree. Having found that a fraud was perpetrated on Hersker at the inception of the contract, he had staring him in the face the further facts that, after knowledge of the fraud, Hersker kept up his membership, and continued paying assessments, and that, after all this, others became members. He could do nothing else than draw the legal conclusion in *Dettra v. Kestner*. Nor was he bound to preface his finding of facts with all the evidence in detail on which the finding was based. Our examination of the evidence convinces us that there was sufficient to warrant the findings. Whether, from all this mass of contradictory evidence, they were certainly the truth, is for the conscience of the court below.

5. There is nothing to convince us that the assessment was arbitrary or excessive. The unproductiveness of the preceding four assessments and the attitude of policy holders, as apparent from this litigation, indicate with reasonable certainty that this one will not more than discharge the existing indebtedness.

We have endeavored to pass upon what we consider the material questions of law and of fact in this issue. Those relating to the illness of the judge, and his physical inability to sufficiently weigh and consider the abundant evidence, both oral and documentary, are not important, and are not borne out by the opinion and judgment before us. He clearly grasped the whole case, in all its vexatious details; eliminated therefrom, in his findings, all irrelevant matter; and has presented to us a concise statement of the facts and law which prompted his decree. It is not improbable that after hearing the witnesses, wading through the papers presented, and hearing arguments of counsel, tinctured with so much acrimony as is present on these paper books, he was physically and mentally weary. If so, the opinion he filed shows a speedy recovery. The judgment is affirmed, and the appeal is dismissed, at costs of appellant.

EICHMAN v. HERSKER. (No. 302.)
(Supreme Court of Pennsylvania. Oct. 7, 1895.)

Appeal from court of common pleas, Schuylkill county.

Action by John Eichman, receiver of the North Schuylkill Mutual Fire Insurance Company, against John Hersker, on a premium note to recover an assessment. From a judgment for plaintiff, defendant appeals. Affirmed.

A. W. Schalck and James Ryon, for appellant. Geo. J. Wadlinger, for appellee.

DEAN, J. This case is in no essential particular different from No. 301, January term, 1895, in which opinion is filed herewith (*Eichman v. Hersker*, 33 Atl. 229). Therefore, the same decree, "Judgment affirmed, and appeal dismissed, at costs of appellant," is herewith entered.

McCARTNEY v. KIPP.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)

WITNESS—COMPETENCY—TRANSACTIONS WITH DEB-
CEDENT—NOVATION—NATIONAL BANKS—
EXCESSIVE LOANS.

1. In a contest for priority between two judgments, the judgment debtor, having no interest in the result, is competent to testify to matters occurring in the lifetime of one of the judgment creditors, since deceased.

2. A novation and consequent extinguishment of a judgment is not shown by the mere fact that the judgment creditor took other securities from the judgment debtor.

3. The loaning by a national bank to an individual of more than the national banking law allows cannot be taken advantage of either by the debtor or another creditor of his.

Appeal from court of common pleas, Westmoreland county.

Property of the judgment debtor having been sold under the judgment of J. S. McCartney, in trust, now to use of Charles Lockhart, against A. V. Kipp, claim to the proceeds was made by the administrator of Charles C. McLain, another judgment creditor of Kipp. There was a decree in favor of the McCartney judgment, and McLain's administrator appeals. Affirmed.

The opinion of the court below (Doty, P. J.) was as follows:

"An auditor was appointed on January 5, 1886, 'to hear the parties and their proofs, and report the facts, with his opinion.' The auditor made report, which was referred back December 28, 1888, 'to find the facts.' The report finding the facts was not filed in court until January 2, 1894, or about eight years after the appointment. There has been no undue haste about this case thus far. About twenty exceptions have been filed to the report. It will not be necessary, however, to consider all these exceptions, as the matter seems to be controlled by one or two well-settled principles. The following facts are pertinent: (1) The judgment of J. S. McCartney, in trust for the Tarentum Bank, vs. A. V. Kipp, was entered 6 August, 1875, in the common pleas of this county. (2) This judgment was assigned to Charles Lockhart on May 21, 1879. The judgment was revived at No. 87, August term, 1880, and to No. 921, May term, 1885. (3) The judgment of Charles C. McLain vs. A. V. Kipp et al., was entered in this court June 3, 1876. On November 16, 1885, the administrator of plaintiff was substituted on the record. (4) Fi. fa. was issued September 21, 1885, on the McCartney judgment, and by virtue thereof certain real estate of defendant was taken in execution and sold by the sheriff, November 14, 1885. (5) The purchaser was Charles Lockhart, the use plaintiff in said judgment. The price was \$3,450. The sheriff made special return that: 'It appearing from the record that the said Charles Lockhart, as a lien creditor, is entitled to receive the sum of \$5,954.45, I have taken his receipt for that amount, and the balance

of said purchase money I have ready as commanded.' (6) The attorneys for the McLain judgment filed exceptions to the special return. The allegation was that the sheriff erred in taking the receipt of the purchaser for \$5,954.45, 'for the reason that said judgment, according to the information and belief of exceptants, has been fully paid.' (7) The auditor awarded the fund to the McLain judgment.

"The contest is, therefore, between two judgment creditors of A. V. Kipp. The fund is insufficient to pay both. There is no allegation of collusion on either side. The defendant was undoubtedly indebted on both obligations. The judgments were given for full and valuable considerations. The McCartney judgment is the first lien. It was entered August 8, 1875, while the other judgment did not become a lien until June 3, 1876. As the record stands, the money was properly appropriated to the McCartney judgment. The exception alleges, however, that the judgment was fully paid. Thus a distinct issue is raised. The burden is clearly upon the exceptant. He affirms that the judgment is paid. Whether this is the fact is to be determined only from the evidence which has been introduced. Before examining the evidence, it is necessary to pass upon the competency of some of the witnesses. The learned auditor excluded the testimony of A. V. Kipp and Charles Lockhart, so far as they testified to matters occurring in the lifetime of C. O. McLain. If we get the facts clearly in mind, it will not be so difficult to apply the principles of law. The contest is for the fund arising from the sale of the real estate of A. V. Kipp. The contest is between two judgment creditors of the defendant. The one creditor, C. O. McLain, is dead. His administrator was substituted of record before the exceptions were filed to the special return. The other creditor, Charles Lockhart, is the assignee of the McCartney judgment. The real contest, therefore, is between the administrator of C. O. McLain, the plaintiff, in one judgment, and Charles Lockhart, the use plaintiff, in the other judgment. We think the auditor erred in excluding the testimony of Kipp. He had no interest in the result of the proceeding. The whole question was between the two judgment creditors. Even before the act of 1869, the defendant in an execution was a competent witness in a contest between judgment creditors over a distribution of the proceeds of a sheriff's sale of his property. *Smith v. Wagenseller*, 21 Pa. St. 491. The act of 1869, as held in numerous cases, disqualified no one who was competent as a witness before its passage. The averment is that the first lien judgment was fully paid. How is this fact in the light of the evidence? After a careful examination of the evidence, we fail to find any statement that will lead to the conclusion that the judgment was in fact paid. There is no evidence tending to show that it was paid by the de-

fendant, Kipp. For the exceptant three witnesses are called, viz. Dr. J. S. McCartney, Robert Mitchell, and John F. Humes. Dr. McCartney testifies: 'Lockhart paid me the first money on account of this judgment, February 8, 1876. Paid by note for \$5,000. * * * He paid balance 22d May, 1879. I at that time assigned balance of judgment to him by power of attorney. * * * Mr. Kipp, not to my knowledge, ever paid our bank any part of the \$7,737 judgment.' It is true, this witness makes inconsistent, if not contradictory, statements. His testimony is thus weakened, if not destroyed. He is a witness called by exceptant, and it will not do to simply cull out the statements of the witness which are favorable to the party calling him, and exclude the other parts of his testimony. On the question of payment, there is little testimony besides. The witness Mitchell testifies simply to a declaration of one Ellis, 'who was a director in the First National.' McCartney testifies that Ellis was not a director, but, taking the declaration for what it is worth, and as coming from one in authority to speak, it does not show payment, nor, as we view it, tend to show payment. The declarations were that the 'bank had gotten its money,' and an alleged declaration of McCartney, 'that the bank had gotten all their money from Kipp, and had not lost a dollar by him.' No statement was made as to how the bank had gotten the money. Such statement is not inconsistent with the contention of Lockhart, and it fails to show payment. The third witness Humes, 'knew nothing about the indebtedness except as he [I] learned it from the president of the bank.' Without regard to the testimony of Kipp, the exceptant, upon whom is the burden, has failed to show that the judgment is fully paid; nor does the auditor find as a fact that the judgment was paid. The weight of the evidence clearly shows that it was not paid by the defendant, Kipp. The exceptant, therefore, clearly fails to establish the fact of payment.

"Nor is there any allegation of collusion between Kipp and the plaintiff in the McCartney judgment. At least no such averment was made in the exceptions, nor any such ground urged at any stage of the proceedings. It is alleged, however, that the debt covered by the first judgment was extinguished by novation. This is not the ground originally laid in the exceptions to the special return, but how is the fact? Novation is a substitution of a new debt for an old one, or of a new debtor instead of a former one. It is recognized in the law as a mode for the extinguishment of a debt. It must clearly appear, however, that a substitution was in fact intended; and that where another person becomes a debtor, instead of a former debtor, he was so accepted by the creditor, who thereupon discharges the first debtor. In other words, it must be shown that the parties in interest assented to the extinguishment of the old debt. Th-

allegation is that the debt was extinguished by novation. The particular facts averred to establish a novation we shall refer to presently. Novation is not to be presumed. It must be established by evidence. The burden, too, is upon the exceptant to establish what he alleges in this regard. In the absence of proof of a special agreement, the mere acceptance of the security of a third person is deemed a conditional payment, or the receipt of collateral security. *Hunter v. Moul*, 98 Pa. St. 13; *League v. Waring*, 85 Pa. St. 244. The acceptance of a new security for an existing debt does not operate as a payment unless so intended by the parties. *Appeal of Kemmer*, 102 Pa. St. 558. To the same effect is *Weekly v. Bell*, 9 Watts, 280, in which case the authorities are reviewed. In what does the alleged novation consist? Kipp was indebted to the National Bank of Tarentum in the sum of \$17,737. This indebtedness was secured by a mortgage of \$10,000 on land in Armstrong county, and by the McCartney judgment, in this county, in the sum of \$7,737. The capital of the bank was only \$50,000, and under the national banking act it was not permitted to loan so much to one individual. After notice from the bank examiner, the following securities were received by the bank, viz.: Note of John Munhall & Co., dated February 8, 1876, at four months, for \$5,000; note, May 1, 1876, at sixty days, for \$5,000; note, May 1, 1876, at sixty days, for \$4,000; note, May 1, 1876, at sixty days, for \$3,737; or a total of \$17,737. On all these notes Kipp was either maker or indorser. In this connection the learned auditor says: 'On May 1, 1876, the change in security is consummated. Kipp, the defendant in said judgment, on February 8 and on May 1, 1876, presumptively at the request of the bank, presented commercial paper, of which he was the owner, and negotiated, or, in other words, sold, the same to the bank, the consideration therefor being the indebtedness secured by the Armstrong county mortgage, and the above judgment in this county; and the discounting of the said paper in the regular way, and accepting of same by the bank was, so far as the bank was concerned, an extinguishment of the old debt,—a clear novation. The old security was in violation of law, and it was supplied by another.' But it does not follow that the acceptance of the new paper was an extinguishment of the old debt. The authorities already cited hold the very reverse. New paper of the debtor, and paper of third persons accepted for a pre-existing debt, in the absence of a special agreement, are regarded simply as conditional payment or collateral security. There can be no novation unless it was the intention of the parties to substitute the new security for the old and thereby extinguish the old debt.

'The evidence, direct as well as circumstantial, goes to show that there was no

agreement for the extinguishment of the judgment in Westmoreland county. Kipp never paid any part of the judgment. His own testimony is to this effect, and it is uncontradicted. Lockhart, the use plaintiff, paid \$2,500 on June 7, 1876, and the like sum of \$2,500 September 11, 1876. The judgment was never satisfied, but, on the other hand, was twice revived by amicable confession of judgment. From the time of the acceptance of the securities until the sale by the sheriff there was nothing done by either the plaintiff or the defendant in the judgment to indicate an intention on their part to extinguish the old debt. Nor do we discover evidence of any special agreement looking in that direction. No party to the arrangement testifies that any such contract was made. The books of the bank and the testimony of Humes, the cashier, show the acceptance of the securities, but fail to show that the judgment was to be satisfied, and the old debt extinguished. Nor is there any other testimony which tends to show an intention of the parties to surrender and extinguish the old debt at the time of the acceptance of the new securities. On the other hand, there is evidence to show the purchase of the judgment by Lockhart. The indebtedness of Kipp was originally to the Tarentum Bank, which was converted into the First National Bank of Tarentum, and by such conversion the assets and business of the old bank passed to the new institution. We have already noticed the fact that the indebtedness of Kipp exceeded the credit which the national bank was permitted to extend to any one individual. Kipp, however, was not in a position to complain of this. The securities which he had given were not, therefore, invalid. In *Winton v. Little*, 94 Pa. St. 64, the doctrine was laid down 'that real estate security taken by a national bank for present or future advances is valid.' In *Stephens v. Bank*, 88 Pa. St. 165, it is pointed out that any violation of section 5200 of the Revised Statutes can only be determined by suit brought by the comptroller of the currency in the proper court of the United States.

'It is important to keep in mind that this is a contest between two judgment creditors, and to remember that judgment creditors have no higher equity than the debtor himself. They are bound by the act of the debtor. As was said by Gibson, C. J., in *Cover v. Black*, 1 Pa. St. 493, a judgment creditor 'stands on the foot of his debtor.' It is plain that the debtor has no equity here; nor does he claim any. The debt was not extinguished as to him until he paid the debt, and there is no evidence to show that he paid any part of the debt embraced in the Westmoreland judgment. The learned auditor relied on the case of *Moorehead v. Duncan*, 82 Pa. St. 488. But in *Shrewsbury Savings Institution's Appeal*, 94 Pa. St. 312, it is made plain that that and similar cases

have no application. There is nothing to show that the subsequent judgment creditor has any equity other than the debtor would have. He was not misled, so far as the evidence goes, in any way, before the indebtedness was incurred. *Mitchell v. Coombs*, 98 Pa. St. 430, *Anderson v. Neff*, 11 Serg. & R. 208, and *Peirce v. Black*, 105 Pa. St. 342, are also cited to sustain the auditor. These cases undoubtedly establish that a mortgage or judgment once paid cannot be kept alive as against subsequent lien creditors. But the cases do not apply to the facts of this case. The *McCartney* judgment, which was the first lien, was never paid by the defendant. Nor was it extinguished by novation. For the reasons already pointed out. The learned auditor erred in his deductions from the evidence. There is no conflict in the testimony as to the fact of payment or as to the question of novation.

"Exception was also filed to the special return to the allowance of the attorney's commission. But, according to the view adopted, the exceptant was not prejudiced by such allowance, and is not in a condition to complain. If disallowed, the fund would be awarded to the judgment which is the first lien. And now, April 15, 1895, for the reasons above given, the exceptions to the special return are dismissed, at the cost of the exceptant, and the special return is now confirmed absolutely."

James S. Moorhead and John B. Head, for appellant. David A. Miller and John F. Wentling, for appellee.

PER CURIAM. Our examination of the record has disclosed no substantial error in the decree from which this appeal was taken. The questions presented have been so fully considered and so satisfactorily disposed of by the learned president of the common pleas that further discussion of either of them is unnecessary. The decree is affirmed on his opinion. Decree affirmed, and appeal dismissed, with costs to be paid by the administrator of Charles C. McLain, appellant.

In re SCHOOL DIRECTORS OF BOROUGH OF ALIQUIPPA.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)

SCHOOL DISTRICTS—ADJUSTMENT OF INDEBTEDNESS—APPEAL—REVIEW.

No right of appeal being given in a proceeding for adjustment of indebtedness between school districts, one of which has been formed out of part of the other, nothing but the regularity of the proceedings on such adjustment can be reviewed.

Appeal from court of quarter sessions, Beaver county.

Petition of the school directors of the borough of Aliquippa for adjustment of indebtedness, etc., between the school district of the borough of Aliquippa and the Logstown independent school district, out of a part of which the former school district was formed. From the decree, petitioners appeal. Affirmed.

John M. Buchanan and William A. McConnell, for appellants. Robert Ritchie, David K. Cooper, and L. E. Grim, for appellee.

PER CURIAM. No right of appeal is given in cases such as this, and hence the certiorari brings up for review nothing save the regularity of the proceedings in the court below. An inspection of the record proper discloses no error that requires either a reversal or modification of the decree. There is nothing in either of the 10 specifications of error that requires discussion. Neither of them is sustained. Decree affirmed, with costs to be paid by the school district of the borough of Aliquippa.

CITY OF NEW CASTLE v. STONE CHURCH GRAVEYARD et al.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)

GRAVEYARDS—LIABILITY FOR STREET ASSESSMENT.

The exemption from taxation of graveyards, authorized by Const. 1874, art. 9, § 1, does not extend to a municipal assessment for paving a street.

Appeal from court of common pleas, Lawrence county.

Proceeding by the city of New Castle against the Stone Church Graveyard and Samuel S. Jackson, trustee, to enforce an assessment for paving the sidewalk of the street in front of the graveyard. Judgment for defendants. Plaintiff appeals. Reversed.

A. W. Gardner, for appellant. D. B. & L. T. Kurtz, for appellees.

GREEN, J. In the case of Broad Street (Church's Appeal) 165 Pa. St. 475, 30 Atl. 1007, we held that the exemption from taxation of places of public worship authorized by article 9, § 1, of the constitution of 1874 does not extend to a municipal assessment against a church for paving a street. The present chief justice, delivering the opinion, said: "The constitutional exemption relates to taxes proper, or general public contributions levied and collected by the state, or by its authorized municipal agencies, for general government purposes, as distinguished from peculiar forms of taxation, or special assessments imposed upon property, within limited areas, for the payment of local improvements therein, by which the property assessed is specially and peculiarly benefited and enhanced in value to an amount at least equal to the assessment. There is such an obvious distinction between all forms of gen-

eral taxation and this species of local or special taxation that we cannot think the latter was intended to be within the constitutional exemption." It is not necessary to repeat the reasoning of the opinion, as it is of such recent date. As graveyards are in the same category with churches, in the exempting clause of the constitution, the same reasoning applies to both. We consider that the case cited, and the other cases quoted in the opinion above referred to, control the present case, and we are therefore obliged to reverse the judgment rendered by the court below. The judgment of the court below is reversed, and judgment is now entered, on the case stated, in favor of the plaintiff and against the defendant, for \$217.60, with interest from March 7, 1890, and costs of suit.

DURKIN v. KINGSTON COAL CO. et al.
(Supreme Court of Pennsylvania. Oct. 7, 1895.)

MINING—NEGLIGENCE OF MINE FOREMAN—LIABILITY OF OWNER—CONSTITUTIONALITY OF STATUTE.

1. Act 1891 (P. L. p. 176), requiring coal-mine owners to employ a mine foreman who shall be certified by the secretary of internal affairs to be competent, who shall, every alternate day, examine every working place in the mine, and direct it to be properly secured, and permit no one to work in an unsafe place, except to make it secure, is unconstitutional, as in violation of the bill of rights, in so far as it makes the owner liable for injuries to other employés, from failure of such foreman, a fellow servant of the other workmen, to do properly what the statute requires him.

2. Act 1891 (P. L. p. 176), providing for employment in coal mines of foremen whose competency is certified to by a certain officer, is not local, because not made applicable to operations of farmers for their own use.

3. A coal-mine foreman, licensed under Act 1891 (P. L. p. 176), is liable, independently of, as well as under, the statute, for injury to an employé, due to his want of attention to his proper duties, in failing to render secure what he must have known to be an unsafe place for work.

Appeal from court of common pleas, Luzerne county.

Action by Thomas Durkin against the Kingston Coal Company and William Jones for injuries received by plaintiff while an employé in the coal mine of which defendant company was owner, and defendant Jones foreman. Judgment for plaintiff. Defendants appeal. Reversed as to defendant company.

Wm. C. Price and H. W. Palmer, for appellants. Edward A. Lynch and John T. Lenahan, for appellee.

WILLIAMS, J. The first article of the constitution of this state, known as the "Bill of Rights," declares that all men are possessed of certain inherent and inalienable rights. One of these is the right to acquire, possess, and protect property. The preservation of this right requires, both that every man should be answerable for his own acts

and engagements, and that no man should be required to answer for the acts and engagements of strangers over whom he has no control. A statute that should impose such a liability, or that should take the property of one person and give it to another or to the public, without making just compensation therefor, would violate the bill of rights, and would be, for that reason, unconstitutional and void. *Harvey v. Thomas*, 10 Watta, 66; *Ervine's Appeal*, 16 Pa. St. 265; *Kneass' Appeal*, 31 Pa. St. 87; *Wolford v. Morgenthal*, 91 Pa. St. 30; *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354. It is in furtherance of the right to acquire, possess, and protect property that section 17 of the bill of rights prohibits the enactment of laws that shall interfere with or impair the obligation of contracts. The tendency towards class legislation for the protection of particular sorts of labor has been so strong, however, that several statutes have recently been passed that could not be sustained under the provisions of the bill of rights. Such was the case in *Godcharles v. Wigeman*, supra; such was the case with some recent provisions relating to mechanics' liens; and such is alleged by the appellants to be the case with some of the provisions of the act of 1891 (P. L. p. 176), under which this action was brought. The title of the act of 1891 is, "An act to provide for the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania and for the protection and preservation of property connected therewith." It divides the anthracite region into eight districts, and provides for the appointment by the governor of a competent mine inspector in each district, who shall have a general oversight of mining operations within his district. It creates an examining board for each district, with power to examine candidates, and recommend such as they shall deem qualified for the position of mine foreman to the secretary of internal affairs. It is made the duty of this officer to issue certificates to those who apply therefor and have been recommended by the board of examiners. Article 8, § 1, declares that no person "shall be permitted to act as mine foreman or assistant mine foreman of any coal mines or colliery" who has not been examined by the board of examiners, recommended to the secretary of internal affairs, and provided by that officer with a certificate. The employment of a certified mine foreman is made obligatory upon all mine owners and operators, and a failure to do so is punished by a fine of \$20 per day, which may be collected from the owner, the operator, or the superintendent in charge of the mine. The duties of the mine foreman are prescribed by the act, and the owner or operator of the mine cannot interfere with them. He is especially to "visit and examine every working place in the mine at least once every alternate day while the men of such place are or should be at work, and direct that each

and every working place is properly secured by props or timber, and that safety in all respects is assured by directing that all loose coal or rock shall be pulled down or secured and that no person shall be permitted to work in an unsafe place unless it be for the purpose of making it secure." Article 12, rule 12. The mine foreman is also required to examine, at least once every day, "all slopes, shafts, main roads, ways, signal apparatus, pulleys, and timbering, and see that they are in safe and efficient working condition." Rule 13. After having thus most effectually taken the management of his mining operations out of his hands, and committed it to officers of its own creation, whose employment is made compulsory upon him, the statute, in section 8 of article 17, imposes upon the mine owner a liability for the neglect or incompetency of the men whom he is compelled to employ, in these words: "That for any injury to person or property occasioned by any violation of this act or any failure to comply with its provisions by any mine foreman, a right of action shall accrue to the party injured against said owner or operator for any direct damages he may have sustained thereby; and in case of loss of life by reason of such neglect or failure aforesaid a right of action shall accrue to the widow and lineal heirs of the person whose life shall be lost for like recovery of damages for the injury they shall have sustained." This statute, regarded as a whole, is an extraordinary piece of legislation. Through it the lawmakers say to the mine owner: "You cannot be trusted to manage your own business. Left to yourself, you will not properly care for your own employes. We will determine what you shall do. In order to make it certain that our directions are obeyed, we will set a mine foreman over your mines, with authority to direct the manner in which your operations shall be conducted, and what precautions shall be taken for the safety of your employes. You shall take for this position a man whom we certify to as competent. You shall pay him his salary. What he orders done in your mines you shall pay for. If, notwithstanding our certificate, he turns out to be incompetent or untrustworthy, you shall be responsible for his ignorance or negligence." Under the operation of this statute the mine foreman represents the commonwealth. The state insists on his employment by the mine owner, and, in the name of the police power, turns over to him the determination of all questions relating to the comfort and the security of the miners, and invests him with the power to compel compliance with his directions. Incredible as it may seem, obedience on the part of the mine owner does not protect him; but, if the mine foreman fails to do properly what the statute directs him to do, the mine owner is declared to be responsible for all the consequences of the incompetency of the representative of the state. This is a strong case of binding the

consequences of the fault or folly of one man upon the shoulders of another. This is worse than taxation without representation. It is civil responsibility without blame, and for the fault of another. The same conclusion may be reached by another road.

It has been long settled that a mining boss or foreman is a fellow servant with the other employes of the same master, engaged in a common business, and that the master is not liable for an injury caused by the negligence of such mining boss. *Coal Co. v. Jones*, 86 Pa. St. 432; *Canal Co. v. Carroll*, 89 Pa. St. 374; *Waddell v. Simoson*, 112 Pa. St. 567, 4 Atl. 725. The duty of the mine owner is to employ competent bosses or foremen to direct his operations. When he does this he discharges the full measure of his duty to his employes, and he is not liable for an injury arising from the negligence of the foreman. *Waddell v. Simoson*, supra. A vice principal is one to whom an employer delegates the performance of duties which the law imposes on him, and the employer is responsible because the duty is his own. As to the acts of the workmen, and the manner in which they do their work, the duty of the employer is to employ persons who are reasonably competent to do the work assigned them, and, if he finds himself mistaken in regard to their competency, to discharge them when the mistake is discovered. But he is not responsible for the consequences of their negligence as these may affect each other. *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. 157, 159. Now, the act of 1891 undertakes to reverse the settled law upon this subject and declare that the employer shall be responsible for an injury to an employe resulting from the negligence of a fellow workman. Prior to the act of 1891, the man whose negligence caused the injury was alone liable to respond in damages. He might not always have property out of which a judgment could be collected, but the plaintiff must, in any case, take his chances of the solvency of the defendant against whom his cause of action lies. The act of 1891 undertakes to furnish a responsible defendant for the injured person to pursue. Passing over the head of the fellow servant at whose hands the injury was received, it fastens on the owner of the property on which the accident happened, and declares him to be the guilty person on whose head the consequences of the accident shall fall. To see the true character of this legislation we must keep both lines of objection in mind. We must remember that the injury complained of is due to the negligence of a fellow workman, for which the master is responsible neither in law nor morals. We must also remember that this fellow workman has been designated by the state, his duties defined and his powers conferred by statute, and his employment made compulsory, under heavy penalties, by the same statute. Finally, we must remember that it is the negligence of this fellow servant, whose competency the state has certified, and whose employment the state has compelled, for which the employer is

made liable. The state says: "He is competent. You must employ him. You shall surrender to his control the arrangements for the security of your employes." It then says, in effect: "If we impose upon you by certifying to the competency of an incompetent man, or if the man to whom we commit the conduct of your mines neglects his duty, you shall pay for our mistake and for his negligence." We have no doubt that so much, at least, of section 8 of article 17 of the act of 1891 as imposes liability on the mine owner for the failure of the foreman to comply with the provisions of the act which compels his employment and defines his duties, is unconstitutional and void. This disposes of this appeal so far as the Kingston Coal Company is concerned.

But why should the certified mine foreman be relieved from the consequences of his negligence? The jury have found that the injury was due to his want of attention to his proper duties, and his liability is clear, without regard to our mining laws. But the statute required him to examine the roads and ways in use in the mine each day. He knew the film of rock separating the upper from the lower working was but eight feet thick, at best. He knew that the supports for this film were not in line with each other in the upper and lower workings. He knew that layers of the rock were falling off, that the thickness of the floor was reduced under the way on which the accident occurred to about five feet, and that, not far away, it had fallen down into the lower working; yet, with all this knowledge, he did nothing, so far as we can learn, to increase the security of the way. Whether his conduct be considered with reference to the statute, or regardless of it, his failure to do what he must have known to be necessary, was a neglect of duty such as should render him liable to his fellow servant who has suffered from it. Some difficulty has been suggested, growing out of the pleadings, but the declaration is not before us. We cannot determine, therefore, whether an amendment is necessary in order to sustain the judgment against him.

We are not prepared to hold the act of 1891 to be unconstitutional as a whole. It relates to all anthracite coal mines, and defines what shall be regarded as such mines. Coal may be taken out of the ground by farm owners for their own use, or it may be taken in such small quantities and for such local purposes as to make the application of the mining laws to the operations so conducted, not only unnecessary, but burdensome to the extent of absolute prohibition. Such limited or incipient operations are not within the mischief to remedy which the mining laws were devised. They are ordinarily conducted for purposes of exploration, or for family supply, and ought not to be classed with operations conducted for the supply of the public. The business of coal mining, like that of insurance or banking, may be defined by the legislature. The definition found in the act of 1891 seems to us reasonable, to be within the fair limits of a legisla-

tive definition, and to exclude only such operations as are too small to make the general regulations provided by the act applicable to them. The ground on which we place our judgment is not, therefore, that the act is local, but that the provisions of it which we have considered are in violation of the bill of rights.

The judgment against the Kingston Coal Company is reversed, for reasons that are fatal to a recovery against it. The judgment against William Jones is affirmed.

**BALD EAGLE VAL. R. CO. et al. v.
NITTANY VAL. R. CO. et al.**

(Supreme Court of Pennsylvania. Oct. 7, 1896.)

**TRAFFIC CONTRACTS—VALIDITY—CONSIDERATION—
COVENANTS—EFFECT ON SUCCESSOR IN INTEREST.**

1. Where plaintiff railroad company contributed money for the development of ore land, and construction of a furnace and railroad, and those having the legal title to the property and equity of redemption, in consideration thereof, covenanted, in the nature of a covenant to run with the land, to give all traffic to and from the land and furnace to plaintiffs' lines, one obtaining title to the property through foreclosure of mortgage antedating the agreement, and having accepted all the benefits derivable from the contract, as shipper, and affirmed it, will be bound thereby.

2. The purchase by plaintiff railroad of bonds secured by mortgage to enable the mortgagor to develop his ore lands, and construct a furnace, and a railroad to plaintiff's line, is sufficient consideration for the covenant of the landowner to give all traffic to and from the land and furnace to plaintiff's line.

3. Const. art. 17, § 3, declaring that all individuals shall have equal rights to transportation, without discrimination, does not give one the right, after making a contract for carriage with one road, to break it.

4. A contract by a railroad company with an iron company by which the former furnishes funds to develop the latter, and give it facilities for transportation, in consideration of which the iron company contracts to give it all its traffic, is not in restraint of trade, against public policy, or ultra vires.

5. While an agreement of an iron company, in consideration of aid in its development, to give all its traffic to a certain railroad, will be enforced, its further agreement to give no aid to the construction of competitive lines will not be, being against public policy.

Appeal from court of common pleas, Center county; A. O. Furst, Judge.

Suit by the Bald Eagle Valley Railroad Company and the Pennsylvania Railroad Company, lessee of the Bald Eagle Valley Railroad, against the Nittany Valley Railroad Company and the Valentine Iron Company, for injunction. Decree for defendants. Plaintiffs appeal. Reversed.

John Blanchard and David W. Sellers, for appellants. Ellis L. Orvis, Calvin M. Bower, and C. M. Clement, for appellees.

DEAN, J. On the 22d of March, 1887, the Valentine Ore Land Association (unincorporated), and William Stewart and Evan M. Blanchard, trustees of the Valentine Iron Company, had the legal title to and possession of a

large body of iron ore lands, mining rights, and other property in Center county, on which was a large iron-smelting furnace, partly built. The Valentine Iron Company proposed to lease this furnace, and manufacture pig iron; then, in conjunction with the Nittany Valley Railroad Company, the latter, as yet, only projected, to construct, equip, and operate a railroad on the lands from the ore mines to the furnace, and also from the furnace to a connection with the Lemont Railroad, near the furnace. For the purpose of raising money, the Valentine Iron Company and the Valentine Land Association had executed a mortgage, dated August 2, 1886, upon all the lands, to the Fidelity Insurance, Trust & Safe-Deposit Company of Philadelphia, as trustee, to secure the payment of \$600,000 of first mortgage bonds; the bonds to be sold, and the proceeds used to promote the project. The Lemont Railroad Company, in aid of the enterprise, agreed to purchase at par \$75,000 of the bonds. In consideration of this aid, the land association, the iron company, and the Nittany Valley Railroad Company agreed to give to the Lemont Railroad Company and the Bald Eagle Valley Railroad Company, connecting short lines of the Pennsylvania Railroad Company, and to the last-named company, the traffic to and from the ore lands, furnace, and railroad. The covenant in this particular was that the covenantors "agree, for themselves, their successors, lessees, and assigns, in the nature of a covenant to run with the title of the lands held by them, that they will give all the traffic coming to or going from the property, mines, and furnaces owned and controlled and to be built and operated . . . by them" to the three railroad companies, so far as these lines were available for the covenantors' traffic, and so long as the railroad companies observed the agreement on their part. The land, iron, and railroad companies further covenanted that, in making any grants of lands, they would provide in the grants that the grantees should take subject to the covenants, and that they would not aid or encourage in any manner in the construction of competitive lines of railroad in the territory. The three railroad companies covenanted that they would transport the traffic thus received at fair and reasonable rates, as compared with charges on like traffic under like circumstances on other parts of their lines. It was further provided that, if any dispute arose under the agreement, it should be referred to two disinterested persons as arbitrators, one to be chosen by each party to the agreement, and these thus chosen to select an umpire if they could not agree. The \$75,000 was paid over for the bonds agreed to be taken by the Lemont Company. Other of the bonds, sufficient to put the furnace and ore mines in operation, were disposed of; and all parties, in observance of the agreement, conducted their business until October, 1890, when, default having been made on the interest on the bonds, the mortgage was foreclosed

by the trustee; and on the 29th of January, 1891, the sheriff sold the property to the trustee, which purchased on behalf of the bondholders, for \$195,000, accepting the trustee's receipt, as a lien creditor, for the purchase money. Deed was accordingly acknowledged to the trustee. On the 26th of February, 1891, by consent of the bondholders interested, the trustee, by deed, conveyed the property to the Valentine Iron Company, a corporation organized the 6th of February, 1891. Instead of the bonds, the former holders of them accepted proportionate amounts of \$634,350 in stock of the new company, issued in shares of the par value of \$50. By this change, the railroad companies (plaintiffs) became stockholders in the amount proportionate to their \$75,000 purchase of bonds. The new company continued the same relations with the railroad companies from the date of its organization down to the winter of 1892-93. On the 11th of May, 1889, the Central Pennsylvania Railroad Company was incorporated, to construct a railroad from Mill Hall, in Clinton county, to Unionville, in Center county, a distance of about 25 miles, located with a view to form a connection with the Nittany Valley Railroad near Bellefonte, and the Beech Creek Railroad near Mill Hall. The last-named railroad is, in its terminals and connections, a competitor of the plaintiff railroad companies. The plaintiffs averred that the Valentine Iron Company, since the beginning of the year 1893, has encouraged the construction of the Central Pennsylvania Railroad financially and otherwise; J. W. Gephart, the president of the iron company, being also the president of the railroad company, is also acting as superintendent of the work of construction of the competing road, and is the chief representative of the undertaking; that the Nittany Valley Railroad, in 1891, was leased to the Valentine Iron Company, and is operated by the iron company; that the Valentine Iron Company threatens to give the traffic coming and going to the mines and furnace for transportation over the Central Pennsylvania, and thence, by its connections, over the lines of competing roads. The plaintiffs aver that the acts of defendants are in violation of their covenants in the agreement of March 22, 1887, and pray that they be restrained by injunction.

The defendants demurred to the bill: (1) Because, by the sale on the mortgage, they took the property free and discharged from all the covenants of the agreement, the agreement having been executed subsequent to the mortgage. (2) The purchaser at the mortgage sale took the land discharged of the covenants; therefore, every other party to the agreement was released. (3) That the agreement was without consideration, and is therefore void. (4) The agreement was against public policy. (5) It was in violation of article 17 of the constitution, and is not enforceable in law or equity. (6) That the Nittany Valley Railroad did not covenant not to aid in the construction of competitive lines

of railroad. (7) That the restraint of the construction of competitive lines, whether by moral support or otherwise, is illegal. (8) That to enjoin defendants from giving traffic to a common carrier, under the laws of the commonwealth, is in restraint of trade. (9) There is an adequate remedy at law. The court below, after argument, sustained the 1st, 2d, 4th, 5th, and 8th grounds of demurrer, and entered a decree dismissing the bill, and from that decree plaintiffs appeal, assigning 16 errors to the decree and opinion of the court. The bill sets out the facts, in substance, as we have stated them, and it follows from the demurrer that defendants admit them as averred.

The opinion of the learned judge of the court below is in good part devoted to demonstrating that the covenant to transport the traffic to and from the ore lands and furnace over plaintiffs' lines, and not to aid and encourage the construction of other or rival roads to the source of the traffic, is not a covenant real, which runs with the land, binding upon the heir, successor, or assignee, but is a mere personal covenant, binding only upon the parties to it. *Spencer's Case*, 1 Smith, Lead. Cas. (9th Am. Ed.) p. 174, the leading case, with many of the cases cited in the notes to the leading case, and others which do not there appear, are relied on as authority for this holding. *Spencer's Case* is taken from 5 Coke, 16, as reported by Coke, who says that, among other questions, it was decided "where the assignee shall be bound without naming him, and where not; and where he shall not be bound, although he be expressly named, and where not." It then appears from the case that the second of the seven resolutions adopted by the court is: "If the lessee had covenanted for him and his assigns that they would make a new wall upon some part of the thing demised, that forasmuch as it is to be done upon the land demised, that it should bind the assignee; for, although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore, shall bind the assignee by express words. * * * But, although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged." This case, decided 300 years ago, as with many of the cases of that time, bases its conclusions, in the main, on the results arrived at by the ratiocination of the judges. They assumed certain premises, and if, from these, a certain conclusion was reached, then the judgment was for plaintiff or defendant; as, for instance, in the first resolution: "When the covenant extends to a thing in esse, parcel of the demise, the thing to be done by force of the covenant is quodammodo annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, al-

though he be not bound by express words." Here the assignee is bound, although the covenantor hath not so said. Then the same resolution goes on: "But, when the covenant extends to a thing not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being." Here, the covenant does not bind the assignee, although the covenantor hath so said. Resort was had to the instrument to ascertain the subject of the contract, and when that was settled on, a contract was made by the judges, for the parties, without much regard to what the parties said. They looked not for the expressed intention, with a view to giving it effect in the judgment, but adopted a conclusion based often on an artificial or arbitrary rule of construction, and this conclusion molded the judgment. The intention was subordinate to the rule. As shown by the large number of cases, both in England and this country, cited by the able editors of the notes to *Spencer's Case*, there has been more or less of a struggle by the courts, in the three centuries which have elapsed since that decision was announced, to escape from its application; and very often, if the rule defeated the manifest intent of the parties, some distinction was found or assumed which warranted a disregard of it; and in some cases, where the rule, if invoked, would plainly shut the door against equity, the door was closed against the rule. Like the arbitrary ancient rules in *Shelley's Case*, in *Twyne's Case*, and others, it has been given such flexibility by so many later decisions that, without overruling well-decided cases, it is impossible to rigidly apply it at this day, even in common-law actions. Whether, under our system of administering equity, if this were an action at law, *Spencer's Case* would rule it on the facts, it is not important to decide. This is not an action at law, but a bill in equity, and the controlling element is the intention of the parties to the covenant; and so it is laid down by many of both the English and American decisions, some of them cited in the notes to *Spencer's Case*. In the note on page 198 (English notes), it is said: "In *Tulk v. Moxhay*, 2 Phila. 774, it was laid down by Lord Cottenham that a covenant made by the purchaser of land that he and his assigns would use or abstain from using the land in a particular way may be enforced in equity against all purchasers, without reference to the question whether the covenant ran with the land." And it is remarked by the editor that *Keppell v. Bailey*, 2 Mylne & K. 517, in the court of chancery, a case cited and relied on by the court below and appellees in this case, is overruled by *Tulk v. Moxhay*, and the latter case has been since followed and extended.

Take the facts as they are averred in the bill in equity, and as they are here admitted by the demurrer: (1) The complainants contributed \$75,000 for the development of the ore land, and the construction of a furnace and railroad. (2) The furnace and railroad

were constructed; were put in operation; and ore mines, from which was obtained ore to run the furnace, opened. (3) The property was sold on a mortgage antedating the agreement and \$75,000 contribution about seven months. (4) Those who had the legal title and equity of redemption made the contract by which they secured plaintiffs' money, and, in consideration thereof, covenanted for themselves, successors and assigns, in the nature of a covenant to run with the lands, to give all traffic coming to or going from the ore lands and furnace to plaintiffs' lines. (5) The Valentine Iron Company, the present assignee of the property from the sheriff's vendee, from January, 1891, for nearly two years, accepted all the benefits derivable from this contract, as shippers, and affirmed it. (6) Defendants refuse absolutely to perform the covenants entered into by their predecessors in title, although the very existence of the property occupied and enjoyed by them was created, in part, by the large contribution of plaintiffs. (7) There is no adequate remedy at law for a persistent violation of such a covenant. Should the facts, as they thus appear, move the conscience of a chancellor to afford relief to the injured party? We do not consider it important that by the judicial sale and reorganization of those interested, under a new charter, the nominal identity of the actual parties to the covenant, and those now in possession, has been changed. The averment of affirmance of the contract by the present defendants is admitted by the pleadings. That the affirmance of a traffic contract touching land rests in parol will not prevent the interposition of equitable principles, even where the contract postdated a lien through which the defendant claimed title. In *Campbell v. Hand*, 49 Pa. St. 234, adjoining owners of land on opposite banks of a stream agreed to build and keep in repair a dam for the use of both. On a judgment against one of them, antedating the agreement, his interest was sold at sheriff's sale. The sheriff's vendee used the dam, as did the debtor in the judgment. The court below held the sheriff's vendee bound to contribute to the repairs, because he had, by the use of the dam, affirmed the agreement. This court (Thompson, J.) says: "I will not undertake to say that the contract created covenants running with the land, because the covenantor could not impose an incumbrance or duty that might not be divested by a sale of the premises so incumbered by a prior judgment, a sale on which would carry back the title to a period coeval with the date of the lien. * * * Now, why should not the assent of the sheriff's vendee, and that of the remaining cotenant, be sufficient to continue the original covenants in their original efficiency? I do not think it is a sufficient negative of the inquiry to say that the remedy on the covenants is not pursued." What would have been the effect of a denial of any affirmance of this contract by the

sheriff's vendee or these defendants we are not called upon to say. We decide the point on their admission of the affirmance of it.

Nor is the contract, as contended by appellees, and as held by the court below, without consideration. The preliminary statements to the stipulations show the value of the consideration. The land association and iron company, with the Nittany Valley Railroad Company, are about to construct the railroad from the furnace to the mines on the land, and from the furnace to a connection with plaintiffs' lines. They are about to complete a furnace or furnaces, partly built. For the purpose of securing funds, they have placed a mortgage to secure \$600,000. They cannot carry out this project with a paper mortgage. They want the money which it is to secure. Plaintiffs give them \$75,000, and agree to carry their products at reasonable rates. If any dispute arises about what is reasonable, they agree to the establishment of a tribunal to determine the dispute without resort to the courts. In consideration of this aid in the development of their property, defendants agree to give them their traffic. Without such development, the railroad to carry the ore from the mines to the furnace head, and from the casting house to market, their property, for present enjoyment, is useless by the stipulated aid, it is valuable. This is an ample consideration.

It is held by the court below that the contract is in violation of sections 1, 3, and 4 of article 17 of the constitution. The first section provides that all railroads, as common carriers, shall carry each other's traffic without discrimination. There is nothing in the agreement which contravenes this provision. The railroad company must carry such freight as a shipper offers it. If freight by the public be routed over its road to destination by way of the Central Pennsylvania Railroad, it must so forward it. It is no averred in the bill that the contract is to the contrary. Section 3 of the same article provides that all individuals shall have equal rights to transportation, without discrimination. The bill does not seek to deprive the iron company of the right here guaranteed. The right of every shipper is to make a contract with such common carrier as he chooses to carry his goods to destination. If he makes none expressly, the law implies one with the carrier who accepts his goods. But he cannot make contracts with two or more carriers to carry the same goods. If he does as but one can carry, the others can invoke the law as a remedy for his violation of contract. If he contract with a railroad to lay its rails to his manufactory or furnace, and furnish him money to aid him in bringing the raw material to the furnace, and he, in consideration, promises to give the railroad the transportation of such manufactured product to market at reasonable rates, how is the shipper deprived of any right? He but exercises the right guaranteed by the constitution

He contracts for the carrying of his own product for shipment to market, from his own manufactory, with whom he pleases. The constitution does not go further, and guaranty him a right to violate his contract when he pleases. How this contract offends against section 4, which prohibits the consolidation of parallel and competing roads, we do not understand, although this is one of the reasons given for declaring the contract void. The Nittany Valley Railroad, whose traffic is sought by plaintiffs, is not a parallel road, but a connecting road, prolonging the plaintiffs' reach into new territory. The Central Pennsylvania is parallel to plaintiffs' line. It has no contract, either for traffic or consolidation, with plaintiffs. The right of one road to lease, make traffic contracts with, or consolidate with, connecting roads, not parallel or competing, has not for 34 years been doubted, that we know of. The act of April 23, 1861, expressly confers such right; and the constitution does not affect it, except to prohibit the consolidation and leasing of parallel and competing lines. The rights of connecting roads under that act have been recognized many times since the adoption of the constitution of 1874; and that contracts for through business, both freight and passenger, between connecting railroads and shippers, are not only not ultra vires, but, on the contrary, have for their basis sound business principles, and special contracts may be made with a special class of shippers to secure business, see *Railroad Co. v. Gage*, 2 Gray, 399; *Hersh v. Railway Co.*, 74 Pa. 181; *Munhall v. Railroad Co.*, 92 Pa. St. 50; *Hoover v. Railroad Co.*, 156 Pa. St. 220, 1 Atl. 282. In this last case the contract was with a manufacturing company for a special rate on coal used for manufacturing purposes. The contract was made eight years before the suit, with a view to the building up and development of the plant. This court, in a most exhaustive opinion by our Brother Green, in which nearly all the authorities on the subject are noticed, held that special contracts for a special rate with a manufactory for the transportation of fuel was not undue discrimination; that blast furnaces, iron mills, and rail factories are encouraged and built up in sparsely settled regions by the aid of such contracts. While the question of discrimination does not arise in this case, the same principle is involved. Is a contract by railroad company with an iron company, which the former contributes a large sum of money to the latter for development, and gives to it facilities for transportation, in consideration of which the iron company consents to give it all its traffic, ultra vires? It is not in restraint of trade, for its express purpose and necessary effect are to increase the trade and population. Not a single traveler or shipper outside the contracting party is affected in his selection of a route. The contract binds none of them. It is not known that those who have reaped benefits

from a contract such as this seek to escape its obligations by taking refuge in that assumed turpitude which, on grounds of public policy, avoids the contract; but here—and it is a gratification to us to say it—the parties to this contract violated no law, restrained not others from engaging in business, did nothing of evil example or detrimental to public morals; therefore, there is no public policy which, in the absence of express legislative enactment, makes void this contract. As there, clearly, is no adequate remedy at law for repeated or continued violations of the defendants' covenants, they ought to be enforced in equity, to the extent equity will take cognizance of their violation.

While the covenant to ship over plaintiffs' lines, on the faith of which plaintiffs enlarged their facilities for shipment, and paid their money, will be enforced, our decree will go no further. The Central Pennsylvania Railroad is a corporation, under the laws of the commonwealth, authorized to construct a line of railroad between certain terminals. Its manifest duty is to construct its road for the benefit of the general public. No citizen can be restrained from giving its construction moral and material aid. Public policy demands that it shall fulfill the objects of its being. Admit that the officers of defendant company are giving it moral aid and encouragement, because its construction will make it possible for defendants to violate their contract for shipment; this, at most, shows disregard of a moral obligation, without an infraction of the legal one,—the actual shipment. The latter, equity can control; the former, it will not, both on grounds of public policy, and because its process would to a great extent be ineffectual. We cannot prevent men wanting to violate their contracts, while we can prevent the overt acts which constitute the breach. Equity can enforce a tangible, substantial right of property under a contract, but it cannot make men good, and it is a very rare case in which it even tries to. With these defendants, however, who have pleaded, the case is different. We can restrain them from a flagrant violation of an essential covenant of their contract. The Nittany Valley Railroad Company and the Valentine Iron Company affirmed the original contract, which, in fact, gave them a business existence. They are bound to give their traffic to plaintiffs. This much of the contract is within the grasp of equity. Therefore, the decree of the court below sustaining the demurrer is reversed and set aside, at costs of appellees; and it is adjudged and decreed that an injunction issue directed to the Nittany Valley Railroad Company and the Valentine Iron Company, their and each of their officers, agents, and employes, including the said J. W. Gephart, president of the Valentine Iron Company, restraining them from giving any traffic coming from or going to points upon the railroad of the said Nittany Valley Railroad, or coming to or going from the mines and furnaces of the said

Valentine Iron Company, that may be owned or controlled by the said company, and originating upon said lands mentioned and described in agreement of 22d of March, 1887, to the said Central Pennsylvania Railroad Company, or to any company or persons other than to the said plaintiffs. It is further ordered that the said contract be specifically performed in this respect: They, the said Nittany Valley Railroad Company and the said Valentine Iron Company, are hereby ordered and directed to give all traffic coming or going to points upon said railroad, or coming to or going from the property, mines, and furnaces of the said iron company, in so far as said traffic originates with or is controlled by them, the said companies, to them, the said plaintiffs, their successors or assigns. It is further ordered that this record and decree be remitted to the court below, that our order and decree may be carried into effect.

PER CURIAM. And now, October 24, 1895, petition for modification of the decree heretofore entered is dismissed.

SMITH v. YORK MANUF'G CO., Limited.
(Supreme Court of New Jersey. Nov. 11, 1895.)

SALE OF PERSONALTY—BREACH—RESCISSION.

1. A contract by which a boiler maker agrees to deliver and set up boilers of a specified capacity, to be determined by a test made after the boilers are set up, is executory, and may be rescinded by the purchaser if the test fails to show compliance with the contract.

2. Plaintiff contracted to deliver and set up for defendants two boilers of a specified capacity and evaporative efficiency, to be determined by a test made after the boilers were set up. The report of the engineer selected to make the test showed that the boilers were not of the capacity stipulated for, and thereafter plaintiff wrote defendants, inclosing the report, and saying that, if time had not been lost in starting the fire, the test would have shown a capacity greater than that specified, "but it can't be helped now." Four days later, defendants wrote, rescinding the contract, and demanding the removal of the boilers, because not up to the required power, to which plaintiff replied, refusing to remove the boilers unless defendants could show that their evaporative efficiency was below that guaranteed, thereby ignoring the real complaint as to their capacity. Plaintiff wrote again, agreeing to submit to another test, but defendants had meanwhile removed the boilers, and substituted others. *Held*, that defendants were warranted in treating the contract as rescinded.

3. The right of one who has purchased boilers to rescind the contract, after they have been delivered and set up, because they are not of the capacity guaranteed, extends to an iron smoke-stack furnished under the same contract, and which is a part of the boiler plant, adapted especially for boilers of that manufacture.

Certified from circuit court, Monmouth county; Conover, Judge.

Action by John N. Smith against the York Manufacturing Company, Limited, to recover the contract price of two boilers and a smoke-stack sold defendants. The court found in favor of defendants, and a rule to show cause why the finding should not be set aside and a

new trial granted was subsequently allowed, and certified to the supreme court for an advisory opinion. Rule discharged.

This was an issue tried in the Monmouth circuit. A jury was impaneled, but afterwards discharged, and by consent the issue was tried before the court. The finding of the court was in favor of the defendants. A rule to show cause why the said finding should not be set aside and a new trial granted was subsequently granted, and certified to this court for an advisory opinion thereon. The plaintiff's suit is for the contract price of two Kingsley boilers, of 100 horse power, and of an iron smokestack, furnished to the defendants.

Argued at June term, 1894, before BEASLEY, C. J., and DEPUE, VAN SYCKEL, and LIPPINCOTT, JJ.

Charles M. Stafford and Blair & Crouse, for plaintiff. Flavel McGee and David Harvey Jr., for defendants.

DEPUE, J. The plaintiff is a manufacturer of boilers known as the "Kingsley Drop Tube Steam Boilers." The defendants had contracted with the Carroll Manufacturing Company to set up for that company a plant for manufacturing ice. For the purpose of fulfilling the contract with the Carroll Company, the defendants contracted with the plaintiff to furnish and place in position two of the Kingsley boilers, with the fittings as described, set up complete for use, and ready for the attachment of steam, feed, water, and blow-off pipes. The boilers were delivered and set up on the 3d of June, 1891. The boilers were furnished under a contract in writing. The negotiations were conducted by correspondence. The defendants, in letters dated January 26th and January 31st, asked the result of the negotiations should be put in proper form of contract, specifying work, pressure, duty, material, and price, to which letters the plaintiff replied, under date of February 2, 1891: "We will send you contract by mail to-morrow or the day following." Under date of February 3, 1893, the plaintiff sent the following proposition, viz.: "York Man'g Co., York, Pa.: Referring to your favor of 26th and 31st ult., and my letters of you of 29th ult. and second inst., I hereby propose to deliver two (2) Kingsley drop-tube steam boilers to you on the premises of the Carroll Manufacturing Co., in the city of Baltimore, Md., on March 15th prox., of a capacity of 100 horse power each. [Here follow a specification of dimensions, materials, etc.] The capacity of said boilers is guaranteed to be as proposed on the basis of the evaporation of 30 pounds water from and at 212 degrees Fahrenheit per hour, per horse power, on fair and impartial test of not less than 10 hours' duration, to which I or my representative shall be present. Payment for said boilers to be made by you as follows, viz.: Upon the completion of the setting up of said boilers as before set forth, you shall pay

me the sum of twenty-seven hundred dollars (\$2,700.00); and upon the completion by me of a test showing the evaporative efficiency of said boilers to be 15 per cent. in excess of the evaporative efficiency of the average return tubular boiler, which said is eight pounds of water, from and at 212 degrees Fahrenheit, to a pound of good coal, then the balance of the price of said boilers, which is forty-one hundred and seventy (\$4,170) dollars, less a special discount of 10 per cent., or ten hundred and fifty-three (1,053) dollars, shall be paid. If this is satisfactory to you, kindly send acceptance of this proposal by early mail, and oblige yours, very truly, John N. Smith." To this proposition the defendants responded, on February 6th: "Replying to yours of the 3d inst., we would state that we accept your proposition of that date, with the exception that we reserve the privilege of attempting to show a greater evaporative power than 8 lbs. on return tubular boilers. We do not know that this will be forced upon us, but, in case it should, wish to stand in a correct position. The proposition simply assumes 8 lbs., and we accept the assumption with the foregoing reservation." Under the date of February 9th, the plaintiff answered: "Your favor of 6th inst. was duly received, and, in reply, have to say that your reservation in relation to the 8-lb. limit of a return tubular boiler is satisfactory to us, provided you are able to show as a test of one that will do better than that, when the setting of our boilers is completed, as we do not desire to be held up on our final test to show the evaporative efficiency of our boilers." The plaintiff's proposal of February 3d, the letters of February 6th and February 9th of the parties respectively, constituted the contract in writing. The terms of the contract were these: (1) That the capacity of the boilers should be 100 horse power each, on the basis of the evaporation of thirty pounds of water, from and at 212 degrees Fahrenheit per hour, per horse power; (2) that the boilers should show an evaporative efficiency 15 per cent. in excess of the evaporative efficiency of the average return tubular boiler, which was estimated at eight pounds of water, from and at 212 degrees Fahrenheit, to a pound of good coal; (3) that the capacity and evaporative efficiency of the boilers should be determined by a test to be made as specified in the contract; and (4) a reservation by the defendants of the privilege of showing a greater evaporative power than eight pounds on return tubular boilers. By the letters of the 6th and 9th of February, the parties also concluded a contract whereby the chimney stack for the boilers should be erected by the plaintiff.

The quality of the boilers, with respect to capacity and evaporative efficiency, was expressly stipulated for, and became an integral and substantive part of the contract, and the method provided for determining compliance with the contract was by means of a test to be conducted as designated in

the contract. The defendants' agreement to purchase and pay was upon these conditions; and if, upon such a test, the boilers did not comply with the terms of the contract, they had a right to rescind and annul the contract. *Bannerman v. White*, 10 C. B. (N. S.) 844; *Behn v. Burness*, 3 Best. & S. 751; *Wolcott v. Mount*, 36 N. J. Law, 262.

The boilers were set up and fire put under them June 3d. Within two weeks, Mr. St. Clair made the objection that they could not get 200 horse power out of them. Changes were then made in the stack, which were completed on Saturday, July 11th. On Monday following, the work was inspected by the representatives of the defendants and the officers of the Carroll Manufacturing Company; and Mr. St. Clair, the defendants' general manager, demanded a test of the boilers, and the following Wednesday, July 15th, was named as the time for making the test. Mr. William T. Howard, an engineer, was agreed upon to make the test. He was selected by Mr. Purington, the plaintiff's representative, and approved by Mr. St. Clair. On the Wednesday named, the test was made by Howard, in the presence of Purington, St. Clair, and the plaintiff. The test was finished July 16th, Howard made his report in writing, dated July 18th, and sent it in duplicate to the plaintiff, who, on the 21st, transmitted a copy to the defendants, with a note as follows: "With this we inclose copy of the boiler test, the receipt of which please acknowledge. If we had not lost half an hour at starting the first fire, we could have given you about 210 horse power, but it can't be helped now." Howard's report showed that in evaporative efficiency the boilers fulfilled the contract, but he certified their capacity in these words: "Horse-power basis of 30 pounds of water evaporated per hour, at 212 degrees, to steam at 70 pounds pressure, 198.5,"—which was less than the horse power contracted for. The criterion agreed upon by the parties for determining whether the contract was fulfilled could not be applied until the boilers were set up and in condition to be subjected to the test; and, until the test was made, the contract was executory, and subject to be rescinded by the defendants if the test failed to show compliance with the terms of the contract. St. Clair testified that, when Howard's report was received, he examined it, and went over some of the calculations, to satisfy himself that the calculations were correct; and finding that Howard's report showed that the horse power was short in its capacity, on July 25th, he wrote to the plaintiff as follows: "Replying to your favor, and acknowledging the receipt of the papers of test made of boilers, we respectfully state that inasmuch that you have failed to fill contract, notwithstanding the extraordinary means used and the long time occupied by you in your various experiments to that end, we would demand the immedi-

ate removal of said boilers, that we may replace same with others at once. We also notify you that we hold you responsible for all damage that we may have or will sustain from this failure on your part to fill contract, until we can substitute boiler plant with others." This letter was a rescission of the contract, made within a reasonable time. The correspondence—the plaintiff's letter of the 21st, and the defendants' reply of the 25th—is important as showing that the plaintiff adopted Howard's report, and that upon that report the defendants made rescission. Howard's report of the amount of horse power justified rescission; and in a short time, within three or four weeks, the defendants removed the boilers and stack, replacing the boilers with tubular boilers. Unless Howard's report can be set aside, or its adoption by the plaintiff avoided, the defendants were justified in rescinding and annulling the contract, and the defense is complete. The test was continued for 10 hours, and the manner in which it was conducted was at the time satisfactory to both parties. Howard's report states the quantity of coal used, the pounds of water evaporated per hour, the mean temperature of the feed water, and the mean pressure of steam. The mean pressure of steam actually applied was 105.95 pounds to the square inch, and the mean temperature of the feed was 230 degrees. The figures exhibited by the test as made were taken down by Purlington and St. Clair, and, as reported by Howard, are practically undisputed. The capacity of the boilers in horse power remained to be computed on the basis of the figures obtained by the tests. Howard reported the horse power at 198.5 on the basis of 30 pounds of water evaporated per hour, at 212 degrees, to steam, at 70 pounds pressure; and it is conceded that, on the basis of his calculation, 70 pounds pressure, his result in horse power was correct.

The contract fixes the mode in which the capacity of the boilers was to be ascertained by a test. The results disclosed at the test, quantity of coal used, amount of water evaporated, etc., are conclusive upon the parties if the test was properly conducted. If either party was dissatisfied with the conduct of the test, the remedy was by requiring another test, until a fair and impartial test was obtained. But Howard, although selected by the parties to make the test, was not by the contract constituted an umpire to pass judgment and decide upon the capacity of the boilers; and his computation of the horse power would not be conclusive unless conclusiveness was given to it by the agreement or conduct and acts of the plaintiff. To overcome the effect of Howard's report of the horse power, the plaintiff produced the testimony of experts, who testified that the scientific and proper mode of calculating horse power where the contract specifies an evaporation "at and

from 212 degrees," as this contract does, is to make the computation at 212 degrees, at atmospheric pressure of 15 pounds, and then upon the figures given by Howard, and a computation upon that basis, the capacity of the boilers would appear to be 205 horse power. The difference between a computation of horse power under a pressure of 70 pounds and the same computation at atmospheric pressure is that, to obtain a given horse power at 70 pounds pressure, more heat, and consequently more coal, would be required than at atmospheric pressure. In other words, on the standard of an evaporation of 30 pounds of water at 212 degrees, a computation of horse power upon a given amount of coal, and an ascertained quantity of water evaporated, would give less horse power if computed at 70 pounds pressure than it would on a computation simply at atmospheric pressure. The plaintiff's experts admit that Howard's computation of horse power is correct upon the rule he adopted. They dispute his right to apply that rule in the computation.

The computation of horse power on the basis of atmospheric pressure is in accordance with a formula approved by the Franklin Institute. It seems to be the method usually adopted. But it appears by the testimony of Prof. Jacobus that there is more than one standard used by scientists; that there is no standard of boiler horse power universally accepted by engineers; and that, in computing horse power, some standard must be taken which is agreed upon by the parties. The professor's condemnation of the standard applied by Howard is based upon a construction of the original contract. Prof. Jacobus also testified that another society, the American Society of Mechanical Engineers, comprising a membership of 1,800 practical engineers, in 1885 recommended the use of the standard based upon 70 pounds pressure, but that 212 degrees feed water was not the figure this society mentioned. He adds that, in consequence of the recommendation of the American Society, he puts in two units of horse power in all boiler tests he makes. The contract is silent as to the rule by which the horse power is to be computed, and it appears that such a computation is capable of being made on the basis of 212 degrees at a pressure of 70 pounds as well as at atmospheric pressure. Howard's computation was made on that basis. Prof. Jacobus testified that Howard computed the horse power on the assumption of feed water at 212 degrees and evaporation into steam under 70 pounds pressure.

It appears that the standard recommended by the American Society may be applied in the computation of boiler power, and that it should be applied if such be the agreement of parties. St. Clair testified that, when the test was applied for and conceded, Mr. Gladfelter (the president of the defendant company) asked how the test was to be com-

ducted, and said that he was ignorant of such matters, and would like to know; that Mr. Purington stated that it would be made upon the basis of 30 pounds of water evaporated per hour from 212 degrees at 70 pounds steam pressure. Mr. Gladfelter asked why he selected 70 pounds steam pressure. Mr. Purington stated that it was an established rule of the American Society of Mechanical Engineers, and that he (the witness) and Mr. Gladfelter maintained that it should be the working pressure of the boilers, and that that terminated the conversation. This contention of Purington with respect to the basis on which the test should be conducted agrees in substance with Howard's report,—feed water, 212 degrees, and 70 pounds pressure. The witness further testified that the next evening, just previous to the commencement of the test, the subject was resumed in the presence of the plaintiff, Howard, the two engineers, and the fireman. He testified that some conversation as to the temperature of the feed water, in which 230 degrees, as reported by Howard, was agreed upon, brought about a discussion as to the pressure under which the boilers were to be run. Mr. Purington had requested that the safety valve be set at 70 pounds pressure. That the witness requested that they be set at a higher pressure, that the machines might be operated during the test. That they agreed to that, Mr. Howard saying that he would make an allowance for the difference in the mean to the 70 pounds. That the witness asked why they were not entitled to the mean working pressure, and Mr. Purington repeated his previous statement that it was the rule of the American Society; and, Mr. Howard corroborating that statement, he (St. Clair) submitted to the 70 pounds pressure. Mr. Purington testified that it was not agreed that the test should be conducted on the basis of 70 pounds pressure. Seltz, the fireman, confirmed St. Clair's testimony, which is strengthened notably by the fact that Howard reported the horse power as computed under the pressure of 70 pounds. Howard was not called as a witness to explain why he inserted the statement in his report that his computation was on that basis. St. Clair's testimony on this head is confirmed still more notably by the fact that Howard's report was received by the plaintiff, and sent to the defendants for action thereon without demur. St. Clair testified that the first knowledge he had of the plaintiff's purpose to repudiate Howard's report in any respect was when testimony to that effect was introduced at the trial, and he is not contradicted on that subject by any one.

The clear weight of the evidence is that there was an arrangement between the parties that the test was to be made of horse power rated at the pressure of 70 pounds. Purington was more than an agent with limited powers; he was secretary of the

Kingsley Boiler Company, the owners of the patent. The plaintiff was manufacturing the boilers in connection with the owners of the patent, and in these transactions Purington represented the owners of the patent and the plaintiff. The entire correspondence with the defendants was conducted by him, and the conduct of the test in every particular was intrusted to him. His acts and conduct in the premises are binding upon the persons whom he represented. Writing in the name of the plaintiff, under date of August 12th, Purington says: "That having fulfilled our contract with you to furnish 2 100 H. P. boilers, capable of evaporating 15 per cent. more water to 1 lb. coal than the average return tubular boiler, and as you have furnished no evidence that the test made at the Carroll Man'f'g Co. works July 16 ult. was not a sufficient proof, we do absolutely and positively refuse to remove the boilers, or to have anything further to do with them, unless you can give evidence that their economy is below our guaranty; then we will give another test, based upon economy alone, which will show that evaporative efficiency." This letter is an evasion of the real matter in controversy. Purington knew from correspondence and conversations before and after the tests that the defendants' complaint was that the boilers did not show 200 horse power. He knew that the economy test, on the basis of evaporation, as compared with the assumed evaporative efficiency of tubular boilers, was reserved to the defendants, to be resorted to in the event of the test that was had showing that the plaintiff had complied with the conditions expressed in the plaintiff's proposal. He also knew the exigency for speedy action arising from the defendants' contract with the Carroll Company. In response to the plaintiff's letter of August 12th, the defendants, in a letter of the date of August 15th, reiterated the demand for the immediate removal of the boilers, for that they were not up to contract in the horse power required; and it was not until August 20th that the plaintiff signified his willingness to submit the boilers to another test. The plaintiff's letter of August 12th was an emphatic and positive refusal to consider the real matter in dispute, and warranted the defendants in treating the rescission as completely accomplished. The boilers and stack were then taken down and removed. The plaintiff's communication of August 20th, offering another test, came too late. When this letter was received by the defendants, the boilers were being removed, and other boilers to take their places were ordered. Howard's report, containing a computation of the horse power, having been accepted and adopted by the plaintiff, and sent by him to the defendants, and having been acted upon by the defendants, we think that, after the refusal of the plaintiff to consider the defendants' protest against the

boilers as not conforming in horse power to the requirement of the contract, the defendants, if the first test was not satisfactory for the plaintiff, were not required to delay longer, when delay would seriously interfere with the completion of their contract with the Carroll Company.

The contract between the parties, consisting of the plaintiff's proposition of February 3d, and the letters of the parties, respectively, of February 6th, and February 9th, was one entire contract for furnishing the boilers and the chimney stack. The stack was part of the boiler plant, placed on the same foundation and brick work, and was adapted especially for that kind of boilers, and not for other boilers, on account of the peculiar construction of the flues. It was of iron, and was taken down and laid aside when the boilers were removed. Where there is a right of rescission with respect to the principal subject of an entire contract, the power to rescind extends to the appendages attached to the principal.

The finding of the trial court is sustained by the evidence, and the rule to show cause should be discharged.

CASE v. BENNETT et ux.

(Court of Chancery of New Jersey. Nov. 6, 1895.)

SUIT ON BOND AND MORTGAGE—USURY—PLEADING—UNIFORMITY OF TAXATION—CONSTITUTIONAL LAW.

1. An answer setting up usury in a suit on a bond, failing to allege that the bond was made in pursuance of any contract for the loan of money, with corrupt intent to evade the statutes against usury, is fatally defective, even though usury appears on the face of the bond.

2. Where a bond provided for the payment by the obligor of all taxes assessed on the loan secured thereby, it may be shown, to avoid the imputation of usury, that the form of the bond, including such provision, was used by the obligee's attorney without the obligee's knowledge or consent, and that such provision was no part of the original agreement.

3. The act of April 17, 1876 (Revision, p. 1174, § 153), providing that the owners of lands within certain counties and cities may agree not to apply for any deduction, by reason of any mortgage, from the taxable valuation of such lands embraced in the mortgage, and that upon claiming a deduction in violation of the agreement the mortgage shall immediately become due, does not conflict with Const. art. 4, § 7, par. 12, declaring that property shall be assessed for taxes under general laws and by uniform rules, because Revision, p. 1163, § 109 et seq., providing that debts secured by mortgage shall not be assessed for taxation unless the owner of the land applies for a deduction, is a general law, and said section 153 merely authorized the insertion in a mortgage of a particular kind of contract in certain counties, and, as the legal rate of interest is not required to be uniform, does not change the law regulating the assessments for taxation.

4. An answer which, after setting out the conditions of a bond in a suit on a bond and mortgage, alleges that said bond and mortgage are usurious, is not sufficient to sustain the defense of usury, in so far as the provisions of the mortgage differ from those of the bond.

Bill by John H. Case against Ernest H. Bennett and wife to foreclose a mortgage. Decree for complainant.

Frederic Adams, for complainant. R. H. McCarter, for defendants.

EMERY, V. C. The bill in this case is filed to foreclose a mortgage given by the defendants to the complainant on lands lying in the township of East Orange, Essex county, and the defense set up at the hearing is usury. It is insisted that the usurious nature of the transaction arises out of the terms and conditions of the bond and mortgage, and the provisions therein relating to taxes. The condition of the bond, after the provision for payment of certain sums of money, and interest thereon at the rate of 6 per cent., adds: "Together with all national, state, county, and municipal taxes which may be assessed upon the money now loaned and hereby secured, or upon this obligation, or the indenture of mortgage given to secure the payment of the same, and bearing even date herewith." The mortgage is conditioned for the payment of the sums of money mentioned in the condition of the bond, with lawful interest at the rate of 6 per cent., according to the condition of the bond, "without any deduction or defalcation for taxes, assessments, or any other imposition whatever," and contains a covenant by the mortgagor that he "shall not nor will apply for or claim any deduction by reason of this mortgage from the taxable value of the lands and tenements." No evidence other than that of the securities themselves is adduced or relied on by the defendants as bearing on the question of usury, and on the hearing before the late Vice Chancellor Van Fleet the defendants objected to the introduction of evidence offered by the complainant for the purpose of showing that the clause in the bond relating to taxes was inserted therein without the complainant's knowledge or direction, and was not in accordance with the bargain between the parties to the bond and mortgage, and that the loan was in fact effected at legal interest only. The objection was based upon the insistence that the bond and mortgage themselves were the only and conclusive evidence of the terms of the loan on this hearing, and the evidence was admitted subject to the objection. The evidence of both the complainant and the defendant, taken under this objection, shows that previous to the execution of the papers the bargain between them was for a loan of \$9,000 at the legal rate of interest, and that there was no reference to the taxes in the bargain for the loan. The defendant says that the exact words used by the complainant were, "You may consider the money yours at the present time as soon as you like, at regular interest." It further appeared that on concluding the bargain for the

loan the complainant directed his attorney, Mr. Adams, to make out the bond and mortgage, that he gave no direction to insert this provision as to taxes in the bond, and that his attention was not called to the fact that there was such provision, until a year and a half after the execution of the bond and mortgage. Mr. Adams states that the bond and mortgage were drawn pursuant to his directions, as Mr. Case's attorney, and that the provision as to taxes in the bond was dictated by him from a printed form of mortgage bond, which has been in very common—though not universal—use in the county of Essex since he came to the bar, and that the mortgage was on the usual blank. Upon this evidence as to the actual bargain between the parties, and their intent in making the loan, the complainant, at the hearing, which was continued before me, applied to amend the bill by adding the allegation that this clause relating to the payment of taxes was inserted in the bond by the scrivener without complainant's knowledge or direction, and was not in accordance with the bargain between the parties, and that the loan was in fact effected at legal interest only, and also to add a prayer for reformation of the bond by striking out this clause. The application to amend was opposed by the defendants, and affidavits were filed on their behalf in opposition to the motion. Decision upon the application to amend was reserved, and argument was heard upon the whole case, including the application to amend.

The preliminary question to be decided is one of pleading, and is whether usury is sufficiently set up in the answer to sustain the defense. It is settled, under our practice, that, where an answer attempting to set up usury is radically defective, that defense cannot be presented to the court, under it, at final hearing. *Crane v. Insurance Co.* (Err. & App.; 1875) 27 N. J. Eq. 484, and cases cited. The defect in this case was a failure to set out the particulars of the alleged usurious contract, but the principle of the case reaches to any other substantial defect. The state of the pleadings in the cause in reference to the question now at issue is as follows: The bill alleges the indebtedness of the defendant Ernest H. Bennett to the complainant in the sum of \$9,000 (not stating, however, the origin or source of this indebtedness,—whether a loan or pre-existing debt), and that, being so indebted, Ernest H. Bennett made, executed, and delivered his bond in the penal sum of \$18,000, with the condition above set out; and the bill sets out in full the clause of the bond relating to taxes. It then alleges that the mortgage in question was given by Bennett and wife to secure this bond, with the proviso or condition above set out, which is also recited in full. No allegation is made of any default by defendants in the agreement, in the bond or mortgage, in reference to taxes, nor is any relief prayed as based thereon. The answer of the defend-

ants admits the execution of the bond for the sum and the conditions set out in the bill, and also the execution of the mortgage upon the conditions stated in the bill. It then proceeds as follows: "And these defendants further answering say that by the terms and conditions of the said bond, for which said mortgage here sought to be foreclosed was given to secure as hereinabove set out, it is provided, and the said complainant did require this defendant, Ernest H. Bennett, to obligate and bind himself that he 'shall and will truly pay \$9,000 lawful money aforesaid, to wit, \$500 in one year from date, \$500 in two years from date, \$500 in three years from date, \$500 in four years from date, \$7,000 in five years from date, with interest at six per cent., payable semiannually on the principal sum remaining unpaid, together with all national, state, county, and municipal taxes which may be assessed upon the money now loaned and hereby secured to be paid: provided, if the said Bennett shall omit to pay any installment of either principal or interest at the time herein specified for the payment thereof, and said installment shall remain unpaid thirty days, and if said Bennett shall omit to pay the annual tax due in any year, and the same shall remain unpaid and in arrear for the space of three months after it shall be legally payable, then the principal and interest remaining due, at the option of the said John Case, shall become and be immediately due and payable, anything to the contrary notwithstanding.' And these defendants are advised and allege that the said complainant in and by the said bond and obligation of this defendant, Ernest H. Bennett, did charge and exact and require this defendant, Ernest H. Bennett, to agree to pay upon the loan or forbearance of one hundred dollars a higher rate than the value of six dollars; and these defendants insist and claim that the said bond and mortgage given to secure the same are usurious, and that in them a higher rate of interest is reserved than was or is allowed by the laws of the state of New Jersey, wherein the said contract was made and executed, and that the said complainant is not entitled to recover any interest upon said mortgage, and that no interest thereon can therefore be said to have become forfeited or due and unpaid, and that the said complainant has no right, therefore, to anticipate the payment of the principal sum so borrowed and agreed to be repaid on said bond and mortgage, prior to the time when the same became and is due and payable; and these defendants deny that any part of said sum of \$7,000 is now due or payable upon said bond until five years from the date of said mortgage, and being the 2d day of February, 1892."

It will be observed that the answer fails to set up either that the bond was made upon a contract for the loan of money, or that the contract for the loan of money was made between the parties with the intent to violate

or evade the statute against usury, or that the bond and mortgage in question were given in pursuance of this corrupt intention. At common law, in a plea of usury to a debt on a bond, all three of these elements are considered essential. 1 Wms. Saund. (5th Ed.) 295, note 1; Id. note b; 3 Chit. Pl. 968, and cases cited in notes. And in addition the particulars of the usurious contract must be set out. Id. A specialty cannot be avoided by usury appearing merely on the face of the condition, but the fact must be pleaded specially, and the defendant cannot demur. 1 Chit. Pl. 484. As to the defense of usury, the answer in equity must, in substantial matters, be as certain and definite as the plea at law. *Taylor v. Morris* (Err. & App.; 1872) 22 N. J. Eq. 606, 611, etc.; *Tanning Co. v. Turner*, 14 N. J. Eq. 326, 329; *Banking Co. v. Dudley*, 8 Paige, 452, 458. And in equity the rule of pleading, as to this defense, may be somewhat stricter than at law, for while at law a general plea of usury, without particulars, may be bad only on special demurrer, and may be cured by the plaintiff's pleading over, our rule in equity is settled that the failure to particularize in the answer will be fatal, even on final hearing. *Crane v. Insurance Co.*, supra. The answer in this case, which merely sets out the condition of the bond, and alleges that it is usurious, seems to be based upon the theory that if, on the face of the bond, the interest reserved is greater than the legal rate, the bond is ipso facto usurious, and a plea or answer need only set up that it is usurious on its face, without further allegations showing that the contract comes within the reach of the statute. But this is not the rule of pleading either at law or in equity. If it were, then a demurrer to the declaration or bill would be well taken if any bond, on the face of it, reserved more than legal interest. But the law is settled that as to usury the terms of the security are not conclusive as to the terms of the loan, and that the lender may show that, although usurious upon its face, there was no usurious intent, and the contract of loan was not in fact usurious. The bond itself on this issue is only prima facie evidence of the corrupt agreement which is the foundation of usury. *Archibald v. Thomas*, 3 Cow. 284; *Griffin v. Oil Co.*, 11 N. J. Eq. 49; *Varick v. Crane*, 4 N. J. Eq. 128, 134. And unless it appear on the face of the bond that it was given to secure a loan or forbearance of money, it would not, as it seems to me, be even prima facie evidence of usury; for, as a bond for the payment of money is valid without consideration, if so intended by the parties (*Aller v. Aller*, 40 N. J. Law, 446), it is manifest, I think, that an agreement thereon to pay more than legal interest on any sum of money is not even prima facie evidence of illegality, unless the bond itself also show that the agreement for interest was made upon a contract for the loan or forbearance of money. The replication to a plea of usury at law is

sufficient if it simply deny the corrupt intent (*Blyd. Usury*, 112; 3 Chit. Pl. 1172; *Waterman v. Haskin*, 7 Johns. 283), showing that the material issue on the plea of usury must be the corrupt intent of the parties. This corrupt intent being then the real question at issue, if a plea or answer setting up usury is to be good at all, it certainly must allege this corrupt intention as a fact upon which evidence may be taken. The defendants in this case object to any evidence upon the question of intent in making the bond, and it is obvious, I think, that, if this evidence as to intention is not admissible under the pleadings, it must be because usury is not properly pleaded. If it were properly pleaded, evidence as to the intention would be admissible under the replication to the answer, without any amendment of the bill.

In my opinion, the defense of usury in this case cannot be heard upon the answer filed, for the reason that the answer upon this point is radically defective, in not setting out that the bond and mortgage in question were made in pursuance of any contract for the loan of money with the corrupt intent to evade the statute against usury.

In the second place, I am of opinion that, taking the answer to be sufficient, the proofs show that the contract of loan was, in its inception, a legal contract between the parties, and that it was no part of the contract for the loan of the money that the defendant should pay the taxes, or that the bond should so provide. Taking the answers to be sufficient, the evidence in relation to the intention of the parties is admissible without any amendment of the bill. The use by complainant's attorney, without complainant's direction or knowledge, of a form of bond which included such provision, could not, in my judgment, invalidate or defeat the original lawful agreement for the loan which both the parties intended to have executed. In this respect I think the case is similar to those where by mistake of the scrivener, or other mistake, a security apparently unlawful has been taken on a lawful contract of loan. *Griffin v. Oil Co.*, supra; *Gillette v. Ballard* (Err. & App.; 1875) 27 N. J. Eq. 489; *Archibald v. Thomas*, 3 Cow. 284, 289. The form of bond taken in this case probably originated under the act of March 15, 1866,—a supplement to the charter of Newark (P. L. 1866, p. 451); and it has been in common use in Essex county since shortly after that time. At the time of passage of this law the general tax laws in force provided that the debt secured by the bond should be assessed directly upon the lender. With the changes in the method of taxation made by the general law of 1876 (Revision, p. 1163), providing that no mortgage or debt secured thereby should be assessed for taxation unless a deduction was claimed, and in view of the supplement to the mortgage act (Revision, p. 1174) allowing mortgagors of lands in Essex and certain other counties to agree not to apply for deduction, the old form of bond, as

to taxes, has become inapplicable to the tax laws as they now exist, and the retention of the form in common use is probably based upon the idea that, having no practical application to existing laws, the retention of it cannot invalidate the bond. Whether the bond providing for the payment of taxes would be invalid, if an agreement to pay taxes was one of the terms upon which the loan was actually made, and the bond was made in pursuance of such agreement, I do not decide; but I do hold that where it is expressly proved that this agreement as to taxes was no part of the contract of loan, and that it was inserted without the knowledge of the lender, the defense of usury, based merely upon the insertion of the clause in the bond, is not maintained. So far as the mortgage is concerned, it will be noticed that in the answer the special terms or conditions of the mortgage, to which objection is made or attention is called, are not at all set out, but the answer, after setting out the terms of the bond, and that by the bond the complainant charged and exacted from defendant unlawful interest, then says: "And these defendants insist that the said bond and mortgage given to secure the same are usurious, and that on them a higher rate of interest is reserved than was allowed by the law." So far as the terms of the mortgage differ from those of the bond, this bare allegation that the mortgage is usurious, without further specification, is not sufficient to sustain the defense of usury as to the mortgage, in so far as relates to any provisions in the mortgage which differ from those of the bond. *Taylor v. Morris* (Err. & App.; 1872) 22 N. J. Eq. 600, 612. The special objection to the provisions of the mortgage is that the clause in the mortgage, agreeing not to apply for deduction of the debt from the taxable value of the lands, renders the mortgage usurious, although it does not, like the bond, contain an express agreement for the payment of the taxes assessed upon the bond or debt. It is admitted that this agreement is made under the express authority of the supplement to the act concerning mortgages, approved April 17, 1876 (Revision, p. 1174); but it is contended that this act is unconstitutional, and therefore does not relieve the mortgage from the taint of usury which inheres in it by virtue of the agreement. The constitutional defect charged is that this act of 1876 applies only to five counties of the state (including Essex), and that in effect it establishes, as to these counties, a special method of taxation, and is therefore invalid, as conflicting with the constitutional provision (article 4, § 7, par. 12) that "property shall be assessed for taxes under general laws and by uniform rules." The evidence which was taken in relation to the insertion in the bond of the clause relating to taxes, by mistake, does not apply to this clause of the mortgage, and the case, upon this point, was argued by both counsel upon the validity of the clause as it stood, and upon the basis that it was, by the agreement of

the parties, to be inserted in the mortgage. For the reasons above stated, I do not consider the defense of usury in the mortgage sufficiently pleaded; but, should I be in error on this point, I reach the conclusion also that the objections to the validity of the law which is attacked are not well founded, and that the mortgage is not usurious by reason of the agreement included in it under the authority of this law. My reasons, briefly stated, are:

1. That, so far as relates to the assessment for taxation of debts secured by mortgages on lands, the act of April 17, 1876 (Revision, p. 1163), a supplement to the tax act, provides a general law for such method of assessments, applicable to all debts secured by mortgage on any land situated anywhere within the state. This general law relating to the assessment of debts secured by mortgage provides that the debt so secured shall not be assessed for taxation, except upon the condition that the owner of land applies for the deduction. It is within the legislative authority to make the assessment of such debts depend upon such condition, and, the condition being universally applicable, the assessment of this class of property is made under a general law, and by a uniform rule, within the meaning of the constitution. In *Insurance Co. v. City of Newark*, 54 N. J. Law, 138, 143, 23 Atl. 305, the constitutionality of this law of 1876 was affirmed, and on writ of error the law was construed and applied as constitutional. *Id.*, 55 N. J. Law, 145, 23 Atl. 137.

2. The supplement to the "act concerning mortgages," approved April 17, 1876 (Revision, p. 1174), providing that the owners of lands within certain counties and cities might agree not to apply for any deduction, by reason of any mortgage, from the taxable valuation of such lands embraced in the mortgage, and that upon claiming a deduction in violation of such agreement the mortgage should become immediately due and payable, together with the tax paid by the mortgagee, did not in any respect change the law regulating the assessment for taxation. Its effect was to authorize, in the counties and cities named, a particular kind of contract to be inserted, by owners of lands therein, in their mortgages on such lands, given to secure debts for which a deduction might be claimed by the debtor, and to provide that the violation of such contract should be attended with certain consequences upon the contract itself. If the result and practical effect of such special authority as to mortgages, within these cities and counties, might be that in them the rate of interest is different from that which applies to other parts of the state, this does not invalidate the law; for, as to the rate of interest, there is no constitutional provision which requires that it shall be uniform throughout the state. Laws providing for special rates of interest for different

counties (e. g. Act March 10, 1875; Revision, p. 520, as to Monmouth), and as to certain classes of corporations (railroads, etc.,—Revision, p. 331, § 20), are undoubtedly within the legislative power. Nor does the fact that the tax on the mortgage debt, if deducted by the owner of the lands, and paid by the mortgagee, is to be added to the amount of the mortgage debt, and recovered on foreclosure, bring the mortgage law within the reach of the constitutional inhibition now invoked. The main object of this provision was the public one of securing uniformity and generality of rules on assessments for taxation of all property which was selected for taxation. It did not interfere with a proper legislative control of the designation of the person who should ultimately pay the assessment for taxation so made; and where, as in the law now in question, the only objection to the legislative control authorized is that it has resulted in producing a contract which violates the laws against usury, I think it is apparent that the validity of the law must ultimately depend upon the power of the legislature over the question of usury and the rate of interest. And, as this is not restricted by the constitution, my opinion is that the law is valid. The evidence shows, and it is not disputed, that the mortgagee has defaulted in the payments of interest as specified in the bond, and that by reason of the default the complainant has exercised the option reserved in the bond, of requiring the whole principal to be immediately due and payable. There will therefore be a decree for the complainant for the whole amount of the principal money, with interest and costs, and upon the bill as it stands, without amendment. The application to amend is denied, without costs.

STATE (KOUNTZE, Prosecutor) v. PROPRIETORS OF MORRIS AQUEDUCT et al.

(Supreme Court of New Jersey. Nov. 7, 1895.)

EMINENT DOMAIN—POWERS OF AQUEDUCT COMPANY—APPLICATION—NECESSITY—RATIFICATION OF PROCEEDINGS.

1. The Proprietors of the Morris Aqueduct have power to condemn lands and rights in lands, not only to enable them to furnish a supply of water to Morristown and vicinity, ample for all reasonable contingencies, but also to collect and preserve the water in a state of purity.

2. An application for condemnation of lands made by that corporation, which is authorized to condemn lands necessary for its purposes, need not show how the corporation made or expressed its determination of the necessity to take the lands sought to be condemned.

3. Where the directors discussed and argued on a plan for making use of certain waters, which plan required the acquisition of certain lands and rights, and have purchased and paid for some of such lands, they have sufficiently determined that it is necessary to acquire the other lands essential to the plan, although they have passed no resolution to that effect.

4. Where afterwards the president made unsuccessful efforts to purchase some of said lands,

and had reported his failure to the directors, it seems that he acquired implied authority from the directors to institute proceedings to condemn; but, if not, the subsequent approval and adoption by the directors of such proceedings instituted by him will sustain an order made thereon.

(Syllabus by the Court.)

Certiorari to supreme court.

Certiorari by the state, at the prosecution of Luther Kountze, against the Proprietors of the Morris Aqueduct and others, to review an order of a justice appointing commissioners to assess damages which the prosecutor will sustain by the taking by said proprietors of certain lands, and of certain rights, easements, and privileges in other lands. Order affirmed.

Argued June term, 1895, before VAN SYCKEL, LIPPINCOTT, and MAGIE, JJ.

Alfred Mills, for prosecutor. Henry C. Pitney, Jr., for defendant.

MAGIE, J. The right of the corporation known as the "Proprietors of the Morris Aqueduct" to exercise the eminent domain for the purposes for which it was created has been established by the concurring judgment of this court and the court of errors. *Olmsted v. Proprietors*, 46 N. J. Law, 495, 47 N. J. Law, 311. But prosecutor contends that the corporation has no right to condemn the easements, privileges, and lands which it seeks to acquire by the proceedings before us, and that the order appointing commissioners ought to be vacated. This contention is mainly put upon the ground that the easements, privileges, and lands sought to be condemned are not necessary for the purposes for which the condemning corporation was created. The corporation was created by an act passed November 16, 1799, for the purpose of supplying Morristown with water. By supplements to its charter, and by general laws, which are collected in the opinions above cited, it acquired the right to supply water beyond the limits of Morristown, and also the right to acquire, by condemnation, lands, springs, and streams of water necessary for those purposes. The application in this case asserts that the corporation deems it necessary to take, by condemnation, the easements and privileges in lands of prosecutor therein described, and also other lands of his therein described; and it is verified by the oath of its president. This was sufficient to confer jurisdiction upon the justice applied to, to make the order complained of. But it is settled in our courts that a landowner whose land is thus sought to be condemned may dispute the fact of necessity, and, by a writ of certiorari, require this court to determine on affidavits whether the asserted necessity in fact exists. The burden is on the corporation to show its right to condemn by establishing the condition precedent upon which the right was granted. *Olmsted v. Proprietors*, 46 N. J. Law, 495. In this case the condemning corporation must make it appear that the rights it seeks to acquire are necessary for the purposes of its incorporation, viz. to supply Morristown and its vicinity with water. In

the Olmsted Case the court of errors held that the word "necessary," with application to the powers conferred on this corporation, was to be construed as justifying the taking of a supply of water so ample so as to remove any reasonable apprehension that it will not be sufficient for those purposes.

It appears in the case that the rights and lands of prosecutor sought to be condemned are intended to be used in the transmission and storage of water flowing from streams and springs in Cat swamp already acquired by the corporation. The contention of prosecutor is that the corporation had previously acquired from other sources, and then possessed, a supply of water so ample that it could not be doubted that it was sufficient; and, therefore, that the necessity contemplated by the grant of power to condemn, as construed by the court of errors, did not exist. Much testimony has been taken as to the present and proprietors' needs for water of Morristown and its vicinity, and the supply otherwise acquired by the corporation. Some expert testimony was taken on both sides as to the wisdom of the plans adopted by the corporation to utilize some of the water it has acquired. But it is not deemed necessary to analyze the evidence. It is sufficient to say that we think that the corporation, in acquiring the waters in question, kept strictly within the lines laid down by the court of errors. The needs to be considered are those of a growing population and an increasing use, and the supply must be reasonably ample for seasons of drought, and to guard against accidents which may deprive the corporation of water from some of its sources. It is made to appear that water acquired by the corporation has at times become unfit for use, by reason of the growth of algae; and it is clearly a matter of question whether the means tried to assure its fitness at all times may prove successful. Under such circumstances, we think the acquisition of the waters in question was within the power of the corporation, because it assured, or tended to assure, a supply ample for a not unlikely contingency.

The easements and privileges sought to be acquired in lands of prosecutor are designed to enable the corporation to carry waters already acquired by it, and which now cross prosecutor's land in an open brook, by an underground pipe, protected by side drains from surface water. The purpose is to prevent riparian abstraction and evaporation, and to exclude impurity. The grant of power to collect water, and to supply it to an inhabited place, and for that purpose to exercise the eminent domain, must include the right to collect and preserve such water in a state fit for use, and to acquire by condemnation such rights in land as are adapted to assure its purity. The lands sought to be acquired by this condemnation are intended to be used, with other lands now owned by the corporation, for a reservoir for the storage of water. It is contended that, as the

evidence shows that the corporation has no present intention to build that reservoir, the necessity for taking lands for its building does not exist. But it also appears that the reservoir in question is part of a general plan for making use of the waters of Cat swamp for the purposes of the corporation. If that plan has been properly determined upon by the corporation, in my judgment, it may proceed to condemn lands necessary to its execution, although the whole plan may not be, and may not be intended to be, executed at once.

Prosecutor further contends that the order before us should be vacated, because the application on which it was made does not show that any corporate action, by resolution or otherwise, was taken by the condemning corporation passing upon the necessity to take prosecutor's land, or declaring its belief in such necessity. The application is made by the Proprietors of the Morris Aqueduct, as petitioners, and states that they deem it necessary and proper to add to and enlarge their present works, and to increase their facilities for furnishing water to the town of Morristown and its vicinity, and preserving the same from contamination, and for that purpose require the portion of lands of prosecutor, and the rights, easements, and privileges in other lands of prosecutor, therein described. This asserts a determination of the necessity to take, and, coupled with the prayer for the appointment of commissioners, it equally shows a determination to take. True, it does not show how the determination was reached or expressed. But I can perceive no reason why it should. So far as my observation extends, applications of this character are in the form of the application before us. Corbins, Forms, 1496.

But prosecutor further contends that, in fact, there was no corporate action on the part of the Proprietors of the Morris Aqueduct either upon the necessity of taking prosecutor's lands or giving authority to make application to appoint commissioners. It appears that the condemning corporation has a president and a board of directors. It also appears that, prior to the presentation of the application for the appointment of commissioners, the directors had never passed any resolution on the subject of acquiring or condemning prosecutor's lands, or authorizing their president to make application for condemnation in the name of the corporation. On May 8, 1895, after the return of this certiorari, the directors passed and entered on the minutes a resolution approving the institution of the proceedings to condemn prosecutor's lands taken by their president, and directing him to continue the prosecution thereof. I think it must be conceded that, before a corporation authorized to condemn lands necessary for its purpose can proceed to acquire such lands by condemnation, it should determine that the ne-

cessity exists. How such determination should be expressed cannot be a matter of importance to the landowner, who may always raise the question of the actual existence of the required necessity. Now, it further appears that a general plan for making use of the waters arising in Cat swamp for the purposes of this corporation had been considered and discussed in meetings of the directors, and agreed upon by them, although not by a formal resolution; that the plan embraced the acquisition of lands and rights including those now sought to be condemned from prosecutor; that other of such lands had been purchased by the president, and title thereto had been acquired by the corporation; that payment for the lands so purchased had been made by the treasurer, and such payment had been approved by the directors; that the president had endeavored to come to an agreement with prosecutor for the purchase of the rights and lands now sought to be condemned, but without success; and that the efforts to purchase and their failure had been reported to the directors. Upon these facts, I reach the conclusion, with some hesitation, that the directors, representing this corporation by paying for and acquiring title to some of the lands essential to this general plan, determined upon the necessity of acquiring, by purchase or condemnation, all the lands essential to the plan, and gave implied authority to take proceedings to condemn upon failure of the efforts to purchase.

But if I were of another mind in respect to the authority to institute these proceedings, implied from the acts of the directors, I should still think that this order should not be vacated, for the act of the president in that regard has been since approved and adopted by the directors. The lack of authority, if such lack there was, has done no injury to prosecutor, who has had an opportunity to raise, and has raised, the real question in the case, viz. whether there was a necessity to take the lands for the purposes of this corporation.

For these reasons, I think the order brought before us by this writ should be affirmed.

NATIONAL RUBBER CO. et al. v. RHODE ISLAND HOSPITAL TRUST CO. et al.
(Supreme Court of Rhode Island. Oct. 31, 1895.)

MORTGAGE — SALE UNDER POWER — INJUNCTION — CLAIM OF MORTGAGOR.

A sale under a power in a mortgage given to secure bonds of the mortgagor will not be enjoined till the mortgagor can obtain adjudication on unliquidated and disputed claims against the bondholder, his title to the bonds being absolute.

Suit by the National Rubber Company and others against the Rhode Island Hospital Trust Company and others.

James, William R. & Theodore F. Tillinghast, for complainants. Arnold Green and Edwards & Angell, for respondents.

TILLINGHAST, J. The complainants seek by this bill to enjoin the sale by the mortgagee, the Rhode Island Hospital Trust Company, of the property heretofore belonging to the National Rubber Company, which property was mortgaged in 1884 to secure the payment of its bonds. Louis Schaefer, one of the respondents, is the holder, and claims to be the absolute owner, of 42 of said bonds, amounting in the aggregate to \$24,000, together with interest due thereon, which bonds having matured he is seeking to enforce payment thereof in accordance with their terms. The ground upon which the complainants rely in asking for said injunction is that said Schaefer holds said bonds either nominally, and without any consideration paid by him therefor, and in trust for the respondents William R. Grace & Co., or otherwise in such way, and with such notice of the purpose for which they were issued to said William R. Grace & Co., as to subject them in his hands to all the equities existing between the complainants and said William R. Grace & Co., and that, as against them, the complainants have claims in set-off to an amount greater than the amount due on said bonds; and that they have commenced a suit in New York against said William R. Grace & Co. for the recovery of the amount due to them. The bill sets out that 31 of said bonds, numbered 28 to 58, inclusive, of the aggregate amount of \$15,500, were originally issued to said William R. Grace & Co. as collateral security for an account which said Grace & Co. then held against said National Rubber Company, and for no other value or consideration whatever; and that the same, as between the complainants and said Grace & Co., have always been, and still are, held as collateral security, and in no other manner. It also sets out that, as against all of said 42 bonds, the complainants have large claims and demands in set-off and recoupment against said Grace & Co., upon which they are indebted to the complainants in a sum much exceeding the total amount due upon all of said bonds for money had and received by said Grace & Co. for the use of the complainants. The prayer of the bill is for an accounting between the National Rubber Company and said William R. Grace & Co., and for an injunction against the sale of said mortgaged property pending the taking thereof. All of the bonds of said National Rubber Company secured by said mortgage, excepting those held by said Schaefer, have now been taken up and paid. An ex parte injunction having been heretofore granted in the case upon the faith of the sworn allegations of the bill, the respondents now, upon the coming in of their answer, and upon the testimony submitted, move that said injunction be dissolved.

Upon the evidence submitted, which is very

voluminous, I am clearly of the opinion that, so far as the said bonds, other than those numbered 28 to 58, inclusive, are concerned, the complainants make no case which entitles them to an injunction. The books of the National Rubber Company, as explained by Mr. Emerson, who is the custodian thereof, show that bonds numbered 376, 377, 400, 408, 414, and 417, for \$1,000 each, were never issued to William R. Grace & Co. as collateral security, and that bonds numbered 9, 10, 11, 74, and 75, for \$500 each, which were included in the original pledge to William R. Grace & Co., were subsequently returned, and were never reissued to said Grace & Co. as collateral security. The bonds originally pledged to William R. Grace & Co. included those numbered 1 to 78, both inclusive, amounting in value to \$39,000. Deducting therefrom the amounts which Emerson says were returned, there are left the identical 31 bonds numbered 28 to 58, inclusive, aggregating \$15,500, which bonds were afterwards transferred in pledge to the Sears Commercial Company, and which are a part of those which Schaefer now holds. The account, made up from Emerson's evidence, stands thus:

Bonds numbered 1 to 78, \$500 each, issued to William R. Grace & Co. as collateral, July 26, 1884..... \$39,000
Returned as follows:
1884.

Sept. 29th. Nos. 59 to 78....	\$10,000
Dec. 9th. Nos. 1 to 8.....	4,000
1885.	
April 14th. Nos. 9, 10, 11...	1,500
June 10th. Nos. 12, 13, 14,	
15	2,000
June 12th. No. 16.....	500
July 8th. Nos. 17 to 22.....	3,000
Sept. 14th. Nos. 23 to 27....	2,500
	\$23,500

Leaving outstanding and pledged with William R. Grace & Co. Nos. 28 to 58, amounting to..... \$15,500

The same witness says that there were no further pledges of bonds to William R. Grace & Co. And it therefore follows that Schaefer now holds the 11 bonds numbered 9, 10, 11, 74, 75, 376, 377, 400, 408, 414, and 417, aggregating \$8,500, free from any defense that could be urged against them on the ground that they had been transferred to him by parties who held them only in pledge from said National Rubber Company. Even assuming, therefore, that the allegations set up in the complainants' bill shall be established, still they would have no force or effect as against these bonds. For, even if said Schaefer and the Sears Commercial Company and William R. Grace & Co. are, as contended by complainants' counsel, practically one and the same person, so that said bonds are virtually held by said Grace & Co., yet the bill does not allege that they were received as collateral security for the debt of the said rubber company to them, and the evidence shows that they were not. In short, there is no allegation in the bill, and no

evidence in the case, which connects these bonds with the transactions out of which the counterclaims arise. The position of the National Rubber Company, then, as to these bonds, is that of a mortgagor who asks that a sale for default, under a power in the mortgage, may be enjoined until he can obtain an adjudication upon certain unliquidated and disputed claims which he has against the mortgagee. And this court has repeatedly held that it would not enjoin a foreclosure sale in such circumstances. *Frieze v. Chapin*, 2 R. I. 429; *McCulla v. Beadleston*, 17 R. I. 23, 20 Atl. 11. As to the ownership of said bonds numbered 28 to 58, inclusive, the proof is conflicting, and raises a number of important legal questions, which ought not, in my judgment, to be determined by a single justice. On the part of the complainants, a large amount of evidence has been offered tending to show that said William R. Grace & Co. never have parted with their title to said bonds, or, if they have parted with their legal title thereto, that the purchaser holds them in trust for the original pledgee thereof, or, in any event, that the purchaser took them with notice of the manner and of the purpose for which they were held by said Grace & Co., and hence that they are subject in his hands to all the equities existing between the original parties to the transaction.

The complainants have also offered a large amount of evidence for the purpose of showing, or attempting to show, that said William R. Grace & Co. and the Sears Commercial Company, from the latter of whom said Schaefer purchased the bonds, are, to all intents and purposes, in so far as the transactions in question are concerned, one and the same person; and in this connection they even go so far as to claim and insist that said Sears Commercial Company has no existence in fact as a distinct legal entity. This latter position, however, is clearly untenable, upon the evidence submitted. The evidence as to Schaefer's title to the bonds in question shows that he was in the employ of said Grace & Co. at the time he purchased the bonds, that he paid but a very small proportion of the purchase price thereof, and that he gave his note for the balance, which note, though still remaining unpaid, has been canceled, and is in his possession, although he does not produce the same. On the part of the respondents, on the other hand, much evidence has been offered tending to show that said William R. Grace & Co. are not the owners of said bonds; that the same are not held in trust for them by said Louis Schaefer, but that they were purchased by him from the Sears Commercial Company in good faith, for a valuable consideration, and without any notice of the equities aforesaid. They have also offered evidence which shows that said Sears Commercial Company is a corporation created under and existing by virtue of the laws of the state of New York, and that it is not and was not identical with said firm

of William R. Grace & Co. The proof, as a whole, however, shows that the relations between William R. Grace & Co., the Sears Commercial Company, and Louis Schaefer, as to their dealings with the bonds in question, were such as to render it quite improbable, at any rate, that said Schaefer should have purchased the bonds without full knowledge of the manner in which they were held by the Sears Commercial Company. And although it is true, as contended by the counsel for the respondents, that a preponderance of the evidence supports the claim that the terms of the note held by the Sears Commercial Company, for which these bonds were pledged as collateral (which note has not been produced in evidence), authorized the sale of said bonds, yet I do not see that this makes any material difference if the purchaser had knowledge of all the facts relating to the transactions in question. After considerable study of the case, and some hesitation, I have come to the conclusion that the matter ought to remain in statu quo, as to the 31 bonds aforesaid, until further order of the court, provided the remainder of said bonds are promptly paid. A decree may therefore be entered dissolving the injunction unless said bonds numbered 9, 10, 11, 74, 75, 376, 377, 400, 408, 414, and 417, aggregating \$8,500, together with the interest due thereon, shall be forthwith paid and discharged.

GROSS v. CITY OF PORTSMOUTH et al.
(Supreme Court of New Hampshire. Rockingham. July 26, 1895.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—JUDICIAL NOTICE.

1. Where the construction and maintenance of waterworks of a city are by statute vested in an independent commission, the city will not be liable for injuries from defects in the street due to negligence of its own, or the servants employed by the commission, in laying the pipes.

2. On suit against a municipal corporation for injuries sustained by defective laying of waterworks, judicial notice will be taken of a statute vesting the entire control of the construction and management of the waterworks in a commission independent of the corporation.

Action by Fanny A. Gross against the city of Portsmouth and others for personal injuries. On demurrer to the declaration. Sustained.

Plaintiff's declaration alleges that the defendants, a municipal corporation, are the owners of a system of waterworks, and, by pipes laid in the ground, conduct water to the dwellings of residents in the city, for which they receive compensation; that, in laying the pipes in 1894 on Market street, their servants so carelessly and negligently filled the trenches in which the pipes were laid as to form a ridge in the street, making the highway defective and dangerous; and that the plaintiff while driving on the street, by reason of the ridge, was thrown from her carriage, and injured.

S. W. Emery, for plaintiff. T. E. O. Marvin, E. L. Guptill, and Calvin Page, for defendants.

CARPENTER, J. Unless the defendants are liable at common law, the demurrer must be sustained. Laws 1893, c. 59. Judicial notice may be taken of the act (Laws 1891, c. 209) authorizing the defendants "to issue water bonds, and to manage and control its water supply." *Hall v. Brown*, 58 N. H. 93, 95, 96. By its provisions, the "immediate management and direction of the waterworks" are vested in a board of water commissioners, consisting of four persons of whom the mayor for the time being is ex officio one. The three other members of the board—one of them to hold the office three years, one four years, and the other five years, from February 1, 1891—are named in the act. In January, 1894, and each year thereafter, the mayor and aldermen are required to appoint a member of the board to hold the office three years from the 1st day of the following February. They may "appoint a superintendent of the works, and such other agents and servants as they may deem necessary, and may fix their compensation. They may make such rules and regulations for their own government, and in relation to all officers and agents appointed by them, as they may deem proper. They shall have the control and management of the construction and enlargement of said works, and may make all such contracts and agreements for and on behalf of the city in relation thereto as they may deem proper and advisable, and shall have full charge and control over the said works when enlarged and constructed. They shall establish rates and tolls and prescribe rules and regulations for the use of water, and may sell and dispose of such articles of personal property connected with said works as they shall deem expedient, and may purchase such property as may be in their judgment necessary for said works and the purposes contemplated by this act." Laws 1891, c. 209, §§ 4-6, 8. The water commissioners are not the city's agents, but an independent board. The city cannot direct or control them in the discharge of their duties. They have exclusive authority to determine where and in what manner water pipes shall be laid, and to do all other things touching the construction, maintenance, and management of the waterworks. For their misfeasance or that of their employés, the defendants are not liable, because they are not the defendants' servants. *Ball v. Winchester*, 35 N. H. 435; *Edgerly v. Concord*, 62 N. H. 820; *Walcut v. Swampscott*, 1 Allen, 101; *Morrison v. Lawrence*, 98 Mass. 219, 221; *Hann v. Mayor*, 70 N. Y. 459.

The defendants have no authority, and can confer none upon their officers and agents, to do any act relating to the construction or management of the works. Their ordinance

authorizing or directing their servants to lay water pipes in Market street or elsewhere, or prescribing the manner of laying them, would be illegal and void. At common law, a municipal corporation is not responsible for the acts of its agents or servants, or for their negligence in the performance of acts that it has no power to authorize. *Edgerly v. Concord*, 62 N. H. 819; *Anthony v. Adams*, 1 Metc. (Mass.) 284; *Lemon v. Newton*, 134 Mass. 476; *McCarthy v. Boston*, 135 Mass. 197, 200, 201; *Smith v. Rochester*, 78 N. Y. 506; 2 Dill. Mun. Corp. § 766; *Cooley, Torts*, § 119. Whether the acts of which the plaintiff complains were done by the water commissioners or the defendants' servants, the declaration discloses no cause of action, and the demurrer must be sustained. The question whether the demurrer might be sustained upon another ground urged by the defendants (*Laws 1893, c. 59, § 1*) is not considered. Demurrer sustained. All concur.

STATE v. PEO.

(Court of Oyer and Terminer of Delaware.
Sept., 1889.)

MURDER—PRESUMPTION OF MALICE—SELF-DEFENSE.

1. A homicide committed with a deadly weapon provided beforehand to be used in the encounter constitutes murder.

2. The burden is on defendant to rebut the presumption of malice arising from the use of a deadly weapon.

3. Where one endeavors to withdraw from a fight, but cannot do so by reason of the hostile opposition of his adversary, and to continue the attempt would result in death or great bodily harm, he may kill his adversary in self-defense.

One Peo was indicted for murder. Acquitted.

John Biggs, for the State. Austin Harrington, for defendant.

COMEGYS, C. J. (charging jury). The instructions prayed for by the attorney general and the prisoner's counsel make it necessary that the court should deliver to you a more formal charge than would otherwise be made, although the testimony laid before you on each side discloses a case differing in its facts from any hitherto tried in this state. As I do not purpose going over the testimony in detail, it will be sufficient, I think, to say, with respect to it, that it shows a fight between the prisoner and the deceased at or about the corner of Front and Market streets in this city, which had its origin either in words or personal violence or both, upon the sidewalk in front of the prisoner's store and peanut stand at the northeast corner where those streets intersect each other, or in the store itself. The one thing certain, as I think I may say, is that for some reason or other, which you may gather from the testimony on both sides, a fight took place between the deceased and the prisoner, which was begun

by one or the other of the combatants; the state's witnesses, or those who spoke to that point, supporting the theory that the first assault was by the prisoner; while those for the defense, who speak of the beginning of the affray, say it commenced by the act of the deceased in violently seizing the prisoner by the throat in his store, after using a very opprobrious epithet about him. However the fight began, it became a mutual combat, both of them participating in it; the state contending that the deceased was in no sense the aggressor, but that the prisoner was; while, on the other side, it is claimed that the first assailant was the deceased, and that throughout the prisoner was strictly on the defensive, endeavoring to avoid collision with his opponent, or to escape it after it ensued. The conflict of testimony on this point, as upon all others in this trial, I submit to you to decide upon, as it is not within the province of this court to do so, or more than to instruct how you shall decide a conflict wherever it occurs. Where there is opposing testimony upon a material point in a cause, the jury must examine the proof carefully, and give credit to that which, under all the circumstances, seems to them entitled to the most weight. In doing this they take into consideration the number and character of the witnesses on both sides, their intelligence, apparent freedom from bias or prejudice, their means of observation, and concurrence in statement; and where there seems to be better reason to rely upon those of one side than the other, then there exists greater weight of testimony on the part of the former,—preponderance of proof, as it is called,—and the jury should yield its credence to the testimony of that side. But it should always be kept in mind that this rule does not apply to all the aggregate of the testimony on both sides; for, if it did, a person accused and on trial might be convicted upon the weight of testimony alone, whereas this is never to be done; nothing being sufficient to warrant a conviction of a prisoner but entire satisfaction on the part of the jury, beyond a reasonable doubt, that he is guilty. It must not be only that the weight of the proof is against the prisoner, but that it also so preponderates over, or outweighs that on his part, as to leave no reasonable doubt of his guilt of the crime imputed to him. After this contest had commenced, the deceased and the prisoner got out into the street in the strife between them, and soon afterwards the deceased overcame the prisoner, and threw him on the pavement of the street, and on an iron gutter cover in it, with great violence, according to the prisoner's witnesses, or some of them, and held him down so firmly that, according to one of them, it took three or four men to take him away from the deceased. After they were separated, it was found that the deceased had received a mortal stab from the pick which the prisoner used at his store!

his sale of dates, and which he had in his hand at the time the deceased was taken from off him. There seems no room for doubt that during the whole time of the affray outside the prisoner's store he had the pick in his hands, for he never got back into the store from the time the contest began until it ended where the parties fell, with the deceased on top of him. By the testimony of the prisoner's witnesses it is stated that the deceased was a large, powerful man, much the physical superior of the prisoner. By the testimony of the state's witnesses speaking to the point it would seem that the deceased from the first was rather in the character of a defender of his person from the attempts of the prisoner to stab him with the pick, and that for such purpose he kept backing away from him; but the prisoner's witnesses state the contrary of this, and say that the deceased was the assailant in the whole contest, and that the pick was used by the prisoner by pushing the deceased back with the butt of the handle, except, as Mr. Scott testifies, after the deceased had repeatedly kicked the prisoner when he seemed to be endeavoring to avoid further contest by returning to his store, and only then he turned around and struck him with the pick on the head.

With this concise, and I hope sufficient, reference to the facts testified to before you,—for they are all fresh in your mind, and need no rehearsal by me,—I shall proceed to point out to you the law in cases of homicide, and leave you to apply such of it as has relevancy to the facts which you may deem sufficiently proved, and thus make up your verdict. I shall treat of that law in the inverse order of the instructions prayed for by the attorney general, because I think it is capable of greater simplicity of exposition in this case in that way. Every killing by one man of another is homicide. It is criminal or not, according to circumstances. There are some homicides which are justifiable, others excusable, and others which are neither, but are felonious, and punishable according to their quality. With the justifiable homicides we have nothing to do in this case, and therefore I shall say nothing about them. I shall deal with felonious homicides and with those excusable on the ground of self-defense. Felonious homicides are murder and manslaughter. They again are divided into such as are malicious and those which are not. Malice is of the very essence of murder, and therefore no homicide is murder unless it is committed maliciously; but manslaughters are not malicious crimes, and that only is what distinguishes them from murders. Originally only one class of murders was known to our law. But the legislature by the Code of 1852, divided the crime of murder into two classes, describing one of them and calling it murder of the first degree, and classing all others as murder of the second degree. Murder itself (which includes both degrees) is the unlawful and felonious killing by one man of another

with malice aforethought, which means malice preconceived. That is engendered before the act done. If that malice be express, then the offense is murder of the first degree; if it be not express, but is implied by law from the nature of the act done, it is murder of the second degree. Express malice exists where one, with sedate and deliberate mind and formed design, kills another. This state of mind and purpose are usually shown by the deliberate selection and use of a deadly weapon knowing it to be such; a preconcerted hostile meeting, whether in a regular duel or street fight, mutually agreed upon, or notified and threatened by the prisoner, privily lying in wait, a previous quarrel or grudge, the preparation of poison, or other means of doing great bodily harm, or the like. Malice implied in law is an inference or conclusion of law upon the facts found by the jury, and among these the actual intention of the prisoner becomes an important fact; for, though he may not have intended to take away life, or to do any personal harm, yet he may have been engaged in some other felonious or unlawful act from which the law raises the presumption of malice,—as if one attempts to kill or maim A., and in the attempt by accident kills B., a dear friend, or child; or if in a riot or street fight one of the parties accidentally kills a third person, who interfered to part the combatants and preserve the peace,—the law implies malice, and the slayer is guilty of murder. Other examples are given in the books, but it is sufficient to say that all malicious homicides other than those committed with express malice aforethought are murders of the second degree. The legal definition of malice is that it is a general malignity and recklessness of the lives and persons of individuals which proceed from a heart void of a just sense of social duty, and fatally bent on mischief. And wherever the fatal act is committed deliberately, or without adequate provocation, the law presumes that it was done in malice; and it behooves the prisoner to show from evidence, or by inference from the circumstances of the case, that the offense is of a mitigated character, and does not amount to murder. I have already shown to you how express malice is shown, and have stated that implied malice appears otherwise.

Manslaughter, as I have said, is not a malicious crime. It usually grows out of a sudden contest or affray between parties mutually contending, and where one in the heat of blood slays his adversary. If the fatal stroke be with a deadly weapon, the homicide will be murder, if it appear that the slayer provided himself with it beforehand, to be used in the encounter. All homicides with a deadly weapon, or an instrument likely to produce death, are presumed in law to be malicious. To save them from that inference, the prisoner must make it appear to the satisfaction of the jury that his possession of such weapon or instrument was not a preparatory one for the conflict.

The law of self-defense is this: That when one is suddenly assailed by another in such a manner as to endanger his life, or to do him some great bodily harm, and he cannot escape the fury of his assailant otherwise than by taking his life, he may kill him. But before he can do this he must do all he can to escape from the fury of his assailant, and may never take his life except in the last extremity, and where no other means for his safety are available to him. And the same is true where two persons are engaged in a fight, and one of them endeavors to withdraw from it, and does what he can for that purpose, and yet he cannot do so by reason of the hostile opposition of his adversary, and to continue it would result in death or great bodily harm to him, he may take the life of such adversary to preserve his own, or protect his person from such harm.

I have now given you, gentlemen, all the law that we think will aid you in deciding this case, and in doing so have answered affirmatively the main points or prayers of the attorney general. In fact, there is in this case no controversy as to the law. With respect to the defense suggested by the learned counsel for the prisoner, that there is ground for the theory that the deceased accidentally fell upon the prisoner's weapon, and was not struck by him with it, we think it only necessary to say that we have heard no fact proved that points to such conclusion. But, if such was proved, it cannot avail the prisoner, unless he was at the time using it lawfully in self-defense. If used otherwise, it would be an unlawful use, and subject him to the penal consequences of manslaughter at least. The case is now submitted to you, gentlemen, upon the law as we have delivered it to you and the facts related by the witnesses, and we have confidence you will well consider it, and that your verdict will be entirely satisfactory to your consciences. It remains but to add the instructions asked for by the prisoner's counsel,—that the prisoner cannot be convicted of any crime unless you are satisfied by the proof in the case, beyond a reasonable doubt, that he is guilty of it. A word more: In all indictments for murder of the first degree, as that in this case is, the jury may convict of that crime, or of murder in the second degree, or of manslaughter, as the evidence may warrant a conviction of a particular offense. If it do not so warrant, they are bound to acquit entirely.

Verdict, "Not guilty."

STATE v. COLTON.

Court of General Sessions of the Peace and Jail Delivery of Delaware. Feb., 1891.)

JUDGE OF ELECTION—REFUSAL TO ACCEPT VOTE—CRIMINAL PROSECUTION—DEFENSES—MISTAKE AS TO LAW.

1. On the prosecution of a judge of election for refusal to accept a legal vote, the state must prove that the voter actually offered his ballot.

2. A judge of election cannot defend a prosecution for willfully refusing to accept a ballot on the ground that he did not consider the naturalization papers of the voter, which were properly certified and sealed, sufficient.

3. Where an officer has the opportunity to ascertain what will be his duty under circumstances expected to arise, and fails to do so, he assumes the risk of acting on his own responsibility, and must be held to intend the consequences of such action.

Franklin B. Colton was indicted for refusing to accept a legal vote.

John Biggs, for the State. Benjamin Nields, for defendant.

COMEGYS, C. J. (charging jury). The state, in prosecutions under the ninth section of chapter 16 of the Revised Code, must prove to the satisfaction of the jury: (1) The right to vote of the alleged voter,—in this case, that Stepanes had been duly naturalized, his residence as required by the constitution, and his payment of a county tax assessed at least six months before the election held as aforesaid. (2) That, being thus qualified, he offered to vote at said election, and that his vote was refused by the defendant.

With respect to the first requirement, it may be said to be without dispute that De Stepanes had a valid right to vote at that election of the 4th of November last. That is not disputed.

In regard to the second, the proof produced by the state, through its witnesses examined upon that point, is that Stepanes did offer to vote by handing in at the window, as other voters do on similar occasions, his ballot; that at the same time he handed in his tax receipt; and that the certificate of his naturalization, by which he was clothed with citizenship in the United States and this state, was presented to the election officers at the same time. On the other hand, some of those present, like the other witnesses, either as officers or clerks of the officers, testified, one of them, that no offer to vote was in fact made by Stepanes, and the others, that they did not hear or see any such offer made. This creates a conflict of testimony upon that point, and it must be clear to the jury that such offer was in fact made; otherwise, the state has not supported the charge in the indictment of the refusal by the defendant of the vote of Stepanes. It is difficult to understand why the election officers should have considered the right of Stepanes, unless he had attempted to assert it, by offer of his ballot. But the question whether he did offer to vote or not is for the jury alone, and not one for the court to pass upon.

Supposing you believe from the testimony that, upon the occasion alleged in the indictment, Stepanes did offer to vote, and that the defendant refused to receive his ballot, and upon the alleged ground that the certificate of his naturalization which he produced to the officers, as part of the evidence of his right to vote, was invalid, because it was different in its language from a blank form which the defendant had shown at any earlier stage of the

election, and then exhibited as having been delivered to him as a guide in determining upon the legality of naturalization papers; you are then to determine whether, notwithstanding such alleged excuse on his part for rejecting the vote, he is answerable for willfully and knowingly refusing the vote of Stepanes. In order that you may reach a satisfactory conclusion on this point (and the case turns upon the motive of the defendant), it is proper that we should say to you what the law generally is in cases of public officers whose duties require the exercise of judgment, and not simple action without discretion or option.

It is a general rule of law that judicial officers (which may be taken to include all who have power to judge and decide before final action) are not responsible for what are called "errors of judgment alone"; that is, they are not held to infallible judgment. When they act honestly, and yet erroneously or by mistake, they are answerable to no punishment, nor to damages in a civil action by a party aggrieved. Whether, however, their action is from mistake or error of judgment or is a willful act,—that is, an act which they know to be wrong,—then they are liable, and must answer the consequences of their misconduct. What is, then, the proof to be that the defendant, in a prosecution for such misconduct, knew he was acting wrong? That question was answered by this court in the case of *State v. Porter*, 4 Har. (Del.) 557 (cited here by the defendant's counsel), tried in this county in 1845, in which the jury put to the court a question which called for an expression upon this very point. The court said: "What we understand the jury to mean by positive proof of corruption is not possible in a direct sense, for the motives of a man's conduct and the impulses of his heart cannot be the subject of direct, positive proof; but there must be proof so clear or positive as to produce conviction of acts or declarations or circumstances from which the party can, and, indeed, has to, draw the inference of corruption. It is difficult to define corruption, but we may say that it is the willfully and corruptly doing an act or omitting a duty which a person, acting in a public capacity, knows it to be his duty to do or omit, in disregard of his official duty, and the obligations of his oath. As to the connection of other persons in such violations of duty, where the corruption is proved, their participation can be no shelter or excuse for the defendant; but their consent to the act may be regarded in considering the probability of the defendant's corruption."

Additionally, we may state to you that if, before a defendant charged with willful and deliberate violation of duty, has acted, he has had produced before him the legal documentary proof by which he is required to act in making his decision, and yet he disregard that proof and act against the necessity it imposes upon him, his course will be entirely without justification or excuse, and must therefore be taken to be willful, and with knowledge. Any

other estimate of his behavior, if sanctioned by courts and juries, would place it absolutely in the power of election officers to disfranchise, for the time being, voters of different political views from their own. In this case the defendant had before him the legal proof of the naturalization of Stepanes in the form used by the district court of this district in cases of naturalization of foreigners, with the hand of the clerk of the court signed to it, and the seal of the court affixed. This was the legal documentary evidence that Stepanes had a right to vote, if he possessed the qualifications, required by our constitution and laws, in the case of natural-born citizens. There was no controversy about his possessing them; therefore, the rejection of his vote must, independent of the proof, be put upon the ground alone that such certificate of naturalization was invalid. Now, as it has not been claimed during the trial that it is in any respect invalid, the question comes down to this: Had the defendant any right to question the sufficiency of such naturalization paper, thus authenticated according to the usage of all courts, whose acts are authenticated by certificate under their seals and the hands of their clerks? There can be but one answer to this,—that he had not. If not, then there is no ground for the plea of error of judgment, for there can be no error of judgment where there is no right to judge. I do not mean that in no case may question be made whether naturalization papers entitle a party producing them to vote (because election officers may certainly inquire into the identity of the party having them with him with the person naturalized); but where they are, as those in this case were, properly authenticated by the seal of the district court of the United States, duly affixed by the clerk, and certified to under his hand, their validity cannot be impeached outside of that court, and no man or tribunal can be allowed any judgment to the contrary of their legality. Such being the law, how can it be argued before you that the defendant erred in judgment of the validity of Stepanes' papers? It would seem as if the only ground upon which a jury could reach the conclusion of want of knowledge of duty in such case, or of disregard of it, would be gross ignorance in the officer, or such stupidity of mind as would disqualify him from comprehending such duty.

But the plea is made for the defendant that he was misled by the blank which was delivered to him by one of those officious persons who obtained it from the office of the district court, and who were themselves, it is most likely, quite sharp enough to know it only applied to one class of cases of naturalization. The slightest comparison of that form with the certificate of Stepanes would have made manifest that they were dissimilar, and that the paper in possession of the defendant was not, in any respect, authenticated. Now, before he adopted the latter as his guide of validity, his obvious duty was to ascertain that it was genuine, and was a safe guide to a

by. This he did not do. Now, where an officer, judicial or otherwise, has the opportunity to ascertain what, under circumstances arising or which are expected to arise, is his duty, and yet neglects to avail himself of it, and chooses to act without such knowledge, he takes the risk of acting on his own responsibility, and must be held to intend, upon a well-known legal principle, the consequence of such action, as the result of his own determination to go by his own will. No other conclusion is a rational one, unless want of knowledge of right and wrong be shown to the jury in some way. While it is not exactly true to say that every man is bound to know what the law is, yet it is true that ignorance of the law will excuse no man as a plea; and it is also true, as before said, that in the case of one performing a public function or duty, where the rights of others depend upon the legality of his acts, he is bound (if ignorant of his duty) to ascertain, before he acts, what it is, where it is in his power to do so, or abide the risk of a verdict against him and its consequences for neglect of this duty, for willful neglect of a duty is equivalent to willful misconduct, and ground for inference of unlawful purpose.

Having thus given you the law in this case, it only remains to say that, unless you are satisfied beyond a reasonable doubt from the defendant's conduct and the other circumstances shown in the proof (of the credibility of which you are the sole judges) that the defendant willfully and knowingly refused to receive the vote of Stepanes, you should acquit him; otherwise, you should find him guilty. The weight to be given to the testimony of the witnesses is for you alone; and the case is delivered to you to be dealt with according to your conscientious convictions, after having weighed and duly considered all the proof; and the law as now given to you.

Jury disagreed.

GORE v. CONDON et al.

(Court of Appeals of Maryland. Nov. 15, 1895.)

MORTGAGE—NO TITLE IN MORTGAGOR—GOOD FAITH OF MORTGAGEE.

A mortgage on land previously purchased by plaintiff from her father, but standing in the father's name, executed by the father, without plaintiff's knowledge, to defendant, who knew at the time that the land had been sold to plaintiff, that part of the price had been paid, and that possession had been taken under claim of title, is void as against plaintiff.

Appeal from circuit court of Baltimore city.

Bill by Martha E. Gore, by next friend, against Levi Z. Condon and another, to annul a mortgage, and enjoin the sale thereunder. From a decree dismissing the bill, complainant appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, BOYD, and McSHERRY, JJ.

Hanson P. Jordan and Rufus E. Jordan, for appellant. Julian I. Alexander, for appellees.

McSHERRY, J. The relief sought in this case under the bill filed in the circuit court of Baltimore city by the appellant against the appellees is a decree to vacate and annul a certain mortgage, and to enjoin a threatened sale of the property upon which that mortgage purports to be a lien. As there is one phase of the case that is, in our opinion, decisive of the whole controversy, we need do no more than state enough of the circumstances to present that phase intelligently. It appears beyond cavil or dispute that in 1886 the appellant, Martha E. Gore, purchased from her father, Daniel Frazier, certain premises lying in the city of Baltimore at and for the sum of \$1,400, and that she forthwith entered into possession of and occupied those premises under the contract. The agreement relating to and evidencing this sale was duly reduced to writing, and signed by the vendor and purchaser. At the time of the execution of the agreement, Frazier owed his daughter \$400, which sum it was then distinctly understood should be treated as a part payment of the purchase money. Subsequently, Mrs. Gore paid other sums in reduction of the principal indebtedness, and smaller amounts in discharge of the interest. In September, 1887, Frazier, without the knowledge of Mrs. Gore, mortgaged this same property to one Collison, for \$500, and this mortgage, after the death of Frazier, Mrs. Gore agreed to assume the payment of, as a part payment of the remaining purchase money then due to her father's estate. In May, 1889, Frazier, without the knowledge and without the authority of Mrs. Gore, placed a second mortgage on this same property. This second mortgage was given to Levi Z. Condon, one of the appellees, and secured the payment of \$600 alleged to be due by Frazier to Condon, and by the terms of the mortgage made payable in 12 months. To this mortgage there was appended the usual affidavit made by the mortgagee, Condon, to the effect that the consideration stated in the body of the mortgage was true and bona fide as therein set forth. Mrs. Gore did not become aware of the existence of this mortgage until some months after her father's death. After her father's death, his executor filed a bill against her to secure the specific performance of the contract of purchase, and a decree was ultimately passed requiring her to pay over the residue of the purchase money ascertained by the auditor's report to be due to her father's estate. Upon a statement by the auditor of an account wherein Mrs. Gore was credited as having assumed the payment of the Collison mortgage as a part payment of the residue of

purchase money, and wherein the balance due by her to her father's estate for the property purchased by her was ascertained, she paid to the executor of her father's estate the balance appearing by the auditor's report to be still unsettled, and she received a conveyance for the property from the executor. Condon filed a petition in the circuit court of Baltimore city, and obtained a decree under the consent clause in the \$600 mortgage from Frazier to him; and it is this threatened sale that the pending proceeding was inaugurated by Mrs. Gore to restrain. In her bill of complaint, it is unequivocally alleged that Frazier was not indebted to Condon in the sum of \$600, or in any other sum, when the mortgage for that amount was given; and it is further asserted that, when Condon took that mortgage, he had actual knowledge that Mrs. Gore claimed to be the owner of and to have purchased the very property which he has caused to be advertised for sale to satisfy his mortgage thereon. The evidence in the record leaves no room to doubt that, in point of fact, there was not due by Frazier to Condon the sum of \$600 when the latter procured from the former the mortgage for that amount, in 1889. Without stating in detail the evidence on this branch of the case, it is only necessary to say that, prior to the date of this mortgage, there was pending between different parties a controversy respecting the ratification of a mortgage sale in the circuit court for Carroll county, in which contest Frazier had become interested, and that, upon the decision of the objections to that sale adversely to the wishes or interest of Frazier, he induced the defeated party to appeal to this court, and procured William B. Thomas to become a surety on the appeal bond, upon the condition that he (Frazier) would indemnify Mr. Thomas from all loss by reason of such suretyship; that Thomas did sign the appeal bond, and thereupon Condon gave him a bond of indemnity against loss by reason of the costs that might accrue on such appeal; and, to indemnify Condon against loss on that bond of indemnity to Thomas, Frazier gave to Condon the \$600 mortgage on the property which he (Frazier) had sold to Mrs. Gore more than three years before. It further appears to the entire satisfaction of this court, by the decided weight and preponderance of the evidence found in the record, that before Condon entered into these arrangements with Frazier respecting the indemnification of Thomas, and considerably before he took from Frazier the mortgage now in dispute, he (Condon) had the most ample, full, and complete notice and knowledge that the property upon which the mortgage he now seeks to foreclose was attempt-

ed to be fastened as a lien belonged to and had been purchased by Mrs. Gore from her father, had been partially paid for by her, had been improved at her own expense, and was then in her possession, under a claim of ownership. With these facts before us, established, as they are, by an overwhelming weight of evidence, is Condon entitled to enforce his mortgage, to the prejudice and injury of Mrs. Gore? This is the only question we need consider or discuss.

That Frazier was not indebted to Condon in the sum of \$600, as stated in the mortgage, admits of no doubt whatever. The mortgage was, at best, merely one of indemnity against any loss that Thomas might incur by being compelled to pay the costs which might accrue upon an appeal to this court in another case. But we need not pause to enter into an inquiry as to the extent of that liability, because the other and controlling question with respect to the good faith of Condon in taking a mortgage on property which he knew did not in fact belong to the mortgagor, though the title stood in the latter's name, is decisive of the controversy. A person who acquires a legal title or an equitable title or interest in a given subject-matter, even for a valuable consideration, but with notice that the subject-matter is already affected by an equity or equitable claim in favor of another, takes it subject to that equity or equitable claim. This general doctrine was formulated by Lord Hardwicke in *Le Neve v. Le Neve*, 2 Amb. 436, in the following terms: "The ground of it is plainly this: That the taking of a legal estate, after notice of a prior right, makes a person a *mala fide* purchaser. This is a species of fraud, and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate, and, after knowing that, he takes away the right of another person by getting the legal estate." In *re Leiman's Estate*, 32 Md. 225; *Weaver v. Leiman*, 52 Md. 711; *Price v. McDonald*, 1 Md. 403; *Johns v. Scott*, 5 Md. 81. In taking the mortgage when he knew that Mrs. Gore had purchased the property, and had partially paid for it, Condon was guilty of bad faith; and he acquired no right, legal or equitable, which he can enforce against her or against the property described in the mortgage. The bare statement of this proposition is all the discussion that is necessary. It follows from this view of the case that the decree below which dismissed the bill must be reversed, and the cause must be remanded, to the end that a decree may be passed perpetually enjoining the threatened sale under the Condon mortgage, and also annulling that mortgage as fraudulent as to her. Decree reversed, with costs above and below, and cause remanded.

HEISKELL v. ROLLINS.

(Court of Appeals of Maryland. Nov. 15, 1895.)
OPEN ACCOUNT—PROOF OF ENTRIES—SECONDARY EVIDENCE.

On proof that the person who made the entries in an open account was outside the state, proof of his handwriting was admissible as prima facie evidence of the truth of the entries.

Appeal from circuit court, Prince George's county.

Action by Peter H. Heiskell, Jr., against Hester J. Rollins on promissory notes and an open account. Plaintiff had judgment on one only of the notes, and appeals. Reversed.

Argued before BRYAN, BRISCOE, ROBERTS, FOWLER, and McSHERRY, JJ.

Wm. J. Hill, for appellant. George C. Merrick, for appellee.

McSHERRY, J. During the last April term of this court an appeal in this case was dismissed because it had been prematurely taken. The record is again before us upon a subsequent appeal, entered in due season, and the questions that it brings up, or purports to bring up, are contained in two bills of exception. The suit below was instituted by the appellant against the appellee upon two promissory notes and an open account. Several pleas were filed, and upon these issues appear to have been joined. The verdict of the jury and the judgment thereon were in favor of the appellant for the amount of but one of the promissory notes. During the progress of the trial, the appellant, to establish the items of the open account, produced a witness to prove the handwriting of the clerk who had made the entries on the plaintiff's day book. This witness testified that he had been informed the clerk was in England; that an effort had been made to produce him as a witness, and that when last in this country he was beyond the jurisdiction of the court. The defendant objected to any proof of the clerk's handwriting. The court sustained that objection, and the plaintiff excepted. This is the ruling complained of in the first bill of exception. We think there was error in this ruling. The proffered evidence falls within one of the well-recognized exceptions to the general rule excluding hearsay evidence. It has been long held that entries made by a clerk in the regular course of business, he having no interest at the time in stating an untruth, should be received in evidence after the clerk's death on proof of his handwriting. 1 Smith, Lead. Cas. 142. The rule has been extended to cases of insanity (Holbrook v. Gay, 6 Cush. 216), and several of the cases referred to in the note in 1 Smith, Lead. Cas. have held such entries equally admissible where the witness is absent from the state. This court adopted that doctrine in Reynolds v. Manning, 15 Md. 523, which was approved

in Morris v. Dry Dock Co., 70 Md. 357, 25 Atl. 417. It is obvious that precisely the same reasons that justify, after the decease of the clerk, the admission in evidence of the entries made by him in the regular and accustomed course of his employment, warrant the admission of similar entries if his attendance as a witness cannot be procured by reason of his being beyond the seas, or out of the jurisdiction of the court, where the cause in which his evidence is required may be pending. The inability to produce the witness if he be dead permits proof of his handwriting to be given as sufficient to establish prima facie the truth of the entries he has made; and a like inability arising from his absence from the state, and from his being, therefore, beyond the reach of the process of the court, and not accessible to a commission, is equally a good ground for admitting proof of his handwriting. The proffered evidence was, consequently, competent, and should have been admitted.

The second exception is so obscurely and vaguely stated that we are unable to determine what precise question was ruled on, or how it related to the controverted issues. We are, consequently, prevented from expressing any opinion on the question argued in the briefs, but not set forth with sufficient clearness in the exception. Because of the error indicated in the first exception, the judgment must be reversed, and a new trial will be awarded. Judgment reversed, with costs above and below, and new trial awarded.

LEPPER v. MOOYER et al.

(Court of Appeals of Maryland. Nov. 15, 1895.)
SALES UNDER DEED OF TRUST—DESCRIPTION OF LAND.

A sale of a truck garden under a mortgage will not be set aside for failure of the advertisement to specifically mention vegetables valued at \$300 or \$400 growing on the land, where the purchaser was not a party to the mortgage, and did not in any way interfere with the sale, and it is not shown that the price was so inadequate as to offend the conscience of the chancellor.

Appeal from circuit court, Baltimore county, in equity.

Proceeding by Amelia Lepper against George Mooyer and another to set aside a sale of land under a power in a mortgage. From an order refusing to set aside the sale, petitioner appeals. Affirmed.

Argued before BRYAN, McSHERRY, BRISCOE, ROBERTS, PAGE, and BOYD, JJ.

R. R. Boarman and F. E. Pegram, for appellant. John S. Biddison, for appellees.

BOYD, J. The property involved in this controversy was sold at public auction, under a power of sale in a mortgage, by an

attorney therein authorized to sell in case of default. The principal exception to the ratification of the sale urged in this court was that the property was not properly advertised, and therefore sold for a grossly inadequate price. There were included in the mortgage 12 acres of land, which were used as a truck farm, and one of the exceptions relied on in this court was that, at the time of the sale, there were vegetables growing in the ground, amounting in value to from six to twelve hundred dollars, which were not mentioned in the advertisement. It does accurately describe the location of the property, give the dates, places of record, and names of parties to the mortgage under which the sale was made, and of the parties to two deeds conveying the property; the last one being a reference to the conveyance to Amelia Hofstetter, the appellant in this case. It speaks of the improvements as consisting "of a frame dwelling house, stable, and other outbuildings," and, after referring to the location of the property, says: "It is convenient to schools, churches, post offices, etc., and is in a good state of cultivation, and a very desirable truck farm." The testimony not only fails to show that anyone was misled by the advertisement as to what property was intended, but it is shown affirmatively that anyone could readily identify the place from it. Mrs. Lepper (formerly Mrs. Hofstetter) was at the sale with a friend, who was ready to aid her in purchasing the property, and there were at least 20 persons present. The auctioneer testified that bids were made by 4 different persons.

Although it cannot be successfully contended that the property was so advertised as to mislead anyone as to what property was intended to be sold, yet it is claimed that the failure to specifically mention the vegetables materially affected the price realized. Now, without stopping to discuss whether or not the reference to this property as being "in a good state of cultivation, and a very desirable truck farm," was sufficient to inform those likely to bid for such property that the vegetables then growing would pass to the purchaser, a careful analysis of the testimony will show that the value of such vegetables was certainly small, and wholly a matter of conjecture. Mrs. Lepper, her brother-in-law, John Hofstetter, and her two sons fixed such value on the day of sale at \$600, or more. Joseph Kahler testified that he, Fred Walker, and Charles Christ made an estimate of their value for Mrs. Lepper on March 9, 1895, and said, in answer to the question what the crops were worth when they appraised them, "I guess between three and four hundred dollars." Mr. Christ testified that it would be impossible to say whether they would be worth that much when put into market, as they might be affected by the weather. Andrew Buck, another witness

produced by appellant, thought them worth about \$300, taking into consideration weather and prices. George A. Langenfeller, produced on behalf of the appellees, did not think they were worth \$200, and Michael Scheeler agreed with him. An average of the testimony on this point shows that the vegetables were probably worth three or four hundred dollars, but of course that was dependent upon the weather, prices, and other things the parties could not control. It is perfectly manifest that at the time of the sale they were not of such great value as would have justified the court in setting the sale aside merely because they were not specifically mentioned in the advertisement. Nor do we think that the appellant has sustained the charge made by her, that she had been informed by Mr. Gontrum that he would not sell the crops. He denies it, and says he told her she would have to take her chances with the purchaser. She admits that nothing was said about excepting the crops when the property was offered for sale.

But let us inquire into the value of the whole property, as disclosed by the testimony, for the purpose of determining whether the appellant is entitled to the interposition of a court of equity by reason of the alleged inadequate price. Under the many decisions in this state it is well settled that inadequacy of price, of itself, is not sufficient to vacate a sale, unless it be so gross as to indicate some mistake or unfairness in the sale, or misconduct or fraud in the party selling, although, when there is any other good reason to question the propriety of ratifying the sale, it is proper to take the price realized into consideration in connection with it. The evidence on behalf of the exceptant was to the effect that the property was worth from four to five thousand dollars, in the opinion of the witnesses produced by her, while 10 witnesses called by the appellees thought it brought a good price at the sale. Some of them said it brought more than they supposed it would, while others spoke of it as "a top price," "extraordinary good price," etc. The whole property was only assessed at \$2,775, including improvements, and several of the witnesses testified that Mrs. Lepper said, after the sale, she was satisfied with the price, but objected to the purchaser. It is true she denied that statement, but she is contradicted by at least three witnesses, and the attorney making the sale testified that she told him before the sale that she wanted it to bring \$3,500, and, if it did not, she would buy it in herself; "that she had a man with her who would back her up." Although it is not necessary to determine whether all the witnesses were competent to express opinions as to the value of real estate, an examination of the testimony satisfies us that some of those produced by the appellees have shown themselves to be much more

familiar with such transactions than others offered by the exceptant.

Taking all the evidence into consideration, we are of the opinion that the property brought a fair price. While we remember that in passing on sales of this character it is proper for the courts to carefully scrutinize the conduct of those making them, yet in this case the purchaser is not a party to the mortgage, has not been shown to have in any way interfered with the sale, and is entitled to have his purchase ratified by the court, unless there be something that would offend the conscience of a chancellor, or at least lead him to a conclusion that injustice has been, or probably was, done some one by reason of the default, misconduct, or other act of the party having charge of the sale. We find nothing in the conduct of this sale to justify any inference that it was not fairly and judiciously made, and the evidence as to the value of the property is, to say the least, too conflicting to permit us to hold that it has been sacrificed, or brought a price so inadequate as to authorize us to disturb the order of the court below.

Order affirmed, with costs to the appellees.

CENTRAL RY. CO. OF BALTIMORE v. STATE, to Use of BUCK et al.

(Court of Appeals of Maryland. Nov. 15, 1895.)

HORSE AND STREET RAILROADS—LIABILITY FOR NEGLIGENCE—MAINTENANCE OF TRACKS—WHAT CONSTITUTES CONTRIBUTORY NEGLIGENCE—CONSTRUCTION.

1. Where, in an action against a street-railway company to recover for injuries suffered by being thrown out of a carriage as resulting from the improper construction of a switch in the street, the evidence for defendant tends to simply show that the switch had been skillfully constructed under the supervision of a competent engineer, and had been frequently inspected, and kept in repair, while the evidence for the plaintiff tends to show that the rails were so far elevated above the surface of the street as to be obviously dangerous, the jury might well conclude that the company must have been aware of such a condition of the tracks.

2. Whether or not the accident in which plaintiff's intestate was injured was due to defendant's negligence in the maintenance of its tracks at an improper elevation over the level of the street, is a question for the jury.

3. Where one was driving with his family in a top surrey, behind a gentle horse going at a brisk trot, and was thrown from his conveyance by the catching of one of the two front wheels in elevated diagonal switch tracks maintained by defendant, his action in holding to the reins and pulling back on the horse, so that his chest was trodden on, does not constitute contributory negligence as a matter of law.

Appeal from superior court of Baltimore city.

Action in the name of the state, for the use of Virginia J. Buck and others as the widow and children of Joseph W. Buck, deceased, against the Central Railway Company of Baltimore, to recover for his death. There was judgment for plaintiffs, from which defendant appeals. Affirmed.

Argued before BRYAN, BRISCOE, ROBERTS, FOWLER, and McSHERRY, JJ.

T. W. Blakistone and George Blakistone, for appellant. George R. Willis, Joseph W. Hazell, and Ferdinand C. Dugan, for appellee.

McSHERRY, J. There are two questions presented by the record now before us, and they both arise on the prayers for instructions to the jury. The facts of the case, briefly stated, are these: The appellant is a street-railway company, whose tracks are laid upon certain thoroughfares of the city of Baltimore. It was not disputed that on Fulton avenue, between Pennsylvania avenue and Clifton street, there was a switch used as a cross-over or connection between the two tracks of the company. According to the testimony of the plaintiff's witnesses, the rails of this cross-over projected some four inches above the surface of the street, and were not guarded on the outer sides by planks or paving. It was further shown that, as thus situated, the switch was dangerous, because in driving a vehicle straight down Fulton avenue the wheels would strike these elevated diagonal switch rails at an acute angle, which would cause the wheels to "slew around," and this would probably throw the occupant of the vehicle out. There was other evidence offered tending to show that the president of the company had stated that the switch as located was a nuisance, though he, in his own testimony, explained that his remark had reference not to the switch, but to the shifting of cars on the street. It further appeared that the only way in which these switch rails could be safely crossed was by diverging from a straight course upon approaching them, and then striking them at right angles with both front wheels. In the darkness these elevated rails were not visible, and were considerably more dangerous than in the daylight. There was evidence adduced by the defendant which conflicted with that offered by the plaintiff as to the elevation of the switch tracks, their dangerous condition, and the difficulty of crossing them. The circumstances attending the accident which give rise to this suit are not involved in any contradiction, and they are these: At about 8:45 p. m. on July 20, 1893, Joseph W. Buck, the husband and father of the equitable plaintiffs, a man 72 years of age, agile, active, and in good health, and a careful driver, was driving down Fulton avenue in a top surrey, in company with his son, his son's wife, and a two year old child of the latter. Joseph W. Buck and his son occupied the front seat, and the former was driving. The horse was gentle, and was going in a brisk trot. One of the front wheels of the conveyance struck the elevated diagonal switch tracks, and the sudden jar threw the senior Mr. Buck out between the front and hind wheels of the vehicle.

He held to the reins, and that pulled the horse back on him, and his breast and stomach were trodden on. In three days he died from the injuries thus received. This suit was then brought in the name of the state for the use of the widow and adult children of the deceased. At the close of the evidence the court granted the plaintiff's prayer, and rejected the first and third prayers of the defendant. From the judgment in favor of the plaintiff the defendant has appealed. We are asked to reverse that judgment—First, because the appellee's prayer was granted; and, secondly, because the first and third prayers of the appellant were rejected.

A special exception was interposed to the granting of the appellee's instruction. It claims that there was no evidence in the case to show that the appellant had any notice or knowledge that the switch tracks were in a dangerous or unsafe condition. We think there was ample evidence to go to the jury on this subject. It was for the jury to decide between the conflicting evidence. While that adduced by the appellant tended to show that the switch had been skillfully constructed under the supervision of a competent engineer, and had been frequently inspected, and kept in repair, the conflicting testimony of several witnesses produced by the plaintiff tended to show that the rails were so far elevated above the surface of the street as to be obviously dangerous. If this evidence was credited by the jury, it showed such a condition of the tracks that the jury might well have concluded the superintendent or other officers of the company must have been aware of it. Besides this, the jury were the only ones who could pass upon and decide between the conflicting evidence of the witness who had testified that the president of the company admitted before the accident happened that the tracks were a nuisance, and the president's explanation of that interview. The instruction properly defined the law of the case, and, there being evidence to support its hypothesis, the court committed no error in granting it.

The defendant's first prayer asked the court to say that there was no legally sufficient evidence to prove that the injury complained of was caused solely by the negligence of the defendant in maintaining its track in a proper condition, and the third asked the court to rule that the deceased, by his own want of care, directly contributed to the happening of the accident. Both of these prayers were rightly rejected,—the first because there was some evidence which, if believed by the jury, was sufficient to show that the accident was caused solely by the company's negligence; and the third because there was no such want of care on the part of the deceased as to make his conduct in law contributory negligence. These questions of negligence and contributory negligence have been so often considered by

this court that we do not deem it necessary to go into any further or more elaborate discussion of them. The judgment appealed from will be affirmed. Judgment affirmed, with costs above and below.

FELLOWS et al. v. LOOMIS et al.
(Supreme Court of Pennsylvania. Oct. 7, 1895.)

JUDICIAL SALE—PURCHASE SUBJECT TO TRUST—NOTICE.

The owner of land subject to a privilege, in favor of the owner of the underlying coal, to pile culm thereon, the mortgagee of the land, and the owner of the coal agreed that part of the land should be conveyed to the owner of the coal, and the remainder should be freed from the servitude and alone be subject to the mortgage. In order to carry out this agreement, the wife of the landowner having refused to join in its execution, it was agreed that the land should be brought to sale on the mortgage, and that the mortgagee should bid it off, carry out the agreement with the owner of the coal, and reconvey the balance of the land to the owner, thus released from the servitude, subject to the amount of the mortgage. The mortgage not being due, the owner of the land executed a note for accrued interest, judgment thereon was entered, writ issued, levy made, and the land sold thereunder, subject to the servitude. *Held*, that the attorney of the mortgagee, who advised him that sale could not be made under the mortgage, as it was not due; who, to obviate the difficulty, drew the note for interest, entered the judgment, etc.; who had in his possession the mortgage and the title papers of the landowner, knew of the servitude, and that there was an agreement to release part of the land therefrom; who, on the night before the sale, took an assignment of the judgment and mortgage, and at the sale purchased the land, and thereafter, in accordance with the previous agreement, exchanged a deed for part of it for a release of the servitude on the remainder,—had constructive notice of the trust existing between the mortgagee and landowner, and took subject to it.

Appeal from court of common pleas, Lackawanna county.

Ejectment by Joseph Fellows and another against F. E. Loomis and another. Judgment for defendants. Plaintiffs appeal. Reversed.

C. Smith, for appellants. H. W. Palmer, H. M. Hannah, and S. B. Price, for appellees.

WILLIAMS, J. This case was before us in 1893, and may be found reported in 156 Pa. St. 74, 27 Atl. 24. The complaint then was that the learned trial judge had withdrawn the case from the jury, and directed a verdict in favor of the defendants. The evidence showed that Joseph Fellows was the owner of a tract of land in the city of Scranton underlaid with coal. The coal had been sold to the Delaware, Lackawanna & Western Railroad Company by a previous owner together with the privilege of using the surface for piling the culm and other refuse brought to the surface in the process of mining the underlying coal. Only a part of the tract had been used for the deposit of culm but the servitude to which it was subject

and the uncertainty as to when and where it would be insisted on by the owners of the mineral estate, rendered the unused part of the surface of little value. To relieve a part of the tract from this servitude, and render it salable for building purposes, Fellows entered into negotiations with the railroad company, and, after some delay, arranged to convey a portion of the tract to the company in fee simple, in consideration of a release of its rights in the remainder of the tract. The result of such an arrangement would be to place Fellows in a position to make a good title to the surface of land, the value of which was estimated by some of the witnesses at \$50,000 or more, while the whole tract, subject to the servitude, was of comparatively little value. His first plan was to convey by himself and wife to the company, and to have the lien of the only incumbrance, which was a mortgage held by Brown for about \$2,800, formally released from the part so conveyed. Brown seems to have been ready and willing to co-operate with Fellows in making the title to the company, but Mrs. Fellows, who was living apart from her husband, refused to join in the deed. It became necessary to resort to some other method for making the title to the company, and that finally settled upon was to make use of the mortgage of Mr. Brown to bring about a judicial sale of the land, and so divest Mrs. Fellows' right of dower. For this purpose, Brown was to bring the land to sale on his mortgage, bid it off, and carry out the arrangement negotiated by Fellows with the railroad company, and reconvey to Fellows the part of the tract thus relieved from the servitude, subject only to the payment of the balance due him upon his mortgage. All parties interested were benefited by the proposed arrangement. The railroad company obtained the fee simple to so much of the tract as it really needed. Fellows secured an unincumbered title to the balance, subject only to the mortgage debt he already owed, while both Brown's security and Mrs. Fellows' dower interest were largely increased in value by the transaction. The court below held, however, that, as Mrs. Fellows did not assent to the arrangement, it was a fraud upon her, notwithstanding her prospective estate in dower was increased in value more than tenfold, and that one who had taken title to the land at sheriff's sale, under this arrangement, could, because of this alleged fraud, hold it absolutely against Fellows and, as a necessary result, defeat both his title and his wife's dower interest therein. We reversed the judgment rendered by the court below, and sent the case back for a new trial, saying, plainly, that the alleged arrangement was not such a fraud upon the wife as could affect the right of Fellows to proceed against an unfaithful trustee, but that it created a relation of trust and confidence between Fellows and Brown which the law would en-

force against Brown and any one holding under him who was in any manner affected with notice. A second trial has now been had, and has resulted in a verdict in favor of the defendant.

The appellants complain that this is due to an erroneous instruction by the learned judge of the court below on the subject of notice, and on the legal effect of the position of Loomis towards the parties and the transaction. It is important to see, therefore, just how the case stood upon the evidence when the instructions complained of were given. First. The general arrangement between Fellows and the railroad company, and the refusal of Mrs. Fellows to join in the deed, were established. Second. The agreement between Fellows and Brown, to overcome the difficulty arising from Mrs. Fellows' conduct, by the use of Brown's mortgage as an instrument for divesting the right of dower of Mrs. Fellows, was not denied. Third. The execution of a note for accrued interest on the mortgage, the entry of judgment upon it, the issuing of a writ of *fi. fa.* on the judgment, the levy and sale of the tract of land by virtue of the writ, were shown to be the successive steps taken to carry out the agreement between Brown and Fellows. Fourth. Loomis, the defendant, was an attorney at law, in practice in Scranton. Both parties came to him to have him draw the note, enter the judgment, issue the writ, and bring the property of Fellows to sale by the sheriff. He knew for what the note was given. He had the mortgage of Brown and the title papers of Fellows in his possession at the time, and knew, in a general way, of the purpose the parties had in view in resorting to legal proceedings. Fifth. Loomis caused judgment to be entered on the note on the 8th day of March, 1886, issued the writ thereon, caused a levy to be made on the tract of land, and brought it to sale, subject to the servitude in favor of the owners of the coal, on the 10th day of April, 1886. On the day before the sale, Loomis obtained an assignment of the judgment from Brown, and at the sale became purchaser for a price amply sufficient to cover the actual costs of the proceeding. After the sale, he carried out the arrangement made by Fellows with the railroad company, conveying to it the land which it had been agreed should be conveyed in fee, and taking to himself the release from the company of its claim upon the remainder of the tract. Sixth. But when Fellows called on Loomis for a reconveyance, subject to the payment of the Brown mortgage, he flatly refused, and denied all right or interest of Fellows in the land or its proceeds. Now, it is clear, too clear for serious contention, that, if Brown had become the purchaser, he could not afterwards hold the land, and repudiate the general arrangement under which he acquired the title. The court below so held on both the first and second trials, telling the jury that the arrangement between Brown and Fellows for the use of Brown's mortgage

created, as between themselves, such a relation of trust and confidence as obliged Brown to the exercise of fair play and entire honesty in its execution. The only open question was, therefore, whether Loomis, upon the established facts just enumerated, stood on any better or higher ground than Brown, his assignor. In considering this question it is important to remember (a) that Loomis was the attorney of Brown, who is conceded to have occupied a relation of trust and confidence towards Joseph Fellows; (b) that, as such attorney, he held in his possession Fellows' deed for the land, Brown's mortgage upon it, and the accompanying bond, and that, after advising Brown that he could not proceed to sell the land on the mortgage because it was not due, drew the note, as he testifies, to obviate that difficulty, and enable the parties to make a judicial sale of the land in the speediest manner practicable; (c) that, as such attorney, he directed the proceedings down to the night before the sale, when he took an assignment of Brown's claim, and became the owner of the mortgage and the judgment. Upon these facts, we are of opinion that he should be held to have constructive notice of all that inquiry of his client or the defendant would have enabled him to learn in regard to the object of the legal proceedings and the duty of his client towards the defendant in the judgment. This would have been the rule if the professional relation had not existed. *Wheeler v. Hughes*, 1 Dall. 23; *Keagy v. Com.*, 43 Pa. St. 70; *Horstman v. Gerker*, 49 Pa. St. 282; *Earnest v. Hoskins*, 100 Pa. St. 551. A multo fortiori ought this to be so where the assignee is the attorney of the assignor in the preparation and enforcement of the instrument assigned. The relations between attorney and client are confidential and fiduciary, and the attorney cannot, by a transfer to himself, escape the obligations that rest on his client. *Thompson v. Christie*, 138 Pa. St. 230, 20 Atl. 934. He succeeds to his client's rights, and to his responsibilities as well, when he takes an assignment from him. But, leaving wholly out of view his professional relation to the parties, and the proceedings in aid of which the judgment was confessed, he was cognizant of facts from which notice may be fairly implied. He knew of the servitude on the land. It is fair to say, from his own testimony, and from his conduct, that he had knowledge of the arrangement between Fellows and the railroad company for the release of the larger part of the land from the servitude. He showed great anxiety to secure a sheriff's deed for the land, and had exacted, as the plaintiff offered to prove, the sum of \$300 from his client for declining to carry out a previous promise to assign the judgment and mortgage to him. After the sheriff's sale he at once carried out the arrangement Fellows had made with the railroad company by conveying to it the part of the tract it was to receive in consideration of its release of the remainder. This was done, as Mr Storrs, who

represented the company, testifies, upon the basis of the agreement made with Fellows, and exactly in accordance therewith. From all these circumstances, it is fair to infer that he knew that to which they so clearly pointed,—that the note for interest already secured by the mortgage, the judgment entered thereon, the writ, the levy, and the sale subject to the servitude, were instruments for divesting the dower of Mrs. Fellows, and enabling her husband to carry out his arrangement with the railroad company for the division of the tract, and for securing to himself a marketable title to the larger portion of it.

If we treat Loomis simply as a purchaser of Brown's judgment and mortgage, and leave wholly out of view his professional relation to his vendor and to the proceedings leading up to the sheriff's sale, he ought, in the light of circumstances just referred to, to be treated as a purchaser with notice of the trust existing between Brown and Fellows, and as taking title subject to it. *Smith v. Gibson*, 1 Yeates, 291; *Brightly, Eq. Jur.* 115, 116; *Dean v. Connelly*, 6 Pa. St. 239; *Jaques v. Weeks*, 7 Watts, 267. He was bound to inquire. If he did not do so, he has constructive notice of all that inquiry would have brought to his knowledge. Inquiry would have brought full information of the consideration and object of the judgment, and the arrangement under which it was confessed. He bought, therefore, with notice of the consideration and object of the judgment, and of the arrangement under which it was confessed. He took title at the sheriff's sale, as his vendor would have done, for the benefit of Fellows, the owner of the land, in accordance with the agreement in pursuance of which the judgment was obtained and the sale made. The subsequent attempt to repudiate the trust, and claim for himself all the benefit to be derived from the arrangement with the railroad company, was a fraud upon Fellows, which a court of equity cannot tolerate. He can no more be permitted to sweep the estate of Fellows into his own hands, by means of the sheriff's sale on the judgment in favor of Brown, than Brown could have been; and that Brown could not have been allowed to hold the tract discharged from the trust, if he had become the purchaser, has been held on both trials in the court below, and with abundant reason.

The assignments of error appearing on this record are 67 in number. It is not necessary, nor is it desirable, to consider them separately. This appeal is controlled by the considerations to which we have now adverted. The case presented, when here before, the question whether the arrangement out of which the trust grew was such a fraud on Mrs. Fellows as closed the doors of a court of equity against Fellows when the trustee repudiated his trust and sought to appropriate the trust estate to his own use. The question now presented is whether the trustee may assign to his own attorney, in actual charge of

he proceedings entered upon under the trust arrangement, and make him an innocent purchaser, without notice, of the entire trust estate. This question was submitted by the learned judge to the jury. We think, upon the facts presented, it was a question of law for the court, and that the jury should have been directed to find upon this question in favor of the plaintiffs, in accordance with the terms of the trust. This would have required a conditional verdict, which would have saved the land to the owner, and the mortgage^{and} interest, and all necessary costs and expenses incurred, to the holder. The result so reached would have inflicted loss on no one, but would have done exact justice to all. The result that was reached in the court below strips the beneficiary of his property, to enrich a faithless trustee or his assignee, and that assignee the attorney under whose direction every step in execution of the trust has been taken. This action is an equitable one. The judge sits as a chancellor. The question presented to him is, shall the trust arrangement, entered into by Brown and carried out to the letter down to the last thing provided for, viz. the reconveyance to Fellows of the part of the tract made marketable by the release of the railroad company, be specifically executed as to this, the sole object of the trust? It does not now matter that Fellows did not fully understand his rights, or that he may have supposed that he had been successfully robbed by what had been arranged between himself and his friend to enable him to realize a large sum out of his otherwise unsalable land. He comes within a time, and with a case, which entitle him to be heard. He has done and said idle and useless things, but nothing has been shown that ought to estop him, in a court of equity, from alleging the truth, or from asking a chancellor to decree a conveyance of that which belonged to him before the trust arrangement was made, and which, under that arrangement, belongs to him still.

This case must be reversed, and go to a jury, to settle the terms of the conditional verdict which must be rendered in lieu of a formal decree of specific execution. Whatever expenses have been incurred by Loomis, the trustee, in addition to the debt due him as the assignee of Brown, that a trustee, acting for the best interests of his cestui que trust, might lawfully incur, should be allowed him. These might include the laying out of the land into lots, expenses actually incurred in the sale of lots, the care of the land, the payment of taxes and municipal charges, and all other legitimate expenses. Subject to the amount due upon the mortgage debt and for expenses of its management and care, the plaintiff is entitled to recover against Loomis, as he would have been entitled to recover against Brown. The attorney of a trustee who, without inquiry, becomes his vendee or assignee, stands on no higher ground than his client, the trustee. He takes and holds, under

such circumstances, subject to the equities subsisting between his assignor and the cestui que trust. A verdict is not conclusive upon a chancellor. Its office is to inform his conscience, not to control it. A verdict finding that the defendant is a purchaser without notice, when the law imputes notice on the uncontested facts before the jury, is entitled to no weight. The court below should have set aside the verdict, and directed a new trial, for the purpose of settling the amount due to the trustee. When this is done by another jury, the trust will be executed, and even-handed justice done to every party interested. The trustee will receive his investment, expenses, and interest. The cestui que trust will receive his land and its proceeds. Mrs. Fellows, if her position towards the property has not been changed by death or divorce, will have a much more valuable dower interest than before her refusal to join her husband in a deed made the trust arrangement with Brown necessary.

For the reasons now given, the judgment is reversed, and a venire facias de novo awarded, in order that a verdict may be rendered recognizing and executing the trust in accordance with the principles enunciated in this opinion.

CITY OF WILKES BARRE v. ROCKAFELLOW et al.

(Supreme Court of Pennsylvania. Oct. 7, 1895).

CITY TREASURER—OFFICIAL BOND—LIABILITY OF SURETIES—EFFECT OF ACCOUNTS.

1. The sureties on the bond of a city treasurer, conditioned for the discharge of the duties of the office and the delivery to his successor of property which he should hold as such officer, are not liable for moneys of the sinking fund, of which he is custodian, subject to the order of the sinking-fund commissioners, where, without the knowledge of the sureties, the commissioners, under their power to invest it subject to the approval of the council, loan it to him as a banker; and it is immaterial that the steps taken by the commissioners and council before making the loan were not strictly formal.

2. The sureties are, however, liable for the interest on the sinking fund paid by the treasurer, as borrowed, to himself as treasurer.

3. A city treasurer does not become a borrower of the general funds of the city, so as to relieve the sureties on his official bond from liability therefor, because of a promise, made on his behalf, before election, to the city council, which elected the treasurer, that, if elected, he would do what another candidate had promised, in case of election, to do, namely, pay 3 per cent. interest on balances in favor of the city.

4. Such promise to pay interest is, however, invalid, and the sureties on the treasurer's bond cannot be held liable for the interest on account of it. Mitchell, J., dissenting.

5. Accounts of a city treasurer, which he is required to keep, do not conclude the sureties on his bond.

Appeal from court of common pleas, Luzerne county.

Action by the city of Wilkes Barre against F. V. Rockafellow and others. Judgment for plaintiff, and defendants appeal. Reversed.

F. W. Wheaton, S. J. Strauss, G. R. Bedford, and H. W. Palmer, for appellants. John McGahren, William S. McLean, and Alexander Farnham, for appellee.

WILLIAMS, J. This is an action upon an official bond. The principal obligor allowed judgment to go by default. The sureties made defense, and raised on the trial some questions that, so far as we have been able to discover, have not been passed upon in the form in which they now appear. It seems that F. V. Rockafellow was elected treasurer of the city of Wilkes Barre for 21 years, consecutively. His last election took place in April, 1892, and he gave the bond now sued on soon after. During all this time he was a banker, in good financial standing, doing business in Wilkes Barre. In February, 1893, his bank suddenly closed its doors. Its liabilities proved to be large, and its assets practically nothing. He made a general assignment for the benefit of his creditors, but his assigned estate realized less than 7 per cent. on his liabilities. His indebtedness to the city, as treasurer, was ascertained to be \$51,743.01. It was made up of four items, viz. the sinking fund of the city, and between \$4,000 and \$5,000 of interest thereon, the ordinary or current funds of the city, and a considerable sum allowed as interest on the balance due upon this account.

The position of the sureties is that their undertaking is to be responsible for their principal as an officer, and not as a banker or borrower; the condition of the official bond being that their principal, "treasurer of said city of Wilkes Barre, shall faithfully discharge the duties of his said office, and pay over and safely deliver into the hands of his successor all moneys, books, accounts, papers, and other things" belonging to the city, which he shall hold as such officer. They allege that he held no part of the \$51,743.01 found due from him, when his bank closed its doors, as city treasurer, but as a borrower, and that the city has, for that reason, no claim upon them for any part of its loss. The position of the city, on the other hand, is that the entire amount demanded belonged to the city, and was in the hands of the city treasurer as its lawful custodian. The assignments of error all relate to some phase of this general controversy, and will be sufficiently considered by determining the relation of F. V. Rockafellow to the four items into which the plaintiff's demand is divisible. The general rule is that the liability of both principal and sureties in an official bond must be measured by the terms of the instrument. The terms must receive a reasonable construction, and, if there has been no violation of official duty, there has been no breach of the condition for which the sureties can be required to account. It follows, necessarily, that for an extraofficial act or undertaking of the principal the sureties cannot be held responsible. 2 Am. & Eng. Enc. Law, 467b. And if the ordinary course of official action is departed from, for the benefit and at

the instance of the party to whom the bond is given, and loss results, the sureties are not, in law or morals, responsible for such loss, unless they assented to the departure from the ordinary course of official action which made the loss possible. *Rogers v. The Marshal*, 1 Wall. 644; *Skinner v. Wilson*, 61 Miss. 90. What was the official duty of the city treasurer? Simply to act as custodian of the funds belonging to the city. As to the sinking fund, it is clear that he had no power to invest it or use it in any manner, except under the direction of the sinking-fund commissioners. They had power, under the ordinance, to invest the funds under their control, subject to the approval of the council, and it was made their duty to report annually the condition of the sinking fund and its securities to the council. The eleventh section of the same ordinance provides that "the treasurer of the city shall be the custodian of the money and securities of the sinking fund, subject to the inspection and order of said commissioners." As the commissioners had power to invest the sinking fund in such securities as the council should approve, they had, of course, power to lend it to the person who had the custody of it as an officer. When they did this, the money was no longer in the treasury, but the security taken for its return stood in its place. The treasurer, as such, held the security. The individual borrower held the money, not as an officer, but as a debtor to the city. The sureties would, in that case, be liable for the care of the security held by their principal, or city treasurer. They would not be liable for the payment of the money borrowed by him from the sinking-fund commissioners, because that was a personal debt, for the collection of which the creditors would be compelled to look, as in the case of any other loan, to the solvency of the borrower, and the securities given at the time the loan was made. When asked to pay the personal debts of their principal, the sureties may well reply: "It was the official conduct, not the personal solvency, of the treasurer for which we engaged to be responsible. If he has been guilty of a breach of official duty, for that we are liable, as sureties upon his official bond; but we have no concern with his personal debts." Now, the defendants offered to prove, at the trial, that Rockafellow borrowed the money in the sinking fund from the sinking-fund commissioners at 4 per cent. per annum; that he held it under this arrangement for eight years before the bond sued on was given, and paid the interest regularly at the rate agreed upon. They also offered to prove, in connection with this offer, that, each year, the commissioners reported the receipt of the interest from him to the city council, and their reports were approved. The learned judge rejected this offer, for the reason that it did not undertake to set forth "what action was taken, either by the council or the sinking-fund commissioners, before the loaning of the money." But if the fact was, as alleged, that, without the knowledge

of the sureties, their principal had been turned from a mere custodian of public moneys into a borrower of them, by the action of the municipal officers, and the money subjected to all the risks of loss incident to its being mingled with the funds of the borrower, and used in his private business, the sureties had a right to show it; and if they did show it, then on the commonest principles of justice they had a right to defend as to so much of the plaintiff's claim. What difference could it make to the sureties whether the proceedings were strictly formal, so long as they resulted in the loss of the money, and were taken by those who had a right to invest it? Suppose the loan had been made to some other person, upon whose failure it was lost, and that in the treasury there was found the borrower's note, taken by the commissioners. Would the sureties, if sued, be compelled to show that every step taken by the sinking-fund commissioners had been regularly entered on their records, and had been in exact compliance with the law, before they could set up the fact that the money had been taken out of the treasury by those who had the right to invest it? Unless there was some breach of official duty on the part of the treasurer in parting with the money, neither he nor his sureties could be held for its loss because the commissioners had made a bad loan. If they had the power to make the loan, and did make it, they took the money out of the treasury for investment, and the treasurer no longer held it as the custodian. This offer should have been received. Whether the evidence would have supported it we cannot determine, but the defendants had a right to make the showing offered if it was in their power. It was, in effect, an offer to show that the sinking fund had been invested, and had not been in the treasury, for more than eight years. The sinking-fund commissioners might be liable to the city for a loss resulting from their neglect of duty, but the defendants are not their sureties, and have no concern with that question.

The interest on the sinking fund stands on quite different ground. If Rockafellow, as a banker, had borrowed of the sinking-fund commissioners the money which Rockafellow, as city treasurer, had in his custody, and had paid interest on it regularly, as alleged, for eight years, the interest, having been paid by him as borrower to himself as city treasurer, was, as to himself and his sureties, in the treasury. For this he was liable to account. His failure to pay it over to his successor was a breach of his official duty, and for such breach of official duty his sureties were liable on their bond. They were liable, not because it was interest due from him to the city, but because it was interest received by him as city treasurer from a borrower from the sinking-fund commissioners. It was income derived by the commissioners from an investment of the sinking-fund money, paid to the treasurer as the proper receiving officer and custodian of all uninvested money belonging to the city. If the money

was not, in fact, lent to Rockafellow, then he was not liable to interest; for, as city treasurer, his duty was to hold the money subject to the orders of the proper officers, and he had no right to use it. His duty was simply to pay over, when legally required so to do, what he had received by virtue of his office; and for the discharge of this official duty his sureties were liable. When this duty was discharged their liability was at an end. Either he held the sinking fund as treasurer, or he had borrowed it as a banker. The rejected evidence, if it had sustained the offer, would have settled this question, and the extent of the liability of the defendants as to this part of the plaintiff's claim.

The remaining question relates to the general funds of the city, and the effect of the agreement by Rockafellow to pay interest at the rate of 3 per cent. on balances in favor of the city. It does not appear that there was, as to this money, any agreement entered into. Some member of the city council, in naming another candidate, stated that the person named by him would, if elected city treasurer, pay interest at the rate of 3 per cent. on the balance in favor of the city. Another member said, if Mr. Rockafellow was re-elected, he would do as well by the city as any one else. The election then took place, and resulted in the choice of Mr. Rockafellow by a decided majority. The relation of borrower and lender was not created by these statements. It does not seem to have been contemplated. The balance would be constantly shifting in amount. The treasurer was to be prepared at all times to honor the warrants of the proper officers, and, upon the surplus of receipts over disbursements, as balances were struck from time to time, interest was to be allowed. This agreement, if made, did not amount to a loan of any particular sum of money by the city council to the treasurer, but was in the nature of a premium demanded from him as the price of the office. It was a premium for which he was not liable, which he could not be compelled to pay if he had taken defense to it, and for which the sureties are not liable. The agreement, if made, was against public policy, and is incapable of enforcement. If, as we incline to think, he was not a borrower of the money of the city, but was to hold the money subject, at all times, to the call of the proper municipal officers, his duty, and his sureties' undertaking on his behalf, are discharged by the payment of the amount of money that came into his hands as treasurer, regardless of any promise to pay interest, or a premium in any other form, for the privilege of holding the office. The promise to pay interest as the price of an election to the office of treasurer has no valid consideration to support it. It is a promise that we cannot recognize as binding on him who made it. A fortiori it is without binding effect on the sureties upon an official bond.

It is contended that, as the law requires the city treasurer to keep accounts of his receipts

and disbursements of the revenues of the city, and to make at stated intervals transcripts of these accounts for the information of the municipal government, the transcripts so made should be held to be conclusive, upon him and his sureties, as to the amount of public moneys received by him. This is putting the effect of the entries by the treasurer upon his books too strongly. They should be held to make a case, *prima facie*, against him and those who are in privity with him. They cannot, however, preclude the defendants from showing that the items, or some of them, have been erroneously entered,—that their principal was mistaken in his view of his own liability, or was disposed, unfairly, to make them responsible for sums of money for which no recovery could otherwise be had against them. Their liability is limited, as we have seen, by the terms of the bond, to a breach of official duty. If it was not the duty of the treasurer to pay, as such, the price demanded from him as the consideration of his appointment, his failure to pay it was not a breach of official duty, and therefore not a breach of his official bond. By the simple device of charging himself with that for which he was not liable, he could not shut the mouths of his sureties, or estop them from alleging the truth in their own behalf. The interest, whether it be treated as an exaction the law does not authorize, or a price demanded for the office, must be struck out, so far as it relates to the general funds of the city. So far as the facts now appear, we see no reason why the sureties should not be held liable for the general funds of the city. This disposes of the questions raised on this record. The assignments of error are sustained, so far as they relate to the questions now considered, the judgment is reversed, and a writ of *venire facias de novo* awarded.

MITCHELL, J., dissents from so much of this opinion as holds that plaintiff cannot recover interest on balances of general account.

SILBERMAN et al. v. SHUKLANSKY et al.
(Supreme Court of Pennsylvania. Nov. 4, 1895.)

OPENING JUDGMENT—PRACTICE.

A rule to show cause why judgment against defendant should not be opened, and he be let in to defend, being discharged, defendant, without appealing, petitioned that the decree discharging the rule be set aside; that he be permitted to take further testimony in support of the rule; and that, on a rehearing, judgment be opened. A rule on plaintiff was granted to show cause why the prayers of the petition should not be granted. The same was made absolute, and judgment opened, and defendant let in to defend. *Held*, that there was no error in the practice.

Appeal from court of common pleas, Lawrence county; Aaron L. Hazen, Judge.

Action by H. Silberman & Co. against J. J. Shuklansky and Solomon Rosenblum.

From a decree opening the judgment, which was for plaintiffs, as to defendant Rosenblum, plaintiffs appeal. *Affirmed*.

The specifications of error were as follows: "First. The court erred in setting aside the decree or order dismissing the former rule to show cause, and granting a rehearing on the same, upon the *ex parte* affidavit of Solomon Rosenblum, and without giving the plaintiffs a day in court. Second. That the court erred in granting a second rule to show cause why the judgment upon the warrant of attorney should not be opened, while, by the order of court made in said case on September 3, 1894, the former rule would still be pending and undisposed of. Third. That the petition and order is illegal, irregular, and anomalous, and should not have been entertained by the court. Fourth. That the matter complained of in the petition was *res adjudicata*, and could not on September 3, 1894, be opened up to allow the defendants a rehearing. Fifth. That the court had no jurisdiction in granting a rehearing, nor to direct plaintiffs to answer the rule to show cause, on account of the term having passed at which the final judgment of the court had been entered. Sixth. That the judgment entered by the court on July 7, 1894, being a final adversary judgment, after a full hearing of all the parties interested, became a judgment of the court of common pleas of Lawrence county, with all the solemnity attached to an adverse judgment; and no appeal having been taken to said judgment, nor no proceedings having been had looking towards the setting aside or opening up of said judgment until after the end of the term, the same became a vested right, and could not be set aside or attacked unless for fraud or irregularity appearing on its face. Seventh. The court should not on March 4, 1895, have made the rule absolute, nor have awarded an issue in said case."

W. H. Falls, E. M. Underwood, and Winter nitz & McConahy, for appellants. C. H. Akens, M. McConnell, and Thos. Tanner, for appellee.

PER CURIAM. On July 7, 1894, the rule theretofore granted on the plaintiffs to show cause why the judgment, as to the defendant Rosenblum, should not be opened, and he let into a defense, etc., was discharged. Nearly two months thereafter, Rosenblum presented his petition, praying, for reasons set forth therein, that the said decree discharging the rule to show cause be set aside that he be permitted to take further testimony in support of the original rule; and that, upon a rehearing, the judgment be opened, etc. Thereupon, September 3, 1894, a rule on the plaintiffs was granted to show cause why the prayers of the petition should not be granted; and the matter was so proceeded in that on March 4, 1895, the same was made absolute, the judgment

opened as to the defendant Rosenblum, and he was let into a defense. From that decree this appeal was taken by the plaintiffs.

A careful consideration of the assignments of error, in connection with the testimony on which the court appears to have acted, has led us to the conclusion that there was no error in making the decree complained of. On the contrary, it was warranted by the evidence. There is nothing in either of the specifications of error that requires special comment. The case appears to have been one calling for equitable relief, and no rule of practice stood in the way of the court below to prevent appropriate action. Decree affirmed, and appeal dismissed, with costs, to be paid by the appellants.

DARRAGH et al. v. BIGGER et al.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)

OPENING JUDGMENT BY CONFESSION.

Judgment by confession on a note containing a warrant of attorney to confess judgment, and revived, as against one of the persons whose names were signed to the note, on returns of nihil habet, is properly opened, as to him, and case sent to jury, where there is evidence in support of the claim that his signature was forged.

Appeal from court of common pleas, Beaver county; John J. Wickham, Judge.

Petition of Elizabeth Stevenson and Charles L. Stevenson, administrators of P. H. Stevenson, to open a judgment in favor of M. Darragh & Co. against John Bigger and P. H. Stevenson, confessed on a note bearing the signatures of said Bigger and P. H. Stevenson, and containing a warrant of attorney to confess judgment, which judgment had been revived on returns, as against Stevenson, of nihil habet. The petition, based on the claim that the signature to the note of the name of Stevenson was a forgery, was granted, and plaintiffs, Darragh & Co., appeal. Affirmed.

J. F. Reed, for appellants. Buchanan & McConnel and Edward B. Daugherty, for appellees.

PER CURIAM. The sole complaint is "that the court erred in opening the judgment as to P. H. Stevenson, deceased, and permitting his personal representatives to make defense to the judgment." An examination of the testimony that was introduced in support of the petition to open the judgment, etc., has satisfied us that it was quite sufficient to justify the action complained of. Discussion of the testimony, as the case now stands, is neither necessary nor desirable. It is enough to say that it is quite sufficient to justify the court in opening the judgment, and sending the case to a jury. Decree affirmed and appeal dismissed, with costs to be paid by appellants.

In re RALSTON'S ESTATE.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)

CONTRACT—VALIDITY—PARTIES.

1. Where testator left property to his wife for life, with remainder to his children who survived his wife, a contract between them, during her life, that the shares of the children should be regarded as vesting at the death of testator, and the survivorship clause be disregarded, is valid.

2. Persons who would take under the intestate laws in case none of the children survived testator's wife are not necessary parties to such agreement.

Appeal from orphans' court, Washington county; J. A. McIlvaine, Judge.

In the matter of the estate of George Ralston, deceased. From a decree affirming the distribution by the auditor of the balance in the hands of the administrator on settling his accounts, George M. M. Ralston and John C. Ralston, Jr., appeal. Affirmed.

The opinion of the court below was as follows:

"Facts Found and Admitted.

"(a) George Ralston, Sr., late of this county, died November, 1842, testate. In his last will and testament, which was duly probated on the 25th day of November, 1842, he gave the full use and benefit of his 'plantation' to his wife, Isabella, for her natural life (or widowhood), for her support and maintenance as well as for the support of her children and mother. He further provided 'that on the marriage or decease of his wife' (if after the death of his mother), his plantation should be put to sale for the highest and best price that could be obtained for it, 'the proceeds to be equally divided among all my children then living, share and share alike, except Ralph, my eldest son. I allow to get \$100 more than his equal share.'

"(b) The testator left, to survive him, his wife, Isabella Ralston, and five sons and three daughters. His wife never remarried. She died on the 29th day of June, 1893, almost fifty-one years after the date of the death of her husband. A few days after the death of the widow, letters of administration d. b. n. c. t. a. were issued to D. M. Campsey, who sold the plantation mentioned in the will; and the balance found to be in his hands, after he had settled his account, was distributed by the auditor, to whose report the exceptions now under consideration were filed.

"(c) The only children of George Ralston, Sr., who were living at the date of their mother's death, were Martha Ralston, intermarried with Jas. H. Meloy, Elizabeth Ralston, widow of T. H. George, deceased, and John C. Ralston, Sr.

"(d) Prior to the 1st day of January, 1868, one daughter and two sons had died; and between that date and the date of the death of the widow, two sons, George Ralston, Jr., and Ralph Ralston, died.

"(e) On the 1st day of January, 1868, the five children then surviving and the widow entered into an agreement as follows: 'Article

of agreement, made this first day of January, in the year of our Lord one thousand eight hundred and sixty-eight, between the heirs of the estate of George Ralston, dec'd, witnesseth: That since the will of the said George Ralston, dec'd, provided that the real estate should be sold at the death of his widow, and the proceeds arising from the sale to be divided equally among his children then living; and since by such provision, should any one of the heirs die before the death of the widow or the sale of the property, his share would fall back to the other heirs, while his children would be excluded from any part of his share: It is mutually agreed that the shares of said children shall be regarded as vesting at the date of the death of said George Ralston for and divested of the survivorship clause set forth in said will; and that each of the children at the testator's death shall be regarded as fully seised and possessed of one share of the estate in fee simple. And it is further agreed that any further or other assurance to fix the date of the vesting of the estate as of the date of the testator's death will be executed at any time by each or all of us. In witness whereof, the parties have hereunto affixed their signatures. Isabella Ralston. [Seal.] John Ralston. [Seal.] George Ralston. [Seal.] Lizzie Ralston. [Seal.] James H. Meloy. [Seal.] Martha Meloy. [Seal.] Witness: John Jamison. W. R. Jamison.'

"(f) On the 5th day of February, 1894 (after the death of the widow), Jas. H. Meloy and Martha Ralston Meloy, Elizabeth Ralston George, and John C. Ralston, Sr., by a writing in due form of law, sold and conveyed the interests of Martha Ralston Meloy, Elizabeth Ralston George, and John C. Ralston, Sr. (the three surviving children of George Ralston, Sr.), in the plantation and in the proceeds of the sale of the plantation mentioned in the testator's will, to George Ralston, the 3d, and John C. Ralston, Jr.; and they now except to the auditor's report because the auditor did not award to them the entire fund realized from the sale of said farm. George Ralston, the 3d, and John C. Ralston, Jr., are sons of Ralph Ralston, dec'd.

"(g) George Ralston, Jr., one of the children of George Ralston, Sr., who signed the family agreement of January 1, 1868, on October 10, 1873, sold and conveyed his interest in this plantation, and the proceeds of the sale thereof, to John Grimes and John Jamison.

"Conclusion.

"On these facts, are the exceptants, George Ralston, the 3d, and John C. Ralston, Jr., sons of Ralph Ralston, deceased (one of the sons who executed the family agreement), entitled to the whole of the fund for distribution? This is the question for determination, for no other person is complaining of the distribution made by the auditor. If the family agreement of date January 1, 1868, is invalid, then the exceptants, as the assignees or gran-

tees of the three children of George Ralston, Sr., who survived their mother, would, in our opinion, be entitled to the whole of the fund for distribution. But is it void? At the date when this agreement was entered into, there were but six persons (under the terms of the testator's will) interested in the plantation which was to be sold, or in the proceeds of the sale thereof,—the widow and the five children then surviving. Those of George Ralston's children who were to take under his will were those only who survived his widow. The five children then still living had an equitable contingent interest in the proceeds of the sale of the land; the three that were dead left no interest therein which descended to their heirs at law. Their death took them out of the class that were to be benefited by this clause of the testator's will. Each of the five children who were still living had an equal interest in the others, which could only be defeated by death. But would they all live longer than their mother. and, if not, who should die before her, and who should survive her, were questions they could not answer. With each one the question was: Shall my interest be increased by the death of one or more of the others before my mother die, or shall I die before her, and the others survive, and my children be left without an inheritance? I give my chance of having my share increased by the death of one of the others for the assured fact that my children will get my one-fifth if I die before my mother. This evidently was the thought of each, and led to mutual family agreement of January 1, 1868, and was a sufficient consideration to support such an agreement. The agreement has all the requisites of a valid family agreement. It tended to promote peace and harmony among the five children and their issue. It was made with a full understanding of all the facts, and by all the parties equitably interested, and upon a sufficient consideration. It settled the question of the distribution of the proceeds of the sale of the real estate after the death of the widow, which at the date of the agreement was in doubt, because it could not be foretold whether all five of the children would survive the widow or not, and, if not, who would and who would not. But it is said that all the children of George Ralston, Sr., who died before the date of the agreement, to wit, January 1, 1868, did not die intestate, unmarried, and without issue. A son and daughter, it is admitted, did so die; but James left a widow and one son, who both died intestate and without issue before the widow, but who were living at the date of the agreement. From this it is argued that the agreement is invalid for want of the necessary parties. It is said that at that time this widow and son of James had an interest in the estate under the intestate laws, and that if all five of the children of George Ralston, Sr., then alive should have died before the widow, that the proceeds of this farm would have been distributed under the intes-

tate laws. Granting this to be true, the agreement entered into by the children then living in no way deprived the widow and child of the deceased son of the testator of their rights; for, without an agreement by and between the five children, this widow and child were entitled to nothing out of the proceeds of the plantation if any one of the five survived. The effect of the agreement was simply to strike out of the will the clause of survivorship, and the widow and child of the deceased son of the testator surely had no interests that would be subverted by allowing that clause in the will to remain. The two words in the testator's will, to wit, 'then living,' which the agreement sought to strike out of it, were the very words that deprived the widow and child of the deceased son of any interest in the proceeds now for distribution; and how the exceptants, either as sons of Ralph Ralston, deceased, or as the owners by purchase of the interests of Mrs. Meloy, Mrs. George, and John C. Ralston, Sr., can complain of the auditor's finding that this was a valid family agreement, I cannot see.

"On the whole case, as presented to us at the argument, we are of opinion: (1) That the order of the testator that his plantation should be sold at the death of his widow, and the proceeds distributed among his children then living, worked an equitable conversion, and that the question before us is simply one of distribution. (2) That the words 'then living' refer to the death of the widow, and not to the death of the testator, and that the eight children living at the death of the testator had not a vested but only an equitable contingent interest in the proceeds that would be for distribution at the death of the widow. (3) That on January 1, 1868, three of the children of the testator having died, the five surviving children at that date were all the persons who had any interest in the question of distribution after the death of the widow; and that the widow and child of the deceased son James Ralston had no such interest in the subject-matter of the agreement of that date as to make them necessary parties thereto. (4) That the agreement of January 1, 1868, is a valid family arrangement, that in equity should be enforced in the distribution of the funds now being made; and that the exceptants were awarded by the auditor all they are entitled to under said agreement; and that they have no standing to object to the distribution made except so far as it affects their own interest. One son and one daughter of George Ralston, Sr., had died before the date of the agreement, unmarried and without issue; and, of course, the agreement could not in any way be construed as relating to them. James, another son, was also dead at that time, but left to survive him a son; and granting, as contended by exceptants, that the agreement of the five surviving children contemplated a participation of that child in the distribution of the fund at the death of the widow with the children of any of the five

that might die, still we do not see how the exceptants can complain that this child's heirs, if it had any, were not recognized by the auditor, when they received all they were entitled to.

"It appears that three of the children of George Ralston, Sr., died before January 1, 1868, and that the widow and son of one of them died before the widow, Isabella Ralston; and it must be presumed, in the absence of testimony to the contrary, that any interest that would have vested in them under the terms of the agreement or otherwise was at the date of the distribution lapsed, or was included in the five interests that the auditor recognized in the distribution.

"And now January 25, 1895, exceptions to auditor's report overruled, and the report confirmed absolutely."

T. F. Birch, for appellants. R. W. Irwin, for appellees.

PER CURIAM. All that need be said in relation to the questions involved in this appeal will be found in the clear, concise, and convincing opinion of the learned judge of the court below; and on it we think the decree should be affirmed. Decree affirmed, and appeal dismissed, with costs to be paid by the appellants.

WILSON et al. v. MARVIN et al.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)

TAX TITLE—BOUNDARY—QUESTION FOR JURY.

1. The effect of a tax sale on the title of the owner of the land is not changed by the fact that his refusal to pay the taxes assessed on it as part of a certain warrant was based on an honest, though erroneous, belief that it was within another warrant on which he paid the taxes.

2. Where defendant claimed that the southern boundary of plaintiff's survey was the northern boundary of a certain other survey and its protraction, and there was no question as to this for a certain distance, and there was evidence that an original mark had been found on such protracted line corresponding with the date of plaintiff's survey, and that the owners of such survey had for many years known and recognized the line set up by defendant as the true boundary of the survey, the court, instead of giving a binding instruction for plaintiff, should have left the location of such boundary to the jury.

Appeal from court of common pleas, Jefferson county; C. A. Mayer, Judge.

Ejectment by S. W. Wilson and another against Robert N. Marvin and others. Judgment for plaintiffs. Defendants appeal. Reversed.

Alexander C. White, Carl I. Heydrick, and C. Heydrick, for appellants. Means & Clark, Geo. A. Jenks, F. J. Maffett, and B. J. Reid, for appellees.

WILLIAMS, J. The plaintiffs' title to the land in controversy depends upon a treasurer's sale, made in 1874, of a lot of unseated land, part of warrant No. 3,540. This lot

was owned, at the time of sale, by Howe, Blake & Co., and was part of a large body of contiguous lands owned by them. When they came to pay their taxes for 1872 and 1873 the question presented itself to their minds whether this lot was in No. 3,540 or in No. 3,400. They investigated it, procured a map of their lands to be made, and with such light as was thrown upon the question by the county map of Jefferson county, and by the result of their own inquiries, they decided that the lot was in No. 3,400. They paid the taxes on that warrant, which was owned by them, and refused to pay the taxes assessed upon the lot as part of No. 3,540. It is now evident that they reached a wrong conclusion. The honesty of their purpose to pay all the taxes justly chargeable to them, and the conscientious character of their effort to settle the question of the true location of the lot, cannot relieve them from the legal consequences of their mistake. They allowed the lot to be sold as part of No. 3,540, and it now turns out that it was located in that warrant. The taxes were a charge upon the land, they were unpaid, and the treasurer's sale vested the title in the purchaser. The first, second, and third assignments of error must therefore be overruled.

The only other question presented upon this record is whether the location of the south line of tract No. 3,540 is, upon the evidence that was before the court and jury, a question of fact for the jury, or of law for the court. The lot in question lay at the eastern end of No. 3,540, and in the county of Jefferson. The remainder of the tract was in Clarion county. The north line of the tract may be treated as settled in accordance with the claim of the plaintiffs. The east line was not disputed. In the language of the learned trial judge, "there is not much controversy between the plaintiffs and defendants in regard to the location of that portion of tract No. 3,540 which lies in Jefferson county, except as to the southern line." This was in controversy. The defendants located it on the north line of the Smith survey, which was several years older than 3,540, and was directly south of it. For a distance of 432 rods westerly from the county line it was the southern boundary of 3,540, and a protraction of this line easterly to the end of the tract would leave a considerable portion of the land claimed by the plaintiffs to fall into tract No. 3,400, which the defendants owned. It was claimed that an original mark had been found on this line corresponding with the date of the survey, and that the owners of 3,540, or several of them, had for many years known and recognized the line set up by the defendants as the true south line of the survey. This evidence was for the jury. The defendants' third point presented the question very clearly. It asked an instruction that, "if the jury find that the south line of No. 3,540 is co-

incident with the south line of the McNaughton farm, and also with the Dr. William Smith survey, then in no event can the plaintiffs recover any land south of the McNaughton line extended eastward." This point should have been affirmed, and the question of fact assumed should have been submitted to the jury with suitable instructions. It may be that the learned judge reached a correct conclusion upon the question of fact, and one that would have been reached by the jury if the question had been submitted to them. On the other hand, the jury may have found in accordance with the contention of the defendants. There was evidence bearing upon the question which it was their province to weigh, and the conclusion from which it was their appropriate function to draw, and the evidence should have gone to them. This case was otherwise well tried, but the learned judge erred in giving a binding instruction to the jury to find in favor of the plaintiffs as to that part of the tract involved in the controversy over the location of the south line. For so much of the land as was north of an extension of the north line of the Smith survey or the McNaughton line, a binding instruction was entirely proper; but for so much as was south of that line the right of the plaintiffs depended upon what the jury might find the fact to be as to the character of that line. The judgment is reversed, and a venire facias de novo awarded.

BORDEN v. ATLANTIC HIGHLANDS, R. B. & L. B. ELECTRIC RY. CO.

(Court of Chancery of New Jersey. June 22, 1895.)

EMINENT DOMAIN—ADDITIONAL SERVITUDE—PRELIMINARY INJUNCTION—ELECTRIC RAILROAD ON HIGHWAY.

1. A person whose land is subject to the servitude of a public highway is not entitled to a preliminary injunction to restrain the construction of an electric railroad on such way, merely because defendant is proceeding without legal authority, but must show, either that the proposed railroad will impose an additional servitude on his land, or that he will suffer some special injury.

2. General allegations "that the building and conducting of said railroad upon the roadbed of said public highway will work irreparable injury" to complainant and his property, "and that the necessary grading and excavations * * * and the setting of poles in the sidewalks, etc., will work irreparable injury," are insufficient to support an application for preliminary injunction.

3. Whether the building and operation of an electric railroad on a country highway impose an additional servitude on land already subject to such highway having never been determined in New Jersey, a preliminary injunction will not issue on that ground alone, at the instance of the landowner.

Application by William L. Borden for a preliminary injunction restraining the Atlantic Highlands, Red Bank & Long Branch Electric Railway Company from constructing a railroad over a public highway. Denied.

Henry M. Nevius, for the motion. Daniel H. Applegate, opposed.

MCGILL, Ch. The bill was originally filed by several complainants, but at the argument of the present motion was amended by striking out all complainants except William L. Borden, who is now the sole complainant. He is the owner of property abutting upon a public highway between Red Bank and Eatontown, which, prior to 1865, was a public country road. In 1865 it became the Red Bank & Eatontown Turnpike, and was maintained as such under statutes incorporating the company by which it was operated. P. L. 1865, p. 7; P. L. 1866, p. 293. The turnpike company acquired nothing more than the right of way for the turnpike (P. L. 1865, p. 10, § 11), and the right to charge tolls in specified cases, excluding passage over the turnpike on business by the owners of farms which abutted upon it. In 1890, or thereabouts, the turnpike company abandoned the collection of tolls and the maintenance of its road, and the township authorities took charge of the highway as one of the public roads within their charge. In 1893 the legislature repealed the character of the turnpike company. P. L. p. 574. This repealing statute, after the words, "be and they are hereby repealed," which refer to the acts above mentioned, contains this addition: "Provided always, that nothing herein contained shall in any way affect any authority, permission or franchise to construct and operate a street railway, on, along or upon the road-bed of said turnpike which may have been by said company granted, sold or conveyed prior to the passage of this act; but such authority, permission or franchise shall be as valid as if this act had not been passed." Prior to this repealing act, under the act of 1887 (P. L. p. 340) relating to street railways within incorporated towns and boroughs in this state, the turnpike company, by its deed, essayed to convey to the defendant, which appears to have been duly incorporated as a street-railway company, its rights in such turnpike. The defendant has obtained the permission of the township authorities to build and operate an electric railway over the road in question, but has not obtained the consent in writing thereto of at least one-half of the owners of property, in lineal frontage, on the road. The complainant contends that such consent by property owners is a condition precedent to lawful authority to construct a railway in the road in question under chapter 250 of the Laws of 1894 (page 374), and that without such consent the defendant is without authority of law to construct and operate its proposed railway. On the other hand, the defendant contends that such consent is not required in the case of its road. It claims support in this contention in chapter 192 of the Laws of 1893 (page 342).

The complainant is the owner of property abutting on the road. The proposed railway will pass over his land which lies in that road. That land is subject to the servitude of the public road, and the complainant cannot object to any use of the highway which is within the limits of that servitude. If the railway be an additional servitude, no act of the legislature can impose it upon his land against his will without providing for his compensation. If a law gives the defendant the right to build and operate such an additional servitude, it cannot avail itself of the right until it shall first make just compensation to the owner of the land, either by agreement or through condemnation authorized by statute, and equity will restrain it from entering upon the land until that compensation be made. If such a railway be not an additional servitude, and the railway company attempt to build it, opening the highway for that purpose, without first obtaining lawful authority to do so, it creates a public nuisance by rendering the highway wholly or partially impassable. Such a nuisance does not take property by imposing an additional burden upon it. It inconveniences and annoys the public. An individual cannot ask redress against such a nuisance by injunction, unless he suffers therefrom some private, direct, and material damage, distinct from that which is suffered by the public at large. The mere fact that he uses the road more frequently than others of the general public, and therefore suffers more from the nuisance than others, does not present a distinct injury. Such injury is, in character, the same that others of the public suffer. The difference between the individual referred to and the others of the public is only in degree of suffering. Redress against such a nuisance is had by indictment, by action instituted by the township authorities having charge of the road, or by proceedings at the instance of the attorney general. In absence of proof of special material damage, distinct in character from that which the public suffers, irreparable in character, the complainant cannot have the assistance of equity by injunction to restrain the creation or maintenance of such nuisance.

Thus understanding the law, I am of opinion that the complainant has no standing in the present application for preliminary injunction, on the ground, merely, that the defendant proceeds with the disturbance of the highway without due authority of law. His case must rest upon a finding (a) that the defendant is about to permanently impose an additional servitude upon his land, and thus take an interest in it without first making just compensation in virtue of legislative authority; or (b) that he is about to suffer some direct, material injury, distinct in character from that suffered by the public, which is to be deemed irreparable by the remedies which the law makes avail-

able. Under the first of these propositions the complainant claims that the construction of a railway upon a country road is the imposition of additional servitude upon that highway, insisting, with much reason, that there is a marked distinction between the servitude of land for country roads and the servitude of land for city streets. The question presented by this claim has never been settled in this state. The decision of the supreme court of Pennsylvania, in *Pennsylvania R. Co. v. Montgomery Co. Pass. Ry. Co.*, 31 Atl. 468, to which I have been referred, rests upon the character of the servitude imposed in the acquisition of lands for country roads under statutes of Pennsylvania. We have no similar decision in this state regarding the servitude imposed under our road laws. The question, therefore, as I have stated, is an unsettled one. Whether or not, then, the servitude exists, is unsettled, and therefore in doubt, and it follows it is doubtful whether the complainant has such a property right as he seeks to have protected by the preliminary injunction he asks for. It has been reiterated in the decisions of our courts that in such a case a preliminary injunction will not issue. Relief, if granted, is to be had at final hearing. Under the second proposition the complainant does not allege facts which show that he is about to suffer some direct, material injury, distinct in character from that which is suffered by the public generally. The allegations of the bill relate to injury and inconvenience in the use of the road, caused by the obstruction which the work of construction of the railway and the existence of its rails after construction will cause. Such injury will be common to the entire public, including the complainant. It is not a distinct, special injury to him. It is true, the bill contains the general allegations "that the building and conducting of said railroad upon the roadbed of said public highway will work irreparable injury" to the complainant and his property, and that necessary grading and excavations will work "irreparable injury" to him, and "that the setting of poles in the sidewalks on the side of the road, which is owned and which belongs to the property owners abutting said road, will work 'irreparable injury' to him; but such allegations lack the specific definiteness necessary to induce the action of the court. The precise injury which is special, distinct, and irreparable in character must be sharply pointed out upon such an application as this, and be duly supported by the proofs. I will deny the motion.

TRUAX v. PENNSYLVANIA R. CO.

(Supreme Court of New Jersey. Nov. 7, 1895.)

Pleading—Answer—Malicious Prosecution.

1. Where there are two counts in the declaration, one in case, and the other in trespass vi

et armis, it is irregular to put in one plea of the general issue to both.

2. It is not a good plea to a malicious prosecution that the defendant submitted affidavits to a supreme court commissioner, who, being satisfied, made an order for bail.

(Syllabus by the Court.)

Action by William O. Truax against the Pennsylvania Railroad Company. Demurrer to plea sustained.

Argued February term, 1895, before BEASLEY, C. J., and DEPUE, REED, and GUMMERE, JJ.

William H. Carson, for plaintiff. Samuel H. Grey, for defendant.

BEASLEY, C. J. This case is before the court on demurrer. The action is in tort, the first count laying a malicious prosecution, and the second a false imprisonment. These two causes of action with respect to form are diverse, the first being in case, the second in trespass vi et armis. There is a joint plea of the general issue, embracing both counts, which, of course, is irregular. It is framed in case, and therefore is applicable only to the first count. I am inclined to think such a plea is bad, as it is pleaded to both counts, and, in strictness, it applies only to one. This defect seems to have escaped attention, and it is the second plea above to which exception has been taken. This plea is special, and is put in as an answer to both these causes of action just attended to. For the sake of perspicuity, it should be stated that the first count alleges that the defendant not then having any reasonable or probable cause of action, etc., falsely and maliciously caused and procured to be sued and prosecuted out of the supreme court of the state of New Jersey "a certain writ of *capias ad respondendum*." It is then shown that the plaintiff was arrested and imprisoned by virtue of that process. To this ground of action the defendant pleaded (in the language of the brief of counsel) "that, before the time of the said arrest, defendant had applied to one James M. Cassidy, a supreme court commissioner of New Jersey, having the lawful power to hold to bail when, in his judgment, good cause was shown," etc., "and submitted to said commissioner certain affidavits of witnesses to the effect that said plaintiff, while in the employ of defendant, and as defendant's agent, had misappropriated large sums of money belonging to defendant; and that thereupon said commissioner did adjudicate and determine that said plaintiff had fraudulently contracted a debt to said defendant, and said commissioner did thereupon order, by writing, under his hand, that said plaintiff should be held to bail," etc. That this plea is not a defense to the charge of a malicious prosecution appears to me to be entirely plain. Its palpable defect is that it does not negative directly or indirectly either the malice charged, or the want of probable cause. The fact that the defendant presented an affida-

vit showing certain facts tending to prove the criminal guilt of the plaintiff in the matter in question is not in negation of either one or the other of these essential elements of the present action. The defendant may have presented intentionally to the commissioner an imperfect or garbled account of the transaction, and may at the time have been fully convinced of the plaintiff's innocence. No court has ever held that the decision of a person acting in a judicial or quasi judicial capacity on a sworn statement which may contain only a part of the essential facts known to the person applying for a capias will have the effect of barring a suit of this character. By force of the admission of this pleading, the arrest in question must be regarded as having been made by this defendant without probable cause, and, in the presence of that admission, the legal conclusion must be that these affidavits upon which the capias was awarded did not present all the facts known to the defendant. The result is that, the plea being addressed to both counts and exhibiting, no defense to one of them is bad as to both. Let the plaintiff take judgment on this issue, with leave to the defendant to plead *de novo*.

STATE (BIDDLE et al., Prosecutors) v.
MAYOR, ETC., OF BOROUGH
OF RIVERTON.

(Supreme Court of New Jersey. Nov. 7, 1895.)

POWER OF BOROUGHES TO ISSUE BONDS—VALIDITY
OF ORDINANCE—CERTIORARI.

1. Boroughs formed under the act of April 2, 1891 (Laws 1891, p. 280), are not empowered by the act of March 28, 1892 (Laws 1892, p. 322), to issue bonds, the proceeds of which are to be used for the purchase or erection of an electric plant for lighting either the houses, stores, etc., of the citizens, or the streets and alleys of such boroughs.

2. The act of March 28, 1892, gives authority to any borough to issue bonds, the proceeds of which are to be used for certain specified purposes. It requires the borough council, before issuing such bonds, to submit by ordinance to the vote of the electors of the borough the question whether or not such bonds should be issued. One of the conditions precedent to the passage of such an ordinance is the presentation to council of a petition or consent signed by the owners of property in the borough amounting to more than one-half the taxable value of all the property therein as shown by the assessor's duplicate of the preceding year. *Held*: (1) That when such a borough has been formed since the last preceding assessment for taxes, the duplicate of the assessor of the township out of which such borough has been formed is the duplicate intended by the act; and (2) that if council, at the passage of such an ordinance, had before it a petition and consent signed by the owners of the requisite amount of taxable property, and communications from four of the signers, retracting such consent, and desiring their names to be removed from the petition, no power existed to pass the ordinance if the taxable value of the retracting signers, when deducted from the taxable value of the property shown by the petition, reduced the latter below the amount required by the act.

3. A taxpayer in such a borough is entitled to a certiorari to review such an ordinance and the proceedings touching the same.

(Syllabus by the Court.)

Certiorari in the name of the state at the suit of Charles M. Biddle and others against the mayor and common council of the borough of Riverton to review an ordinance by defendant borough directing an election to be held in that borough to determine for or against the issuance of improvement bonds for electrical lighting of the borough and the proceedings concerning the same. The return shows that an election was held under the ordinance, resulting in a majority in favor of issuing such bonds. Judgment for prosecutors.

Argued June term, 1895, before VAN SYOK-EL, LIPPINCOTT, and MAGIE, JJ.

Mark R. Sooy, for prosecutors. Clarence T. Atkinson, for the borough.

MAGIE, J. Counsel for the borough first contend that the certiorari in this case was improvidently allowed. The borough was incorporated under the "Act for the formation and government of boroughs," approved April 2, 1891 (Laws 1891, p. 280). The proceedings before us were taken under the provisions of the "Act concerning boroughs," approved March 28, 1892 (Laws 1892, p. 322). The latter act authorizes the issue by any borough of improvement bonds, the proceeds of which are directed to be appropriated by its council to the payment and cancellation of indebtedness incurred or to be incurred for certain specified purposes. It provides for an election at which the voters of the borough may vote in favor of or against the issue of such bonds, and that, if a majority vote against such issue, it shall not be made. The ordinance shows the purpose of the issue of the proposed bonds to be "the purchase and erection of an electric light plant for lighting said borough."

It is thereupon contended: First. That prosecutors have no standing to sue out this writ. But it is now settled that after the allowance of a certiorari the right of prosecutors to the writ will be assumed, in the absence of proof to the contrary. *State v. Mayor, etc., of Borough of Neptune City* (Sup.) 30 Atl. 529; *Id.* (Err. & App.) 32 Atl. 220. There is no such proof. On the contrary, it appears that prosecutrix is the owner of taxable property in the borough. As such she may prosecute a certiorari to review this proceeding, which tends to burden the taxing district with debt. *Middleton v. Robbins*, 54 N. J. Law, 566, 25 Atl. 471. If the other prosecutor, who is her husband, is improperly joined, or if the writ should be indorsed in the name of the state, the error is amendable. *Long Branch v. Sloane*, 49 N. J. Law, 356, 8 Atl. 101, and cases.

It is next contended that, although the election resulted in favor of the issue of bonds, yet that the council is not bound to issue them because it still has a discretion

whether or not to purchase and erect the electric plant proposed; that the discretion may be exercised against such purchase or erection, in which event no bonds could be issued, and that prosecutrix, although a taxpayer, is not now injured, and perhaps never may be injured, by these proceedings. It may be questioned whether this construction of the act of 1892 is admissible, and whether council could not be compelled by mandamus to proceed with the scheme to which a majority of the voters have given their adhesion. But the contention cannot prevail. It has been settled in the court of errors that when a proceeding of such a character is put in motion, which, in its outcome, is calculated to specially touch a person adversely, he may prosecute a certiorari for its review before final action, although there is no certainty that such final action will be taken. An order for an election under the Werts law to determine whether the minimum fee for license in a township should not be \$5,000 was allowed to be questioned by certiorari although no election had been held, and there was nothing to show that, if held, it would have resulted in fixing that minimum. *Middleton v. Robbins*, ubi supra. The case before us is stronger, for the election has been held, and the bonds may, and perhaps must be, issued.

We must therefore examine prosecutors' objections to the ordinance and proceedings. It is first contended in their behalf that the borough is not empowered to "purchase or erect an electric light plant for lighting the borough" to meet the expenses of which these bonds are proposed to be issued. If this be so, the ordinance is ultra vires. Among the powers conferred upon boroughs formed under the act of 1891 is included that of passing ordinances "for lighting the streets and alleys" in the borough. Laws 1891, p. 281, § 17. Counsel of the borough concedes in his brief that the true intent of the ordinance is to provide means for procuring an electric plant, not only to light its streets and alleys, but also to supply its citizens with electric lighting in houses, stores, etc., and contends that this is within the power of the borough. If this be the scheme, the contention cannot be maintained. The grant of power extends no further than to the lighting of streets and alleys, and the grant thus expressed excludes any implication that it extends to any other purpose. Every act in excess of the exercise of the power as granted is obviously ultra vires. But it is not clear that this admission of counsel should be accepted as determining the purpose of this proceeding. The ordinance declares that the plant to be purchased or erected is to be for "lighting said borough." This may be construed—not unreasonably—to intend such lighting only as there was power to do. If the secret purpose of council extended to unauthorized acts, it could doubtless be restrained within

the limits of its actual authority. The question, then, is whether the borough has been endowed with power to purchase or erect an electric plant for the purpose of lighting its streets and alleys. The borough act of 1891 not only gave power to any borough formed thereunder to light its streets and alleys, but also to lay pipes through streets for the conveyance of gas, and to provide for the erection and maintenance of gas works. It is argued from this that the power to light streets and alleys is restricted, and that gas only can be used for that purpose. But this is too narrow a view of these provisions of the act. The express power to light streets and alleys doubtless includes by implication what is reasonably appropriate for that purpose, if not prohibited or negated in other parts of the act. So, doubtless, the borough could erect posts, and supply lamps to burn oil, to light streets and alleys. Perhaps it could use electric power supplied by private persons or corporations for that purpose. But lighting by gas requires a manufacturing plant, with the means of transmitting the gas by pipes. So, lighting by electricity requires a plant furnishing power and means of transmission by wires, etc. The express grant of power to procure the plant and means of transmission in case of the use of gas in my judgment excludes the notion of an implied grant in the other case. The legislature has failed to confer on such boroughs the power to purchase or erect an electric lighting plant. The act of 1892, under which this proceeding was taken, gives no greater power. The sole purpose of that act is to grant to all boroughs the power of issuing bonds to meet expenses incurred under the powers conferred or to be conferred upon them. The supplement to the borough act of 1891, which was approved February 28, 1893, does not extend the power of these boroughs in respect to the matter involved in this contest. Laws 1893, p. 65. The result is that the ordinance and the proceedings dependent thereon cannot be sustained.

While the case is thus disposed of, it will not be amiss to discuss another objection by prosecutors, which involves an important matter of practice in these proceedings. The power of the borough council to direct an election under the act of 1892 depends upon two precedent conditions. It must first have passed a resolution fixing the amount of bonds it deems necessary to issue. Next, it must have received and filed a petition and consent in writing, signed by the owners of more than one-half in value of the taxable property in the borough as shown by the assessor's duplicate for the preceding year. This borough had been formed since the last preceding assessment for taxes. There was no assessor's duplicate for the preceding year, except that of the assessor of the township out of which the borough had been formed. The contention is that such duplicate is not that intended by the act of 1892.

and therefore that the second condition precedent to the passage of this ordinance did not and could not exist. But this contention cannot prevail. The act will be satisfied by any duplicate which shows the taxable value of property in the borough in the preceding year, by whomsoever made. The township duplicate filled the requirements of the act. It appears that on December 31, 1894,—the day when the ordinance in question passed,—a paper signed by owners of taxable property in Riverton was presented and filed. It purported to give consent to the issue of bonds proposed by the ordinance. Taking the taxable value of the property in the borough to be the amount counsel for the borough claims to be shown by the township duplicate of the preceding year, the paper presented to council footed to over one-half thereof. But that paper had been signed before December 26, 1894. Council met on that day, and, although the paper was not then presented, the members knew of it. Four of the persons who had signed it, by communications in writing presented to the council on that day, gave notice that they withdrew their consent and request, and desired their names to be removed from the paper. Without their names, paper would not be signed by the owners of the required amount of taxable property. On December 31, 1894, council, having before it this paper, and also the communications of four of its signers, withdrawing their consent and request indicated by their signatures, passed the ordinance in question. In my judgment, it exceeded its powers in so doing, for it did not have before it the petition and consent of the required number of owners of taxable property. The consent appearing from the petition was negated by the other communications. For this reason, also, the ordinances and proceedings must be set aside.

THIEL v. BULLS FERRY LAND CO.

(Supreme Court of New Jersey. Nov. 7, 1895.)

EVICITION OF TENANT—TRESPASS—DAMAGES.

1. If a tenant holding over after the expiration of his term be evicted by force by his landlord, an action of trespass is one of his legal remedies.

2. The statute of this state vests in the person in peaceable possession of land a right to hold the property against a forcible entry, and for an invasion of such right suit can be brought.

3. In such cases the tenant can recover only nominal damages for the deprivation of the possession.

(Syllabus by the Court.)

Rule to show cause to the circuit court, Hudson county; before Justice Lippincott.

Action by August Thiel against the Bulls Ferry Land Company. Judgment for plaintiff. Rule to show cause why new trial should not be granted. Granted.

Argued June term, 1895, before BEASLEY, C. J., and DIXON and GUMMERE, JJ.

Collins & Corbin, for plaintiff. George L. Record, for defendant.

BEASLEY, C. J. This suit is founded on an alleged eviction by a landlord of his tenant. The plaintiff, Thiel, held the premises under a written demise made by the defendant for a term of years, such instrument containing a provision that in case of a breach by the lessee of any of his covenants the lessor might re-enter. On the allegation of certain breaches the company evicted the plaintiff, using violence to his person, though to the extent only that was necessary to effect his dispossession. The damages claimed are those proceeding from two sources, to wit, by reason of the assault upon his person; and, second, his loss by reason of having been deprived of the use of the premises. It will elucidate the view to be expressed on the question of law that is argued in the briefs of counsel for me to state that the court has concluded that on the uncontested facts it is clear that the plaintiff, at the time of his expulsion, was unlawfully withholding the possession of the property from the defendant. He had in the plainest manner forfeited his lease, by the violation of his covenant with respect to the number of men to be continually employed in the mines. So manifest is this omission that it is not deemed necessary to exhibit the facts which led the court to this conclusion. Starting then from this premise, we approach the legal aspect of the case.

It is insisted on the part of the defense that by the clear weight of authority in this country and in England a landlord on the determination of a lease is entitled to remove his tenant, using no unnecessary force. That the defendant was guilty of a forcible entry and detainer is not denied, but it is insisted that, this being granted, the present action of trespass will not lie. This view of the defense is founded on the theory that as at common law, when a man had a right of entry he was permitted to enter with force and arms, the only remedy for such an eviction is that provided in the statute concerning forcible entries and detainers. At common law, while such dispossession was indictable, no civil remedy existed against a person who, having the right, took possession of his own land by force; and the consequence has been that it has long been held by the English courts that since the act of parliament on the subject the only redress possessed by the person thus evicted is that prescribed in the act itself, and which is to cause himself to be restored to the possession in the method therein defined. Similar statutes in this country have received a similar construction. The view forming the ratio decidendi in these cases is that such statutes were not intended to confer any civil right upon the tenant who was holding the land against the rightful owner. The decisions on the

subject will be found fully collected in 3 Watt, Act. & Def. tit. "Forcible Entry and Detainer," and under same title in 8 Am. & Eng. Enc. Law, 104. There are some of the American courts that have maintained the opposite doctrine from that above expressed. But it does not seem to me that it would serve any useful purpose to collate and criticise this line of cases, for they consist of the construing of statutes that are not, except in a general way, similar to our own. It is the statute of this state that is to be enforced, and which consequently needs alone to be expounded. The single question is, does such statute confer a right on a person in the actual and peaceable possession of land to hold such possession against the owner, having in the law the right to possession? This interrogatory must, I think, be answered in the affirmative. That the use of force on the part of the owner is made a wrong done to the person in possession seems to be a doctrine plainly written on the face of our act. The first section contains an express prohibition against any person's entering upon lands except in a peaceable manner. This is a provision conferring a benefit on the possessor. It secures him against all danger of a dispossession by violence. The statute then provides for a violation of this prohibition by prescribing a summary proceeding, in which, if the possessor shall prove his peaceable possession and a forcible ouster, he shall recover treble costs, and by force of a writ of restitution he shall become "re-seised and repossessed" of the premises. This return of the property to him is a strong indication that as between the peaceable occupier of the land and the owner, in the attitude of a law-breaker, the right of possession for the time being is in the former; and such indication is forcibly accentuated by the additional direction that if the owner shall appeal the judgment he shall give bond, with sureties, conditioned that he shall prosecute the said certiorari in the supreme court, and if defeated shall pay the yearly value of the premises in dispute from the time of granting the said certiorari, etc. And as the complement of these adjustments we find in the statute, given to the owner, the same summary remedy when he is unlawfully kept by force out of the possession of the land. In view of these statutory arrangements it is claimed to be manifest that a person in the peaceable occupation of realty has an exemption against a forcible eviction vested in him by the law, and that an invasion of such right constitutes a wrong remediable by the ordinary action of trespass. He is not confined to the special redress defined in the statute.

The result is that the court is of the opinion that there was no error in the charge of the judge at the trial to the effect that the defendant was liable under the evidence, whether the lease under which the plaintiff

was possessed was terminated or not, or whether the defense of force used was necessary or not. This is in harmony with the view of the court already expressed. But touching the instruction to the jury on the subject of the damages to be awarded for the loss by the plaintiff of the possession of the premises we are unable to agree. It has been already stated that in the opinion of the court it was conclusively proved that the plaintiff was holding over without right, and it was therefore incumbent on the judge to instruct the jury that only nominal damages would be awarded for having been deprived of the possession of land to which he had no right. On this account the judgment must be reversed, and a venire de novo must issue.

STATE (PROSSER, Treasurer, Prosecutor) v. BEHRENS, Collector.

(Supreme Court of New Jersey. Nov. 7, 1895.)

SCHOOL MONIES—PAYMENT TO TOWN TREASURER.

School moneys collected by the collector of the town of Guttenberg must be paid over by him to the town treasurer.

(Syllabus by the Court.)

Application by the state, on the prosecution of Frederick Prosser, treasurer of Guttenberg, for mandamus against Frederick Behrens, collector of Guttenberg. Granted.

Argued November term, 1895, before VAN SYCKEL, MAGIE, and LIPPINCOTT, JJ.

Randolph, Condict & Black, for plaintiff. Collins & Corbin, for defendant.

VAN SYCKEL, J. The question is whether the collector of the town of Guttenberg shall be required to pay over to the treasurer of the town all school moneys collected by him for the several school districts therein. The town charter, section 4 (P. L. 1859, p. 199), provides for the appointment of a town treasurer. Section 7 requires the collector to pay over to the town treasurer all taxes collected by him. Section 14 of the act of 1875 (P. L. 1875, p. 612) provides "that the treasurer shall receive all moneys collected by said corporation from the persons who shall collect the same." Section 15 requires the moneys collected by any officer of the town to be paid over to the treasurer within 10 days after he receives the same. By the act of 1894 (page 506), relating to a system of public instruction, it is provided, in section 10, that the collector shall receive and hold in trust all school moneys, except as provided in section 23 of the said act. Section 23 provides "that this act shall apply to all districts in this state, receiving any portion of the state school money, provided that in any district acting under a special charter or under the provisions contained in the charter of any city, town, borough or other municipality, this act shall apply only so far as is consistent with the provisions

of such charter, and that all such charters shall remain and be in full force and effect, the same as if this act had not been passed." Section 10 of the act of 1894 provides that the collector shall pay out the school moneys collected by him, and settle with the township committee. There is no town committee in the town of Guttenberg with which a settlement can be made by the collector, and therefore it is inconsistent with the provisions of the town charter to apply the act of 1894 to this subject so far as Guttenberg is concerned. The provisions of the town charter requiring the money to be paid over to the town treasurer is the law of the case, and a mandamus should issue as applied for, but without costs.

CHAMBERS v. NIAGARA FIRE INS. CO. (Supreme Court of New Jersey. Nov. 7, 1895.)

RELEASE AND DISCHARGE—WHAT CONSTITUTES.

The payment of a less sum in satisfaction of a larger one is no satisfaction.

(Syllabus by the Court.)

Case certified from circuit court, Camden county; Miller, Judge.

Action by Frank Chambers against the Niagara Fire Insurance Company. Judgment for defendant, and case certified. New trial ordered.

Argued June term, 1895, before BEASLEY, C. J., and DIXON and GUMMERE, JJ.

John J. Crandall, for plaintiff. John W. Westcott, for defendant.

BEASLEY, C. J. The declaration contains but a single count, which avers that plaintiff's property was insured against fire by defendant, and that, a fire having occurred, the loss thereby sustained was liquidated by the plaintiff and defendant at the sum of \$116. The suit was for the amount thus ascertained.

The pleas were, first, the general issue; second, a release of all claims and demands. This latter plea is obviously bad upon its face. It professes to be a release of all demands, but shows no consideration for such a discharge, and it does not appear to be under seal. Besides this, when the facts were developed at the trial, both it and the plea of the general issue were plainly inapplicable, for both of them related, as the defenses so set up were pleaded, to the time of the commencement of this action, while at the trial it was shown that defense relied on had occurred after the test of the writ. The fact so relied on was that, during the pendency of the suit, the defendant had settled with the plaintiff, paying him \$75 in satisfaction of his claim, and costs. Although such defense was not admissible by force of the pleadings, nevertheless, as it was received by the court and counsel without noticing its irrelevancy to the issues apparent upon the

record, it becomes now necessary to consider the disposition that was made of it at the trial.

The facts to be regulated were these: The plaintiff proved the statement in his declaration that his loss was \$116, as agreed upon by himself and defendant. I do not understand that there was any dispute on this head. By way of defense, the company showed that, after suit brought, the defendant had agreed to take for this claim the sum of \$75, which they paid to him. In behalf of the plaintiff, it was contended that this settlement had been obtained from him by false and fraudulent representations, and, the evidence being conflicting upon the subject, that controversy was properly submitted to the jury. But with respect to the other question in the case, as to the effect of such settlement, the charge of the court was plainly erroneous. The instruction was that, if the \$75 was paid by the defendant, and was accepted in full satisfaction on the plaintiff's demand of \$116, then they were to find for the defendant. The contradictory of this proposition has always been held in this state. Our decisions have followed the ruling in this respect established in the leading case of *Cumber v. Wane*, 1 *Strange*, 426. It was there decided that the payment of a less sum in satisfaction of a larger one, as of £5 for £15, was no satisfaction. If, therefore, in this case the plaintiff's demand was for a sum entirely liquidated, and the payment was of a sum less than the amount so due, the release in question was nugatory, being devoid of all consideration. The circuit court should be advised that there should be a new trial.

ROGERS v. STATE.

(Supreme Court of New Jersey. Nov. 7, 1895.)

INTOXICATING LIQUORS—SALE WITHOUT LICENSE.

1. An indictment charging the sale of liquor without license to various persons, without showing either the place of sales or that they were habitual, does not disclose an offense within the scope of the supplement to the crimes act (P. L. 1893, p. 193).

2. It must be shown that the sales were such that thereby the seller would, at common law, have been deemed the keeper of a disorderly house.

(Syllabus by the Court.)

Error to court of quarter sessions, Monmouth county; Conover, Higgins, and Morris, Judges.

Edward Rogers was convicted of selling liquor without a license, and brings error. Reversed.

Argued June term, 1895, before BEASLEY, C. J., and DIXON and GUMMERE, JJ.

Charles E. Cook and R. T. & W. B. Stout, for plaintiff in error. Charles H. Ivins, for the State.

BEASLEY, C. J. The indictment in this case charges that the defendant sold liquor

various persons without having obtained a license. It does not assert that such sales were made in any house or particular place in the township. By force of this charge the defendant has been convicted, and has been sentenced to pay a fine of \$300, and to stand imprisoned in the county jail for the period of three months. This judgment is sought to be justified on the theory that the proofs making a case against the defendant brings his offense within the operation of the supplement to the crimes act, approved March 10, 1893 (P. L. 1893, p. 193). While this is true as to the facts established, the legal difficulty is not thereby relieved, inasmuch as there is no charge in the indictment corresponding to these proofs. According to the testimony, the defendant's offense consisted in habitually selling liquor unlawfully in a certain building in his possession, and this transgression would, at common law, have rendered the defendant guilty of keeping a disorderly house. This effect is frustrated by the supplement to the crimes act, above cited, for it expressly declares that, "where the offense sought to be punished consists wholly in the unlawful sale of spirituous, vinous, malt or brewed liquors," then in that case the person so selling shall not be indicted for the offense of maintaining a common-law nuisance or keeping a disorderly house; and provides that in all such cases the indictment shall be in form for the sale of intoxicating liquors contrary to law. After this follows a provision that in case of conviction of such unlawful sale of any of such liquors the person or persons so convicted shall be punished as in and by said section 192 of the said act for the punishment of crimes is provided. This supplement has this effect: that when liquor has been habitually sold in a certain house, contrary to law, in such cases the indictment, instead of charging the defendant with keeping a disorderly house, shall simply allege that such sales—that is, habitual sales at the designated place—were contrary to law. The indictment in the case before the court does not contain any such description of the offense as will thus subject the transaction to the operation of the supplement in question; the consequence being that the judgment must be reversed.

**CLARK MILE-END SPOOL CO. v.
SHAFFERY.**

(Supreme Court of New Jersey. Nov. 7, 1895.)

TRIAL—EXCEPTIONS—INJURY TO MINOR—DAMAGES.

1. Every exception taken at the trial should contain a specification of the ground, and the judge called in to sign the bill should state thereupon all exceptions not so explained.

2. The plaintiff was a minor complaining of bodily injuries. The trial judge by oversight included the damages sustained and the loss of earning power during her minority. The judgment was reversed on this ground.

(Syllabus by the Court.)

Error to circuit court, Essex county; Childs, Judge.

Action by Katie Shaffery against the Clark Mile-End Spool Company. Judgment for plaintiff, and defendant brings error. Reversed.

Argued June term, 1895, before BEASLEY, C. J., and DIXON and GUMMERE, JJ.

Colle & Swayze, for plaintiff in error. Abner Kalisch, for defendant in error.

BEASLEY, C. J. This suit was for the damages sustained by the plaintiff in operating a machine for the defendant in its manufacture of spool cotton, the ground of action being that she was not notified of a latent danger. The plaintiff was an unemancipated minor, and the trial judge, in charging the jury on the subject of damages, gave them, among other directions, this instruction: "And you are also to consider the loss of wages in the past, if there has been any proof of such loss." There can be no doubt that the legal exposition was erroneous, inasmuch as the right to such damages in the past did not reside in the minor. That this was a mere slip is obvious, for the exception to the instruction was general and unspecific, so that the attention of the judge was not called to the subject. As was said in the case of *Crater v. Binninger*, 33 N. J. Law, 520, "such a bill ought not to be allowed, for, as has been repeatedly said by this court, exceptions, to be legal, must be specific. But as the bill in this case comes before us in the general form this court has no power to limit the range of objections." See, also, *Packard v. Railroad Co.*, 54 N. J. Law, 229, 23 Atl. 722. These wages are an unknown quantity, and must have been included in the verdict. The error is incurable and the judgment therefore must be reversed. We have found no flaw in any other part of the trial.

THATCHER v. ALLEN.

(Supreme Court of New Jersey. Nov. 7, 1895.)

SALE OF FIRM BUSINESS—CONTRACT WITH OUTGOING PARTNER.

When a partnership business, after it has been sold, continues to be carried on in the firm name, a contract within the scope of the firm business, made by a member of the firm with a person who has no knowledge of the change in the ownership of the business, is binding upon the person to whom the business has been sold.

(Syllabus by the Court.)

Error to circuit court, Hunterdon county; Abbott, Judge.

Action by Mary B. Allen against Belle Thatcher. Judgment for plaintiff, and defendant brings error. Reversed.

Argued June term, 1895, before BEASLEY, C. J., and DIXON and GUMMERE, JJ.

George H. Large, for plaintiff in error. Richard S. Kuhl, for defendant in error.

GUMMERE, J. This writ brings up for review a judgment of the circuit court en-

tered upon a verdict for the plaintiff, which was directed by the trial judge at the close of the testimony. The error alleged is the action of the court in taking the case from the jury. The pertinent facts developed at the trial were these: The plaintiff, in 1879, purchased from her father-in-law, Robert Thatcher, and her husband, Amos Thatcher, a milk business, which they had carried on up to that time under the name of R. Thatcher & Son. The plaintiff, after purchasing the business, continued to carry it on under the same name, and neither the defendant nor the public generally, so far as the case shows, was ever notified of the change of ownership, but believed it to be still carried on by Robert and Amos Thatcher. From 1880 to 1893 the plaintiff supplied milk to the defendant, and this action was brought to recover the moneys which she claims are due to her on that account. The defendant does not deny that the milk was furnished her at the times and in the quantities stated by the plaintiff, but sets up as a defense that her husband (who died in 1878) recovered a judgment against Robert Thatcher and others in his lifetime, and that the bill sued upon was incurred by her under an agreement made with the firm of R. Thatcher & Son that the moneys to grow due upon the sale of the milk in question should be applied as part payment on that judgment; and she insists that, notwithstanding the change in the ownership of the business, she is entitled to the benefit of this agreement. Some evidence was offered by the defendant tending to show that such an agreement had been made, but the trial judge overruled the defense, and directed a verdict, on the ground that there was nothing in the case to show that the defendant had any interest in the judgment. In this there was error. The case should have been submitted to the jury, under proper instructions from the trial judge. This milk business having been originally carried on by the firm of R. Thatcher & Son, and there being no change in the name under which that business was conducted after its transfer to the plaintiff, and no notice having been given to the defendant, or to those who made this contract for her benefit, of the transfer of the business to the plaintiff, this contract was as valid against her as it would have been against the firm of R. Thatcher & Son, if the business had still belonged to them. 1 Lindl. Partn. p. 221, and cases cited. Nor does the fact that there was no evidence to show that the defendant had any interest in the judgment which was the subject-matter of the contract invalidate that contract, for it was entirely immaterial to the firm of R. Thatcher & Son who owned or controlled that judgment, so long as the moneys due for the milk furnished were applied to its payment. The judgment below should be reversed, and a new trial ordered.

STATE (ORENSTINE, Prosecutor) v.
SCHAFFER.

(Supreme Court of New Jersey. Nov. 11, 1895.)
ATTACHMENT FROM JUSTICE'S COURT—BY WHOM
SERVED.

1. A writ of attachment issued out of the court for the trial of small causes under the sixty-second section of the attachment act (Revision, p. 53), must be directed to one of the constables of the county, and he must execute and return the writ in order to confer jurisdiction upon the justice to proceed to judgment in the action.

2. A justice of the peace who issues an attachment in the court for the trial of small causes has no authority to deputeize a private citizen to execute and return the same. The return made by such deputeized person is a nullity, and by it the justice acquires no right to proceed any further upon the writ.

(Syllabus by the Court.)

Certiorari at the suit of Mollie Orenstine against Joseph Schaffer to review attachment proceedings before a justice of the peace. Judgment for prosecutor.

Argued at June term, 1895, before VAN SYCKEL, MAGIE, and LIPPINCOTT, JJ.

George M. Bacon, for prosecutor.

LIPPINCOTT, J. This certiorari brings up for review the proceedings and judgment in attachment in the court for the trial of small causes before Philip Schnitz, one of the justices of the peace of the county of Camden, wherein Joseph Schaffer was plaintiff and Mollie Orenstine was defendant. The affidavit upon which the writ was issued was in due form. The writ is directed to "any constable of the county of Camden." After the writ was issued by the justice of the peace, he deputeized one George R. Thompson, a private citizen, to execute the same, and the writ was by him executed and returned, and the justice continued the proceedings in attachment, and rendered judgment in favor of the plaintiff and against the defendant. Section 62 of the act for the relief of creditors against absconding and absent debtors (Revision, p. 53) provides that the writ of attachment issued by a justice of the peace holding the court for the trial of small causes shall be directed to a constable, who shall execute the same on the effects, rights, and credits of the defendant, according to the statutes, and then, upon the return thereof, the justice can, in accordance with this section, proceed to judgment and execution. It is clear that a constable is the only person qualified or authorized to execute this writ and make return thereto. The statute so clearly directs the manner of the execution and return that there can remain no doubt of the correctness of this proposition. The constable is the official appointed by the statute, and the only one qualified to perform these duties, and no authority exists in the justice of the peace to appoint a private citizen to execute the writ and make a return. In courts for the trial of small causes the constables are made, by the statute, the officials to execute the process within the county.

Robins v. Martin, 44 N. J. Law, 368. The execution of the writ and the return thereto could only be made by a constable, and without such execution and return the justice of the peace holding the court for the trial of small causes had no authority to proceed to judgment. The judgment must be reversed, with costs.

BEACH et al. v. STERLING IRON & ZINC CO.

(Court of Chancery of New Jersey. Nov. 8, 1895.)

NUISANCE—POLLUTION OF STREAM—INJUNCTION.

1. To a bill by a riparian proprietor to restrain defendant from polluting, by discoloration, the stream, it is no defense or equitable excuse that the discoloration is the natural and necessary result of mining operations prosecuted in the ordinary way. The doctrine finally adopted in Pennsylvania in the case of *Coal Co. v. Sanderson*, 6 Atl. 453, 113 Pa. St. 126, is not the law of this state.

2. Nor can the defendant set up that other independent causes are already operating to pollute.

3. The maintenance of a nuisance to real estate amounts to a taking of property, and cannot be legalized by the legislature for private purposes, even upon terms of making compensation. Hence, where the right of the complainant is clear, and the facts undisputed, a court of equity is bound to give preventive relief. To refuse it is to allow the defendant to take complainant's property upon terms of paying such compensation, from time to time, as a jury may assess.

4. In this case the discoloration of the water coming from the mine shaft was caused by a fine clay found in a rent or fissure in the rock intersected by the shaft, and, after continuing several months, began to abate, so that defendant was able, by the use of a settling basin, to deliver it to the stream in a clear condition; and such was the situation of affairs at the final hearing, which commenced about six months after the bill was filed. *Held* that, considering that defendant, by its answer, denied complainants' case throughout, and set up a right to throw the discolored water into the river, and that the proofs show that there is some danger of the occurrence of discoloration in the future, the decree establishing the complainants' rights should include a provision for a perpetual injunction.

(Syllabus by the Court.)

Bill by Alfred E. Beach and others against the Sterling Iron & Zinc Company to restrain the pollution of a natural water course. Heard on pleadings and proofs. Decree for complainants.

The object of this bill is to permanently restrain what is alleged to be a nuisance, namely, the pollution of a natural water course. The complainant Beach is the owner, and the complainant manufacturing company is lessee in possession, of a paper mill intended for making white tissue paper, situate on the Walkkill river, at Hamburg, in Sussex county, and driven by the waters of that river, drawn out of an old artificial pond called the "Furnace Pond." The defendant is the owner of a mining property situate near the river, at a place called "Greenspot," about a mile and a

half upstream, and southward from the paper mill. The complaint is that the defendant, in its mining operations, pumped out of its mine, and discharged into the river, upstream from the complainants' mill, large quantities of turbid and discolored water, which affected the whole stream, and rendered it unfit for use for making white tissue paper when it reached their mill. The answer puts the complainants on proof of the allegations of their bill; alleges that the water of the river as it flowed previous to its mining operations was unfit for use for making white paper; that its unfitness was not materially increased by the contributions from its mine; and that it had a right to continue its mining operations, although the effect was to increase the discoloration of the water of the river.

The bill was filed on the 21st of April, 1893. On that day an order to show cause why an injunction should not issue, with an order for interim restraint "against corrupting or discoloring the water in the Walkkill creek, so as to prevent the complainant the Sparks Manufacturing Company from carrying on its business of manufacturing white tissue paper in its accustomed manner," was made, returnable the 1st of May then next. On the 25th of April, upon ex parte application, and affidavits to the effect that the flow from the mine was discolored only for a short time at intervals, an order was made, modifying the interim restraint embodied in the order of April 21st, as follows: "That if in the course of pumping from its mine the defendant shall pump discolored water, and shall immediately notify the persons in charge of the complainants' factory of such discoloration before the discolored water shall reach the factory, in such case the restraining order shall be of no effect." On the 1st of May the hearing of the original order to show cause was postponed until the 15th of May, upon terms that the defendant give bond to secure the complainant against damages, and on the 15th of May it was further postponed, and from time to time thereafter until the 28th of June, when an order was made that an injunction do issue restraining the defendant from corrupting or discoloring the water of the creek above the paper mill of complainant, so as to damage complainant in its business of manufacturing white tissue paper in its customary manner, but that the operation of the injunction be suspended until the 17th of July next, in order to give the defendant an opportunity to provide for the disposition of its foul water, or otherwise avoid the injury to the complainant complained of. On the 17th of July a motion was made to further extend the operation of the injunction, which was denied, and an injunction was issued, according to the order of June 28th. The cause was duly referred, and was heard by evidence on the 2d and 3d of November, the 27th and 28th of December, 1893, the 10th and 11th of April, 1894, and on the 2d of October, 1895.

Theodore E. Dennis, R. L. Lawrence, and T. N. McCarter, Sr., for complainants. Charles D. Thompson and Gilbert Collins, for defendant.

PITNEY, V. C. (after stating the facts). The material facts of the case are undisputed. The only dispute is as to the degree of discoloration caused by the defendant's operations, and the length of time over which such discoloration extended.

The facts clearly established are as follows: The Walkkill river rises in the southern part of Sussex county, and flows upon a course of nearly north, passing through the villages of Franklin and Hamburg. At the latter place is situated an artificial pond, called the "Furnace Pond," caused by an old dam, upon which for several years has been a paper mill, driven by the waters of the river from that pond. The complainant Beach purchased this water power, and lands connected with it, in the summer of 1891, for the purpose of erecting a plant for the manufacture of what is known as "white tissue paper." Associated with him were two gentlemen by the name of "Sparks," who had previously been engaged in the business of waxing white tissue paper according to a process which they controlled, and the project was to both manufacture and wax for market white tissue paper. For that purpose the corporation was formed, of which Mr. Beach and the Messrs. Sparks were stockholders, and the latter were the active managers. A large amount of money was spent in erecting a plant between the date of the purchase and the 1st of February, 1892, when they commenced the manufacture of white tissue paper, and carried it on with success for about a year. The manufacture of such paper requires a perfectly clear, pure water, and, before purchasing the Hamburg water power, the complainants inspected the stream, and inquired as to its character for clearness, and satisfied themselves that they would be able to use it for making white tissue paper without incurring the expense of filtration, and their experience for a year proved that their expectations were just. In the month of February, 1893, complaints began to come in from the purchasers of their paper that it was deteriorating in the matter of whiteness, and they investigated the cause. The pond was frozen over, but they knew by reputation that mining operations were being carried on at Greenspot by the defendants, and they went there March 1st, and found a stream of highly-colored water flowing from the defendant's mine shaft into the river, traced its effect in discoloration to their pond, and, by subsequent observations by themselves and others in the neighborhood, traced its effect, not only in and through the Furnace pond, but for miles down the river, to the north of Hamburg. In fact, several respectable and credible witnesses called by

the complainants testified to the discoloration of the water in the Furnace pond and beyond, and the complainants were stopped by the court from producing further evidence on that subject in the opening of their case. Several witnesses called by defendant, among them its superintendent, corroborated this evidence, and there was no attempt to meet it. The color was a peculiar reddish yellow tint, which was in marked contrast with the discoloration due to the ordinary road and field wash after a heavy storm or spring thaw. This peculiar discoloration continued throughout the month of March, and, with some intermissions and variations in degree of discoloration, through the month of April. Complainants, early in March, were obliged to stop the making of white tissue paper. Negotiations between the parties for some arrangement of the matter failing, the bill was filed on the 21st of April, 1893. The immediate origin of the discoloration was as follows: The defendant corporation was organized by two gentlemen by the name of "Heckscher" and two by the name of "Wetherill," for the purpose of reaching and working a bed of franklinite ore, which had been located by boring explorations at a depth of about 1,000 feet below the surface near this point called "Greenspot." It was the continuation of a seam of ore for many years worked to the southwest of Greenspot by two companies, one of which, viz. the Lehigh Zinc & Iron Company, was owned and controlled by the Heckschers and Wetherills. In the spring or early summer of 1891 the defendant commenced to sink a perpendicular shaft, known as the "Parker Shaft," 10 by 20 feet in diameter, and, after passing through a small amount of superincumbent earth, struck solid limestone rock. It continued the working without cessation until August 11, 1892, when, having attained a depth of 560 feet (many feet lower than the bed of the Walkkill), the workmen struck a water-bearing fissure or rent in the rock, which instantly flooded the mine, and drove them out. Previous to that time they had encountered small seams or fissures from time to time, producing a little water, and sometimes a little mud, which they pumped up, of course, carried through a trough or trunk several hundred feet westerly toward the Walkkill till it reached a small spring run, where it was discharged, and from thence it ran into the Walkkill. The amount of water up to August was small, and its discoloration was slight, so that it was not felt or observed by complainants. The influx in August, 1892, was discolored by a fine clay, amounting almost to a pigment, having a high reddish yellow tint, and intermixed with a small quantity of very fine sand. This water rose to within 40 feet of the surface, and resisted all attempts to lower it by the pumps then in use, and until very large and heavy pumps were introduced. This was

done in September. After the shaft filled with water, there was no further movement, it became perfectly quiet, and the clay and sand began to settle, so that the water in the upper reach of the shaft became comparatively clear. The first water that was discharged after heavy pumping commenced came from near the top, and was but slightly discolored, such discoloration being due to the disturbance of the clay and sand which had settled on the timbering of the shaft. The quantity of water struck in the fissure was so great that with these powerful pumps very slow advance was made, the pumps being lowered from time to time, and the greater the depth attained, the less rapid the advance and the greater the discoloration. On about the 1st of January, 1893, the water was reduced to a depth of 420 feet from the surface, and a delay there occurred of about three weeks, caused by the necessity of establishing a pumping station at that point. When the rapid pumping commenced again, at or near the 1st of February, the discharge was much discolored, and continued growing worse and worse, until the bottom was reached, and there, without detailing the circumstances, the greatest discoloration was reached, and continued during the month of March. The discoloring clay is so very fine in its texture that a very slight movement of particles of water with which it comes in contact will thoroughly mix it, and it will only subside in perfectly still water. This accounts for the fact that it did not fully subside in passing through complainants' pond, which is quite narrow, so that it is probable that the volume of the water of the Walkill causes continued motion throughout its length. After the shaft had been entirely pumped out, and the volume of water stored in the fissure had been entirely exhausted, and the flow reduced to the natural supply of the fissure, and the various water channels which had been created throughout it by the sudden drawing off of the water had arrived at what the experts call an "angle of repose," so that no further scouring resulted from the flow of the ordinary quantity of water, there was no discoloration, and the water ran clear. This condition was, as claimed by the defendant, reached some time in the summer of 1893, and the case shows that, from about the middle of April or the 1st of May till about the middle of July, the discolorations were temporary, and increasingly infrequent, and usually the result of clearing out the different settling basins, called "sinks," which had been established in the rock at different points in the shaft. Since that time the shaft has been sunk over 200 feet without finding any more water or fissures. The proof is clear that the result of the contribution of this discolored water to the waters of the river was to render the mixture, when it reached complainants' mill, unfit, without filtration, for use in making white paper.

An ingenious experiment was made by an expert, as follows: He ascertained, by a rough measurement, that the flow of the river was about 40 times that of the output from the mine, and he took a jar of perfectly clear water, and mixed with it one-fortieth its quantity of the dirty water that came from the mine, and exhibited the sample, to show to what a slight extent it was discolored. The dirty water which he used had been confined in a jar for several months, with the result that the fine particles of clay had partially coagulated, and gathered into little flakes, and when shaken up did not produce the same degree of discoloration as exhibited when freshly taken from the running stream. But even that experiment showed that the result of so slight a mixture made the whole mass palpably roily. In point of fact, as shown by the evidence of the expert paper-makers, a very small admixture of mud or clay will render the water improper, without filtration, for making white tissue paper; and the effect of that evidence is that the river, in its ordinary clear state, is no clearer than is necessary for that purpose. A very small admixture of coloring or dirty matter renders it unfit for use.

Several matters are urged in defense to this case: First, but faintly, that the doctrine finally established by a bare majority of a divided court in Pennsylvania in *Sanderson v. Coal Co.*, 86 Pa. St. 406, 94 Pa. St. 303, and 102 Pa. St. 370, and *Coal Co. v. Sanderson*, 113 Pa. St. 128, 6 Atl. 453, should be adopted here. The history of that case in its various phases is given by a writer in 1 *Am. Law Reg. & Rev.* (N. S.) p. 1 (1894). It was an action, as here, by a riparian proprietor against a mining company for polluting a natural stream with water pumped from its mine. After three decisions by the supreme court of Pennsylvania in favor of the plaintiff's right, that court finally held the contrary, and affirmed the right of the coal company to discharge its acid mine water into the creek, without regard to its effect upon lands below, upon the broad ground that the necessities of the mining interests of the commonwealth required it. This result was attributed by the author of the article in the *American Law Register & Review* (pages 5, 18), in part, to a lack of care on the part of the learned judge who prepared the first prevailing opinion (86 Pa. St. 406). The doctrine of that case is shown by that writer to be inharmonious with a long line of previous decisions in Pennsylvania, and has not been, so far as I can learn, followed in any other state,—certainly not in this state. It was repudiated in Ohio, whose mining interests are quite large, in the recent and well-considered case of *Iron Co. v. Tucker*, 48 Ohio St. 41, 26 N. E. 630. I refer particularly to the lucid expressions of the learned judge found on pages 58-62, 48 Ohio St., and page 630, 26 N. E.

It was not suggested on the argument that the doctrine ever had the least foothold in this state. No case of a stream fouled by mining operations has, indeed, ever, so far as I know, been presented to our courts; but the right of a riparian proprietor to have the waters of the stream come to him unchanged in quality, as well as undiminished in quantity, has been determined in the clearest and most positive manner. In fact, the doctrine stated so tersely by Chancellor Kent in *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162, at page 166: "A right to a stream of water is as sacred as a right to the soil over which it flows; it is a part of the freehold,"—has always been adhered to by our courts. I need refer only to *Holsman v. Bleaching Co.*, 14 N. J. Eq. 335, and *Water Co. v. Watson*, 29 N. J. Eq. 386. In the last case the right was stated by the learned master in an extremely clear and comprehensive manner, and the decree advised by him was unanimously affirmed on appeal for the reasons by him given. The facts of that case are, in a manner, analogous to those here under consideration. Watson owned and operated a bleachery, which required for use clear and pure water, which he obtained from a small stream running through his land. The water company, desiring to supply the city of Passaic with potable water, proposed to take this small stream above the bleachery, and substitute for it an equal or greater quantity of Passaic river water drawn from the Dundee canal, and used to drive its pumps. This the court restrained, on the ground that the substituted water was not of equal purity with that abstracted.

There is a line of cases of pollution by mine water in England which sustains the general doctrine. *Hodgkinson v. Ennor*, 4 Best & S. 229, was the case, as here, of a paper-maker against a miner, who had permitted dirty washings of lead ores to run through rents, called "swallets," in limestone rock, into a subterranean stream, rendering the water, which, in its course, came to plaintiff's paper mill, unfit for use in the manufacture of paper; and the action was sustained by Chief Justice Cockburn and Judges Blackburn and Mellor. *Magor v. Chadwick*, 11 Adol. & E. 571, was a suit by a brewer against a miner. *Pennington v. Coal Co.* (1877) 5 Ch. Div. p. 769, was a suit by a manufacturer against a coal miner, where the only allegation of injury was that the acid contributed to the water from the mine rendered it less fit for use in the engine boilers driving the machinery of the plaintiff's mill. An injunction was allowed. Defendant relied, without success, upon the ground taken in *Sanderson v. Coal Co.*, supra, that the acid could not be removed from the water, that there was no means of remedying the evil, and an injunction would absolutely stop its work. The learned judge (Fry) refused even to exercise the right giv-

en by the English statute to give damages, instead of an injunction; relying on *Clowes v. Water Works Co.* (1872) 8 Ch. App. 125, and he declared that he would have granted the injunction, although the present damage was only nominal, because of the injury to the riparian rights of the plaintiff. And such is the doctrine of the case relied on, which was a suit by a silk dyeing and washing establishment against a waterworks company for rendering the water coming to their works less clear and pure.

The English cases dealing with pollution by mine water culminated in the case of *Young v. Distillery Co.* [1893] App. Cas. 691, in the house of lords, on appeal from Scotland. The case was argued, elaborately, of course, before six law lords, whose unanimous judgments were delivered after consideration. The riparian proprietor (Bankier), the plaintiff there, was a distiller, and used the water of the stream in his distilling process, presumably for making mash, for which it was peculiarly fit by reason of its softness. The added mine water did not render it unfit for ordinary purposes, there called "primary purposes," but, by reason of its hardness, rendered it less fit for distilling purposes. *Sanderson v. Coal Co.* was cited, but the court repudiated its doctrine, and was unanimous in judgment in favor of the respondent, who was the plaintiff, and had judgment below. Lord Macnaghten (at page 699) says: "Then the appellant urged [precisely as does the defendant here] that working coal was the natural and proper use of their mineral property. They said they could not continue to work unless they were permitted to discharge the water which accumulates in their mine; and they added that this water course is the natural and proper channel to carry off the surplus water of the district. All that may be very true, but in this country, at any rate, it is not permissible in such a case for a man to use his own property so as to injure the property of his neighbor."

There are numerous English cases upon the general right of a riparian proprietor to have the water of his stream come to him in its natural condition of which I cite *Crossley v. Lightowler*, L. R. 3 Eq. 279, Id. (1867) 2 Ch. App. 478; *Attorney General v. Colney Hatch Lunatic Asylum* (1868) 4 Ch. App. 146. Numerous other cases will be found cited in *Gould, Waters*, § 219, and in *Higgins, Water Courses*, p. 132 et seq.

The argument was advanced by the defendant that the use of the defendant's property for mining purposes is what was termed, unfortunately, I think, by Lord Cairns in *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330, at pages 338, 339, a "natural user," and similar in that respect to plowing a field; and that, if it be unlawful for defendant here to cast into the stream the muddy waters from its mine, it is also unlawful for the farmer to plow his land, and

allow the muddy water which runs from it after a heavy rain to reach the river. But the very statement of the two cases shows the absence of analogy between them. In the first place, the water from the plowed field comes thereon by natural causes beyond the farmer's control, and runs by gravity to the stream, while in the case of the mine the water is, as here, found and raised by artificial means from a level far below that of the river, and would never reach it but for the act of the miner; and, in the second place, by the common law of the land, every owner may cultivate his land without regard to its effects upon his neighbor, while such is not the law as to mining. The supreme court of Ohio, in *Iron Co. v. Tucker*, 48 Ohio St. 41, at page 58, 26 N. E. 630, repudiates the notion that mining was a natural use of land in the sense that farming is. The ground of a reasonable natural user seems to be at the bottom of what was said in *Merrifield v. Worcester*, 110 Mass. 216, upon this topic. So far as the expressions there used favor the notion that a city or town may collect and discharge sewage matter into a fresh-water stream, to the injury of a riparian owner, without liability to action, they are contrary to the law as held in England for centuries. *Higgins, Water Courses*, p. 127 et seq., where several cases besides those above cited are collected.

Equally untenable is another position advanced by the defendant, viz. that the river was always more or less polluted by contributions from other mines, and from the washing of plowed fields, public roads, and railroad embankments. Such insinuations have been frequently made, and always overruled. The question in such cases seems to be whether the stream has already become so far polluted by contributors who have acquired a right so to do, by adverse use or otherwise, as that the pollution presently opposed will not sensibly alter its condition; and even in such a case the courts have held that the party has the right to deal with each contributor in detail, and to buy off such contributors as have acquired a right, and is not obliged to submit to fresh contributions. I cite the following authorities: *Ross v. Butler*, 19 N. J. Eq. 294, at page 306, and *Attorney General v. Steward*, 20 N. J. Eq. 415, at page 419, where the learned chancellor says: "The defendants have no right to pollute or corrupt the waters of the creek, or, if they are already partially polluted, to render them more so;" and to *Cleveland v. Gas Light Co.*, 20 N. J. Eq. 201, at page 208, and *Meigs v. Lister*, 23 N. J. Eq. 199, at page 205, where the learned chancellor says: "The position taken by counsel that the complainants were entitled to no relief from this nuisance, because the locality was surrounded by other nuisances, and dedicated to such purposes, has no foundation in law or in fact. If there were several nuisances of the

like nature surrounding them, they must seek relief from each separately; they cannot be joined in one suit, nor need the suits proceed *pari passu*." *Crossley v. Lightowler* (1867) 2 Ch. App. 478, at page 481, where Lord Chelmsford says: "But the defendants contend that the plaintiffs have no right to complain of any pollution of the Hebble occasioned by them, because there are many other manufacturers who pour polluting matter into the stream above the plaintiffs' works, so that they never could have the water in a fit state for use, even if the defendants altogether ceased to foul it. The case of *Smelting Co. v. Tipping*, 11 H. L. Cas. 642, 11 Jur. (N. S.) 785, is, however, an answer to this defense. Where there are many existing nuisances, either to the air or to water, it may be very difficult to trace to its source the injury occasioned by any one of them; but if the defendants add to the former foul state of the water, and yet are not to be responsible on account of its previous condition, this consequence would follow: that if the plaintiffs were to make terms with the other polluters of the stream, so as to have water free from impurities produced by their works, the defendants might say: 'We began to foul the stream at a time when, as against you, it was lawful for us to do so, inasmuch as it was unfit for your use, and you cannot now, by getting rid of the existing pollutions from other sources, prevent our continuing to do what, at the time when we began, you had no right to object to.'" *Attorney General v. Colney Hatch Lunatic Asylum*, 4 Ch. App. 148, at page 150 (report of the expert) and page 155; *Attorney General v. Leeds Corp.* (1870) 5 Ch. App. 583, at page 595, where the lord chancellor says: "I think the argument deduced from the foul state of the water before it gets to Leeds is not deserving of any weight for two reasons: First, and it is hardly disputed, the evil did become seriously aggravated when the new sewer was opened,—that is to say, sixteen or seventeen years ago; and, secondly, the nuisance might terminate, and no one can say it was right that, when one nuisance terminates, there should be another brought into existence." The sensible and material increase in the discoloration of the water in this case, resulting from the contribution of the defendant's mine is clearly proved. The complainants were able to make white paper successfully and satisfactorily from February 1, 1892, for nearly a year, and until the serious discharge of discolored water from the defendant's shaft in January, 1893; and they were also able to make such paper after the discolored water ceased to run in June or July, 1893. During the intermediate period, while the discoloration of the water being discharged from defendant's mine was the greatest, complainants could not make white paper satisfactorily.

In whatever point of view the complainants' case is considered, it seems entirel

clear and free from doubt. I cannot think the least doubt is cast upon the law by the last decision in the Sanderson Case, in Pennsylvania, and the facts of the case are substantially undisputed. The complainants' title and possession of the ripa, though put in issue by the answer, are established by the proofs, and were finally admitted at the hearing. Their right to have the water come to them in its natural condition follows inevitably. *Holsman v. Bleaching Co.*, 14 N. J. Eq. 335, at page 343, bottom, and cases there cited. The learned chancellor there says: "Where the complainant seeks protection in the enjoyment of a natural water course upon his land, the right will ordinarily be regarded as clear; and the mere fact that the defendant denies the right by his answer, or sets up title in himself by adverse user, will not entitle him to an issue before the allowance of an injunction."

There can be no doubt that, upon the facts presented, it would be the duty of a judge to direct a verdict, and the rule adopted by the court of errors and appeals in *Higgins v. Water Co.*, 36 N. J. Eq. 538, applies. I refer to the language of the chief justice on page 544 et seq. The jurisdiction of this court to adopt, on final hearing, the extreme remedy of an injunction in this class of cases, when the right is clear, is well established, not only by the case just cited, but by *Water Co. v. Watson*, supra, which was decided by the court of errors and appeals, and by *Holsman v. Bleaching Co.*, supra, decided by Chancellor Green, and by *Shields v. Arndt*, 4 N. J. Eq. 234, and by *Carlisle v. Cooper*, 21 N. J. Eq. 576.

It was suggested that in this case no injunction should be ordered, but that the complainants should be left to their action at law for damages. I am unable to adopt that view. It must now be considered as settled law in this state that the maintenance of a nuisance of the kind here in question is, in effect, a taking of property. *Railroad Co. v. Angel*, 41 N. J. Eq. 316, at page 329, 7 Atl. 432, where Judge Dixon, speaking for the court of errors and appeals, says: "This principle rests upon the express terms of the constitution. In declaring that private property shall not be taken without recompense, that instrument secures to owners, not only the possession of property, but also those rights which render possession valuable. Whether you flood the farmer's fields, so that they cannot be cultivated, or pollute the bleacher's stream, so that his fabrics are stained, or fill one's dwelling with smells and noise, so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense. Of course, mere statutory authority will not avail for such an interference with private property. This doctrine has

been frequently enforced in our courts;" and he proceeds to cite previous authorities in the same court. If this be so, then the legislature has no power to authorize the maintenance of a nuisance for the promotion of private objects, even upon terms of making compensation; for no authority is necessary for the position that the legislature is powerless to enact a law declaring that defendant may have complainants' mill and water power, upon terms of paying them what a court may ascertain they are worth, and I am unable to distinguish such action and that of leaving complainants to the remedy of repeated actions at law to recover damages as often as they are suffered. In this respect our system of laws varies from that of England, where parliament is omnipotent, and is not confined to the mere making of laws,—the true function of a legislature,—but may take private property for private purposes, with or without making compensation, the only restraint upon its power being its own innate sense of justice. Hence the English courts are authorized, in cases of certain nuisances, to give damages once for all, instead of an injunction.

The result of my consideration of the subject is that there is no principle which will sustain a court of equity in refusing an injunction against the maintenance of an established continuing nuisance, and leaving the injured party to his remedy at law. To do so is, in effect, to permit a party to take his neighbor's land for his own use, upon terms of making such compensation as a jury shall assess. This is inadmissible. The object and office of a verdict and judgment at law is to establish the right, and give compensation for past injuries. The right being once made clear, whether by judgment at law or upon incontrovertible rules of law and well-established facts, the remedy in equity by injunction to prevent future injury is a matter of right, and the relief cannot be refused.

The ground, however, mainly relied upon by defendant is that the proofs show that the nuisance has entirely abated, and that there is no danger of its recurrence, and hence an injunction is unnecessary and improper. At about the time the injunction was issued, July 17, 1893, defendant purchased a small tract of land skirting the railroad, between the shaft and the river, and established on it a settling basin, into which the mine water was turned, and given opportunity for subsidence before reaching the river. The result was that it was substantially clear, and no further injury has been since felt at the paper mill. It is also in proof that from that time up to July, 1894, the water was usually clear when it came from the mine. At the sessions of December 27 and December 28, 1893, Professor Nason, a competent geologist and mining expert, testified that in his opinion no further clay and water-bearing seams or rents would be met in the course of defendant's mining operations, and that the rent which had given so much trouble had, by natural causes, be-

come harmless. It was not suggested that all or any large proportion of the discolored clay deposit had been removed, but the theory was advanced that the descending water had worn channels in the clay, resulting in little rivulets, centering at the section by the shaft, and that the scouring power of the water—that is, its power to bring down clay—had ceased by reason of the clay banks and beds of the little rivulets having arrived at an “angle of repose.” The stability of this state of affairs depends, of course, upon the uniformity of the flow of water both as to quantity and source of inflow, and Professor Nason, on cross-examination, admitted some uncertainty in this respect. After his examination, and the close of the evidence on both sides, and before the argument, viz. about July 16, 1894, an unexpected influx of muddy water occurred, due to an overflow from a flume carrying water from the neighboring mine of the Lehigh Zinc & Iron Company, which found its way into the seam or rent at a point where it came to the surface, about 1,800 feet from the Parker (defendant’s) shaft. This opening was a surface fissure or swallet in the rock, quite common where limestone rocks come to the surface. In this case, as I understand Professor Nason, he did not suppose or infer, from the trend of the fissure, that it reached the surface in that neighborhood, but such was the fact. It was promptly stopped by defendant, and filled up, so as to prevent any more water getting in at that point. Now it seems to me that this occurrence shows the impossibility of affirming that there will be no further incursions of muddy water. It is true that, with the continued use of the settling ground, no injury will probably result to complainants from such an irruption. I say “probably,” because, in case of a sudden irruption of discolored water, the quantity might be so great as to overwork the present settling basin. But, without a decree and injunction, the defendant will be at liberty to discontinue its use, and permit any muddy water that may appear to flow into the Furnace pond as of old. At the time the complainants filed their bill, the injury was serious and continuous. The defendant positively declined to stop it, but claimed the right to continue it. To complainants’ bill was interposed a general denial, and setting up a right to persist in the injury as long as its necessities required. On all these issues the defendant is beaten. The complainants have established their case, and it would seem to be a most lame and impotent conclusion to refuse to give them the very relief prayed for, viz. a perpetual injunction. I am unable to imagine any other decree in their favor which would adequately meet the case, and give them the just fruits of their suit; and surely, if there is no danger of further discoloration, the injunction will do the defendant no harm, but will be of value as a muniment of title to the complainants’ property. The language of Lord Justice Turner in *Goldsmid v. Commissioners*, 1 Ch. App. 349,

at page 355, applies: “In this particular I think that regard must be had, not merely to the comfort or convenience of the occupiers of the estate, which may only be interfered with temporarily, and in a partial degree, but regard must also be had to the effect of the nuisance upon the value of the estate, upon the prospect of dealing with it to advantage; and I cannot but think that the value of this estate, and the prospect of advantage in dealing with it, are and will be affected by the continuance of this nuisance.”

But the defendant further urges that the complainants have manifested a disposition to make an unreasonably harsh and oppressive use of their rights in the premises, and thereby weakened their standing in equity, and disentitled themselves to the extreme relief asked for. In the month of March, 1894, while the outflow from the mine was at its worst, negotiations took place between the parties for some sort of settlement, and no result was mentioned. The complainants offered to be satisfied if defendant would furnish them with a filter of proper size, which they estimated at about which there is no dispute—worth about \$5,000. The defendant offered to furnish one-half of the expense of the filter, the other half to be in full compensation for all damages to the time it was furnished, which offer the complainants refused to accept. I cannot say anything harsh or oppressive in that refusal. Next, and after bill filed, as I now recollect, the defendant made an arrangement with the complainants for the use of a gristmill, located upon a little stream, which empties into the Furnace pond, and which has the right to divert water from the mill, and discharge it by a flume several hundred feet down the stream to the complainants’ works, and furnish them with clear water from that stream. Complainants employed an expert to examine the stream, and see whether it would supply sufficient water for their paper engines, with the result that they were informed and believed that it was not sufficient, and declined to accept it as a substitute for the river water. The defendant, nevertheless, in the face of the complainants’ refusal, built the flume—a wooden trough set upon benches and trestles—along the surface of the ground, down to the mill yard of the complainants. The complainants refused to allow it to be put across the mill yard, because it would prevent them from having access to their works, and from the free passage with carts and wagons from one part of the mill to the other, and said that anything of the kind must be put underground, in iron pipes. But the radical difficulty with that move on the part of the defendant was that it gave no right to the use of the water was merely retained temporarily from a mere tenant of the mill property, and did not give the complainants any permanent right to the flow of the stream, even if it had been large enough to supply their purposes. I can see nothing harsh or oppressive in complainants’ action in refusing this offer of substitution. They not only have the strict right in law to refuse to accept

them, but their conduct in so doing, in my judgment, was not inequitable.

I shall advise a decree establishing the complainants' right to the flow of the stream in its natural condition, and an injunction, with costs.

STEVENS v. BOSCH et al.

(Court of Chancery of New Jersey. Nov. 8, 1895.)

TRUSTS—ENFORCEMENT IN EQUITY—PLEADING—PARTIES—COSTS.

1. A bill by the successor of a deceased trustee against the assignee of deceased's executrix is not multifarious because it both seeks to ascertain the amount of the trust fund in the hands of the executrix of the deceased trustee, who was also his sole devisee, and declares the same a lien upon certain lands belonging to deceased's estate.

2. Where a bill by one appointed by the court as successor to a deceased trustee under a will, filed to ascertain the amount of the trust estate in the hands of the deceased at his death, shows that the will appointing deceased devised an estate to him in trust to pay the income therefrom to the testator's daughter during her life, and at her death to divide it among her children and grandchildren, and that the daughter is still living, complainant's *cestuis que trustent* are not necessary parties, the object of the suit being simply to recover the trust estate from the former trustee's estate.

3. A trustee devised his entire estate to his wife, who was also named as executrix, and she assigned the whole of the property passing under the will to a third person, for the benefit of the creditors of a partnership of which her husband had been a member, and of a corporation in which he had held stock. A bill was filed by a successor appointed by the court in the trusteeship left vacant by the husband's death, to ascertain the amount of the trust estate in the deceased's hands at his death, and to recover the same. *Held*, that the *cestuis que trustent* of the assignee of the executrix were not necessary parties defendant.

4. A. was appointed trustee under a will to hold testator's property in trust for the payment of the income therefrom to his daughter during her life, and then to divide the entire property between her children and grandchildren. A. died, devising his entire estate to his wife as executrix, and she assigned it to a third person, in trust to pay the debts of a partnership of which her husband had been a member, and of a corporation in which he had held stock. B. was appointed to succeed A. in his trust, and filed a bill against the executrix and her assignee to ascertain the amount of the trust estate, and to recover possession of it. In it he alleged that the trust fund amounted to a certain sum, and that the former trustee had executed his bond for that sum to a third person, and secured it by a mortgage on certain of his own property; that subsequently he procured an assignment thereof to himself as trustee, and held it as such at the time of his death; that the bond and mortgage were still in existence and in the possession of complainant, but that the property covered by it is insufficient as security. He prayed a foreclosure of this bond and mortgage, and the former partner of the deceased trustee was made a party defendant. Upon his demurring to the bill on the ground of multifariousness, complainant moved to amend by striking out the clause praying for a foreclosure. *Held*, that the granting of the motion to amend would not be made contingent upon payment of costs as against the deceased trustee's former partner.

Bill by Frank Stevens, as trustee under the will of Clark Hammond, deceased, against Joanna C. Bosch, James E. Howell, and others, to ascertain the amount of a certain trust fund, of which Alfred Lister, deceased, a former husband of defendant Bosch, was trustee, and over which complainant was appointed as his successor. The cause appears on demurrers to the bill. Overruled.

Charles H. Hartshorn, for complainant.
F. W. Ward and George M. Keasbey, for defendants.

PITNEY, V. C. The complainant was appointed by the orphans' court of the county of Essex trustee to execute the trust created by the will of one Clark Hammond, in place of Alfred Lister, deceased, who was the trustee named in the will. The object of the bill is—First, to ascertain the amount of the trust estate which was received by Lister in his lifetime; and, second, to recover the same from the estate of which he died seised. Lister, by his will, after directing the payment of his debts, gave the whole of his estate, which consisted entirely of land, to his widow, Joanna C. Lister (who has since intermarried with one Bosch), and appointed her executrix thereof. There was no personal estate. Mrs. Lister conveyed all the lands (with a trifling exception) of which her husband died seised to the defendant Howell, in trust for the payment of certain debts of a corporation in which Lister was interested, and of a certain partnership of H. S. Miller & Co., of which he was a member. The allegation of the bill is that Lister received at least \$6,000 of the estate of Hammond which he failed to properly invest, so that his estate is liable to pay that sum, at least, with arrears of interest, to the complainant; and the equity relied upon is that the debt due the estate of Hammond was the individual debt of Lister, and should be paid out of his estate before the partnership debts of H. S. Miller & Co., and before any of the debts of the corporation of which he was a member.

The demurrer states two grounds: First. Misjoinder of causes of action, viz.: (a) A suit to ascertain the amount of the trust fund in the hands of the executrix of Lister, and (b) to declare the same a lien upon certain lands. Second. Lack of parties, both complainant and defendant.

There is no misjoinder of causes of action. The suit has a single object, namely, to recover from the estate of Alfred Lister, in whose-soever hands it is found, the amount due from him to the estate of Hammond. The ascertaining of the precise amount due is a mere incident. The main object of it is to follow the assets of the estate into the hands of the assignee of the devisee, and to enforce a lien thereon given both by the statute and by the will of the decedent. The author—

ties cited for the contrary position, when carefully examined, do not sustain it. *Salvidge v. Hyde*, 5 Madd. 138, Jac. 151, was a creditors' bill against an executor to settle the estate of the testator, and also to set aside a sale made by the executor to a purchaser who was made a party. The vice chancellor, as reported in 5 Madd., held the bill not to be multifarious, and I think his reasoning is sound. He was reversed by Lord Eldon, on appeal, for reasons which Lord Cottenham explained in *Attorney General v. Cradock*, 3 Mylne & C. 85, at page 96. And see *Campbell v. Mackay*, 1 Mylne & C. 603. The object of the present bill is not, as in *Salvidge v. Hyde*, to have a general settlement of the estate of Lister, but to ascertain simply the amount due from him. All the parties to the bill are interested in both the questions, and the two are indissolubly connected.

It was suggested that the complainant should first establish the amount due from the estate of Lister, and then file his bill against the grantee to establish his lien upon the lands. But the complete answer to that suggestion is that the grantee, as trustee, is engaged in selling the lands and distributing the proceeds among the creditors of Lister, and, by the time the first suit would come to a conclusion, the estate would probably have been disposed of and distributed among divers creditors in different parts of the country.

Upon the question of multifariousness or misjoinder, the judges all agree that it is impossible to lay down any rule applicable universally, or to say what constitutes or not multifariousness as an abstract proposition, but that each case must be determined upon its own particular facts, and in the exercise of a sound discretion by the court as to what will best tend to the promotion of justice in a particular case. Vice Chancellor Van Fleet, in *Ferry v. Lalble*, 27 N. J. Eq. 146, at page 150, says: "The question is not one of principle, but of convenience, addressed to the sound discretion of the court." And Justice Depue, in *Railroad Co. v. McFarlan*, 31 N. J. Eq. 758, says: "The rule with regard to multifariousness, whether arising from the misjoinder of causes of action, or of defendants therein, is not an inflexible rule of practice or procedure, but is a rule founded in general convenience, which rests upon the consideration of what will best promote the administration of justice, without multiplying unnecessary litigation on the one hand, or drawing suitors into needless and unnecessary expenses on the other." The present case resembles that of the foreclosure of a mortgage against an assignee by deed with warranty of the mortgaged premises, who has not assumed the mortgage, and where the amount due upon the mortgage is open to dispute. Clearly, in such a case the original mortgagor and bondsman should be brought in, and the

amount due upon the mortgage established as against him, as a part of the foreclosure proceeding.

Next, as to want of parties: It is alleged that the cestuis que trustent under the will of Hammond should be made parties complainant, and that the cestuis que trustent of the defendant Howell should have been made parties defendant.

With regard to the first allegation, the bill shows that the estate was devised to the trustee in trust to pay the income to the testator's daughter during her life, and at her death to divide it among his children and grandchildren. The daughter is still living, and hence the trustee is not a mere naked formal trustee holding the legal title, without any active duties to perform except to pay it as soon as received to his cestui que trust, but he is entitled to hold the fund upon a continuing trust, with active duties; and the object of the present suit is simply to recover the estate from the hands of the holders of the estate of the former trustee. In such case the general rule laid down in the books that cestuis que trustent are necessary parties complainant does not apply. *Story, Eq. Pl. § 215a*. The cases cited by counsel, to wit: *Tyson v. Applegate*, 40 N. J. Eq. 305; *Brokaw v. Brokaw*, 41 N. J. Eq. 223, 7 Atl. 414; *Cool's Ex'rs v. Higgins*, 25 N. J. Eq. 116; *Allen's Ex'rs v. Roll*, Id. 163,—are all distinguishable on the ground that in those cases either the complainant was a bare trustee, and was not entitled to hold possession of the fund when recovered, or the interests of the cestuis que trustent were adverse to those of the complainant. The distinction above pointed out is treated of by Mr. Calvert in his book on *Parties* (2d Ed., 1847, pp. 277, 278), and several cases are there cited illustrating the distinction, to which I add the case of *Reeve v. Richer*, 1 De Gex & S. 624, 17 Law J. Ch. 86. This is not a suit to administer a trust, or in which the construction of it or the rights between trustee and cestuis que trustent are at all involved. The trustee here represents his cestuis que trustent, and the case is clearly within one of the exceptions mentioned by Justice Dixon in his opinion in *Smith v. Gaines*, 39 N. J. Eq., at pages 549, 550.

The next specification of want of parties is that the cestuis que trustent of the defendant Howell should have been made parties. I am of opinion that this objection, as well as the others, cannot prevail. So far as the bill shows, the names of the persons for whom Howell holds the estate in trust are wholly unknown to the complainant, and the allegation is that they are not only unknown to the complainant, but, if known, are so numerous as to make it inconvenient and improper to bring them all in. The defendant Howell represents them, and they are clearly within a familiar exception to the rule that all the cestuis que trustent must be made defendants. The defendant Howell will have no difficulty in protecting himself by giving to each of his cestui

que trustent notice of the suit and its objects; and, if he is embarrassed by any lack of harmony among them, he may take such means to protect himself as he shall be advised. At present I can only be governed by the allegations of the bill, which show a clear case for omitting Howell's cestui que trust-ent.

The bill had another aspect which requires consideration. The allegation is that the trust fund amounted to at least \$6,000; and, as evidence of this, it is stated that the former trustee, Lister, made his bond for \$6,000 to a third person, and secured it by a mortgage of certain of his own real estate; and that subsequently he procured an assignment of his own bond and mortgage to himself as trustee of Hammond, and held it as such at the time of his death; and that the bond and mortgage are still in existence, and at the moment of the argument were in the possession of the complainant. The allegation with regard to this bond and mortgage is that the property covered by it is entirely insufficient to secure it, and that, if it was intended as an investment of so much of the fund, it was a breach of trust. The bill prays a foreclosure of this bond and mortgage, and certain judgment creditors of Mrs. Bosch, the devisee of the deceased trustee, were made parties, and brought in as subsequent lienors upon the mortgaged premises. Among these is Henry S. Miller, the former partner of Lister, the trustee, and he demurs to the bill on the ground of multifariousness, alleging, among other things, that so much of the bill as prays foreclosure has no connection with the other part of the bill, and renders it multifarious. Before the argument came on, complainant moved to amend his own bill by striking out the clauses praying foreclosure, and making the judgment creditors of Mrs. Bosch parties as lienors. The motion was granted, the only question being as to whether it should be granted upon payment of costs as against Miller. The object of adding the prayer for foreclosure was evidently to save the costs of a separate suit for foreclosure. If the complainant succeeds in enforcing a lien upon the lands conveyed to Howell as trustee, and those lands should be insufficient, after paying complainant, for the purpose of the trust vested in Howell, then he will be entitled to have the bond and mortgage in question assigned to him, and to foreclose it; or it may be that the court would, upon his application, stay the execution of the decree against him until the amount which might be realized out of the mortgaged premises should first be ascertained by an actual foreclosure and sale; and I am not at all sure that, if the complainant had not moved to amend, I should have finally held that the bill was rendered multifarious by the part stricken out. The complainant is acting in perfect good faith as an officer appointed by the court to execute a trust, and, as Miller is interested in the execution of the

trust given to Howell, I do not see how he is injured by the introduction of a foreclosure into this bill, and therefore decline to give costs.

I will advise that the demurrers be overruled.

DOUGHERTY v. GREENWICH INS. CO. OF THE CITY OF NEW YORK.

(Court of Chancery of New Jersey. Nov. 12, 1895.)

REFORMING EXECUTED CONTRACT—MUTUAL MISTAKE—SUFFICIENCY OF EVIDENCE.

1. Equity will not reform an executed contract on the ground of mistake, unless the mistake is shown to have been mutual.

2. After the issuance of a policy of insurance on household goods "while contained in the two-story, frame * * * extension, occupied as store and dwelling, situate No. 212 D. street," the insured moved the goods, together with his grocery stock, to No. 211, also a two-story, frame building, and thereafter an indorsement was made on the policy: "This insurance is transferred to cover similar property in the frame dwelling house No. 211 D. street." After a loss of the property insured, by fire, and the refusal of the company to pay, the insured sought to have the policy reformed by inserting the words "store and" after the word "frame" in the indorsement of transfer, alleging that its omission was due to the mistake of defendant's agent, which complainant did not notice until after the loss. It did not appear that, when complainant wrote defendant of the transfer, he informed it that the new building was also used as a grocery, or that defendant did in fact have knowledge thereof; and the latter denied that there was any mistake in writing the indorsement, but alleged that it relied on complainant's statement that No. 211 was a frame dwelling house. Held, that no mutual mistake was shown entitling complainant to a reformation of the policy.

Bill by Charles Dougherty against the Greenwich Insurance Company of the City of New York to reform a policy of fire insurance. Dismissed.

P. H. Gilhooly, for complainant. A. J. Brunson and R. V. Lindabury, for defendant.

EMERY, V. C. The primary object of the bill in this case is to reform a fire insurance policy. The policy was issued by the defendant to complainant on February 10, 1891, to insure household furniture and like articles of the defendant, for the term of three years. By the terms of the policy, as originally issued, the property was insured "while contained in the two-story and attic, frame, shingle-roof building, and two-story, frame, tin-roof extension, occupied as store and dwelling, situate No. 212 Delaware street, Elizabeth, N. J." The complainant, at the time of issuing the policy, lived on these premises, and also carried on a grocery store therein. The stock in the store was not covered by the policy. A few days before April 23, 1892, the complainant moved the property insured from No. 212 Delaware street to No. 211, on the same

street, across from No. 212; and, after the transfer, the following indorsement was made on the policy: "The Greenwich Ins. Co. April 23, 1892. This insurance is transferred to cover similar property in the frame dwelling house No. 211 Delaware St., Elizabeth, N. J. [Signed] Wm. Adams, Asst. Secy." No. 211 was also a two-story and attic, frame building, owned by complainant; and, at the time of the transfer, he lived there, and also carried on a grocery store in the building, but in the transfer of April 23, 1892, no special statement is made as to the manner in which the dwelling house is occupied. On December 1, 1892, the property insured was destroyed by fire, and the company refusing to pay for the loss, suit to recover upon the policy was brought by complainant against defendant, in the Union circuit court. The policy contains a provision that the entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void "if the hazard be increased by any means within the control or knowledge of the assured," but contains no express provision as to the effect of the use or occupation of the premises as a grocery store or for other purposes. The defendant, among other pleas in the suit, set up the following: "Second. That, before the said fire occurred, the hazard of said insurance had been, and then was, increased by means within the knowledge and control of the plaintiff, and without the permission of the defendant. Third. That, at the time said fire occurred, a portion of the premises in which the insured property was contained was used and occupied by plaintiff as a grocery store, contrary to the terms of said policy." The complainant then filed this bill for the reformation of the policy, by inserting in the indorsement of transfer the words "store and," so that the property will be described "as contained in the frame store and dwelling house, No. 211 Delaware St., Elizabeth, N. J.," and praying that the defendant may be enjoined from claiming or offering proof, in the action at law, that the policy of insurance covered the goods therein mentioned while contained in a dwelling house only, or from presenting any proof or defense to said action that the risk or hazard on said policy was increased or changed by reason of complainant's carrying on the grocery business in the premises described.

The complainant's right to an injunction from this court controlling the proofs or defenses in the court of law depends solely on his right to a reformation of the contract. The basis for this reformation, as stated in the bill, is mistake. The bill alleges that after complainant had removed his grocery business and store from 212 to 211 Delaware street, and shortly prior to April 23, 1892, he inclosed his policy to the company, informing them that he had removed to No. 211 Delaware street, and

requesting the company to make the proper changes upon the policy; that the policy, with the indorsement as made, was returned in due time, but that he did not notice or know that the risk had been changed from store and dwelling to dwelling only, until after his attention was called to it, after the fire; that he was conducting his grocery business in No. 211, at the time of the indorsement of transfer; that no instructions were sent to the company, and that, if a survey had been made by the company or its agents of No. 211, the fact that it was built and used for a store and dwelling would have been apparent. The bill then charges that, in the indorsement of transfer, the agent or clerk who wrote the same inadvertently omitted to follow the language of the original contract, and that the change as made therein was occasioned by mistake or accident. No fraud is charged. The defendant, in its answer, as to the circumstances of the transfer, admits that the complainant sent his policy to the company about April 23, 1892, and says that he gave it notice that he had removed the insured property to the frame dwelling house 211 Delaware street, and requested a transfer of the insurance to cover the property contained in said dwelling house; and that defendant, acting in its general knowledge of the locality, and without a survey, and trusting entirely to the complainant's representation that the property No. 211 was a frame dwelling house, made the transfer by the indorsement referred to. The defendant denies that the omission to follow the language of the original description was due to the inadvertence of the clerk who made the indorsement, or that there was any mistake or accident on its part in making the indorsement in the form in which it was made; and the defendant denies that it knew of the removal of the store, or that the complainant was carrying on the grocery business at No. 211 at the time of the transfer, or until after the fire. The proofs show that the only communication between the complainant and the company in reference to the transfer before it was made was by a letter or note sent by complainant to the company at its New York office, inclosing the policy for transfer. The letter or note has not been produced, having been probably destroyed shortly after making the indorsement, in accordance with the usual practice of the company at that time. The complainant's recollection of the contents of the letter, stated at the trial from memory only, is that it read as follows: "Please transfer this policy from No. 212 Delaware street to No. 211 Delaware street, Elizabeth, N. J., and oblige, yours respectfully, Charles Dougherty." According to this statement, there was no description whatever of the character of the building at No. 211; and in view of the fact that the company had, at its office at that time, no other sources of information as to the character of the building than the complainant's letter, it is difficult to believe that the witness' recollec-

tion of the latter is complete. The insurance map or atlas covering this district, which the company then used, did not show any building at all at No. 211, and this building was erected by complainant in 1890 or 1891. Mr. Adams, the secretary, who made the indorsement, was not called by the defendant, being absent in Florida on account of ill health; but considering the course of business in the office of the defendant in relation to transfers and the other evidence in the case, so far as it could throw any light on the question, my conclusion upon the whole proof is that the complainant has failed to establish that the words which he claims should be inserted in the policy were omitted by any mistake or inadvertence on the part of the defendant or its agents.

In deciding the case, I can place myself upon no proofs which would justify me in finding that the defendant intended, in making the contract of transfer, to insert the description of the original contract, or that the change was made by its inadvertence or mistake. From the proofs, I conjecture—for there is no basis in the evidence for anything but conjecture—that the change occurred by reason of complainant's describing the property No. 211 as a frame dwelling house, it then not occurring to the complainant that a reference to the occupation of any part of it as a store was necessary, or would make any practical difference. That is, as he now swears, his present view, and I am not prepared to say that he is not correct. This, however, is a question for the court of law, on the construction of the contract. The fact clearly established by the evidence, on which the complainant relies for relief, viz. that by the transfer there was no increase, but rather a lessening, of the hazard, cannot affect the decision of the only question on which I have the right to pass, which is whether the contract relating to the transfer should now be corrected or changed, as claimed by complainant, because it was made in its present form through mistake. The law relating to the reformation of executed contracts is well settled, and it is only a question of the application of the law in each case. The rule in such cases is that proof must be made that there was a mutual mistake, in that the contract was not drawn as both parties intended it should be. Mistake on one side may be ground to rescind a contract; but an executed contract, such as a deed or policy of insurance, cannot be rectified, so as to be changed by a court of equity to another contract than that which the parties have signed, on the ground of mistake, unless it is shown to have been a mistake of both parties. *Doniol v. Insurance Co.* (1881; Runyon, Ch.) 34 N. J. Eq. 30; *Mortimer v. Shortall* (1842; Lord Sugden) 2 Dru. & War. 363; *Hearne v. Insurance Co.*, 20 Wall. 488. Applying this rule to the facts of the present case, the reformation of the policy must be refused, and bill must be dismissed.

COUSE et al. v. COLUMBIA POWDER MANUF'G CO. et al.

(Court of Chancery of New Jersey. Nov. 11, 1895.)

FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—PLEADING—DEMURRER—MULTIFARIOUSNESS.

1. A bill by an attaching creditor alleging that the attachment defendant, prior to the issuance of the writ, had conveyed all its property to defendant, another company, in consideration of the assumption by the latter of the former's debts and the issuance to members of the former company of stock in the latter equal to the amount of stock held by them in the former company, and that the conveyances were made either in trust for the payment of all debts of the grantor, including complainant's debt, or with intent to defraud creditors, and praying that the property be impressed with such trust in the hands of the grantee, or that the conveyances be declared fraudulent, and asking the appointment of a receiver, is good on general demurrer, for want of equity, filed by a defendant who was a judgment creditor of the grantee prior to the issuance of complainant's attachment, but who was charged in the bill with full knowledge of the transfer prior to the entry of his judgment.

2. A transfer by a corporation of all its property to another corporation in consideration of the assumption by the latter of the former's debts, and the issuance of stock of the grantee to the grantor, which is carried out by the delivery of such stock to individual stockholders of the grantor, so that they could, if they saw fit, divide it among themselves, instead of applying it to payment of debts, is *prima facie* fraudulent as to creditors of the grantor.

3. A judgment creditor of a fraudulent grantee is not a purchaser, within the statute of frauds (Revision, p. 447, § 15), excepting bona fide purchasers of property fraudulently conveyed from the operation of the statute.

4. A bill in aid of an attachment, alleging a transfer by the attachment defendant of all its property, prior to the issuance of the writ, to other defendants, and praying that the grantees be declared trustees of the property, or that the transfer be declared fraudulent, and that the grantor be declared insolvent and a receiver appointed, is not multifarious, all relief asked being against such transfer or incidental thereto.

5. A defendant cannot object to multifariousness which exists only as to other defendants.

Bill by Emily Couse and another against the Columbia Powder Manufacturing Company and others to set aside fraudulent conveyances, and for a receiver. Heard on demurrer to bill. Overruled.

Aaron E. Johnston, for complainants.
Warren Dixon, for defendant Smith.

EMERY, V. C. The bill in this case is filed by the complainants in their right as attaching creditors of the Columbia Powder Manufacturing Company, a nonresident corporation, in aid of their lien under the attachment upon the real and personal property of that company. The bill alleges that the property attached as the property of the Columbia Company under the writ had been conveyed by that company to another nonresident corporation, called the Maxim Powder Manufacturing Company, previous to the issuance and execution of the writ. On the 23d day of December, 1893, the stockholders and incorporators of the Columbia Company,

passed a resolution directing the sale of all the property, real and personal, of the Columbia Company to the Maxim Powder Company, upon the terms that the Maxim Company should assume and pay all debts and liabilities of the Columbia Company, guarantying in writing to save the latter harmless from all liability by reason thereof, and as further payment or consideration for the transfer should issue and deliver to the stockholders and certificate holders of the Columbia Company one share of stock in the Maxim Company for each share of stock in the Columbia Company. The officers of the company were directed to make the transfer, and Nathan Kellogg and John Claffy were appointed, as trustees for the stockholders of the Columbia Company, to exchange the stock on the deposit of all the shares of stock and the execution of the agreements of sale. The bill further shows that on the same day and at the same place the Maxim Company, which is alleged to be composed in the main part of the same officers, stockholders, and incorporators as the Columbia Company, passed resolutions on its part for the purpose of carrying out the sale. The resolutions of the Maxim Company, set out in full in the bill, substantially provide as follows: After reciting that the Columbia Company is willing to sell all its property and assets, including patent rights, to the Maxim Company, and to receive in full consideration therefor \$250,000 of the capital stock of the Maxim Company, provided the Maxim Company guaranties and saves harmless the Columbia Company from all indebtedness of every kind, and further reciting that the value of the property so purchased, in actual cash value, after deducting the said indebtedness, largely exceeds the sum of \$250,000, then directs the issue of \$250,000 full-paid capital stock of the Maxim Company to Nathan Kellogg and John Claffy, who are appointed trustees for the purpose, "to be delivered to the Columbia Company, or such certificate holders or stockholders as they may direct, in exchange for the stock of the Columbia Company to the amount of \$250,000, to be canceled, and upon the delivery to this [the Maxim] company of proper transfers of all the assets, property, and patent rights of the Columbia Company." The resolution authorized the proper officers to execute the necessary papers, particularly the written guaranty. The bill then further alleges that on or about the 23d day of December the Columbia Company, by deeds of that date, transferred its lands and personal property (being the property afterwards attached) to the Maxim Company, and that on that day the Maxim Company executed an agreement (set out in the bill) by which the Maxim Company "hereby agrees to assume, and does hereby assume and agree to pay, any and all debts or liabilities lawfully existing against the said the Columbia Company, and

hereby agrees to indemnify and save harmless the said Columbia Company of and from all costs and liability therefor or thereunder." On or about the 23d day of December, as appears by the bill, the Columbia Company also conveyed to the Maxim Company certain patent rights and interests to which the Columbia Company were entitled under an agreement with one Hudson Maxim, dated January 14, 1892, and which agreement is set out in full in the bill. On December 27, 1893, Maxim confirmed these rights so assigned to the Maxim Company, and gave additional rights by an agreement of that date also set out in the bill. The bill further charges as matter of fact that no consideration was paid for these conveyances and transfers by the Columbia Company, except the issuing of stock to the stockholders of the Columbia Company under the agreement, and also charges that by reason of these conveyances it is unable to obtain the benefit of the attachment, or enforce it against the property attached. As to the intent with which the conveyances were made, the bill alleges that they were made "either for the purpose of conveying said lands and transferring said personal property in trust for the payment of the debts of the said Columbia," etc., "Company, and in particular for the payment of said debts of your orators, or for the purpose of defrauding their creditors and your orators in particular, and delaying them in collecting their debts," etc. Having stated these substantial facts as to the transfer, the complainants make their statement of their legal effect, and in this statement of the legal effect they present them in an alternative aspect, and base their right to relief either upon one ground or the other. The transfer to the Maxim Company, say complainants in the first place, was upon the trust to pay the debts of the Columbia Company, including complainants' debts, and the Maxim Company should be decreed to hold the property in trust for that purpose, and, if not held on that trust, then the conveyances are alleged to be fraudulent against the creditors of the Columbia Company. Discovery is asked as to the terms of the transfer, the debts are prayed to be charged on the property, and, on allegations of insolvency of the Columbia Company, and the perilous condition of the property, a receiver is prayed for the property conveyed by the Columbia to the Maxim Company.

By reason of this double—or, as he claims, triple—aspect of the bill, the defendant Arthur H. Smith demurs specially for multifariousness, as well as generally for want of equity. Smith's status on the record is as follows: Previous to August 27, 1894 (the date of the attachment upon which the complainant's liens are based), and on August 7, 1894 (wrongly stated in the bill as 1893, by a clerical error), the defendant Arthur H. Smith recovered a judgment against

the Maxim Company, the alleged fraudulent grantee, upon which execution has been issued and levied on the lands afterwards attached as the property of the Columbia Company. The bill alleges that Smith "knew of the said transfer and conveyance of said lands and premises and personal property by the said Columbia," etc., "Company to the said Maxim," etc., "Company, as above set forth, at the time thereof; also, knew of the said resolution, propositions, and agreements of the respective companies above set forth, at the time of making the same, and knew at that time of the terms and conditions of said transfers and conveyances." Upon the facts above stated and appearing by the bill, my conclusion is that the demurrer must be overruled. So far as relates to the general demurrer for want of equity, my opinion is that the facts stated show a basis for equitable relief against the defendant Smith. As against creditors of the Columbia Company who were such at the time of the conveyance, the transfer to the Maxim Company, under the circumstances stated, was, *prima facie* at least, fraudulent. The whole consideration of the conveyance (outside of the guaranty of debts), which was declared to be fully \$250,000 in cash value, was by the arrangement between the companies and their stockholders delivered, not to the vendor, the Columbia Company, as its assets for the payment of its debts, but to the individual stockholders of the Columbia Company, and was practically a division among the stockholders of that company of all of its assets, without paying a dollar of its debts. By arranging with the vendor company to pay the consideration for the transfer in such form that the whole assets of the company were placed beyond the reach of its creditors, the Maxim Company is not a purchaser in good faith, so far as the creditors of the Columbia Company then existing were concerned, but must, as to them, be considered a fraudulent grantee. The case in this respect stands much worse for the purchaser than the case of *Owen v. Arvis*, 26 N. J. Law, 22, where the fact that the consideration was left subject to some extent to the control of the vendor against his creditors was held to make the transfer fraudulent. The agreement, under the circumstances here alleged, to assume all the liabilities of the vendor, made by a purchaser on securing a transfer of all his property, manifestly cannot, of itself, constitute a purchase for good consideration, and *bona fide*, under the fifteenth section of the statute of frauds. *Revision*, p. 447. *Prima facie*, this agreement, under the circumstances here stated, shows a transfer of all the property of the company without paying or securing any part of the consideration, in such manner that it was available to the existing creditors of the vendor company; and, if any circumstances can make such an agreement valid against cred-

itors, they must be shown by the vendee by its answer or otherwise.

The conveyances being fraudulent as between the grantor and grantee, as against the grantor's creditors, the next question is whether Smith, a judgment creditor of the fraudulent grantee subsequent to the conveyance, is within the protection of the fifteenth section, as a purchaser for good consideration and *bona fide*. The bill shows that he is not. His knowledge of the facts constituting the alleged fraud is alleged, and, besides, the doctrine, as settled under similar statutes in other courts, is that a judgment creditor of a fraudulent grantee is not a purchaser at all, within the saving of this section. 2 *Bigelow, Frauds*, p. 485, § 12; *De Voe v. Brandt*, 53 N. Y. 462; *Beavan v. Oxford*, 2 Jur. (N. S.) 121, 25 Law J. Ch. 299. This I think is the status of the complainants, as lien creditors of the Columbia Company, against Smith, upon the facts relating to the transfer set out in the bill, and imputing to the parties the intention as to creditors which the law would imply, at least *prima facie*, from the facts stated. And so far as the defendant Smith is concerned the question whether the intent of the transfer was to defraud the creditors of the Columbia Company, or to convey the property in trust to pay its debts, can make no difference upon the present record, for the statement in the bill, admitted by the demurrer, that the transfers were made either with one intent or the other, furnishes, as against Smith, sufficient equitable basis for a decree that the lands should be charged with the payment of the complainants' debts. That would be the ultimate decree to be made on the facts stated, if either one intent or the other existed, and the bill therefore shows a right to relief, and is good upon a general demurrer for want of any equity. A defect observable in the bill is the omission of an allegation that the debts of the complainants were created before the transfers in question. The demurrant, however, did not raise this objection at the hearing, and under rule 225, requiring the particular grounds of demurrer to be stated, it is doubtful whether it could be alleged unless specified. *Van Houten v. Van Winkle*, 46 N. J. Eq. 380, 20 Atl. 34; *Essex Paper Co. v. Greacen*, 45 N. J. Eq. 504, 19 Atl. 466. And, inasmuch as it appears by the affidavits for injunction annexed to the bill that these debts did in fact exist at the time of the transfer, the complainants may amend the bill in this respect either before or after order overruling demurrer.

The second ground of demurrer is multifariousness, and rests upon the contention that the complainants seek three different and inconsistent remedies: First, the declaration that property conveyed is held upon a trust to pay complainants' debts; second, to set aside the conveyance as a fraud upon complainants; and, third, to have the cor-

poration declared insolvent and a receiver appointed. If the trust attempted to be asserted were a trust imposed on the property by express contract of the Maxim Company to that effect, the complainants perhaps might be required to elect whether they accepted or renounced the benefit of the trust, and the bill would probably be defective in not showing the election made; but in this case the conveyance of the property did not in terms impress the property with a trust for the payment of debts, and for this payment of its debts the Columbia Company held only the personal agreement of the Maxim Company. Equity may, under the facts stated in the bill, impress the property with a trust, but, as it seems to me, the trust, if held to arise on the facts stated in the bill, will arise by reason of the fraudulent character of the transaction as to the vendor company, and as arising out of it. The trust, then, if construed so to arise, is not inconsistent with a declaration that the transfer was fraudulent, but would be the equitable method by which the remedy of the creditor against the fraud is worked out. In *Belford v. Crane*, 16 N. J. Eq. 265, the equity of a creditor was thus worked out, and, where lands conveyed to a wife had been purchased with the husband's property under circumstances rendering the transaction void as against his creditors, the wife was treated as a trustee for the creditors, and the property sold for their benefit. And in other tribunals it is held that a court of equity will follow the assets under such circumstances into the hands of the vendee company, which cannot be considered a bona fide purchaser. 1 *Thomp. Corp.* §§ 375, 378, and cases cited. The complainants in this case are entitled to relief on the facts stated. Nor can the bill be considered defective, as multifarious, because it states two separate legal theories of relief upon the facts, each resulting in the same decree, viz. charging the debts upon the property conveyed. In *Emans v. Emans*, 14 N. J. Eq. 114, relied on by counsel, the bill was held multifarious because it involved totally distinct questions, requiring different evidence and leading to different decrees.

As to the objection that the bill is also a proceeding in insolvency against the Columbia Company, and asks a receiver, and is therefore multifarious, the situation is, as I read the bill, that the appointment of a receiver is asked as incidental to the relief prayed by the bill, and for the preservation of the property pendente lite. This is also in the line of the principal relief sought, and if, for this purpose, facts are stated in the bill upon which a decree in insolvency is sought to be made, the bill cannot be considered as a bill in insolvency, nor held multifarious, and that for that reason this relief may not be granted. Besides, this objection, even if valid for the company, is of no avail to the demurrant, Smith, for his judgment under the facts stated is invalid against a re-

ceiver as well as against the complainants, and the complainants, therefore, would be entitled to have the sale threatened under his judgment restrained pending the adjudication of insolvency, and the appointment of a receiver, in the interest of all the creditors. Defendant Smith cannot object to multifariousness which exists only as to other defendants. 2 *Daniell*, Ch. Prac. (6th Ed.) 337, note 3; *Olds v. Regan* (N. J. Ch.; Aug. 24, 1895) 32 Atl. 827. The demurrer is therefore overruled, with costs.

SAYRE v. COYNE et al.

(Court of Chancery of New Jersey. Nov. 12, 1895.)

SUIT TO ENFORCE JUDGMENT—PROPERTY SUBJECT TO PARTNERSHIP—MORTGAGE LIEN—PRIORITIES.

1. In a suit to subject land claimed by a wife to a judgment against the husband, it appeared that when complainant's debt was created the husband and his oldest son were partners; and the answers averred that thereafter the business failed, and the firm was composed of the wife, and the son, and that the father worked for wages, and that the land in suit was bought partly with the profits of the business of such new firm. It was shown, however, that the firm name remained the same, and that the father remained the controlling member; that written contracts for work were signed in the firm name, and recited that the firm was composed of father and son; and no written evidence was offered to show the wife's interest. *Held*, that the firm was composed of father and son throughout, and that the father had a one-half interest in the profits forming part of the price of the land.

2. In an action to subject to payment of a judgment against a husband land standing in the name of the wife, and on which a defendant had a subsequent mortgage, it appeared that the land was bought with the profits of a firm in which the husband had a one-half interest, and that the mortgagee was a brother of the wife of the judgment defendant, and the evidence failed to show that the wife had any interest in the firm. The consideration of the mortgage was alleged to be various loans made to his sister, but no memorandum was kept of such loans, and their exact amount was uncertain. It was shown that the mortgagee prior to the execution of the mortgage knew that creditors of such judgment defendant were beginning to press their claims. *Held*, that the lien of the judgment was entitled to priority over the mortgage lien.

Bill by Marcus Sayre against Patrick Coyne and others. Heard on pleadings and proof. Decree for complainant.

F. T. Johnson and Robert H. McCarter, for complainant. Frank J. Swayze, for defendants.

PITNEY, V. C. The object of the bill is to subject to the lien of a judgment held by complainant against Patrick Coyne certain lands, the title to which is vested in Mary Coyne, his wife. The foundation of the equity is that the property, as is alleged, was purchased and conveyed to Mary Coyne, and buildings erected thereon, with the money of Patrick Coyne. Judgment was recovered in October, 1876. An execution was issued and a levy made, which was

fruitless by reason of a sale of the premises levied on by virtue of a prior mortgage, which did not produce a surplus to be applied to the complainant's judgment. The allegation of the bill is that the real estate now in question, consisting of two lots, one fronting on Day street and the other on Garfield street, in the city of Orange, was purchased after the recovery of the judgment, and paid for out of the proceeds of the business which the judgment debtor was carrying on under the name of P. Coyne & Co., viz. the business of a master mason taking contracts to build. It is not disputed by the answer that a portion at least of the cost of the lots and buildings afterwards erected thereon came out of the profits of the business of P. Coyne & Co., but the allegation is that the firm of P. Coyne & Co. after some time in 1881 or 1882—the exact date is not given—was composed of the defendant Mary Coyne and her son Charles F. Coyne, and the profits of the business were equally divided between Charles and Mary, and that the father and husband, the judgment debtor, had no interest in the business whatever, but that he worked for the firm of P. Coyne & Co. as a journeyman mason and foreman employed by his son and wife, and was paid stated wages. And this is the first issue raised. It is further alleged by the defendant that part of the purchase money for the lot on Garfield street, and a portion of the lot on Day street, was composed of the proceeds, amounting to \$1,300, resulting from the sale in 1890 of a house and lot owned by Mary on Lakeside avenue. The Lakeside avenue lot was purchased (by deed dated February, 1878) of one Condict for \$500. It is admitted that this \$500 was paid by mason work done on other buildings for Mr. Condict, and that the house was erected in the same way. The mason work was done by the husband and sons, and the carpenter work was done by a master carpenter who accepted pay in mason work done on other jobs. A faint attempt was made to show by the proofs that all this mason work, as well that done upon the house as that done for Condict in payment for the lot, and that done for the carpenter in exchange for work done on the house, was done by Charles and his younger brother without the aid of the father, but I think the attempt fails, and the failure rebounds and throws distrust upon the defendants' witnesses. Patrick Coyne was before his failure a thriving and competent mason and builder in Orange, doing considerable work by contract, and his failure was due to the shrinkage in values of the years 1875 and 1876. The theory of the defendants is that he thereupon became despondent and unable to make a living for the family, and that he was supported by the efforts of his wife and his two oldest sons. Now, the proofs show that in 1877, shortly after his failure, and prior to the purchase

of this Lakeside avenue lot, he was doing business under the firm name of Patrick Coyne & Co. At one time, shortly after his failure, he had a partner by the name of Beck (but for how long a time does not appear), and afterwards, as distinctly stated in the answer, his son Charles was his partner, and he was taking large contracts for mason work, several of which were offered in evidence,—one dated August 13, 1877; another October 17, 1877; another in March, 1879; another in March, 1881. On the other hand, his oldest son, Charles, was born about January 1, 1860, and in February, 1878, was just turned 18 years old, and the next son was about 14 years old. These boys undoubtedly worked for their father as soon as they were old enough to work, but the proofs show that the father must have been at that time the manager, brains, and energy of the concern, and the only one of the party who was competent to do this kind of business. Besides, it is absurd to suppose that either Mr. Condict, the seller of the lot, or the carpenter who did the carpenter work, would accept the work of such mere boys in exchange for their property and work. Without going into the details of the evidence on this point, which was elaborately argued on both sides, it is enough to say that there were serious contradictions in that of the defendants, and I am entirely satisfied from all the circumstances that the Lakeside avenue property was paid for with the profits of Patrick Coyne's business. In January, 1881, Charles attained his majority, and shortly afterwards—but just how long does not appear, nor whether in 1881 or 1882—married, and brought his wife home to the Lakeside avenue house; and the question is whether he then entered into a new partnership with his stepmother, Mary, or merely continued the old one with his father. No written articles are produced by the defendant,—not a scratch of a pen to show that the wife had any interest in the business. She had no business capacity, was quite illiterate, and absorbed with her household duties. The business was continued after Charles' marriage precisely as it was before, under the management of Patrick and Charles, and all contracts were made in the name of P. Coyne & Co., and the business carried on under that name up to 1893. All this time the desk containing the partnership papers was kept in the kitchen of Patrick Coyne's house, and all business requiring clerical labors was conducted there, in all of which Mrs. Coyne took no part and knew nothing of.

Several building contracts were produced, which had been filed in the office of the clerk of Essex county during this period, in which Patrick Coyne is especially named as the partner. They are: A contract dated the 1st of July, 1882, between Cooper and wife and Patrick Coyne and Charles F. Coyne, part-

ners under the name and firm of P. Coyne & Co. The words "Patrick Coyne and Charles F. Coyne, partners under the name and firm of," were interlined before the words "P. Coyne & Co.," and in different ink. It is plain that this was done upon the requisition of some one interested on the part of the builder, who felt that the individual names of the contractors should be declared. Before that amendment was made it had been signed "P. Coyne & Co.," in the handwriting of Patrick Coyne. An attempt was made to deny this, but a comparison with other undoubted standards in the case satisfies me that the words "P. Coyne & Co." were written by Patrick Coyne. Then the "& Co." after the words "P. Coyne" is erased, and "Charles F. Coyne" is written in Charles' handwriting, in the same ink in which the interlineation was made, and that was undoubtedly done by Mr. Kingsbury, the subscribing witness. Next is a contract dated January 30, 1883, made between T. Boup and "P. Coyne and C. Coyne, known as the firm of P. Coyne & Company, masons." This is signed "P. Coyne & Co.," in the handwriting of Charles Coyne. Next is a contract with Mr. Ash, dated the 17th of September, 1883, and is declared to be with "P. Coyne & Co., Patrick Coyne and Charles Coyne." This is signed by Charles, using the name of P. Coyne & Co. The next is a contract dated the 23d of October, 1883, with one Westcott, in which Coyne & Co. are described as composed of Patrick Coyne and Charles Coyne. This is signed by Charles. A similar contract was entered into with Mr. Ball on the 3d of September, 1885; another one, dated the 30th of April, 1890, between the Glen Ridge Building Association and Patrick Coyne and Charles F. Coyne, composing the firm of P. Coyne & Co. Objection to this documentary evidence was made on the ground that it could not bind the defendant Mary Coyne. But it is clearly competent to contradict Charles and Patrick, and I think it is also competent as the contemporaneous acts of the parties, especially in the absence of any documentary evidence of partnership with her, and in face of the admitted fact that Patrick and Charles composed the firm of P. Coyne & Co. before 1881 or 1882, and that Mary admitted that she knew the business was being carried on all the time in the name of P. Coyne & Co. It is impossible to ignore the fact of the relationship between the parties, and the absence of any diversity of interest among them, or of any motive in dealing in their business with third parties in stating Patrick to be the partner, instead of Mary. Thus the actual conduct of the parties during the period in question, and before suit stirred, becomes of the utmost importance and significance. The case discloses no reason why Patrick, after having done business openly and successfully in his own name from 1876 to 1881 or 1882, should suddenly retire and work as a journeyman for his son, a youth just turned 21; nor why, if

he did retire, his name should have been retained in the new firm's name.

The defendant swears that Patrick worked for the firm as foreman, at a weekly wage, in prosperous times, of about \$24 per week, which he immediately gave to his wife for family support, the average amount of such contribution being at least \$18 per week. But why should Patrick give all his wages to his wife for the family support when she was engaged in a profitable business,—for the proofs show clearly that it was profitable,—and where was the written evidence of such payment to him of wages? None of the partnership books, bank vouchers, bank accounts, or other writings relating to the business are produced. The defendants' case rests upon the unsupported evidence of the defendants Patrick, Mary, and their son Charles, and Patrick and Charles are hopelessly contradicted by the contracts which they have signed. But the defendants allege that in 1881 or 1882, when this new partnership started, the wife put \$1,500 in money into the business, as capital, which she obtained from her brother James Fallan, the other defendant herein. An examination as to the truth of this allegation renders it necessary to refer for a moment at this point, in part, to Fallan's connection with the case. He is a plumber residing and doing business in Brooklyn, and may be a thrifty man, and is made defendant because he holds two several mortgages on the two pieces of real estate in question, both dated and executed December 5, 1893. On October 2, 1893, complainant issued an alias execution on his judgment, returnable the first Tuesday of November then next. Under a return of nulla bona he took proceedings, by a judge's order, for the examination of Patrick and others before a commissioner, and that examination was had on December 11 and 17, 1893. Patrick, Mary, and Charles were all examined under oath. Just when the judge's order was made and served upon the defendant in execution does not appear, but it is clear that the defendants herein knew of it before December 5, 1893, for on that day Patrick and his wife went to Brooklyn and executed the two mortgages, one for \$3,000 and the other for \$4,000, which sums they say were in part made up of moneys previously loaned by Fallan to Mary, and among those sums of \$1,500 alleged to have been loaned in 1881 or 1882 when the new partnership was formed. Fallan swears that before these mortgages were executed he heard at Patrick's house in Orange that some old creditors were stirring against Patrick. It is clear, therefore, that the parties went upon the stand upon the examination under supplemental proceedings, a few days later, with their minds refreshed as to all moneyed transactions between Mary and her brother Fallan. Upon that occasion Patrick swore that the working capital of the firm of P. Coyne & Co. was the result of the savings of the whole family,—himself

wife, and son,—and that his wife received presents from her brother which were also used. But his evidence does not indicate, or warrant the conclusion, that any large sum was furnished by his wife, or that the whole amount of moneyed capital amounted to any such sum as \$1,500. Mary swore that she received from her brother \$1,000 or \$1,500 or \$2,000,—being quite uncertain as to the amount; that it was paid to her in small amounts, of \$100 or \$200, from time to time, as it was needed; and her evidence there given does not indicate any large payments at one time, and she expressly declares that they were mere gifts by her brother, and not loans, and she denied that her husband ever contributed a cent. Upon her examination as a witness in her own behalf in this cause, she swears that her brother advanced her at one time, or substantially at one time, \$1,500 to put in as working capital in the business of P. Coyne & Co., at its start. Charles Coyne, in his examination in supplemental proceedings, and as a witness for the defense in this cause, says that his mother did contribute to the capital of the firm. But he did not mention any particular sum, nor did his language indicate that it was of any considerable amount. And he further swears that the firm kept a bank account, and that whatever his mother contributed was deposited in the bank, to the firm's credit; and yet the bank account is not produced to show any such credits, nor any reason given why it was not produced. The brother, Fallan, swears that he advanced to Mrs. Coyne, about that time, \$1,500, in two sums of \$500 and \$1,000, for which he took no receipt or acknowledgment, and of which he made no memorandum whatever. Not a scrap of writing is shown in support of this item. No attempt is made to show that the firm needed any such large sum as \$1,500, and Charles intimates that it did not. It had been carried on for several years successfully upon the savings of the family, and the question arises, why make such a large addition suddenly at that time? The proofs fail to satisfy me that this or any considerable sum was put in the business as capital by Mary.

Upon a view of this part of the case as a whole, the fact that Patrick did conduct the mason business as a master mason and contractor, under the name of P. Coyne & Co., successfully, from the date of his failure up to the date of the commencement of the alleged partnership; that his son Charles was towards the last of this period his partner therein; that there was no external change in the partnership name or mode of conducting the business at the time of the alleged change; that Patrick continued to take an active part in it; that written contracts continued to be entered into by P. Coyne & Co., declared therein to be composed of Patrick Coyne and Charles Coyne; that no writing is produced indicating that the wife had any interest in it; that she took no part in the

business whatever; that no written proof is produced that she furnished any capital,—I conclude that the written contracts speak the truth, and that Patrick Coyne and Charles Coyne, in name and in fact, composed the firm, and were entitled to its earnings, and that the idea of making Mary the partner, instead of her husband, was an afterthought. This conclusion renders it unnecessary to consider the forcible argument made by counsel of the complainant in support of the position that, even if Mary was the nominal partner, yet as she contributed nothing to the capital or to the management, while the business was really carried on by her husband, she cannot claim the proceeds of his management under the law as declared in the line of cases cited and culminating in *Manufacturing Co. v. Hummell*, 25 N. J. Eq. 45, modified by the fourth section (enacted 1874) of the married woman's act (Revision, p. 637).

The next question is, how much of the earnings of P. Coyne & Co. went into the property and the improvements upon it? And here, again, we are not aided by any documentary proof produced by the defendants. It is admitted that the two properties—both land and buildings—were partly paid for by the firm's money and means, and all by the firm's checks, except so far as the firm did work directly upon them. But no checks are produced. It is asserted that Mary received loans from her brother, which went into it, but not a scratch of a pen is produced in support of it; and she swears that all the money she received she handed to her son Charles, and he swears that it all went into the bank account. And certainly, if that be true, the bank account would show traces of it, and yet no bank account is produced, nor any excuse given for its non-production. The first purchase of property herein directly involved was made on the 19th of March, 1887, by conveyance from Dykman and wife to Mary Ann Coyne of 30 feet front on Day street, in Orange, the consideration being \$1,050. At the same time conveyance was made of 30 feet immediately adjoining it to Mrs. Catharine Coyne, wife of Charles, at the same price; total, \$2,100. A consideration mortgage for \$500 was given back by Mary, which was afterwards assigned to Dr. William Pierson. The cash payment for this property came out of the bank account of the firm of P. Coyne & Co. A year and a half later—September 10, 1888—Mary and her husband and Charles' wife and her husband joined in a mortgage to Dr. Pierson for \$2,000 on the 60-feet front composed of the two lots owned by Mary and Charles' wife. These mortgages were both paid on the 31st of May, 1895, and canceled of record on the 2d of June, 1893. The building comprises two houses under one roof, built together, half on Catharine Coyne's lot, and the other on Mary Coyne's lot, and all paid for at the same time, and out of the

bank account of the firm of P. Coyne & Co. It was alleged and sworn to by Charles that, although it was all paid for by checks of P. Coyne & Co., yet that the account of P. Coyne & Co. was kept good by contributions made by his mother of moneys which she alleged she got from her brother Fallan. But the bank account is not produced to show a single dollar coming from Mary Coyne, and as Charles was entitled to only one-half the profits, and there was no pretense that he had not been drawing money for his own living from the firm all the time, or that his profits had accumulated more rapidly than his mother's, there was no reason why her profits should not have been sufficient to pay her her one-half of the property as well as his profits for his one-half. So I conclude that the house and lot in question on Day street, so far as they were paid for prior to 1893, were wholly paid for out of the share of Patrick Coyne in the profits of the firm of P. Coyne & Co.

In 1891 an additional 10-foot front on Day street was purchased of one Cadmus, and added to Mary's part of the Day street property, at a cost of \$450. It was alleged that this was paid for out of the proceeds of the sale of the Lakeside avenue property. About the same time—1891—a lot of 30 feet front was purchased on Garfield street, the rear of which adjoined the rear of the Day street property, at a cost of \$625. The defendants swear that this lot was paid for by the proceeds of the sale of the Lakeside avenue property, which amounted to \$1,300. On his examination in supplemental proceedings Charles Coyne swore that it was paid for with the money of P. Coyne & Co., and this is probably true, because the conveyance to Mary Coyne of the 30 feet included a conveyance of 60 feet front at a price of \$1,250, and she immediately conveyed half of it to Charles' wife. So that it would appear that Charles was able out of his share of the firm's profits at that time to pay one-half of the whole purchase; and the same remark made with regard to the Day street purchase applies here. If he could buy and pay for one-half of the Garfield street purchase, why could not Mary? Here, again, we are not aided by the production of any bank accounts or bank vouchers. But the proceeds of the sale of the Lakeside avenue property were undoubtedly received about that time, and the fair inference from all the evidence is that they were used as a common fund to pay for the whole purchase, 10 feet on Day street, and the 60 feet in all on Garfield street,—amounting in the aggregate to \$1,600 or \$1,700. A year or two later a house was built on Mary's Garfield street lot at an expense of about \$3,000. Whether one was built on Charles' part does not appear. In the examination under supplemental proceedings, Mary—and I think Charles, also—swore that \$2,000 of the firm's money went into the building of this house. An attempt was made to vary this evidence on the hearing in this case.

But I think the probabilities are all in favor of the truth of the former evidence. It was given at a time when the effect of its truth was not so clearly apparent as it became at a later date. So that I conclude that the proofs show satisfactorily enough that both of these properties, so far as they were paid for, were paid for with the earnings of the firm of P. Coyne & Co., of which one-half belonged to Patrick Coyne. The two mortgages held upon the Day street property by Dr. William Pier-son were paid and discharged, as before remarked, about the 1st of June, 1893. The share of Mary's house in those was \$1,000. She says that she borrowed the money of her brother Fallan to pay those mortgages, but no assignment of them was made to Fallan, nor any memorandum given to him for the money loaned, nor any entry made by him of the amount in any book, nor even upon a loose piece of paper.

This brings us to the Fallan mortgages, which are attacked by the bill on two grounds: First, that they were taken with notice of complainant's equity; and, second, that they were made for the express purpose of defeating it.

As to the notice of complainant's equity: The proofs show that Fallan was, during all the years since the recovery of complainant's judgment, on intimate terms with his sister; fully cognizant of the business affairs of her husband and herself and their son Charles. His evidence indicates in the clearest manner that before taking these mortgages he knew that some old creditor of Patrick was pressing him, and was likely to make claim to the premises here in question, and he took the mortgages with a view to securing himself in advance of this old creditor. Now, the old creditor could have no possible ground of relief against these properties, except that they were in equity the properties of Patrick Coyne. If they belonged in good faith to the wife, then they were clearly beyond the reach of any creditor of Patrick. As he got the information from Patrick and Mary by visiting them at their house in Orange shortly before December 5, 1893, he must have learned who the creditor was, and that he held a judgment and was trying to collect it. In fact he admits that the affair was talked over, and that "there was a possibility of old claims coming against the property." And this raises the question whether, admitting Fallan's mortgages to have been given in good faith for a proper consideration, and simply for the purpose of securing him an honest debt, they can be awarded in equity priority over the complainant's judgment.

But the complainant alleges that the mortgages are fraudulent and void against him for the additional reason that they were given for a larger sum of money than was actually due, if anything was due, and so purposely inflated, and that their object, as far as relates to any money presently advanced, was to assist Patrick Coyne in preventing complainant from realizing on his judgment, thus bring-

ing them within the reach of the principle acted upon in *Holt v. Creamer*, 34 N. J. Eq. 181. The two mortgages aggregate \$7,000. The answer of Mary Coyne states the consideration as follows: June 23, 1877, \$500; April 23, 1881, \$1,500; February 26, 1887, \$1,000; May 10, 1893, \$1,000; and December 5, 1893, when the mortgages were executed, \$2,097; in all, the sum of \$6,097 besides interest. Fallan's answer, prepared by the same solicitor, gives the same items, and adds \$550 loaned to purchase the Day street lot, making his sums total \$6,647. On the hearing Mary swore that on the occasion of the execution and delivery of the bonds and mortgages her brother paid her \$2,500 in cash, and subsequently paid her \$500, making altogether \$3,000. Her brother produces not a check or scrap of writing to prove either of these payments. He swears that he never received any note, duebill, receipt, or other memorandum from his sister, and never made an entry anywhere of any of the moneys he advanced to her; that he on one occasion made from memory a memorandum, upon a loose sheet of paper, of moneys which he advanced to her, which he put on a file among other papers and vouchers, and which has been lost; that on the day of the execution of the mortgages he paid her \$2,097 in money; and fails to state that he ever paid her any afterward. With regard to the payment on the day of the delivery of the mortgages, his story does not agree with Mary's. With regard to the cash down at the delivery of the mortgages, Mary does not state why she borrowed so much, except that she needed a small portion to finish the building on the premises, and the remainder she proposed to keep to live upon. She does not show what disposition she made of any of it. Now, the proof of the advance of these large payments might, since the year 1887 at least, easily have been supported by the production of the checks with which the money was drawn from the bank. No attempt of that kind was made, nor any reason assigned why it should not have been made. The parties seem to have relied upon the value of their own oaths, unsupported by any other evidence. I have weighed this evidence carefully, and I feel constrained to say that it does not convince me that these large sums were ever advanced; and, if the \$2,097 payment was actually made to Mary at the date of the mortgages, its object was so palpably to put the property within her reach, so that Patrick's creditors could not get it, that it brings it directly within the familiar principle that even if full value be given for property, and the object, known to the grantee, is to enable the grantor to set his creditors at defiance, the conveyance is void. Of this the case of *Green v. Tatum*, 19 N. J. Eq. 105, 21 N. J. Eq. 364, is an illustration.

The judgment, principal and interest, in this case, will amount to less than \$1,500, and the property is of ample value to pay that sum, and also all that I am able to believe can be

honestly due James Fallan on his mortgages. I therefore feel no hesitation in advising that complainant's judgment be declared to be a lien prior to Fallan's mortgages.

LIPPINCOTT et al. v. WIKOFF et al.
(Court of Chancery of New Jersey. Nov. 7, 1895.)

WILLS—COMPETENCY OF SUBSCRIBING WITNESS—
APPOINTMENT AS EXECUTOR—SALE OF LAND
BY EXECUTOR—SPECIFIC PERFORMANCE.

1. Under Revision, p. 378, § 5, making the husband or wife of any party interested in a suit a competent witness, and compelling them to give evidence on behalf of any party to the suit, a husband may subscribe as witness a will under which his wife takes as devisee.

2. An appointment of the husband of a devisee as executor does not disqualify him to attest the will as subscribing witness, under Revision, p. 1244, § 4, disqualifying as a subscribing witness a devisee, or one beneficially interested under the will.

3. On the disqualification of one of several executors, on whom, in their official capacity, and not as individuals, is conferred a joint power of sale, those remaining may execute the power.

4. The appointment of a wife as executrix does not ipso facto make her husband a coexecutor, so that his disqualification to act as such will disqualify her to act alone.

5. Where a husband and wife are appointed joint executors with power of sale of realty, and the husband is disqualified from acting by being a subscribing witness to the will appointing them, the wife may execute the power of sale alone by deed in which her husband joins.

6. In an action for specific performance of a contract for the purchase of land from the executors, the defense of unmerchantableness of title in that, under the statute, the will was void, and no power of sale conferred on the executors, cannot prevail where the statute is so clear as to leave no doubt of its construction in favor of the validity of the will and of the power.

Bill by Carrie Lippincott and husband, executors, and others, against Edward H. Wikoff and others, for specific performance of a contract of sale of land. Decree for plaintiffs.

George Berdine, for complainants. John S. Voorhees, for defendant Wikoff.

EMERY, V. C. This is a bill for the specific performance of a contract for the sale of real estate, and the question to be solved is whether the title of the vendors, tendered under the contract, is such a title as the court will compel the purchaser to accept. The bill is filed by the vendors, Frank P. Lippincott, as executor, and Carrie Lippincott, his wife, as executrix, or Margaret Runyon, and they have, as such executors, made a contract in writing with the defendant Wikoff for the sale of lands of which the testatrix died seised, acting under a power of sale conferred, or supposed to be conferred, upon them by the will.

The purchaser raises questions as to the legal execution of the will, and also as to the existence in the complainants, as executors, of any power of sale under the will; and insists that, as to one or both of these, it

tions, such doubt exists that the title is not such a good and merchantable title as should be forced upon him.

The questions as to the validity of the will must be first considered, and they arise as follows: The complainant Carrie Lippincott, who is one of the two children and heirs at law of the testatrix, besides being appointed executrix, is one of the devisees and legatees under the will, and her husband, Frank P. Lippincott, the other executor, is one of the two witnesses to the will. He alone proved the will before the surrogate, and on this probate letters testamentary were issued to him and his wife. The defendant contends that Frank P. Lippincott was an incompetent witness to the execution of the will, and that, there not being two competent witnesses, the instrument was invalid as conveying any title to the real estate of the testatrix. The objection to his competency as a witness is that he is the husband of Carrie Lippincott, who is one of the devisees and legatees under the will. At the common law, and in the absence of express statute, he could not be a competent witness to a will in which his wife was so interested, and the question is whether, by section 5 of the act concerning evidence (Revision, p. 378), this objection is removed. The section relating to evidence reads: "In any trial or inquiry in any suit, action or proceeding in any court or before any person having by law or consent of parties authority to examine witnesses or hear evidence, the husband or wife of any person interested therein as a party or otherwise shall be competent and compellable to give evidence the same as other witnesses, on behalf of any party to such suit, action or proceeding," etc.; with certain exceptions relating to criminal actions and proceedings for divorce and confidential communications. This broad and comprehensive statute was passed March 17, 1870, after the decisions of our courts, under previous statutes, refusing to extend the competency of husband and wife beyond the express letter of those statutes. *Bird v. Davis*, 14 N. J. Eq. 467; *Handlong v. Barnes*, 30 N. J. Law, 69; and *Cross v. Cross*, 17 N. J. Eq. 288, holding that the act of relieving the incompetency of parties did not apply; and *Van Houten's Ex'rs v. Post*, 21 N. J. Eq. 355, under the act of 1868, providing for competency in a suit against her, did not apply to a suit by her. The present act of 1870 was then passed, and in its broad and comprehensive form this section seems to me clearly to reach a proceeding in the orphans' court, or before the surrogate, for the probate of this will, and to make the husband a competent witness in any proceeding in any court to prove this will, notwithstanding the fact that his wife is interested as a devisee or legatee under the will; and, so far as this objection goes, my opinion is in favor of the title.

The next question is whether, if the will be a valid will, the executors have a power

of sale thereunder. The purchaser's contention on this point is, first, that, by the express provision of section 4 of the wills act, the appointment as executor is made null and void by his becoming a witness; and, second, that, where a married woman is appointed executrix, the husband becomes, ipso facto, an executor with her, and, if his appointment as executor is expressly made void by statute, the wife's appointment as executrix must also fall with that of the husband, and neither of them can be executors of the will, or execute the power of sale.

First, as to the effect of the fourth section of the statute relating to wills (Revision, p. 1244). This section provides: "That if any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate, other than charges on lands for the payment of debts is given by the will, the devise, legacy, estate, interest, gift or appointment shall be void, so far only as concerns the subscribing witness, but the person to whom the devise or appointment is made shall be admissible as a witness." As to whether the appointment as executor comes within the terms of the section which relates to "a beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate," I think that it does not. My reasons are that the "appointment" contemplated by this section seems to be an appointment which is expressly made by the will to affect some real or personal estate which the testator devises or bequeaths, or over which he has a power of appointment, which he purposes to exercise by will. It must be considered that this section 4 was a part of the wills act of November 16, 1795 (*Stat. Laws*, 189; *Rev. Laws*, 223), by the twelfth section of which it was provided that personal estate might be disposed of by last will in writing in the same manner as before the passage of the act. Now, at the time of the passage of this act, only wills of real estate, by the statute then in force (Act March 17, 1713-14), were required to be attested by witnesses, and wills of personal estate were valid, as at common law, without witnesses. It was not until the act of March 12, 1851 (Revision, p. 1247), that witnesses were required to wills of personal, as well as of real, estate. In view of this subsequent section of the act of 1795, and of the state of the law then existing, it seems highly improbable that by the appointment referred to in the fourth section should be intended an appointment as executor, who, as such, administered solely on the personal estate. At common law an executor, who was not residuary legatee, and had no beneficial interest in the estate, might be a witness to prove the execution of the will and the sanity of the testator, being considered a mere trustee and nominal party, having no real interest in the contest (*Sears v. Dillingham*, 12 Mass. 358), and this was the common law as declared in *Snedekers v. Allen*, 2 N. J. Law, 33. Pennington, J., says that an execu-

tor may be a witness to establish a will, unless he takes an interest under it, and that the practice in this state of allowing a reasonable compensation for services did not alter the case.

These considerations lead me to the conclusion that this appointment as executor was not the beneficial appointment of, or affecting, any real or personal estate intended by this statute to be made void. But, even admitting that there is a doubt upon this point, and conceding that the appointment of the husband as executor comes within this section, and was invalid, the effect of this was to leave the wife the sole executrix. I am satisfied, from an examination of the authorities, that the effect of her appointment as sole legal executrix was not, as defendants' counsel contend, to make the husband *ipso facto* executor with her of the estate. If this were the result, then the wife's appointment, it seems to me, would also be invalid, as, otherwise, the statute expressly declaring the invalidity of the husband's appointment, and which is applicable to all cases, would be circumvented and nullified as to this case. As to the precise status of the husband of a woman who is appointed executrix, the authorities show that a married woman may be appointed executrix, but cannot accept the office against the consent of the husband, for the reason that the wife, at common law, can do no act which may prejudice the husband without his consent (1 Williams, Ex'rs, 233); and, as the husband of the executrix, the law also gave him the power of disposition over the personal estate, and required him to join with her in the bringing of suits (2 Williams, Ex'rs, 966, 967). But his power and rights throughout were those of a husband, and not those of an executor in his own right, and, on his decease, the wife's power as executrix continued. As to his liabilities as husband, Sir John Romilly, in *Smith v. Smith*, 21 Beav. 355, 387, says: "It is settled that a husband is liable for all the assets received or devastated committed, either by himself or his wife, during the coverture, in respect of an estate of which his wife was personal legal representative." And Lord Turner, in *Soady v. Turnbull*, L. R. 1 Ch. App. 495, 498, adopting the language of Sir E. Vaughan Williams, says: "That the wife having become executrix was her own act, that the legal consequence of that act was to confer authority upon her husband to deal with all the assets of the testator, and that it follows that all his acts under them must be regarded as done under her authority, and that she is consequently responsible for them as executrix." It is evident from these authorities that the wife still continues in law as the sole executrix, and that the husband's dealings with the estate are considered not those of an executor in his own right, but as the acts of the executrix. The expressions to the effect that by the marriage the husband becomes *ipso facto* executor in his own right, made in the cases relied on by counsel, were made on cases in

which only the questions of the husband's liability for the acts of himself or his wife were involved. As to this liability, there was no doubt, but the question as to whether the liability arose as executor, or as husband of an executrix, was not involved or considered in either of the cases; and considering, also, that the right of the husband of the executrix, as husband, to deal with the assets extended only to the personal estate, I think it is clear that a power to sell real estate, given to a married woman as executrix, cannot be considered as *ipso facto* conferring a power of sale on him as coexecutor with her. It may be necessary for him to join in the execution of the deed executing her power, as well as in the agreement of sale, under our statute relating to conveyances by married women (Revision, p. 154, § 9); but, independent of statute, the concurrence of the husband was not necessary for the execution of a power by a married woman (1 Sugd. Powers, p. 182).

The further objection is made that the power of sale was given jointly to the executors, and that it cannot be exercised by the wife as sole executrix, but must be exercised by both together, as executors. The clause directing the sale and appointing the executors is as follows: "Third. After the above directions are carried out, I request that my executors, whenever they may deem proper, to sell my real and personal property, and divide the same between my son, George J. Runyon, and my daughter, Carrie Lippincott. I direct that if there remains anything, that it shall be given to Lewis Lippincott. It being my desire, however, that the executors shall have full power to determine when the real estate shall be sold. Fourth. I hereby appoint Frank P. Lippincott executor, and Carrie Lippincott executrix, of this my last will." The power of sale having been given to the executors in their official capacity, and not by name, as individuals, the invalidity of the subsequent appointment of one of the executors named brings the case within the rule laid down in *Weimar v. Fath*, 43 N. J. Law, 1, approved in *Denton v. Clark* (Err. & App.; 1883) 36 N. J. Eq. 534. These cases decide that, on the removal of one of two or more joint executors, the power can be executed by the remaining executor. It is true that in both these cases the provisions of the orphans' court act (section 129) relate to the powers of the successor of an executor who has been removed; but the law, independent of these statutes, was collated and examined at length by Chief Justice Beasley in *Weimar v. Fath*, supra, and the principle deduced from all of the authorities that where the power is given to executors in their official capacity, and not as individuals, by name, it may be executed by the remaining executors, in case of the death, removal, or refusal to act of the other. If, therefore, the husband's appointment as executor be void under the fourth section of the statute

of wills, the effect of this, I conclude, would be to leave the wife the sole executrix, who could execute the power by a deed, in which her husband joined, as required by our statute of conveyances; and, if the husband's appointment be not void under the act, then both husband and wife together may execute the power. There can be no objection, I think, to the execution of the deed by both husband and wife for this purpose, and upon this question, also, my opinion is in favor of the title.

The important question remains, whether, notwithstanding my opinion is in favor of the title on both the points, there has been such doubt raised as will make it inequitable to require the purchaser to take the title. The general rule relating to the subject is expressed in the terms that the title which a court of equity will compel a purchaser to take must be a merchantable title. Doubts as to a title evidently may arise under different circumstances, and involve different classes of questions. The doubt may arise by reason of the existence or nonexistence of facts involved in the title, or may involve, as here, a question of general law, or the construction of a statute, or of the terms of a will or other instrument; and I think an examination of the decisions in our own courts and elsewhere will show that there is no invariable rule which can be applied to all classes of cases. In cases where the doubt in relation to title is one of fact, which the court is called on to consider, the general rule has been declared to be that the court will never compel a purchaser to take a title where the point on which it depends is too doubtful to be settled without litigation, or where the purchase would expose him to the hazard of such proceedings. *Dobbs v. Norcross* (1874) 24 N. J. Eq. 327 (Runyon, Ch.); *Tillotson v. Gesner* (Err. & App.; 1880) 33 N. J. Eq. 313, 327; and *Cornell v. Andrews* (1882) 35 N. J. Eq. 7 (Runyon, Ch.).—were cases in which the validity of the title depended on whether certain facts existed, and the court held that there was sufficient doubt to put the purchaser in hazard of litigation, and he would not be compelled to take the title. On the other hand, where the doubt raised involves a question of general law, as to which the courts of equity often or specially have direct jurisdiction, e. g. the power of executors or trustees to sell, our courts of equity, both below and on appeal, have in some cases adopted the practice of settling in the suit for specific performance the question of the power, and of directing the title to be taken if the decision be in favor of the power. In *Clark v. Denton*, 36 N. J. Eq. 419, affirmed on appeal, Id. 534, the questions of the existence of the power and of the validity of its execution were both involved, and were decided, and specific performance was decreed, without discussion of the question as to whether any doubt existed sufficient to pre-

vent this relief. In *Oruikshank v. Parker* (1893) 51 N. J. Eq. 21, 28 Atl. 925, on a bill for specific performance, which involved the question of the power of a trustee to sell, Chancellor McGill decided against the validity of the power, and, on this question of doubt as to the title, said that the objection was a serious one, which rose above mere speculation, theory, and possibility, and hence fairly stood in the way of free alienation of the land in question, and the title, therefore, should not be forced on the defendant, especially in the absence of parties to be bound by the decree. On appeal, however, the court of errors and appeals took a different view as to the existence of the power in the trustee, declaring that the power to sell was clear, and compelling the purchaser to take the title. (1894) 52 N. J. Eq. 310, 29 Atl. 682. Nor did the court of appeals discuss at all the question as to imposing a doubtful title on the purchaser. Where, therefore, a question of the power of executors or trustees to sell under a will is involved, the cases as decided by the court of errors and appeals establish the rule that, where the power to sell seems clear, the court should decide the question of power, and should direct the title to be taken over this objection. A distinction in reference to this class of cases may arise from the fact that the construction of wills in reference to the powers of executors or trustees is a settled branch of equity jurisdiction, and, although such construction is usually made on bill filed for that special purpose, bringing all parties interested before the court, yet the question of the power may often be as well and thoroughly examined and settled in a suit involving directly, as here, the interests in favor of and against the exercise of the power. In *Chambers v. Tulane* (1852) 9 N. J. Eq. 146, the opinion of Chancellor Williamson was against the existence of the power, and specific performance was denied.

My opinion as to the validity of the power of sale under the will being clear, for the reasons above stated, I should, on the authority of the above cases, and so far as this objection is concerned, feel justified in requiring the purchaser to take the title.

When the doubt as to the title is claimed to arise by reason of the questions raised as to the validity of the will itself, as an instrument divesting the title of heirs, the question must be solved without the aid of direct authority of our own courts. The two heirs at law are both made parties to this suit, one of them being the complainant Carrie Lippincott, and the other her brother, George J. Runyon; but the latter has been brought in as an absent defendant, and, inasmuch as the right to compel him to settle his title as heir at law in this suit for the specific performance of a contract to which he was not a party is very doubtful, I should feel obliged to consider the question as if he were not made a party to the suit. The ques-

tion as to the kind of doubt, upon a question of general law, which will make a title unmerchantable, has been of late much discussed in English cases, and a statement of these will throw much light upon the question. The leading case is that of *Pyrke v. Waddingham*, 10 Hare, 1, in which Vice Chancellor Turner, stating that it has been for a long time the settled rule of the courts of equity not to compel a purchaser to accept a doubtful title, examined the question as to what titles are to be considered as doubtful within the rule, and whether the rule applies only in cases in which the court itself entertains doubts upon the title, or whether it extends to cases in which, although the court itself may entertain an opinion in favor of the title, it is satisfied that that opinion may fairly and reasonably be questioned by other competent persons. He concludes that the cases show that it is the duty of the court not to have regard to its own opinion only, but to take into account what the opinion of other competent persons may be. As to the scale by which the courts are to be guided in measuring their doubts under this rule, he says also (page 8) that the cases throw some light upon this question; that, if the doubts were upon a question connected with the general law, the court is to judge whether the general law upon the point is or is not settled, enforcing specific performance in the one case, and refusing to enforce it in the other. If the doubts arise upon the construction of particular instruments, and the court is itself doubtful upon the points, specific performance must be refused; and, even though the court may lean in favor of the title, its duty is either to consider whether it would trust its own money upon the title, or, at least, to weigh whether the doubt is so reasonable and fair that the property would be left in the purchaser's hands not marketable. If the doubts which arise may be affected by extrinsic circumstances, which neither the purchaser nor the court has the means of satisfactorily investigating, specific performance is to be refused. He also says (page 10, etc.) that, although the court's opinion is in favor of the title, a purchaser is not necessarily to be compelled to accept it, and that he thought each case must depend on the nature of the objection, and the weight which the court might be disposed to attach to it; that it must be borne in mind that the exercise of the jurisdiction by specific performance is discretionary, and that the court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion should ultimately turn out not to be well founded. Applying these principles to the case in hand, in which the question of title depended upon the construction of a particular will, and not upon any general principle of law, he declared his own opinion to be in favor of the title; but, being unable to base that

opinion upon any general rule of law, or upon any reasoning so conclusive as to fully satisfy his mind that other competent persons might not entertain a different opinion, or that the purchaser, if compelled to take the title, might not be exposed to substantial, and not merely idle, litigation, or even that he would be free from all possible hazard, he declined to order a specific performance. So far as relates to doubtful questions of general law, the doctrine of this case has, I think, been undoubtedly qualified by the later case of *Alexander v. Mills* (1870) 6 Ch. App. 124, in which Sir William James, L. J., delivering the opinion of the court of appeals upon a disputed title, involving a question of general law, said (page 131): "That, as a general and almost universal rule, the court is bound, as much between vendor and purchaser as in every other case, to ascertain and determine as it best may what the law is, and to take that to be the law which it has so ascertained and determined; and that the exceptions to this rule will probably be found to consist, not in pure questions of legal principle, but in cases where the difficulty and the doubt arise in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument." The court considered the question of law involved, and reached a conclusion different from that of the master of the rolls, and directed the title to be taken. As to this decision in *Alexander v. Mills*, and its effect upon the previous decision of *Pyrke v. Waddingham*, Lord Selborne, in *Palmer v. Locke* (Ct. App.; 1881) 18 Ch. Div. 381, says, page 388, that there are many cases in which it is necessary and proper to say positively and finally, in a suit for specific performance, that the law is one way or the other on the point argued; but when you have a question raised upon the construction of a general statute, if there is any reasonable ground for saying that that question is not determined by previous authorities, or that the previous authorities are conflicting, then, in the terms of Lord Justice Turner's judgment, in *Pyrke v. Waddingham*, that cannot be treated as a question of general law so settled as to exclude that kind of question which the court has paid regard to, when it sees there is a doubtful question of title, which cannot be forced upon a purchaser. He further said: "It is not at all necessary to inquire whether the case of *Alexander v. Mills* did or did not overrule some previous decisions which might have intended to draw a line as to what was or was not a title to be forced upon a purchaser more strictly than it was drawn in *Alexander v. Mills*,"—but that he did not understand that the general doctrine, as laid down by a long series of decisions of judges of the greatest eminence, and determined before *Pyrke v. Waddingham*, and which was explained in that case, has been displaced by subsequent authorities. "When the court finds," he added, "according to the

principles explained in that case, that there is a question open to doubts of the kind there mentioned, and that a title ought not to be forced upon the purchaser, it is neither necessary, nor generally convenient or desirable, that the court, whatever may be the opinion it has formed upon the question, and on the materials presented on a suit for specific performance, should think that that should conclude all questions, as against persons who are not before it." The case then in hand involved at least one doubtful question of fact, viz. whether a certain notice had been received, and the court of appeals held that the doubt was so serious that they would not compel the purchaser to take title.

In *Re Thackray and Young's Contract* (1888) 40 Ch. Div. 34, the latest case I have found, the question was whether a certain transaction between a landowner and a railway company was an absolute sale and disposition of the lands, within the meaning of the Lands Clauses Consolidation act. After stating this to be the question, Mr. Justice Chitty says: "I take it as a general principle of law, with regard to specific performance, that the court does decide, in general, matters of law about which there cannot be fairly said to be any judicial doubt. In regard to this question, which of late has undergone a good deal of consideration, as to titles which the court will or will not force upon a purchaser, it has been laid down by James, L. J., in *Alexander v. Mills*, that with regard to general matters of law, including the construction of a general act of parliament, the right course for the court is to decide the question. But then I think it must appear to the judge who decides it that there was no decision or dicta of weight which show that another judge or another court, having the question before it, might come to a different conclusion. The court, I take it, must feel such confidence in its own opinion as to be satisfied that another court would not adopt another conclusion." In this case, Mr. Justice Chitty held that the question of the construction of the statute was, by reason of the dicta of Sir George Jessel and Sir James Hannen, in the decision of previous cases, left in such a state of doubt that, although it was the question of the construction of a general act of parliament, he could not say, with the certainty which was required of him to say, that no other court would come to a different conclusion.

These decisions of Lord Selborne and Mr. Justice Chitty qualify, to some extent, the broad doctrine laid down in *Alexander v. Mills*, that, with regard to general principles of law, including the construction of a general statute, it is the duty of the court to decide it on a suit for specific performance; and the doctrine, as thus qualified, is that specific performance should not be decreed if there is reasonable ground for saying that the question is not settled by previous authorities, or if there are decisions or dicta of

weight which show that another judge or another court, having the question before it, might come to a different conclusion. This rule is, as it seems to me, sufficiently favorable for the protection of the purchaser, and it is equitable to apply it in the present case. In this case, the question of the validity of the will must be fairly considered as so settled a question as to justify the court in directing the title to be taken. There is no decision, it is true, settling the construction of the statute, but its language is so clear that I do not consider that a doubt has been thrown upon its application. It is a question purely of statutory construction, and the decisions of other courts, cited by counsel in his brief, are based either on the common-law status of husband and wife, or on statutes which expressly exclude the husband from attesting a will in which his wife is interested. The doubt as to the title must, as was said by Vice Chancellor Dodd, in *Vreeland v. Blauvelt*, 23 N. J. Eq. 483, be put upon some debatable grounds. They do not seem to exist in reference to the construction of this statute, and I therefore advise that specific performance be decreed.

STATE v. CLARK et al.

(Court of General Sessions of the Peace and Jail Delivery of Delaware. Dec. 18, 1891.)

CONSPIRACY—EVIDENCE—DECLARATIONS—HUSBAND AND WIFE.

1. A conspiracy is an unlawful combination by two or more persons for the doing of an unlawful act, or for the doing of a lawful act by unlawful means.

2. The existence of a conspiracy may be proven by circumstantial evidence.

3. Where the existence of a conspiracy is proven, the admissions of any of the parties concerned therein are admissible against others absent when the admissions were made.

4. A conspiracy may be proven without proof of attempts towards its execution.

5. Where a husband and wife are indicted jointly with others for conspiracy, the wife may be convicted without proof that she was not acting under the influence of her husband.

6. A husband and wife, being one in law, cannot alone be guilty of conspiracy.

7. A person joining a conspiracy after its formation is as guilty as if he had joined it in the beginning.

8. Evidence failing to satisfy a reasonable mind as to defendant's guilt leaves a reasonable doubt.

Prosecution of Edward Clark and others for conspiracy.

John Biggs, Atty. Gen., and Thomas Davis, Dep. Atty. Gen., for the State. Austin Harrington and William S. Hilles, for defendants.

CULLEN, J. (charging jury). The case you are impaneled to try is a very important one, and a grave responsibility rests upon you in order that the public interests may be protected. The indictment here is one for what is called "conspiracy." A conspir-

acy is an unlawful combination, entered into by two or more persons for the purpose of doing an act which is unlawful, or the doing of a lawful act by unlawful means. In order to sustain this indictment, it is necessary, in the first place, to show that there was an unlawful combination by and on the part of two or more persons to do an act which is wrongful. The matter which is presented here, and which is charged in the indictment, is that the defendants in this case, Edward Clark, Mary Clark, Joseph Clark and William J. Gibbons, unlawfully conspired and combined together (which is the gist of this action) to burn a barn belonging to the Messrs. Du Pont. Now, it is necessary for the state to clearly prove those facts to you beyond a reasonable doubt. As far as the testimony in this case is concerned, I may say that it does not appear to be conflicting, but it is more a matter of a continued series of testimony without contradiction as to certain facts. Those facts, therefore, and that evidence, must go before you for your decision in relation thereto.

According to the evidence here, is a conspiracy disclosed? For the fact of a conspiracy must first be proven, and in order to establish the same it is necessary to show it as any other fact. It may be shown directly,—that is, by positive evidence; or it may be shown by the declarations of the parties themselves, or by the declarations or evidence of an accomplice, or one who was a party to the conspiracy. But, as a general thing, offenses of this nature are necessarily secret, and it is not often that positive testimony can be produced in order to establish the fact of a conspiracy; and the law therefore admits what is called “circumstantial evidence,”—that is, facts and circumstances from which you can infer certain things; and if the facts that are brought out as connected with the circumstances established the fact that a conspiracy does exist, then the offense becomes complete when you are shown the connection of the parties with it who are charged as being implicated. The testimony of the different parties as to this matter prior to the formation of the conspiracy is admissible in evidence, not as charging the whole conspirators, until the fact has been proved; but when the fact is proven that a conspiracy existed, then the declarations of all the parties who were concerned in that conspiracy is evidence against the whole, though they were not present. But otherwise the declarations and admissions of the one are not at all to implicate or in any way join the other co-conspirators. In the decision of this case you must take into consideration the whole testimony that is offered here going to show that there was a conspiracy to burn this barn. There is presented to you a letter, which speaks for itself. The inferences that are naturally and reasonably to be drawn from that letter you must draw. Do they establish the fact

that there was a conspiracy—an unlawful combination or agreement—on the part of the prisoners at the bar in this case to do an unlawful act, namely, the burning of this barn? Has that testimony been followed up by the testimony on the part of the state as to the declarations as to what is termed overt acts on their part, which is nothing more or less than certain things which they did or said going to carry out and complete this conspiracy; not in the execution of the conspiracy, but acts and sayings which go to complete it, and to make perfect that conspiracy? Are the declarations of these parties offered in evidence here sufficient, in your minds, to establish the fact that a conspiracy really existed?

It is the province of the court, gentlemen, if the fact of a conspiracy is not proven, to stop the case; for you cannot, of course, convict parties of being implicated or concerned in an unlawful combination when such is not proved. But where the unlawful combination is proved, then the fact comes up as to whether or not the parties charged are really guilty of the offense. You have other testimony in relation to this matter,—as to this conspiracy; and it is for you to say whether or not those facts are sufficient, in your minds, to satisfy you that there was a conspiracy. The court think that the facts are sufficient to allow this case to go to the jury to determine as to the guilt or innocence of the defendants. You have the testimony before you relative to the matter. If that testimony is sufficient to satisfy you of their guilt,—in other words, that they did combine to do this unlawful act,—then you should undoubtedly render against them a verdict of guilty. I would say to you, gentlemen, in relation to the testimony as to the admissions and declarations on the part of these defendants, none of these are proper to go in evidence so as to charge the co-conspirators who were not present at the time of these declarations, and had nothing to do with them, unless you are satisfied that they were all together concerned in it. Have you testimony sufficient to warrant you in believing that there was a combination of this character, or is there testimony sufficient to warrant you in coming to any other conclusion in relation to this matter?

We have been asked to charge you here that, inasmuch as a husband and wife are indicted together for a conspiracy, the wife cannot be convicted, because she is presumed to be under the influence of the husband. We know of no principle of law that would justify such a doctrine. There are cases in which the wife is presumed to be under the influence of her husband. There have been no authorities presented to us to show the ground upon which the matter has been referred to the court, but I will cite you to Wright, Cr. Consp. p. 127 [from which he read]. That is sustained by several very ancient authorities, which, so far as I know,

have never been overruled. 5 Esp. 107. It must be so. The idea that, where a man and his wife are indicted jointly for an offense, the latter cannot be convicted, with no proof on the other side to show there was an influence exerted by and on the part of the husband as compelling the wife to enter into this matter, is a strange one. You must have the proof. If there was an influence exerted over the wife, that should have been brought out; but there is no defense on that. A husband and wife may together commit a crime as well as either one alone. They may combine together, and commit a murder. If they were both engaged in this transaction, though the law regards them as one, they are alike guilty. It is true that, if those two alone were concerned in the commission of an offense of this kind, then you could not convict, because it takes two to make a conspiracy,—they being one in law; but it would be sufficient if there were other persons joined in it, though they were not known. Then they might be convicted.

We have been asked to say in relation to the charge against one of these parties—William J. Gibbons—that there is not sufficient proof to connect him with these conspirators; that there has been no proof adduced here to show that he was a party who was in the organization of this conspiracy. That is a matter for you to consider, as to whether or not there is testimony going to show you that this party was implicated in this conspiracy. A conspiracy may be formed, and a party not be in it at the time of its formation, but afterwards may come in and become connected with the conspiracy. Then, in that case, he is guilty, as he would also be if he were in the incipient stage of the same. Does the testimony disclose here that Mr. Gibbons was in the original formation of this conspiracy; that he was connected with the Clarks at the time; or, if not that, does it disclose the fact that it was a matter which was brought to his knowledge, and that he acted and co-operated with these persons? We cannot close our eyes to the fact that there was a conspiracy, and that some unlawful acts had been done, and that a wrong had been committed against the public interests. The fact as to whether or not he came into this conspiracy after its inception or at the time, and was, therefore, a part of the conspiracy, is to be inferred by you; but your inference must rest upon proper grounds. You must be satisfied beyond a reasonable doubt. If the declarations made by the witnesses implicating Mr. Gibbons are not sufficient to satisfy you that he was privy to this combination, and that he was interested in the same, then, under those circumstances, you should acquit him. You may convict all of these parties, or you may convict a part and find guilty the others. That is a matter depending entirely upon the proof, which you are to decide.

There is no dispute in relation to the law applicable to this case. If you are satisfied from the evidence that these defendants were guilty of entering into an unlawful combination to burn this barn, your verdict should be a verdict of guilty. If, however, there is a reasonable doubt, such as not to satisfy a reasonable mind as to their guilt, then you should give them the benefit of that doubt, and acquit them. So with any one of them, if you find that the evidence is not sufficient to satisfy you beyond a reasonable doubt as to the guilt of one or more of them, then you should find a verdict of not guilty as to that one or two, whoever they are.

Verdict, "Guilty," as to all the defendants.

STATE v. LODGE.

(Court of Oyer and Terminer of Delaware. Jan. 29, 1892.)

HOMICIDE—ABORTION—DYING DECLARATIONS— CONTRADICTION—IMPEACHMENT.

1. Dying declarations may be contradicted by proof of previous contradictory statements made by deceased. Cullen, J., dissenting.

2. Evidence of the past character of one charged with murder is inadmissible where he has not put his character in issue.

3. An abortion or attempt to produce a miscarriage, resulting in the death of the woman operated upon, and which was not necessary to preserve her life, constitutes murder in the second degree, whether she consented to the operation or not.

Indictment against John K. Lodge for murder in the second degree, committed in an attempt to produce abortion. Verdict of guilty.

During the trial, the defendant called Patience Johnson to the stand, and asked witness the following question: "When Mrs. Evans got into the carriage after she returned from behind the house on that Saturday with Mr. Lodge, and you had both left, did she say to you that all Mr. Lodge did was to give her a box of pills?" The state objected.

CULLEN, J. Suppose a witness is called to the stand here, and swears to a certain state of facts; could you contradict that witness by proving that that witness had made declarations to the contrary, unless the attention of the witness were called to it?

Mr. Robinson (for the defendant). Very clearly not.

CULLEN, J. I call your attention to this because this is a very important matter. In this case the dying declarations under the law are presumed to be under the sanctity of an oath; it is equivalent to that. If you can admit statements prior to those, without an opportunity of the party's attention being called to them, it seems to me that it makes a direct innovation of our practice.

GRUBB, J. I want to get the exact bearings of the question. I am not expressing an opinion. Dying declarations are admit-

ted in homicide cases, because the parties are apprehensive of impending death, and there is the prospect of almost immediate dissolution, on the ground that, as they are about to enter the presence of their Maker, it is supposed that they will not dare to deceive any more than when they invoke the attention of their Creator to the oath when made, so that the fact of their coming dissolution is considered to be quite as binding as the taking of an oath in its obligation upon them. The objection made always is that the accused is deprived of the opportunity of calling the attention of the person who supposed himself to be about to die to certain facts, which, if brought to his attention, he might modify his statement or make none at all; that there is no opportunity to test his judgment, the strength of his recollection, or his bias. But the law says that it insures justice in the greater number of cases, and that it is necessary to let it in, although it does deprive the defendant of testing the memory of the witness and his truthfulness by cross-examination. Then it is as though it says: "Very well, if you are deprived of that opportunity of ascertaining if that witness was wrong, and of bringing any witness to contradict him, when we let in the dying declarations, without an oath, you ought to have the right to put in testimony of previous declarations, without laying the ground." In other words, the party on one hand says: "If you let in the dying declarations, I ought to have the right to contradict them (aside from the rule that I am bound to lay the ground for a contradiction) by proof of a previous conversation." And so the two, according to Judge Field and these other authorities, seem to balance each other; and, where there is a balance, the law leans in favor of human life or personal liberty. That is just the situation. Now the question is, where there is a loss of cross-examination on the side of the defense and also by the state, in that you have not laid the ground, whether the favor of the law should not be on the side of liberty and life, and should let in the previous statements that are contradictory of the statements made by the person who supposed she was dying. Therefore, as dying declarations are admitted on the ground of necessity, ought not proof of contradictory or inconsistent statements by the deceased to be also admitted on the same ground?

HOUSTON, J. In order to get on with the trial of this case, let us dispose of the question now before us. Although it is fair to say (that counsel and the jury may know) that the court have some doubt on this question, yet the inclination of the mind of the majority of the court is that the testimony may be contradicted in the mode proposed, and that, therefore, the question is admissible.

Thereupon the testimony offered was admitted in evidence.

CULLEN, J., dissented.

John Manning having been produced and sworn on the part of the state, the attorney general interrogated him as follows: "Did you ever have any conversation with him about an operation that he performed on any one to produce a miscarriage?" Defendant objected.

GRUBB, J. We are of the unanimous opinion that this testimony is not admissible. This subject came up in that professional thief case,—State v. Carter, *Houst. Cr. Cas.* 406. There such testimony was held to be inadmissible, unless the prisoner's character was put in. We therefore rule it out.

CULLEN, J. This man is indicted for one offense. I don't care what his past character is, whether a murderer or not. The matters in evidence here must be germane to the issue. You propose to prove past character or his reputation. That has nothing to do with the guilt or innocence of the person. As I view this matter, the question here is, is this man guilty, under the act of assembly, of the commission of this offense with which he is charged?

HOUSTON, J. He has not himself put his character in issue, nor has testimony been adduced on the other side to show anything by which we could infer that his intention is to put his character in issue, and therefore I do not think this evidence is admissible.

John Biggs, Atty. Gen., and Thomas Davis, Dep. Atty. Gen., for the State. Alfred P. Robinson and Robert C. White, for defendant.

GRUBB, J. (charging jury). I will preface the charge of the court to you by saying that we realize the great service which you are rendering to this community in being here, as you have been, for the past three days, with several of the members of your body suffering from great illness; and we therefore congratulate you that you have reached, as we hope, very near the conclusion of your arduous and valuable labors. The case which you are called upon to try in this instance is no ordinary one; in fact, it is a most serious case, in its own circumstances, as well as in its importance to the community. This case, gentlemen, seems to be unprecedented in the annals of the criminal jurisprudence of this state, so far as I know, and so far as I have been able to learn from my associates; for even our venerable brother, Judge Houston (who has been upon the bench for more than thirty-five years, and who has lived beyond his three-score years and ten), does not remember any instance in this state in which any man has been charged, as this man is, with murder of the second degree (or perhaps with any other crime) for the commission of the act for which he stands accused; so that this is to all intents and purposes a

new question, and therefore a question of great importance to this community; and it is of the greatest importance that you should give it your most serious, intelligent, and conscientious consideration, before you decide it.

Gentlemen, you will remember that you are sworn to try this case and to render a verdict according to the evidence; and that this means, not what you may have heard outside this jury box, not what may be the sentiments of the communities from which you come, respectively, but it means the legal evidence that this court has decided is admissible in this case from the mouths of the witnesses (and from them only) who have been before you, and that you must exclude all other considerations, all other impressions, and be governed entirely by the evidence which has been submitted to you from that witness stand with the consent of the court, after opportunity has been afforded counsel to object to any that was inadmissible.

John K. Lodge, the prisoner at the bar, stands charged in this indictment with murder of the second degree, for the felonious killing of Martha I. Evans in the month of July, 1891, at Indian River Hundred, within this county. As the prisoner stands charged with murder of the second degree, it becomes necessary for the jury to be sufficiently informed as to the distinctions between murder and the inferior grades of homicide (or man-slaying, and also woman-slaying), and particularly as to the definition and nature of murder of the second degree.

Homicide is the killing of any human creature, and is of three kinds: Justifiable, excusable, and felonious. The taking of human life is held to be justifiable when done in the execution of public justice, as where the proper public officer duly executes a criminal under lawful sentence of death, or in the advancement of public justice, when a public officer of necessity, in the due execution of his office, kills a person who assaults and resists him, or for the prevention of any atrocious crime attempted to be committed with force, such as murder, robbery, housebreaking in the nighttime, rape, mayhem, or any other act of felony against the person. Excusable homicide is that which is committed either by misadventure or in self-defense. Homicide by misadventure is the accidental killing of another where the slayer is doing a lawful act, unaccompanied by any criminally careless or reckless conduct. In this case the act was unlawful, unless done to preserve the life of the mother; for, unless this act to produce a miscarriage was necessary to preserve the life of Mrs. Evans, it was an unlawful act. Dr. McCabe, from that witness stand, said to you that the miscarriage in this instance was not necessary to preserve her life. If you believe him, then this was an unlawful act; and therefore, it being an unlawful act, Lodge's per-

forming it was no excuse for him in law, and therefore this is not a case of excusable homicide. Homicide in self-defense is another form of excusable homicide. It is not pretended that Lodge committed this act in self-defense; therefore it is unnecessary for me to say anything further in regard to what is homicide in self-defense, because the facts in this case will not warrant you in finding that it was either justifiable or excusable homicide.

The question then is, was it felonious homicide? Now, felonious homicide at common law is of two kinds, viz. manslaughter and murder, the difference between which consists principally in this: that in murder there is the ingredient of malice, while in manslaughter there is none; for manslaughter, when voluntary, arises from sudden heat of the passions, but murder from the wickedness and malignity of the heart. Therefore manslaughter is defined to be the unlawful killing of another without malice, either express or implied, and, of course, without premeditation. Manslaughter is either voluntary or involuntary. Voluntary manslaughter is where a man kills another in the heat of blood, and this usually arises from fighting or from provocation, but it must be shown that such fighting was not preconcerted; for in the case of a deliberate fight, such as a duel, the slayers and his seconds are guilty of murder. You will see at once that this is not voluntary manslaughter, because this act was not committed in the heat of blood at the time by the prisoner, nor was it from provocation. The question then arises, was it involuntary manslaughter? (I refer to the subject of manslaughter because the counsel for the defendant, Mr. Robinson, referred to that subject in the course of his argument.) Involuntary manslaughter is where one in doing an unlawful act, not felonious, nor tending to great bodily harm, or in doing a lawful act without proper caution or requisite skill, undesignedly kills another. Thus, if one shooting at another's poultry, without intent to steal it, accidentally kills a man, it is but manslaughter; but, if the shooting be with intent to steal, then, such act being felonious, the homicide occasioned thereby is murder. To reduce a charge of murder to manslaughter of this kind, the evidence would be directed to show either that the act committed or attempted to be done was not felonious, nor tending to great bodily harm, or that it was not only lawful, but was done with due care and caution, or, in cases of science, with requisite skill. I have explained to you what involuntary manslaughter is, and that it may be committed in doing an unlawful act which is not felonious. But, of course, if this act, by virtue of what we call "common law," or by any statute of this state, should be declared felonious, and you should find the prisoner guilty of it, and that it caused her death, then, being a felo-

nious act, it would be murder of the second degree, at least.

Having defined what involuntary manslaughter is, we come to murder. Murder, which is one of the two kinds of felonious homicide (manslaughter being the other), is when a person of sound memory and discretion unlawfully kills any reasonable creature in being, under the peace of the state, with malice aforethought, either express or implied. The chief characteristic of this crime, distinguishing it from manslaughter and every other kind of homicide, and therefore indispensably necessary to be proved, is malice prepense or aforethought. This term "malice" is not restricted to spite or malevolence towards the deceased in particular, but, in its legal sense, is understood to mean that general malignity and recklessness of the lives and personal safety of others which proceed from a heart void of a just sense of social duty, and fatally bent on mischief. Malice is implied by law from every deliberate cruel act committed by one person against another, no matter how sudden such act may be; for the law considers that he who does a cruel act voluntarily does it maliciously. And whenever the fatal act from which death ensues is committed deliberately, or without adequate provocation, the law presumes it was done in malice; and it is incumbent upon the prisoner to show from evidence, or by inference from the circumstances of the case, that the offense is of a mitigated character, and does not amount to murder. Under the statute law of this state, there are two degrees of murder, namely, murder of the first and murder of the second degree. The first is where the crime is committed with express malice aforethought, or in perpetrating or attempting to perpetrate any crime punishable with death; and the second degree is where the crime of murder is committed otherwise, and with malice aforethought implied by law. Express malice is proved by evidence of a deliberately formed design to kill another; and such design may be shown from the circumstances attending the act, such as the deliberate selection and use of a deadly weapon, knowing it to be such; a preconcerted hostile meeting, mutually agreed on, or notified and threatened by the prisoner; privily lying in wait; a previous quarrel or grudge; antecedent menaces; the preparation of poison or other means of doing bodily harm to the deceased; or the like.

Implied malice (which is alleged under this indictment), or constructive malice, is an inference or conclusion of law from the facts found by the jury; and among these the actual intention of the prisoner becomes an important and material fact, for, though he may not have intended to take away life or to do any personal harm, yet he may have been engaged in the perpetration of some other felonious or unlawful act from which he law raises the presumption of malice. It

is the difference between express and implied (or constructive) malice aforethought which distinguishes murder of the first from murder of the second degree, except, however, that, under our general statute, murder of the first degree may be committed where the malicious killing is done in perpetrating or attempting to perpetrate any crime punishable with death, as rape or arson is in this state, although from such a felonious act malice is merely implied or presumed by law. Therefore murder of the second degree is held to be proved where it is not satisfactorily shown by the evidence submitted to the jury that the killing was done with a deliberately formed design to take life, or in perpetrating or attempting to perpetrate any crime punishable with death, but is so shown that it was done suddenly, without justification or excuse, and without any provocation, or without provocation sufficient to reduce the homicide to the grade of manslaughter, or was done in perpetrating or attempting to perpetrate a felony (not capitally punishable) or any unlawful act of violence from which the law raises the presumption of malice.

In the present instance, the prisoner is indicted, not for murder of the first degree, but of the second degree only. The charge of murder of the second degree in this indictment is founded upon the allegation that the killing was done by the prisoner while he was engaged in committing or attempting to commit an act—namely, to procure a miscarriage—which is declared to be a felony by chapter 226 of volume 17 of the Laws of Delaware. Section 2 of said chapter 226 provides that every person who, with intent to procure the miscarriage of any pregnant woman, supposed by such person to be pregnant, unless the same be necessary to preserve her life, shall, among other things, use any instrument or other means whatsoever, whether said miscarriage shall be accomplished or not, shall be guilty of a felony, and, upon conviction thereof, shall be fined and imprisoned as provided in said section. This indictment charged that on July 25, 1891, the prisoner, Lodge, violated said statutory provision, and so became guilty of a felony, by using an instrument with the intent to procure the miscarriage of Martha I. Evans, as alleged in the indictment, and thereby caused the death of Mrs. Evans, with malice aforethought, implied by law, and is therefore guilty of murder of the second degree.

It becomes necessary for you to determine—First, whether the prisoner has violated said statutory provision as charged; and, second, whether, in so doing, he caused the death of Mrs. Evans in the manner as alleged in this indictment. Inasmuch as every accused person is presumed to be innocent until he is proven guilty, the burden is upon the prosecution to prove by competent and satisfactory evidence every essential ingredient of the crime charged in this indict-

ment, and that the prisoner is guilty thereof beyond a reasonable doubt. Therefore, before you can find the prisoner guilty in manner and form as he stands indicted, the following essential inquiries must be affirmatively determined beyond a reasonable doubt: First. Did the prisoner, Lodge, use an instrument in the manner described in the indictment? Second. Did he so use it with the intent to procure the miscarriage of Mrs. Evans, he supposing her to be then and there pregnant, and when the same was not necessary to preserve her life? Third. Did she die on or about July 30, 1891, and was her death caused by a miscarriage or other injuries to her thereby produced by Lodge. And, fourth, if so, is he guilty of murder of the second degree? For, if you shall find from the evidence that Lodge did so use the instrument, and with the said intent to procure the miscarriage of Mrs. Evans, he supposing her to be then pregnant, and when the same was not necessary to preserve her life, then he is guilty of the felony defined by the statute we have referred to, whether he did or not thereby produce her miscarriage or cause her death; for the legislative power of this state, having deemed it necessary for the protection of human life, and for the preservation of the public safety and welfare, as we must presume, has set the seal of public condemnation and prohibition upon such an act, and has declared it to be a felony when committed. And if you shall further find that Mrs. Evans came to her death on or about July 30, 1891, and that her death was caused by a miscarriage or other injuries produced by the prisoner's said felonious act, as alleged in this indictment, then he will, in contemplation of law, be guilty of murder of the second degree, and it will be your imperative duty, in accordance with the law which we have stated for your guidance, so to find by your verdict. For we have already explained to you that, according to the law as it has been declared by the courts of this state, if one person, while he is engaged in committing another felony (not capitally punishable here), shall kill another person, he is guilty of murder of the second degree, whether he intended to take life or not; for the law presumes malice in such a case, and therefore he is guilty of murder of the second degree. And where such killing ensues from the felonious act of performing an operation with intent to procure miscarriage, as provided by our statute, the assent of the pregnant woman whose death was caused thereby to such operation is no defense, in law, to an indictment against the person performing the operation.

That Mrs. Evans actually died on July 30, 1891, is proven by both her physicians and other witnesses who have appeared before you. That her death was caused by blood poisoning, resulting from a miscarriage or other injuries caused by an operation performed upon her for that purpose by some

one, is also testified to by the several physicians who were upon the witness stand. Some of these physicians also testify that they are positive an instrument was used for the purpose of procuring a miscarriage, and that they found two or three wounds within Mrs. Evans' womb which were produced by a blunt instrument; but these witnesses do not undertake to say that the prisoner, Lodge, is the person who used the instrument, or who produced the miscarriage and the injuries and the resulting blood poisoning, which caused her death. Therefore, although you should believe upon the testimony of said witnesses that Mrs. Evans actually died on July 30, 1891, and that her death was caused by a miscarriage and injuries resulting in said blood poisoning produced by an operation performed upon her for that purpose by some person, yet you will still have to be satisfied beyond a reasonable doubt, from all the evidence on both sides before you, whether or not the prisoner is the person who performed that operation and caused the miscarriage and injuries and resulting blood poisoning, which occasioned her death. The prosecution charges that the prisoner, Lodge, is that person; while the prisoner denies it, and contends that the miscarriage and injuries which resulted in her death were caused by Mrs. Evans herself, by the use of medicines or a knitting needle or other means for the purpose of procuring her own miscarriage.

The two prominent questions in this case, then, are: First. Is the prisoner the person who caused said miscarriage and injuries by his use of an instrument, as alleged in the indictment? And, second, did he use said instrument with the intent to procure the miscarriage of Mrs. Evans, contrary to the provisions of the statute of 1883, heretofore referred to? In order to prove to your satisfaction that the prisoner at the bar is the person who caused said miscarriage and injuries, and thereby produced her death, the state has offered witnesses to prove facts and circumstances from which you may infer and conclude that he is such person, as well as the dying declarations of Mrs. Evans herself, stating what Fannie Morris, in part, and Eliza J. Jones, in part, have testified to you as to those declarations. You will recall all these facts, and also the statements made as dying declarations, and consider them in connection with all the evidence on both sides in the case, and determine whether they satisfy you beyond a reasonable doubt that the prisoner is the person who actually caused the miscarriage and injuries which, as the said physicians say, produced blood poisoning, which caused her death. If you shall be so satisfied that the prisoner is that person, then you are to further determine whether said facts and dying declarations, viewed in connection with all the other evidence in the case, satisfy you beyond a reasonable doubt whether the prison-

r used the instrument in the operation which caused the miscarriage and injuries and death of Mrs. Evans (if you shall find that it was so caused) with intent to procure her miscarriage, and contrary to the provisions of said statute. Now, gentlemen of the jury, as you cannot look into the mind and heart of a man, and see his secret intentions and motives, you must look to his actions, expressions, and all the other circumstances attending his particular act, in order to ascertain what was his actual intent or purpose at the moment of its commission. In order to show that the prisoner committed the act in question upon Mrs. Evans, the state has sought to show by witnesses who are testified before you, as well as by her own dying declarations, that the prisoner had reason to know that she was then pregnant, and that he performed the operation with the intent to procure her miscarriage, contrary to the said statute, and therefore feloniously, within its meaning and purpose. To prove this intent, as well as other requisites of this charge, the state has sought to show by said witnesses and dying declarations (to which witnesses and dying declarations you will give such credit and weight as in view of all the evidence before you, you shall deem proper),—the state has sought to show thereby, I say, the following circumstances (if you find we correctly state them to you): That Mrs. Evans had determined to destroy, by miscarriage, her unborn embryo child; that she had said to one of the witnesses, at least, on Thursday, July 3d, that she had tried medicines for that purpose, and also a knitting needle, but that these had failed; that she sought and had an interview with the prisoner in Lewes on that Thursday; that on the following Saturday, July 25th, she met Lodge near Truitt's mill; that Lodge asked Mrs. Evans to get out of her carriage, which she did; that, after a brief private conversation with her, he told her companion, Patience Johnson, to drive down the road a certain distance, and return again to Mrs. Evans, which Patience did not do, but remained, and saw Lodge take Mrs. Evans behind an unoccupied house, and out of her sight; that, in about five or ten minutes, Mrs. Evans and Lodge reappeared, and Mrs. Evans came to her carriage, where she picked up her purse, and then took some money out of it, and returned to where Lodge was standing; that Mrs. Evans then drove Patience Johnson to her house, and, upon leaving her there, drove on towards her own home; that, on the next night (Sunday), Mrs. Evans had a miscarriage, and on Monday was found with the certain evidence of her recent miscarriage apparent to Patience Johnson, who saw her that morning about 7 o'clock, and by her physician Dr. Frame, who saw her the same day, July 27th, about half-past 2 in the afternoon; that she was on that Monday afternoon suffering from symptoms of

blood poisoning; that, according to Dr. Frame and Dr. Layton, who were her physicians, she continued to grow worse, and died on Thursday, July 30th (five days after leaving Lodge), from septic fever caused by blood poisoning, resulting from her miscarriage and the injuries attending it.

Now, gentlemen, it is from these circumstances, and such others as you may recall, that the prosecution asks you to infer and conclude that the prisoner both performed said operation with an instrument, as alleged in the indictment, and also did it with intent to procure the miscarriage of Mrs. Evans, in violation of the statute, and that thereby he caused the death of Mrs. Evans, and is therefore guilty,—not only of the felony, as provided in the statute, but also of murder of the second degree, under the law of this state. Whether this conclusion is warranted by the evidence is for you, and not this court, to decide, after you have carefully and conscientiously considered all the evidence on both sides. If you shall be satisfied beyond a reasonable doubt that it was so warranted, then it will be your duty to find the prisoner guilty in manner and form as he stands indicted; that is, of murder of the second degree. But, in case you should not find him guilty in manner and form as he stands indicted, you may find him guilty of manslaughter, if you find that the evidence, under the instructions as to the law which we have given you, shall warrant you in finding such a verdict. But, if you find that he is guilty of neither murder of the second degree nor manslaughter, you cannot find him, under this indictment, guilty of any other offense, but you must find him not guilty, and render a verdict, accordingly, of not guilty. But, as we have already informed you, if you find that the said statute against procuring miscarriages was clearly violated by the prisoner, and that in violating it, as alleged in the indictment, he caused Mrs. Evans' death, then he cannot be found guilty of manslaughter in this instance, but must be found guilty of murder of the second degree, by your verdict.

This, gentlemen of the jury, so far as we comprehend the case, comprises all that is necessary for us to say to you. We therefore leave this case in your hands, to render such verdict as, according to your oaths, you shall find warranted by the evidence.

Verdict: "Guilty."

826-1119

JACKSON et al. v. JACKSON.

(Court of Appeals of Maryland. Nov. 15, 1895.)

FOREIGN MARRIAGE—VALIDITY—PROOF—FOREIGN LAW—EVIDENCE—REPUTATION—INSTRUCTIONS.

1. A marriage in a foreign state, proved only by general reputation, if valid there, is valid in Maryland. In the absence of a law positively prohibiting it.

2. It is proper to refuse prayers for instructions, where the case was fully covered in the court's charge.

3. It is proper to refuse a prayer not applicable to the evidence.

4. A lawyer of a foreign state is competent to testify as to the laws of that state.

5. Error will not be presumed for refusing to permit competent questions to be answered, unless it is shown what such answers would be.

6. Evidence of a woman's reputation, after she left her husband, for chastity during the time she lived with him, is not competent to disprove marriage.

7. The value of evidence is for the jury.

8. A witness cannot testify that parties alleged to be married had a divided reputation on the subject.

Appeal from circuit court, Wicomico county.

Action by Sallie Jackson against Elihu E. Jackson and others. Plaintiff had judgment, and defendants appeal. Affirmed.

Argued before BRYAN, BRISCOE, ROBERTS, BOYD, and McSHERRY, JJ.

James E. Ellegood and John R. Pattison, for appellants. E. Stanley Toadvin and George W. Bell, for appellee.

McSHERRY, J. This case is now before us for the second time. The first appeal is reported in 80 Md. 176, 30 Atl. 752. The legal principles applicable to the controversy were then laid down, and, upon a reversal of the judgment, the cause was remanded for a new trial. A new trial was had, resulting in the same verdict and judgment that were recorded on the first trial, and the same parties have again appealed who were the appellants on the former occasion. There was but a single issue involved, and that was whether the appellee is the legitimate daughter of Richard Watson Jackson, who died intestate some years ago. In passing on this issue, two juries in different counties have found by their verdicts that she is. The record now before us contains 12 bills of exception, but it will not be necessary to review them separately, because they form several distinct groups, presenting but few questions which require any discussion.

The alleged marriage of the appellee's mother and father, if it took place, as has been twice found by separate juries, took place in the state of Pennsylvania. The evidence relied on to establish this marriage was general reputation, cohabitation, and acknowledgment. The admissibility and sufficiency of such evidence to prove a marriage was fully considered on the former appeal, and we need not repeat here what was so recently decided there. There was no effort to prove as a distinct fact that the marriage had been performed with any religious ceremony. It is true that one of the witnesses, in giving the declarations of the parties, stated that they (the mother and father of the appellee) upon one occasion said they had been married by a minister of the gospel; but it must be borne in mind that the appellee, who was seeking to prove her legitimacy, did not set

up a marriage of her parents at a particular place, by a particular form or ceremony. Had she done this, and failed, she would not have been at liberty to rely on general reputation to establish the alleged marriage. *Barnum v. Barnum*, 42 Md. 251. Assuming there was no religious ceremony proved, or attempted to be proved, as there was not, it has been insisted with great zeal and earnestness that even if the marriage found by the verdict of the jury to have been contracted and consummated in Pennsylvania were valid by the laws of that state, yet the legitimacy of the appellee, who was born in Pennsylvania, where her parents then lived, must be determined, not by the laws of that state, but by the laws of Maryland; and that if, therefore the marriage were, by reason of the failure to show there had been some religious ceremony, one that would not, on that account have been valid under the statutes of Maryland, the issue of such a marriage would in Maryland be illegitimate, even though the marriage of which that issue was the fruit were conceded to be perfectly valid in the state where it was contracted and consummated, and the case of *Doe v. Vardill*, 5 Barn. & C. 438, was much pressed upon us to support that view. But that case, and others founded on the same settled principle, are clearly distinguishable from the case at bar. It is a maxim as old as the common law that "heres legitimus est quem nuptiae demonstrant." A marriage, if valid where solemnized, is, in general, valid everywhere and, of necessity, the offspring of that marriage would be treated as legitimate, wherever the marriage itself would be regarded as valid. But a local statute which makes an illegitimate child, or a child born out of wedlock, legitimate upon certain prescribed conditions, such as the subsequent marriage of the parents, and the recognition of the child as theirs, can have no extraterritorial operation, and therefore cannot give to such child in another jurisdiction an inheritable status not accorded to it by the law of the latter jurisdiction. By the law of England, a child born out of wedlock was a bastard. By the law of Scotland, the subsequent marriage of the father and the mother, and their recognition of the child as theirs, legitimated the child. But that statute could not operate upon real estate in England, where the law gave to such a marriage no effect as legitimating prior-born children. The same principle was decided in *Barnum v. Barnum*, 42 Md. 251, and *Smith v. Derr*, 34 Pa. St. 126. We have said that in general a marriage valid where performed is valid everywhere. To this broad rule there are, however, exceptions. "These exceptions or modifications of the general rule may be classified as follows—First, marriages which are deemed contrary to the law of nature, as generally recognized in Christian countries; second, marriages which the local law-making power has declared shall not be allowed any validity. * * * To the

first class belong those which involve polygamy and incest; and in the sense in which the term "incest" is used are embraced only such marriages as are incestuous according to the generally accepted opinion of Christendom, which relates only to persons in direct line of consanguinity, and brothers and sisters. The second class, i. e. those prohibited in terms by the statute, presents difficulties that are not always easy of solution, and have led to conflicting decisions. This class may be subdivided into two classes—First, where the statutory prohibition relates to form, ceremony, and qualification, it is held that compliance with the law of the place of marriage is sufficient, and its validity will be recognized, not only in other states generally, but in the state of the domicile of the parties, even where they have left their own state to marry elsewhere, for the purpose of avoiding the laws of their domicile. Instead of being called a subdivision of the second class of exceptions, it would be more accurate to say that it is an exception to the exception, and falls within the operation of the general rule first announced, of 'valid where performed, valid everywhere.' To the second subdivision of the second class of exceptions belong cases which, prohibited by statute, may or may not embody distinctive state policy, as affecting the morals or good order of society." *Pennegar v. State*, 87 Tenn. 244, 10 S. W. 305; s. c., with copious notes, 2 Lawy. Rep. Ann. 703; *State v. Tutty*, 41 Fed. 753; *Brook v. Brook*, 9 H. L. Cas. 198; *Com. v. Ibrahim* (Mass.) 31 N. E. 706. It is obvious, then, as there is no statute in Maryland declaring that a marriage of whose existence here is no other proof than general reputation shall be void, and as, at most, the statutory provisions relative to the methods of solemnizing marriages in Maryland relate to form and ceremony only, the courts of this state will recognize the Pennsylvania marriage as valid, if that marriage is valid by and under the laws of the latter commonwealth, and does not contravene the declared policy of our own positive law. We are not to be understood as speaking of marriages operated elsewhere, but denounced by our own positive state policy as affecting the morals or good order of society. Such marriages, however regarded elsewhere, would not be treated as valid here. For instance, the statutes of Maryland peremptorily forbid the marriage of a white person and a negro, and declare all such marriages forever void. It is therefore the declared policy of this state to prohibit such marriages. Though these marriages may be valid elsewhere, they will be absolutely void here, so long as the statutory inhibition remains unchanged. But the question before us does not belong to such a category. At most, all that is asserted against the validity of the alleged marriage of the appellee's parents has reference to form or ceremony, and these, as we have seen, do not cause a marriage to fall within

any of the exceptions to the general rule that a marriage valid where performed is valid everywhere. These views, merely supplementing what we said in 80 Md. and 30 Atl., sufficiently answer the objections to, and the criticisms upon, the instructions granted by the court below at the instance of the appellee; and, without going into a further examination of these instructions, we content ourselves with saying there was no error committed in giving them.

The rejected prayers of the appellants were properly refused. The whole law of the case was fully, fairly, and clearly put before the jury in the instructions given at the instance of both parties. The hypothesis assumed in the appellants' second prayer, that the intercourse between the appellee's mother and father was illicit in the beginning, was not supported by a particle of evidence, and it would have been error to allow vague conjectures to be indulged in by the jury on that subject. The third prayer was faulty in submitting to the jury to find that the appellee undertook to prove that a marriage took place between her father and mother at Chester, Pa. The record does not show that she set up any such marriage. As already mentioned, there was some allusion by a witness to a statement made by the parents of the appellee as to the place where they were married; but the appellee never attempted to assert that a marriage was actually solemnized at Chester. These observations dispose of all the questions raised by the twelfth exception.

This brings us to the 11 exceptions involving the rulings of the court on questions of evidence. The first exception was taken to the ruling of the court allowing a witness to prove the law of Pennsylvania as to the requisites of a valid marriage in that state in the years 1872 and 1873. The witness was a lawyer of that state, and had deposed that he was familiar with the law there. We think, under repeated adjudications, he was competent to give evidence. *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752. With reference to the second, third, and sixth exceptions it is only necessary to say that the answers of the witnesses are not set forth in the record, and we are therefore unable to decide whether, even if the questions were conceded to be admissible, any injury was done to the appellants. Where the answers are not given, it cannot be assumed that they were prejudicial to the appellant. If not prejudicial, they could cause no injury, and, unless injury and error both appear, there is no ground for reversal. The question objected to in the fourth exception was not competent. It appeared that, after the father and mother of the appellee had lived together several years, and after the birth of the appellee, they separated. In the fourth exception a witness was asked whether he knew the general reputation of the appellee's mother, aft-

er the separation, for chastity while she and Jackson were living together. While evidence of her general reputation for chastity before the alleged marriage, and during the period she lived with Jackson as his reputed wife, was admissible to rebut the presumption of marriage (*Jackson v. Jackson*, supra), it was manifestly irrelevant to adduce evidence of such a reputation after the parties had separated, and had ceased to live together. As offered, it would have been allowing evidence of a reputation that she had had a reputation for the want of chastity at some antecedent time. It was not evidence of a general reputation for unchasteness, but evidence of a reputation that she had had such a reputation. It was consequently not evidence of a reputation at all. For the same reason, there was no error in the ruling complained of in the eighth exception. The fifth exception was abandoned. The objection urged to the evidence set forth in the seventh and ninth exceptions goes to the value, and not to the admissibility, of the evidence. If admissible, as it was, its value was for the jury. The tenth and eleventh exceptions present the only question remaining to be considered. In the tenth a witness was asked: "Do you know of any reputation in the community of Salisbury on the subject of that marriage at the time they were living together? If yea, was that a general reputation, or a divided reputation?" In the eleventh the question objected to was: "Was there or not a divided reputation in the community of Salisbury as to the subject of their being married, while they lived together as man and wife?" Both of these questions were excluded. A reputation, to be a provable reputation at all, must be a general reputation. It may be either one of two opposites; for instance, either good or bad. It cannot be intermediate,—that is, partly one, and partly the other; for that would not be general, and there would then be no general reputation either way. If it is generally good or generally bad, or, as applicable to the case at bar, if a man and woman are generally reputed to be married, or if the converse is generally asserted, a general reputation, one way or the other, exists; and of a general reputation, and none other, the law allows evidence to be given. But, if it be not general, then, obviously, it does not exist as a fact, and evidence cannot be received to show a partial, limited, or qualified repute. When the courts employ the term "divided reputation," it is not meant that an individual can have such a thing as two opposite general reputations at the same time. A condition of that sort is an impossibility. A reputation cannot be general if it is not general, and no reputation of a marriage but a general reputation is competent evidence to establish marriage. General reputation, whether affirmative or negative, is a fact to be proved, like any other fact within the knowledge of wit-

nesses, by the witnesses who know it. If it exists at all, it exists as a fact. That which goes to make it up is hearsay, but that which the hearsay does make up is a fact. Now, when parties are generally reputed to be man and wife, the general reputation thus asserted is a fact. If the witness called to establish that fact does not know that such a general reputation prevails in the community, he does not know the party's general reputation on that subject, and of course he can give no evidence of it. Necessarily, the method to disprove such an asserted fact must be by witnesses equally competent to speak; and hence, unless the witness knows, or can say, that the particular person has no general reputation on that particular subject, he cannot testify that no general reputation exists. A divided reputation, which is but the result of conflicting evidence as to a general reputation, is not a distinct, substantive, provable fact, for it is a mere deduction from proved facts. The existence of a diversity of opinion is one of the means by which a witness may know there is a general reputation, but this means of knowledge, apart from the fact that there is or is not a general reputation, and as a totally independent circumstance, is not the thing to be proved. Hence to ask the witness whether there is a divided reputation is to ask him, not whether he knows a provable fact,—a general reputation, one way or the other,—but merely what is one source of knowledge, without reference to whether he possesses the knowledge itself. He may testify, if he can, that the parties were generally reputed not to be married, or, having equal means of knowing that they had a general reputation as other witnesses who have testified that the parties did have such a general reputation, he has never heard it discussed or spoken of. In the one instance, he would testify to a fact, just as the witnesses who depose in the opposite way; in the other instance, he would depose to facts which, if believed by the jury, would tend to discredit the evidence to establish a general reputation; but in neither instance could he be permitted to say that there was a divided reputation, for that is nothing more than the result of the witness' conclusion from his own comparison of conflicting opinions. There was therefore no error committed by the rulings in these exceptions. Finding no error in any of the rulings excepted to, we shall affirm the judgment. Judgment affirmed, with costs above and below.

REGISTER et al. v. WOODWARD IRON CO.
(Court of Appeals of Maryland. Nov. 15, 1895.)
ATTACHMENT—NOTICE—STRIKING OUT JUDGMENT
—EX PARTE AFFIDAVIT.

1. Where defendant's property is attached while in the possession of one who is not sum-

moned and returned as garnishee, the failure of the latter, even when he is the plaintiff in the attachment suit, to give defendant notice of the attachment, will not invalidate the proceeding.

2. It is error to strike out a final judgment merely on an *ex parte* affidavit of fraud.

Appeal from circuit court, Baltimore county.

Motion by the Woodward Iron Company to strike out a final judgment against it in attachment proceedings in favor of J. Register & Sons. From an order granting the motion, the judgment creditors appeal. Reversed.

Argued before BRYAN, BRISCOE, ROBERTS, BOYD, and McSHERRY, JJ.

S. S. Field and Samuel Register, for appellants. W. Pinkney Whyte, for appellee.

McSHERRY, J. This case is, in our opinion, free from difficulty. The appellants sued out a foreign attachment against the appellee, and the writ was levied upon certain pig iron belonging to the appellee, and alleged to be stored on the premises of the appellants. After the sheriff had made return of the writ, and no appearance had been entered for the defendant, a judgment of condemnation nisi was rendered, and this, upon the expiration of the term, became final. Thereafter a writ of *fi. fa.* was issued, and the iron was sold thereunder, and was purchased by the appellants, who were the judgment creditors. After these proceedings had been had, and after the lapse of the term at which the judgment of condemnation became final, the defendant in the attachment case, the appellee here, filed a motion to strike out the judgment of condemnation, and alleged that there had been fraud and surprise in its obtention. With and in support of this motion there was filed an *ex parte* affidavit made by the agent of the defendant. On the hearing of the motion no testimony or evidence was taken by either side. The circuit court for Baltimore county, with no other evidence before it than the *ex parte* affidavit alluded to, struck out the judgment previously entered, and from that order this appeal was taken.

There are two reasons suggested why the order appealed from should be affirmed. One is purely technical, while the other involves an inquiry as to whether there was fraud practiced, as alleged, in procuring the judgment. The first reason is neither jurisdictional nor meritorious. The second is not sustained by that quality and character of proof which this court has uniformly held necessary, in cases of this description, to justify an interference with the formal judicial records of the courts. It has been insisted that the judgment was rightly stricken out, because the sheriff, when he attached the iron, which was in the possession of the appellants, did not return the appellants as garnishees, and because the appellants, the attaching creditors, did not notify the ap-

pellee of the pendency of the attachment. But the attachment was levied on the iron specifically, and there was no necessity for summoning the appellants as garnishees; for, while it is always proper, when a party is found in possession of lands and chattels which are attached, that he should be returned as garnishee, this is required only in respect to the party's apparent relation to the property, and in order to give a day in court to assert and vindicate any right that he may have inconsistent with the right of condemnation. *Corner v. Mackintosh*, 48 Md. 387. While it is proper that a garnishee in whose possession property attached may happen to be should notify the defendant who owns the property that an attachment has been levied thereon (*Lawrence Bank v. Raney & B. Iron Co.*, 77 Md. 321, 28 Atl. 119; *Hodge & M. Attachm.* § 83), yet, where such person is not in fact summoned and returned as garnishee, he is under no absolute and imperative obligation to give the defendant notice, and his failure to do so, even when he is the plaintiff in the case, will not, of itself, render the attachment proceeding irregular or void. If there is no obligation on a person who is not in fact a garnishee to give notice to the defendant, it is obvious that his failure to do that which he is not required to do cannot be a legal cause for declaring the whole proceeding void. As there is no statute imposing such a duty upon a plaintiff in an attachment proceeding, we cannot visit upon him, for a failure to do what he is not required to do, the same consequences that would follow from his neglect or omission to comply with some imperative jurisdictional requirement, upon the doing of which his right to maintain this summary remedy is made to depend.

It has been frequently said by this court that the judgment records of the state are the highest evidence of debt known to the law. They are presumed to be made up after the most careful deliberation. To permit them to be altered or amended without the most solemn forms of proceeding would be contrary to law and good policy. After the lapse of the term during which a judgment has been entered, something more than a mere *ex parte* affidavit is necessary to warrant the court in setting aside a judgment, even upon so serious an allegation as fraud. It is not the allegation, but the proof, of fraud that justifies the striking out of a judgment, and in no instance has an *ex parte* affidavit been treated as sufficient evidence for this purpose. "*Allowing an ex parte affidavit to have such an effect would be calculated to produce dangerous consequences.*" *Foran v. Johnson*, 58 Md. 144. It would serve no useful purpose to elaborate these views. They embody the settled law of Maryland, and we do not see any reason for questioning or disturbing them. In the light, then, of the principles thus firmly established, we are of opinion that the

learned judge of the court below erred in giving to the ex parte affidavit the effect he did, and in striking out the final judgment of condemnation, rendered more than three months previously. We do not deem it necessary to go into an examination of the affidavit, for, even if it were conceded that its averments were sufficiently specific, it could not be accorded any probative value, being but an ex parte statement. For these reasons the order striking out the judgment will be reversed, and the cause will be remanded. Order reversed, with costs above and below, and cause remanded.

JAY et al. v. MICHAEL.

(Court of Appeals of Maryland. Nov. 15, 1895.)

DEED—DESCRIPTION—EJECTMENT—EVIDENCE.

1. A deed described the land conveyed as all of a certain farm composed of a tract called the "M." and one called the "P.," "the interest intended to be conveyed thereby being the entire interest and estate," received by will from S., "and which said farm * * * is particularly described in a deed from P." Held, that the deed did not convey a tract received by will from S. which was not included in the deed from P., and which was a separate tract from either the M. or the P.

2. Where, in ejectment, both parties claim under the same source of title, plaintiff need not trace title further back than the common grantor.

Appeal from circuit court, Harford county.

Ejectment by Samuel Jay and another against John M. Michael. There was a judgment for defendant, and plaintiffs appeal. Reversed.

Argued before BRYAN, McSHERRY, BRISCOE, ROBERTS, and BOYD, JJ.

James J. Archer, Hy. W. Archer, Jr., and John S. Young, for appellants. S. A. Williams and George L. Van Bibber, for appellee.

BOYD, J. The appellants instituted an action of ejectment against the appellee for a tract of land known as "Horner's Fishery," which was alleged in the declaration to be adjacent to a tract called "Mould's Success," and is described by courses and distances. The plaintiffs claim under the wills of their aunts, Frenetta F. Smith and Maria M. Smith, who died in 1860. They offered evidence tending to prove that Samuel G. Smith, a brother of the Misses Smith, was in possession of Horner's Fishery at the time of his death, in 1845, and that the Misses Smith then entered and took possession of the same as his only heirs at law, and continued in the exclusive, peaceful possession thereof until they died, when John Jay, the father of the plaintiffs, took possession of it, and so continued until his death, in 1892. The Misses Smith devised to John Jay for life "all that farm and premises lying and being on or near Swan creek, in the said [Harford] county, composed of a tract called 'Mould's Success' and part of a tract called 'Palmer's

Point,' containing in the whole three hundred and thirty-five acres, more or less," etc. By the third clause of their respective wills they each devised to said Jay for life all the rest and residue of their real estate, or such part thereof as they died seised and possessed of, or entitled to. They then devised the remainder in all their real estate to the plaintiffs. The plaintiffs offered the wills, and testimony tending to show that Horner's Fishery was a separate and distinct tract from Mould's Success and Palmer's Point. The defendant introduced in evidence four deeds, —one from James B. Baker to the defendant, one from John Jay and wife to Baker, one from Samuel Smith Jay, and another from John G. Jay, to John Jay. The last two are practically alike. It is contended by the defendant that these deeds conveyed all the interest of the plaintiffs in Horner's Fishery to their father, John Jay, who conveyed it to Baker, and Baker to the defendant, and the proper construction of them is the important question presented to us by this record. It is only necessary to consider the two last-named deeds, as we are only called upon to determine what the plaintiffs have conveyed away, and not what John Jay undertook to convey. Let us take, for example, the deed from Samuel Smith Jay. It recites that he became entitled to an undivided interest in fee simple in the lands and premises therein mentioned and described, by the wills of Maria M. and Frenetta F. Smith, and grants the following: "All my interest and estate in and to all that farm and premises lying and being on or near Swan creek, in Harford county, aforesaid, composed of a tract of land called 'Mould's Success' and part of a tract of land called 'Palmer's Point,' containing in the whole three hundred and thirty-five acres of land, more or less, being the same lands and premises mentioned and described in the hereinbefore mentioned wills of the said Maria M. Smith and Frenetta F. Smith, and by the said Maria M. and Frenetta F. devised to my father, the said John Jay, for and during his natural life only, with the remainder in fee simple to me, the said Samuel Smith Jay, and my brother, John Goldsmith Jay, the interest intended to be hereby conveyed being the entire interest which I, the said Samuel Smith Jay, have taken or may take under and in virtue of the aforesaid wills of the said Maria M. Smith and the said Frenetta F. Smith, and which said farm or parcel of land is particularly described in a deed from Priscilla Presbury, John Moores, and others," etc. It is contended on the part of the appellee that Samuel Smith Jay conveyed by this deed his interest in all the real estate devised to him by said wills, and that through this and the other deeds above mentioned the defendant became the owner of the tract in controversy. The court below adopted that view, and granted a prayer that under the pleadings there was no legally sufficient evidence to en-

title the plaintiff to recover. The deed from Priscilla Presbury and others to S. G. Smith and others conveyed the tract called "Mould's Success," containing 314 acres, more or less, exclusive of elder surveys and water, and part of Palmer's Point, containing 21 acres, more or less; but is there anything on the face of the deeds to John Jay from his two sons which would necessarily indicate an intention to convey Horner's Fishery, if that be a separate and distinct tract from Mould's Success and Palmer's Point? They describe the property as "all that farm and premises lying and being on or near Swan creek," and it is contended that Horner's Fishery is a part of that farm, although the deeds add that the farm is "composed of a tract of land called 'Mould's Success' and part of a tract called 'Palmer's Point,' containing in the whole three hundred and thirty-five acres of land, more or less." It is urged by the appellee, however, that the subsequent clause in the deed, which says, "The interest intended to be hereby conveyed being the entire interest and estate which I, the said Samuel Smith Jay, have taken or may take under and in virtue of the aforesaid wills," etc., clearly shows the intention of Samuel Smith Jay (and the deed from J. G. Jay is similar) to convey all the real estate he acquired by these wills. But this clause is again qualified and limited by adding, "and which said farm or parcel of land is particularly described in a deed from Priscilla Presbury" and others. The expression, "the interest intended to be hereby conveyed being the entire interest and estate," etc., may have been used to describe the quality of the estate in the farm intended to be conveyed, not necessarily to mean the entire property devised by the Misses Smith, if they had real estate other than the two tracts. The deed from Jane Shipley and others to Samuel G. Smith tends to show that Samuel G. Smith recognized that there was a separate tract called "Horner's Fishery," as by it there was conveyed to him an undivided half interest in that tract, while Priscilla Presbury and others had previously conveyed to him and his two sisters the other two tracts; and there was other testimony to the effect that Horner's Fishery was a separate and distinct tract from Mould's Success and Palmer's Point, and was not a part of the farm known as "Mould's Success Farm." The defendant claimed his title through the same source that the plaintiffs did, or, to speak more accurately, claimed it through the plaintiffs themselves. It was not necessary, therefore, for the plaintiffs to produce evidence to establish the title beyond the Misses Smith in order to make out a *prima facie* case, for it is well settled that when the plaintiff and defendant in an ejectment suit are claiming title through the same party it is "*prima facie* sufficient to prove derivation of title from that party, without producing any patents or deeds to prove title in him." Ahern

v. White, 39 Md. 423; Elwood v. Lannon, 27 Md. 200. The plaintiffs did, however, produce some testimony tending to show such adverse possession and user of the tract by those under whom they claim as to entitle them to recover it, unless the defendant's construction of these deeds be correct.

We do not think that the intention to convey all the real estate devised by the wills, or this particular tract, is so clear and manifest as to justify the court in determining from the face of the deeds that Horner's Fishery was conveyed. We are of the opinion, however, that it was intended to convey the farm of the Misses Smith on Swan creek, but whether the land sued for is embraced in that farm, or is separate and distinct from it, is a matter of proof. If the farm, as generally understood, included the land sued for, the plaintiffs cannot recover. But, as already said, the plaintiffs offered some evidence to show that Horner's Fishery was separate and distinct from Mould's Success, and was not considered a part of the farm known as "Mould's Success Farm." We think, therefore, the court below was in error in granting the prayer of the defendant. There was a question of fact to be determined by the jury under proper instructions of the court. It is true, it is the duty of the court to construe a deed, but it is for the jury to apply its terms, when thus construed, to the land in controversy, to ascertain whether the premises in question are within the description. 3 Washb. Real Prop. 409. Parol testimony can be offered to explain the circumstances under which the deed was executed, Proof of these circumstances is intended to place the court, as far as possible, in the position of the parties, so it can intelligently interpret the language used. When all pertinent and admissible facts are before the court, it can then better determine what was meant, although, of course, parol testimony must be admitted with great caution. In the case of Winter v. White, 70 Md. 305, 17 Atl. 84, the plaintiff claimed title under a deed which conveyed to him "all those tracts or parcels of land situate in Howard county, constituting the farm of which the late Theodore R. S. Boyce died seised," followed by a reference to the several deeds under which Boyce acquired title, and also to a survey of said tracts of land in which the metes and bounds, courses and distances, were given. The deed and the survey did not embrace a strip of ground which was included in the farm, but the court held that the deed passed or conveyed all the farm upon which Boyce resided at the time of his death, and of which he was then seised, whether the particular description given by the surveyor and mentioned in the deed covered it or not. So we think that the true construction of these deeds is that they intended to convey the farm of the Misses Smith on or near Swan creek, and even if there be any part of the farm outside of tl

limits of the original tracts, Mould's Success and Palmer's Point, it was conveyed under the general description. But what land the farm in point of fact included must be determined by evidence.

The court was clearly right in refusing to permit the plot, with accompanying description, to be put in evidence. So far as the record discloses, there was no proffer to show that the defendant or John Jay's grantee had any knowledge of such plot, or that the purchase was made with reference to it. We know of no ground upon which it could have been admitted at the instance of the plaintiffs, and there was no error in rejecting it. But as the court erred in granting the defendant's prayer the judgment must be reversed. Judgment reversed, with costs to the appellants, and new trial awarded.

FULTON et al. v. COMMERCIAL TRAVELERS' MUT. ACC. ASS'N OF AMERICA.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)

SERVICE ON AGENT—CONCLUSIVENESS OF RETURN.

A return of service which does not set forth the character of the agent served is presumably good, but may be inquired into, and depositions may be taken, on a motion to set aside the same, and it will be set aside if the presumption of a good service is conclusively rebutted.

Appeal from court of common pleas, Allegheny county; Kennedy, Judge.

Action by Harriet Fulton and another against the Commercial Travelers' Mutual Accident Association of America. From a decree setting aside the service of summons and return thereof, plaintiffs appeal. Affirmed.

The opinion of the lower court was as follows: "The return of service of summons in this case is in the following words, viz.: 'Served May 20th, 1895, by delivering to Dr. T. J. Patterson, agent for the Commercial Travelers' Mutual Accident Association of America, a true and attested copy of this writ and by making known to him the contents thereof.' The testimony taken on this rule shows conclusively that the person upon whom service of process was made was in no sense the agent of the defendant company to receive such service. He was simply, as his name in the return indicates, the physician or surgeon of the company, whose sole duty it was to examine members of the association who had been injured, when notified so to do, and make report of such examination to the company at its office in Utica, New York. We think the testimony also shows that the defendant was not actually doing business in this state. All applications for membership were sent direct to the company at Utica, in the state of New York, from which place all policies were issued to members, no person here being authorized to accept such applications or re-

ceive or collect money thereon, or on any other account, for the company. Plaintiffs' counsel, however, contends that the return here shows a service in conformity with the statutory direction, and cannot be set aside on motion; that evidence is inadmissible to contradict the sheriff's return; that, if defendant is injured thereby, his remedy is by action against the sheriff; and that, if the defendant company is not suable in this court, the question can only be raised by a plea to its jurisdiction. In support of his position, and as controlling this case, he cites *Iron Works v. Hutchinson*, 101 Pa. St. 359. An examination of that case shows material differences between it and the present one. There was a service upon a proper officer of the company, and, no appearance having been entered for the defendant, judgment by default was entered against it for want of appearance and affidavit of defense. The position of the plaintiff in error was that it was a foreign corporation, and that the court had no jurisdiction over it by reason of the fact that its officer upon whom service was made was found within the county where suit was brought. No testimony was taken, and there was nothing to show that the contract or matter on which the action was founded was not suable in this court, and hence the supreme court said that a plea to the jurisdiction was the proper remedy in that case. In this case the service was upon one who was not an officer of the company, or in any sense its agent. The testimony clearly shows this, and it also tends to show that the matter on which the action was founded was not suable in this court, the business not being transacted in this state. The question raised here seems to be conclusively decided by the case of *Hagerman v. Slate Co.*, 97 Pa. St. 534, wherein it was held that a return of service under the act of assembly of March 21, 1849, which omits to set forth the character of the agent served is only prima facie evidence of a good service, and may be rebutted by proof to the contrary. The return of service in that case was in almost precisely the same words as in this. On motion of the defendant's attorney, a rule was granted to show cause why the return should not be set aside. Depositions were taken under this rule, which showed conclusively that the person upon whom service was made was the agent for defendant company, and for this reason the service was sustained. It will be noted also that the subject-matter of the suit was actionable in this state, it being a scire facias sur mortgage upon property therein situated. That case establishes the principle that a return of service which, as in the present case, does not set forth the character of the agent served, is presumably good, but may be inquired into, and that depositions may be taken on a motion to set aside the same; and, if the presumption of a good service is conclusively rebutted, it will

be set aside. That principle covers the whole question involved in this case. We see no reason for declining to follow the direction given us in *Hagerman v. Slate Co.*, supra, in order to entertain this suit, and, following that direction, this rule must be made absolute, and the service and return thereof in this case set aside. It is so ordered."

R. A. & Jas. Balph, for appellants. Lev. McQuiston and S. A. Will, for appellee.

PER CURIAM. All that need be said in vindication of the correctness of the decree setting aside the service of the writ in this case will be found in the clear and concise opinion of the learned president of the common pleas, and on it the decree is affirmed and appeal dismissed, with costs to be paid by appellants.

KEAN v. KINNEAR, Tax Collector.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)

TAXES ON LAND—COLLECTION FROM PERSONALTY—RESORT TO LAND—TRESPASS BY COLLECTOR.

1. Resort can be had to the land itself for the payment of taxes thereon only after a failure to collect the taxes from the personal property on the premises, or by demand on the owner individually.

2. A collector who proceeds directly against the land for the taxes, except under the prescribed conditions, is liable as a trespasser.

3. In an action against a collector for trespass in resorting to land for the collection of taxes thereon without first proceeding against the personalty, where it appears that he returned that "by the proper effort he could not find sufficient personal property by a legal sale of which such taxes could have been collected," and plaintiff gives evidence that there was such property on the premises, there is a prima facie case of false return to go to the jury.

4. In trespass against the collector for resorting to the land instead of collecting the taxes from the personalty thereon, which belonged to the tenant, who had covenanted to pay the taxes, plaintiff is entitled to recover what she paid under the compulsion of the wrongful return of her land for sale.

Appeal from court of common pleas, Venango county; Charles E. Taylor, Judge.

Trespass by Mary Jane Kean against J. B. Kinnear, a collector of taxes, for wrongfully resorting to plaintiff's land to obtain payment of taxes thereon. From a judgment for defendant, plaintiff appeals. Reversed.

J. H. Osmer & Sons, for appellant. J. W. Lee, for appellee.

MITCHELL, J. By the act of April 29, 1844, § 41 (P. L. 501), real estate on which personal property cannot be found sufficient to pay the taxes assessed thereon, and where the owner refuses or neglects to pay, shall be returned by the collector to the county commissioners for the purpose of sale. But by the proviso of the same section no sale shall be had until the owner shall have refused or neglected to pay for the space of two years. By the act of May 13, 1879, § 2 (P. L. 55), in all cases where land has been

sold or returned for sale for taxes the owner may show that there was on it sufficient personal property to pay all the taxes assessed thereon, which might have been seized by the collector if he had used due diligence, "and in such case the title of the original owner shall not be doubted." To the same effect is the act of June 3, 1885 (P. L. 71), making valid sales for taxes, irrespective of the fact whether seated or unseated, but providing that nothing in the act should validate or authorize the sale of any land in fact seated at the time of the assessment, if there was sufficient personal property on the premises to pay all taxes assessed thereon, liable to have been seized therefor. And by the act of April 15, 1884, § 46 (P. L. 518), the goods and chattels of any person occupying any real estate shall be liable to distress and sale for taxes in like manner as if they were the goods of the owner of such real estate. From these statutory provisions it is clear that the law has established the order of liability for taxes to be—First, the personal property on the premises; secondly, demand on the owner individually; and, lastly, the land itself; and it is only on the failure to collect by either of the first two methods that resort can be had to the third, and the land be legally sold or returned for sale. The collector proceeding directly against the land, except under the prescribed conditions, is without warrant of law and liable as a trespasser. In the present case the collector returned that "by a proper effort he could not find sufficient personal property, by a legal sale of which such taxes, or any portion thereof, could have been collected." The plaintiff, having given evidence that there was such property on the premises, had made out a prima facie case of false return, which should have gone to the jury. It is said in appellee's paper book that the property was grain in a granary, not accessible to the collector for levy. No authority is cited to show that a tax collector may not peaceably break open a locked barn or grain bin, but, without reference to whether or not that would have been a sufficient excuse, the facts were for the determination of the jury.

There remains the question of damages. It is no answer to say that the plaintiff only paid her own debt, for which she was personally liable, and therefore has suffered no damages. A debtor may pay his debt out of whatever fund he chooses, and when the law steps in to make the payment by compulsion he has a right that the order of liability which the law has established shall be strictly followed. The plaintiff had the right to have these taxes collected in the first instance out of the goods on the premises. By the action of the collector in passing by these goods and returning the land, the plaintiff was put under duress to pay in money. Even if the goods had been her own, she would have been entitled to nominal damages, which would have included the costs of advertise-

ment, etc., which she was obliged to pay. But it appears in plaintiff's evidence that the goods on the premises belonged to the tenant, who had covenanted to pay the taxes as part of his rent. If, therefore, the collector had done his duty by collecting the taxes from those goods, the plaintiff would have been relieved from the payment altogether. Whatever she did pay, therefore, under the compulsion of the return of her land for sale, was a loss and damage to her, resulting directly from the defendant's illegal act. While it is no part of a collector's office to enforce contracts between lessor and lessee, yet the fact that incidentally he may be doing so does not relieve him from the duty of proceeding according to law, and if he departs from this obligation he makes himself liable for any damages which may result to other parties. Judgment reversed and procedendo awarded.

ALTOONA COAL & COKE CO. v. BURK et al.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)
EXECUTION OF DEED—FRAUD BY GRANTEE—RESULTING TRUST.

On an issue as to whether a deed made to C. in 1881, to take the place of one made in 1865, in which the grantee's name was omitted, was rightly made to him, it appeared that C. was in 1865 purchasing coal lands for K. and his associates, and that he then purchased the land covered by the deed in question; that counsel for K. and his associates prepared a deed of the land in 1865 and sent it to C. for execution by the vendors, after which it was returned to him by C., and was taken by the agent of K. and his associates to the recorder's office, from which it was removed after recording by one of such associates, who paid the recorder's fees. The receipt in the deed for the purchase money was to K., and, in a suit brought by C. in 1869 to recover compensation for the land purchases negotiated by him, he named the tract covered by the deed as bought by him for K. and his associates, and stated that he procured a good title for them by deed of conveyance, and after 1865 the land was assessed in K.'s name. One of the vendors stated that he understood that C. was buying for K.'s company, and that the deed of 1881 was to be in place of that of 1865, which C. said had been lost, and no new consideration was paid for the later deed. *Held*, that the land was purchased by C. for K. and his associates, and paid for with their money, and that their assignee was entitled to a conveyance from the grantees of C.

Appeal from court of common pleas, Cambria county; J. H. Longenecker, Judge.

Bill by the Altoona Coal & Coke Company against Francis N. Burk and others to have a trust in certain land declared in its favor and a conveyance made to it. From a decree for plaintiff, defendants appeal. Affirmed.

The material parts of the report of the master were as follows:

"From the testimony taken and filed herewith the master finds the following facts, to wit: That Josiah M. Christy in July, 1865, purchased for a number of persons in Pittsburgh a number of tracts of land in this

county, and among others a tract of land from George and Bernard Delaney, as described in the bill, containing 103 acres, for the sum of \$1,300; it being agreed by the purchaser that the deeds should be made to Samuel M. Kier, one of their number, and, intending to be incorporated as the Allegheny Mountain Coal & Lumber Company, then have the tracts conveyed by S. M. Kier to the corporation. Cyrus L. Pershing, Esq., was the attorney and counsel for the said company, and Josiah M. Christy was their agent and negotiated the purchase of the tract in question, and a number of other tracts, about the same time. From May 12, 1865, till June 10, 1865, a large sum of money was placed in the hands of J. M. Christy for the purchase of said lands, and the purchase money paid to George and Bernard Delaney was paid by J. M. Christy, in the opinion of the master, out of this money. There is some evidence that there was some money in the hands of Christy belonging to his wife, Rebecca A. Christy, and it is urged by defendants that that money was used for the purpose of buying the particular tract in question, but in the opinion of the master it is not strong enough to raise that presumption, and he is of the opinion from the evidence as a whole that the purchase money paid by J. M. Christy to the Delaneys was out of the funds in his hands belonging to the Allegheny Mountain Coal & Lumber Company, as they styled themselves. The deeds for the several tracts purchased by J. M. Christy for the company were prepared by Mr. Pershing, including the one in question, in all of which the name of Samuel M. Kier was inserted as the grantee, excepting the deed from Bernard and George Delaney. By an oversight of some one preparing the deed under Mr. Pershing, the name of the grantee was not inserted. The deed without the name of a grantee was acknowledged by the grantors, George and Bernard Delaney, and delivered to the agent of Samuel M. Kier, and placed on record by him in the recorder's office of Cambria county on November 8, 1866. The said deed was dated 26th July, 1865, and contained, as recorded, the following receipts: 'Received the day of the date of the above indenture, of the above-named Samuel M. Kier, the sum of \$2,500, lawful money of the United States, being the consideration money above mentioned in full. [Signed] George Delaney, for Bernard Delaney. Witness: Samuel Craig.' The said company paid the taxes regularly on the tract in question until the same was sold under a decree in equity of the court of common pleas of Cambria, and since that time by the subsequent holders of title, the land having been assessed in the name of Samuel M. Kier. That, Samuel M. Kier having died, a suit in equity was instituted, wherein J. W. F. White was plaintiff and I. C. Pershing et al. were defendants; the said defendants, as well as the plaintiff, be-

ing entitled to the interest in said land as beneficiaries of the title held in the name of Samuel M. Kler. A decree was made in said case June 8th, 1881, for the sale of said lands, John W. White being appointed by the court to sell the same, and under said order a sale was made to James L. Reed by the trustee, which was confirmed, and a deed was duly executed to him. The said J. L. Reed sold and conveyed the said lands to S. C. Baker by deed dated November 23, 1881, and the said S. C. Baker sold and conveyed the same to the Altoona Coal & Lumber Company, the plaintiff in this action, by deed dated 23d November, 1881. J. M. Christy on the 26th day of March, 1881, obtained from Bernard and George Delaney a deed for the land in question without any further or other consideration than that paid for the deed intended to be made to Samuel M. Kler. The said deed was obtained from the Delaneys upon the representation of J. M. Christy that the former deed made by them was lost and could not be found, stating to them that the land was his. The Delaneys first objected to making such deed, but, after consulting counsel, concluded to do so, but accepting no consideration for the second deed. The original deed made by George and Bernard Delaney had a consideration of \$2,500, in writing, but the testimony shows that but \$1,339 was paid for the same. F. N. Burk, one of the defendants to this action, by deed dated 10th February, 1882, purchased from J. M. Christy an undivided half interest of the land in question after the death of Josiah M. Christy. His heirs and F. N. Burk, the defendants in this case, brought an action of trespass quare clausum fregit against S. C. Baker in the common pleas of this county on December 9, 1882, to recover damages for an alleged trespass of the tract of land in question, and in which the question of whose money went into the land in question was raised on a defense founded on a deed to—intended to be—S. M. Kler, and the jury found in favor of S. C. Baker, and a judgment entered on a verdict. From the above facts warranted by the evidence, and the evidence as a whole, the master is of the opinion that the prayer of the complainant should be granted, and suggests respectfully that a decree be made by your honorable court in conformity with the bill, directing the Delaneys to execute a deed to the Altoona Coal & Coke Company, and that F. N. Burk and the Christy heirs be directed to deliver up their deed from the Delaneys to be canceled. All of which is respectfully submitted."

The exceptions to the report of the master were as follows:

"The said report is not sustained by the evidence. The said report is not governed by the law in the case. (1) As to the facts: Josiah M. Christy was purchasing lands in Gallitzin township and vicinity, in said coun-

ty, for the purpose of selling the land so purchased to any person or persons who desired to purchase from him, particularly S. M. Kler & Co., as they appeared to be the first parties offering to buy coal lands, the kind Josiah M. Christy contracted for. (2) That he did purchase a number of tracts; which were duly conveyed to said S. M. Kler; the said S. M. Kler taking the titles and advancing certain amounts of money, as shown by the testimony. Those tracts were duly conveyed by deed to S. M. Kler. (3) The master erred in finding that S. M. Kler and others intended to be incorporated as the Mountain Coal & Lumber Company, as no such incorporation ever existed, nor is there any evidence a charter was ever applied for by the parties named in the bill of complaint in this case. (4) The master erred in finding as a fact that J. M. Christy was the agent of S. M. Kler et al., while in fact the evidence shows he was purchaser on options to sell at an advance. (5) The purchasers did not agree that the deeds for said lands, not including the Delaney, should be made to S. M. Kler. The evidence shows on the contrary that the deeds were made without naming a vendee, and that S. M. Kler's name was subsequently inserted, arbitrarily and without the consent of the vendors, who had contracted with J. M. Christy, nor with the consent of said Christy. The deeds so made were therefore void and of no effect whatsoever, for want of contracting parties. (6) The evidence shows that, while the Kler party sent J. M. Christy money to advance on lands, it is clear and not disputable that the money, not only of J. M. Christy, but of his wife, now Mrs. Wm. Glass, was paid on the land of George Delaney and Bernard Delaney. (7) The master should have found further, from all the evidence in the case, that whatever lands J. M. Christy sold them were to be at \$20 per acre. While he was purchasing in his own name, in his own right, and the shortest, quickest, and most convenient method was adopted to convey to no one, and this under the advice of an eminent legal gentleman, to whom Christy would as a purely business matter, defer. (8) The master should have found that the deed in question was properly, legally vested in J. M. Christy, and that the plaintiffs in this case can have no legal right to the property in dispute, and consequently no decree in this case can be effected and carried into effect, made in accordance with the report of the master. (9) That the master should have affirmed paragraph 4 of defendants' answer of plaintiff's bill; also that paragraph 9 of defendants' answer should have been affirmed. (10) The error most palpable in the report being from page 2: "That Josiah M. Christy in July, 1865, purchased for a number of persons in Pittsburgh a number of tracts of land in the county, and among others a tract of land in name of Bernard and George Delaney, as described in the bill, containing 103 acres, for \$1,300; it being agreed that the deeds should be made

to S. M. Kler, one of their number, and intending to be incorporated as the Allegheny Mountain Coal & Lumber Company, and then have the tracts conveyed from S. M. Kler to the corporation.' This finding is not borne out by the evidence, but is contradicted by it. The Delaneys knew no one in the transaction but J. M. Christy, and his own check paid the money for the land. And in this connection it is proper to object to the reception of the evidence of Hon. C. L. Pershing in this case without his personal presence before the master, and more so because J. M. Christy was dead when this hearing was held. The master again erred in this part of his report in finding that the money paid for the Delaney land was furnished by the Pittsburgh parties. (11) The failure of the master to take up the paragraphs of the plaintiff's bill and compare them with the defendants' answer shows that his preconceived opinions of the case were formed from former litigation in this case, wherein the parties were equally successful. (12) The master erred in admitting litigation of said title of J. M. Christy of the previous trials between the said parties. (13) The assignments and records are not such as to place the legal title in the plaintiff, and this is denied in paragraph 4 of defendants' answer. (14) That the defendants do deny all the averments of plaintiff's bill, from paragraph first to the end of said bill, and do further assert that said assertions were fully met by the answer thereto, and that the allegations in the answer have been fully sustained by the evidence, and that the plaintiff has not sustained his claim. (15) The contest between the parties hereto, being nominal, purchasers unnamed in the original papers, no decree can be made to set aside a signed and sealed instrument. (16) The deed to F. N. Burk of 10th February, 1892, from J. M. Christy, conveyed the undivided half of said tract to F. N. Burk. The master did not find on the question of notice to Mr. Burk as a third party; does not find on the question of notice. (17) The master should have affirmed all of the paragraphs in defendants' answer from 1 to 10, inclusive, and to have reported that the bill should be dismissed. (18) And the exceptants add thereto that all past proceedings between the parties hereto are not evidence, and that the evidence offered prior to the Altoona Coal & Coke Company, plaintiff, is illegal; that they by these pleadings admitted the possession of the lands in the defendants. (19) And, to follow the above paragraph, either ejectment or trespass q. c. f. was the proper remedial effort on part of the present plaintiff, who had his full remedy therein. (20) That under all the evidence and law bearing on the case the bill of complaint should have been dismissed."

The opinion of the court below was as follows:

"After a careful reading of the exceptions by the defendants to the report of the examiner and master, and all the evidence bearing on the points involved therein, we

conclude we must overrule Nos. 1, 2, 3, 6, 8, 9, 11, 12, 13, 14, 15, 17, 18, 19, and 20, because they are not sustained by the evidence and law of the case. In answer to the remaining exceptions it may be advisable to state more fully the grounds for our action thereon. As to the third it may be said, while it is true no such corporation as the Mountain Coal & Lumber Company was ever formed, the evidence clearly shows that the vendees contemplated procuring a charter, and for the time being employed that name, and Christy in 1869 sued them by that name. As to the fifth and tenth exceptions we say, though there is some contradiction as to whether it was understood and intended when the deed from the Delaneys was taken that the name of the vendees should not be then inserted, but remain in blank until after the purchasers had decided upon a trustee or had formed themselves into a corporation as indicated by their resolution of October 18, 1865, and the declaration of trust attached to the deposition of Judge Pershing taken November 15, 1884, yet there is no reason to doubt that when the deed was taken on the 26th July, 1865, by Christy, he and the vendors fully understood the sale to be to the Pittsburgh parties, calling themselves the Mountain Coal & Lumber Company. Nor can there be any doubt that their money paid for the land. There is no evidence to sustain the claim of the defendants that it was paid with funds of either Christy or his wife. If it had been his wife's money, why take the deed of 1881 to himself? If all the participants in the transaction assented to making the deed with the vendee's name in blank, upon the understanding that the corporation name or that of a trustee should be thereafter inserted, how can Christy, the agent of the purchasers, take advantage of the arrangement to secure to himself the title? If, on the other hand, the omission occurred through mere accident or mistake, as stated by Judge Pershing, Christy was in no better position to take the title for which his principals had paid. As to the claim that he was to be paid at the rate of \$20 per acre for the sales negotiated by him, it is enough to say the burden of making out such claim is on the defendants; but as the controlling question in this case is whether he bought the 103 acres in suit for the Pittsburgh parties as their agent, and paid therefor with their money, it is a matter of indifference what his compensation was to be. In answer to the sixteenth exception it may be stated, if the deed on record, showing the payment of the purchase money by Kler, was not constructive notice to Burk, the vendee of Christy, under the deed of February 10, 1882, the evidence shows that he participated in procuring the deed of March 26, 1881, from the Delaneys to Christy, was present when it was executed, and knew it was without consideration, and that it was to take the place of that of 1865. We think the conclu-

sions of the examiner and master in this case were amply justified by the evidence. Judge Pershing says he, as counsel for the Pittsburgh parties, prepared the deed of July 26, 1865, and sent it to Christy, that he might have it executed by the Delaneys; that after it was so executed by them it was returned to him by Christy. If it had been a sale to his wife or himself, as is claimed by the defendants, would he not have kept it? It was taken by Mr. Barrett, the agent of the Pittsburgh parties, with other deeds belonging to them, to the recorder's office, and placed on record. After it was recorded it was lifted by Mr. Martin, one of the Pittsburgh parties, and the recorder's fees paid by him. The receipt in the deed, for the purchase money, is to Kler, and not to Christy or his wife. In 1869 Christy brought suit against the 'Allegheny Mt. Coal Co.,' being this same Pittsburgh party, to recover compensation for land purchases negotiated by him for them, and in his declaration enumerates the tract of land in suit as one of those bought for them. In his amended declaration he mentions it again as one of the tracts purchased by him for the defendants, saying he 'procured for said defendants a good title therefor by the deed of conveyance of the former owners of the same, duly delivered to said parties.' After the sale of 1865 the land was assessed in the name of Kler. Bernard Delaney, one of the vendors, says he understood Christy was buying for the 'coal company, and that the deed of 1881 was to be a new one, in place of that of 1865, which Christy said had been lost.' It was not understood as a new purchase. The consideration mentioned in each deed is \$1,339, and not a cent was paid in 1881 for the second conveyance. The theory of the plaintiff seems, therefore, to be fully sustained by the evidence, and the report of the examiner and master is confirmed and the exceptions thereto overruled. In accordance with the foregoing, we make the following decree, viz.: And now, October 31, 1894, this cause having come on for hearing on the exceptions to the report of the examiner and master, after full argument thereof by counsel, it is ordered, adjudged, and decreed that the defendants, Bernard Delaney and George Delaney, shall, within twenty days after notice of this decree, make, execute, and deliver to the Altoona Coal & Coke Company, plaintiff, a deed of conveyance for the 103 acres mentioned and described in their deed of July 26, 1865, recorded in Cambria county, in Record Book, vol. 25, page 488, etc., in lieu of said last-mentioned deed. It is further ordered, adjudged, and decreed that the other defendants shall, within twenty days after notice of this decree, surrender and deliver up to the plaintiff, or to the court of common pleas of Cambria county, the deed from the said Bernard Delaney and George Delaney to J. M. Christy for the same land, dated the 26th day of March, 1881, and recorded in said county, in

Record Book, vol. 44, page 853, etc., and that the same be thereupon canceled, and that the said last-named defendants pay the costs of this proceeding."

William H. Sechler, for appellants. P. J. Little, for appellee.

PER CURIAM. The decree in this case is affirmed on the opinion of the learned court below.

WILLIAMS et al. v. LADEW et al.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

TENANTS AT SUFFERANCE—RECOVERY FOR USE AND OCCUPATION—MEASURE OF DAMAGES.

1. Tenants holding over after the expiration of a lease for a fixed term of years are strictly tenants at sufferance, though the lessors may treat them either as trespassers or tenants from year to year, or, by permitting the holding over to run on, may turn the tenancy into one at will.

2. A tenant at sufferance is liable in assumpsit for use and occupation for the interval between the termination of the lease and the lessor's election to treat him as a trespasser.

3. In assumpsit by a lessor of certain water rights for the use and occupation thereof for the interval between the termination of the lease and the lessor's election to treat the tenants as trespassers, evidence as to the value of the water to defendants is inadmissible, the question being merely what plaintiffs could probably have gotten for the use of the water from other parties had defendants given up possession at the end of their lease.

Appeal from court of common pleas, Bedford county; J. H. Longenecker, Judge.

Action by Harvey C. Williams and others against Edward R. Ladew and another, trading as Fayerweather & Ladew, to recover for the use and occupation by defendants of certain water rights from the termination of a lease of such rights made by plaintiffs' ancestor to defendants' assignor. From a judgment for plaintiffs, defendants appeal. Reversed.

John H. Jordan and Alexander King, for appellants. Kerr & McNamara, Frank Fletcher, George F. Sill, and Harvey C. Williams, for appellees.

MITCHELL, J. The main contention of the appellants, that during the time of occupation sued for they were tenants from year to year, cannot be sustained. The lease was for a definite term of 15 years, at a gross rental for the entire term. Although the amount—one dollar—appears to be merely nominal, yet it is for the whole term, and not for any particular year or years. But, even if it were an annual rent, it would not help appellants' case, for the lease expired at a fixed date, and no notice was necessary to terminate the tenants' rights under it. When they held over after its expiration, they were strictly tenants at sufferance, though the lessors had the option to treat them either as trespassers or tenants from year to year (*Hemphill v. Flynn*, 2 Pa. St.

144); or, by permitting the holding over to run on for a sufficient length of time, might turn the tenancy into one at will, which would require notice to terminate (*Bedford v. McElharron*, 2 Serg. & R. 49). But nothing of this kind took place between these parties. There were dickerings for a renewal of the lease, and offers on the one side and the other, but nothing which could be considered as an agreement for a new lease, or a waiver of the lessor's rights on the expiration of the old one. Failing to reach an agreement, the appellants remained as tenants at sufferance. At common law, tenants at sufferance appear not to have been liable for rent, and some expressions to that effect are to be found in our own earlier cases; but in *Bush v. Refining Co.*, 5 Wkly. Notes Cas. 143, it was expressly held that such tenant is liable in assumpsit for use and occupation for the interval between the termination of the lease and the election of the lessor to treat him as a trespasser. The plaintiffs, therefore, made out a sufficient cause of action, but there were unfortunately such serious errors in the way it was submitted to the jury that we are obliged to send it back for another trial. A very large part of the evidence admitted was wholly irrelevant. The jury seem to have been allowed to consider what the water was worth to the defendants, and the bulk of the evidence in the case, covered by the first four assignments of error, was directed to this view. The same idea was conveyed in the plaintiffs' eighth and tenth points, which were affirmed. This was wholly erroneous. What the water was worth to the defendants, what it would cost them to get a supply elsewhere, or what loss they would suffer if they failed to get a supply, were matters with which neither the plaintiffs nor the jury had anything to do. What the plaintiffs are entitled to recover is compensation to them for the use of their property, and whether such use was profitable or otherwise to the defendants is entirely immaterial. The question is, what could plaintiffs reasonably and probably have got for the use of their water from other parties had the defendants given up possession at the end of their lease. All the assignments of error based on this branch of the case must be sustained. It was also error to submit to the jury the testimony in regard to the consideration in the way of business to the original lessor, J. B. Williams, for the lease. While it was competent for plaintiffs to show that the money named in the lease was not the whole consideration, yet they were bound to prove it by clear and convincing evidence. They entirely failed to do so. The testimony at the utmost establishes nothing more than an incidental advantage to Williams from having an active tannery in operation at that place, and the direction of custom by the owners to his store. This no doubt was, as the witnesses say, a part of the inducement moving Williams to give the lease of the water at a nominal rent, but

there is nothing in the testimony to justify the inference that it was any part of the consideration agreed between the parties, or that even Williams, much less Hoyt & Co., so regarded it. The offer as well as the testimony fell far short of the requirements, and should have been excluded. Judgment reversed, and venire de novo awarded.

REDDING v. RICE.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

CONSTRUCTION OF WILL—DEVISE TO WIDOW—DURATION OF ESTATE.

Testator gave his property to his widow "for her own proper use and behoof as long as she shall remain my widow, and, if she should get married, then she shall be only entitled to the one-third in said property, the balance, being two-thirds, to my youngest daughter, K., and, if the said K. should die, then I will and bequeath the two-thirds to my son W., and, if both should die, then the residue remaining shall be equally divided among my remaining children." *Held*, that the whole estate was given to the widow in fee, subject to the condition that she should not marry again, and defeasible as to two-thirds upon the breach of that condition.

Appeal from court of common pleas, Blair county; A. V. Barker, Judge.

Suit in ejectment by Mary Redding, heir of Thomas Rice, deceased, to recover from William Rice a one-sixth interest in a lot of ground sold to William in 1880 by his mother, Mary Rice, the widow. From a judgment for plaintiff, defendant appeals. Reversed.

The clause of the will of Thomas Rice on which the widow's title depended was as follows: "Thirdly. I will and bequeath all my real and personal property to my beloved wife, Mary, to have and to hold the same for her own proper use and behoof as long as she shall remain my widow, and, if she should get married, then she shall be only entitled to the one-third in said property, the balance, being two-thirds, to my youngest daughter, Kate, and, if the said Kate should die, then I will and bequeath the two-thirds to my son, William, and, if both should die, then the residue remaining shall be equally divided among my remaining children."

Greevy & Walters, for appellant. O. H. Hewit, for appellee.

MITCHELL, J. It is unquestionable that Mary Rice, the widow, would only have taken a life estate at common law. But, under our wills act of 1833, the whole estate passes by a devise without words of inheritance, unless the intention of testator appears to have been to devise a less estate. The testator here devised to his widow "for her own proper use and behoof, as long as she shall remain my widow," which are apt words to create a life estate, and would certainly have done so had the will stopped here. But it did not. It continued: "and if she should

get married, then she shall only be entitled to the one-third in said property, the balance, being two-thirds, to my youngest daughter, Kate, and, if the said Kate should die, then I will and bequeath the two-thirds to my son William, and, if both should die, then the residue remaining shall be equally divided among my remaining children."

These words develop the testator's intention. If the widow should marry, then she shall only have one-third, and the balance, two-thirds, is to go to Kate, and in fee simple, for there is no limitation of any kind expressed, and the presumption raised by the statute must prevail. But, "if Kate should die" (meaning, certainly, die before the happening of the contingency which would divest the widow's estate in the whole), then the two-thirds which would have gone to Kate if she had been living would go to William, and, if both Kate and William should die, i. e. before the widow's marriage, in that case, and only in that case, would the "residue remaining," i. e. the two-thirds, go to the other children. But if the two-thirds that were to go alternately to Kate or to William were to be in fee, then the other third, which was to remain to the widow, must also be in fee. The testator gives both in the same sentence, and in the same distribution of his property, with no distinction as to the quantity of the estate in either case, and no suggestion of a devise over of his widow's third after her death. Nor is there any hint of a devise over of the whole estate after the widow's death, if she does not remarry. On her remarriage, then, her estate is to be reduced to a fee in one-third, and this certainly implies that the prior estate in the whole, which is thus reduced, was also a fee. The plaintiff's construction would make the testator die intestate as to the fee, - a construction which is never to be favored in cases of doubt, and which in this case would be irreconcilable with the unquestionable contingent devise in fee to Kate and William. Moreover, if the testator intended to die intestate in regard to the fee, in case his widow did not marry again, then the fee would go to all his children equally. But, if she did marry, then he has clearly provided that the fee in two-thirds shall go to Kate or to William, and only in case of the death of both of them does any part of the two-thirds go to the other children. Why this distinction? Why should the share of Kate or William be disproportionately increased, and that of the other children reduced, by the circumstances of the widow's remarriage, over which none of them had any control? No reasonable explanation suggests itself for such a result. But, if we take the other construction, the difficulty disappears. The fee is in the widow as to the whole estate and it is to be noted that the testator blends reality and personality together), subject to a reduction to one-third on her remarriage, in which case the two-thirds then undisposed

of are specifically given to Kate or William in succession. Taking the entire clause of the will together, it shows that the testator's intent was to give his whole estate to his widow in fee, subject to a condition that she should not marry again, and defeasible as to two-thirds upon the breach of that condition.

The learned judge below thought the interpretation of the language of this will was governed by that in *Cooper v. Pogue*, 92 Pa. St. 254, and *Long v. Paul*, 127 Pa. St. 456, 17 Atl. 988. In so far as the devises were to the testator's widow so long as she remained such, and, in the latter case, with a reduction upon her second marriage, the cases are closely alike; but in neither of those cited was there the additional language to be found in the will of Thomas Rice, which, as already said, develops his intention as to the quantity of estate that he intended to give, and enlarges the life estate, to which the first gift would have been limited had it stood alone. Precedents are of little value in the construction of wills, because, when used under different circumstances, and with different context, the same words may express different intentions. When the intent of the testator—and by that is meant his actual intent—can be fairly gathered from his words, the fact that another testator has used the same words with a different meaning is of no avail. Neither precedents nor rules of construction can override the testator's expressed intent.

The question of estoppel does not arise. As the widow took a fee, which, though defeasible, was never defeated, the plaintiff never had any title at all, and the verdict should have been directed for defendant. Judgment reversed.

COLLINS v. BELLEFONTE CENT. R. CO.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

CONTRACT OF BAILMENT—LEASE OF ROLLING STOCK—REPLEVIN BY BAILOR—EVIDENCE—ESTOPPEL OF DEFENDANT—CLAIM OF OWNERSHIP.

1. The directors of a railroad company passed a resolution authorizing the president to purchase the rolling stock owned by one C., and then in use by the company, the rolling stock to be held by C. as security until fully paid for; and a few days later the company, by its president, entered into a written agreement for a lease of the rolling stock to the company, with an option to the company to purchase before the expiration of the lease. *Held*, that the resolution and the lease, when read together, constituted a bailment.

2. On an issue as to whether the title to certain rolling stock passed to purchasers under a foreclosure sale of the property of a railroad company which had possession thereof as bailee, the bailor may introduce evidence that his claim to the property was made known to all bidders at the sale.

3. He may also show that his title to the rolling stock has been recognized by the president of the company claiming it under the sale, and that such company, in its sworn report to the

secretary of the interior, stated that the rolling stock belonged to one under whom the bailor claimed.

4. In replevin by a bailor of personalty against one claiming under the bailee, who has given bond to retain the property, a plea setting up a claim of absolute property does not estop defendant to show, in mitigation of damages, that the special interest of the bailee passed to him, and that he has made certain payments under the contract of bailment.

5. In replevin for the wrongful detention of property, defendant is estopped, by an assertion of an absolute title to the property, made to plaintiff before suit, to allege at the trial that suit was brought prematurely.

Appeal from court of common pleas, Center county; A. O. Furst, Judge.

Action by Philip Collins against the Bellefonte Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

John S. Gerhard, Orvis, Bower & Orvis, E. M. & J. Blanchard, and John G. Johnson, for appellant. James A. Beaver, John M. Dale, and S. R. Peale, for appellee.

DEAN, J. In 1885, two connecting short railroads, the Bellefonte & Buffalo Run and the Nittany Valley & Southwestern, were consolidated under the name of the Buffalo Run, Bellefonte & Bald Eagle Railroad Company. Under the original grants, the new company had authority to construct and operate a railroad from Beach creek to Bellefonte, and from thence, by way of Buffalo Run, to State College, in Center county. After consolidation, the road was built from Bellefonte to State College, by a contract with Frank McLaughlin. To raise money for the construction, the new company executed a mortgage to the Fidelity Insurance, Trust & Safe-Deposit Company, as trustee, to secure the payment of \$600,000 in bonds, to promote the work of construction. This mortgage was recorded in Center county 13th May, 1886, and, by its terms, pledged the railroad then under construction, and all the rolling stock and equipment to be acquired for operating the road. All the bonds were disposed of when the road was completed. Some had been sold to purchasers. Others had been delivered to McLaughlin in payment for construction. McLaughlin, to facilitate the completion of the work, first borrowed from the Pennsylvania Railroad Company some rolling stock, but afterwards replaced this by a new locomotive and some construction cars purchased in his own name, and used these in completing his contract. On October 10, 1888, McLaughlin and Philip Collins, the plaintiff, entered into a written agreement, wherein, for certain considerations, McLaughlin transferred, among other things, all his interest in the rolling stock to Collins, thus describing it: "Fourth. All the right, title, and interest of said Frank McLaughlin in and to the locomotives, passenger cars, freight cars, and rolling stock, of every description, used in and upon the said Buffalo Run, Bellefonte & Bald Eagle railroad, together with the right to receive

payment and make settlement for any such rolling stock which may have already been transferred to said railroad company and still remains unsettled for." The rolling stock having thus passed to Collins, it remained in use by the railroad company. Collins was interested as a stockholder in the company, and was one of the directors. While some of the rolling stock was marked with one or other names of the original companies, none of it had upon it the corporate name of the new company. On December 31, 1890, as appears from the minutes of the company, this resolution was adopted by the board of directors: "Resolved, that the president be authorized to purchase the rolling stock owned by Philip Collins, and now in use on the railroad, at its cost, less any payments made thereon, the said rolling stock to be held as security by Collins until fully paid for; and that the funds available from the earnings for the year be applied to the payments to Philip Collins, on account of the rolling stock owned by him, and used in operating the railroad." Five days afterwards, on January 5, 1891, the company by its president, and Collins, entered into a written agreement for a lease of the rolling stock to the company, at an annual rental, with an option to purchase before the expiration of the lease. The paper starts out thus: "Whereas, the said Philip Collins purchased at his own proper cost, amounting, with interest and repairs, to \$17,185.67, in the years 1886 and 1887, and let the same to the said party of the second part [the railroad company], the following described rolling stock and equipments." Then follows a detailed description of cars and locomotives corresponding to those in dispute, and then is this declaration: "And whereas, the party of the second part [the railroad company] has had the use and benefit of said described rolling stock and equipments, without any definite annual rental therefor having been fixed and agreed upon." Then follows the stipulation that, for the consideration thereafter named, Collins agrees to lease all of the rolling stock to the railroad company, its successors and assigns, for eight years, from January 1, 1887, to January 1, 1895. And then follows this stipulation on part of the company: "The said party of the second part [the railroad company], its successors and assigns, agree to pay the said party of the first part [Collins], his executors, administrators, and assigns, an annual rental therefor of \$2,500, payable quarterly at the end of each and every quarter from January 1, 1887." It is then further stipulated that the company has the privilege of purchasing the rolling stock at any time during the term, at the price of \$17,185.67, with interest; and, should the purchase be made, credit is to be given for amount of rent paid, as purchase money. The company paid Collins rents at different dates between February 21, 1891, and December 19, 1891, amounting to \$10,542.67, for which he gave

ceipts, stating in them that the money received was "on account of lease for purchase of engine and cars dated January 5, 1891." The lease was not acknowledged or recorded. Default having been made on interest on the bonds, the mortgage was foreclosed by bill in equity against the railroad company, filed in the circuit court of the United States for the Western district, and a decree of sale of the mortgaged property made, including engines, cars, and all equipment. The sale was advertised for December 1, 1891, at Philadelphia. A committee of the bondholders, Henry Whelen, R. Dale Benson, and Francis M. Milne, was formed to bid on the property. It was knocked down to them, and, by order of the court, the trustee in the mortgage conveyed to them, and they conveyed it to the Bellefonte Central Railroad Company, this defendant, which, about January 1, 1892, took possession of the railroad and all the equipment. Before the sale to the committee, Collins read aloud a notice to bidders of his claim to the rolling stock transferred to him by McLaughlin, and then leased by him to the railroad company. There was also some evidence, by correspondence and otherwise, of the recognition of his claim by Mr. Fraser, the president of the new company; but afterwards the company repudiated his claim and asserted title to the property. Thereupon Collins issued a writ of replevin, and the company gave a claim property bond, and retained possession. The plea of "non cepit and property" was afterwards put in, and on January 17, 1894, the case was called for trial.

The facts proven were in substance as we have stated, except there was no evidence of payment of rental to Collins admitted; the offer of the defendant in that particular having been overruled. But two questions were submitted to the jury: (1) Was the contract between Collins and the company, for leasing the property, made in good faith? (2) If so, what was the value of the property, as that was the measure of damages? There was a verdict for plaintiff for \$12,890.41. Afterwards there was a motion for a new trial, which the court, in an opinion filed, overruled, and entered judgment on the verdict. Defendant appeals, preferring 22 assignments of error,—4 of them to rulings on admission and rejection of evidence, and the remainder to answers to points and charge of the court.

There was abundant proof in the case that Collins was the actual owner of the property claimed by him on his writ. There really was nothing even tending to contradict this proof. We speak now of the facts; not of the legal conclusion sought to be drawn from the description in the mortgage, and the neglect, under the act of July 5, 1883, to record the lease. It is uncontradicted that McLaughlin, the contractor, bought the whole of it, and sold for it, for his own purposes, before the completion of his contract, and then transferred it to Collins. It never was property

"acquired" by the railroad company, under the description in the mortgage, unless acquired by the lease from Collins; and the company, up until after the sale on the mortgage, never pretended to assert possession in hostility to Collins' title. Nor, if notice to the purchaser at that sale was given by Collins, as is uncontradicted, would the act of 1883 operate to divest his title. The resolution of the directors and the written lease, when read together, constituted a bailment, and such they were correctly interpreted to be by the learned judge of the court below. The alleged errors, in the first two and the fourth assignments, to the admissions of evidence on part of plaintiff, cannot be sustained. The evidence offered tended to prove full notice to bidders of Collins' claim, and that his right, after this defendant company was formed, had been recognized by its president; and, further, that in the sworn report by the company to the secretary of internal affairs was an implied disclaimer of title to this property. Not one, except the third, of the many errors alleged, is well founded. The rulings of the court are correct, and the reasons therefor sound, and there is nothing of merit in the assignments which calls for further notice. Therefore all except the third are overruled.

As to the third assignment, it will be noticed that the plaintiff claimed damages for the taking and detention of the property in an amount equal to its value, \$17,185.67, with interest. The defendant offered in evidence rental receipts attached to a duplicate copy of the lease of January 5, 1891, in its possession. These receipts amounted to \$10,542.67. The form of these receipts was the same in substance. This is a copy of the first in date: "Received February 21, 1891, from the Buffalo Run, Bellefonte & Bald Eagle Railroad Company, the sum of five thousand five hundred and forty-five dollars and nine cents on account of lease for purchase of engine and cars. [Signed] Philip Collins." The offer of defendant was of the lease, with receipts attached, signed by Philip Collins, being stated "on account of lease for purchase of engine and cars." Then follows the purpose of the offer, in these words: "The purpose of the offer is to present upon the record to the court and jury what the defendants conceive to be the principal data upon which to estimate and determine the damages due from the defendant in this action to the plaintiff, in case the court is of the opinion that the plaintiff, as against this defendant, has any right to recover at all." To this offer plaintiff objected, for the reasons: (1) Because defendant denies plaintiff's title under the lease. (2) Defendant never declared the option to purchase under the lease. (3) The plea of non cepit and property is a denial of any payments under the agreement. The court then put this question to defendant's counsel: "Do you offer this paper as binding upon you?" to which counsel answered: "We

offer it as showing what the contract was between the original parties to it, so that when the court comes to consider the question of damages, in case the court should differ with us as to the question, right here we have the evidence from which the true measure of damages is to be determined on that issue;" the court being of opinion that, as defendant had disaffirmed the lease, and claimed under a title paramount to it, the mortgage, had not acknowledged it in any way, or offered to purchase under the option, the receipts were inadmissible, and the offer was overruled. Was this ruling correct?

The suit was replevin. The property had been seized by the sheriff, and defendant had given a bond, and then pleaded property. So far as the property itself was concerned, the plaintiff could not recover it. Replevin is a mixed action, in rem and personal. The defendant has his election to deliver the property on the writ, or to give security and keep it. If the property be delivered to plaintiff, the defendant is answerable in damages only for the taking and detention. If it be retained, he is answerable for the full value. As is said in *Fisher v. Wollery*, 25 Pa. St. 197: "In either case the action thenceforth proceeds for damages alone. The property itself can in no event be recovered at law from the defendant; nor can he tender it afterwards in discharge of the action, or even in satisfaction pro tanto of the damages claimed. Nothing but money can be recovered in an action on the defendant's property bond." So that the possession of the property itself was no longer an element in the case. It belonged absolutely to defendant. How much money, if any, ought defendant to pay plaintiff? As the defendant had the property, and must keep it, that was the only question remaining. To answer this involved the determination of three other questions. If the property passed to the defendant under the description in the mortgage, it ought to pay nothing; but we have already held, with the court below, that this position is not sustainable. If the interest of the Buffalo Run, Bellefonte & Bald Eagle Railroad Company in the property leased passed by the mortgage sale to defendant, then, when the writ of replevin issued, the latter had a qualified interest in the property, and such interest as it did not have Collins had, and ought to be paid for. If no interest passed under the lease to defendant, it ought to pay damages measured by the value of the property. It is very clear to our minds that whatever right its predecessor had by virtue of the lease passed to this defendant. Assume that it wholly repudiated the claim of Collins, as one branch of its defense; why should that estop it from setting up the other? If a landlord distrain for rent in arrears, and the tenant replevy the goods, the latter may not, at the trial, allege title paramount, and also set up payment of the

rent. From motives of public policy, the law will not tolerate such repugnant defenses. If the entry was under plaintiff's title, whether good or bad, that created the relation of landlord and tenant, and the tenant must pay. If not under that title he owes nothing, for he is not tenant to the holder of it. But, in both ejectment and proceedings for the collection of rent, it has always been held that, while the tenant may not defend under an outstanding or paramount title, he may show that during the term his landlord's title had ended by assignment or judicial sale. Such defense is not repugnant to the original contract relation of landlord and tenant. So here the plaintiff alleged a bailment with an option to purchase. There was no serious denial of it by defendant; but it averred, by the mortgage of after-acquired equipment, and the failure to record the bailment contract under the act of 1883, the mortgage clasped the bailed property, and it passed by judicial sale to the purchaser, absolutely. But defendant alleged further, even if it did not so pass absolutely, the special or qualified interest of the bailee—an interest measured by the amount of rental paid—at least passed, and the damages of plaintiff should be measured by the amount yet unpaid. This was substantially the position defendant took when it offered the receipts. In assuming these two theories of defense, there was nothing inconsistent with good morals or public policy, nor was there anything inconsistent with the issue framed. The judicial utterances that a suitor will not be permitted to "stultify himself," will not be permitted to "blow hot and cold in the same breath," and the like, have no application to the facts here.

There was a repugnant defense which the court below thought defendant might take if the receipts were admitted, and which would operate with hardship on plaintiff, and defeat a trial on the merits. In amount the payments made were all that were under the contract up to date of suit, and therefore, if the suit had been instituted on the contract, it was prematurely brought; but, in replevin for wrongful detention, such claim on part of defendant would not have been tolerated at that stage of the proceedings. When Collins demanded his rights under the contract, defendant asserted absolute ownership of the property, under the judicial sale. In view of this claim before suit brought, there would have been, at trial, such repugnancy between it and a plea of premature suit that the latter would not have been entertained. Defendant had positively and peremptorily denied any title in Collins to the property. He was thereby lured into an action to test his right. Equity would, in view of defendant's attitude, before suit brought, estop it from alleging at trial that suit was brought prematurely. It could not wholly repudiate his title before

suit, and then, at trial, defeat his action by a qualified acknowledgment of it. Defendant did not take such position at the trial, and our remarks are prompted solely because the court below indicates this view as partly the ground of its rulings.

Take any one of these receipts on its face, and what does it show? If the court had admitted them to be read to the jury, as was the offer, it would have been bound then to say to the jury: "This written receipt declares that the money paid is on account of lease for purchase of engine and cars, dated January 5, 1891." This contract, with all these receipts attached, being produced by defendant, and by it offered in evidence, must be taken as true. Being so, it is a distinct, unequivocal recognition of the contract; and before suit brought, having given distinct notice to plaintiff that it repudiated liability under the contract, would neither pay rental nor the purchase money, he (the plaintiff) was not bound to wait until the period for declaring the option had expired, but could bring his suit at once. The measure of plaintiff's damages is the value of the property, as stipulated in the bailment contract, mitigated by the amount already paid him by defendant's predecessors, as shown by these receipts. This, it seems clear to us, was the ruling that should have been made on the offer of the receipts, and the interpretation that should have been put upon them by the court. It was not important what significance was attached to them by counsel when the offer was made. The purpose, clearly stated, was to mitigate damages. That rendered them admissible. Once in evidence, if they were to affect the amount of damages, their purport was for the court. Assume that the offer of the receipts, and their admission as a ground of defense, would necessarily have been the destruction of the first ground, neither was inconsistent with the issue, for both tended to show property in defendant,—the first, by a title absolute, under a sale which, it was argued, wholly divested plaintiff's title; the second, by a special or qualified title in sub-servance to that of plaintiff.

The judgment is reversed, and a v. f. d. n. awarded.

LANCASTER COUNTY NAT. BANK v. HENNING.

Supreme Court of Pennsylvania. Oct. 7, 1895.)

RULE OF COURT—AFFIDAVIT OF DEFENSE—EXECUTION OF INSTRUMENT—COMPETENCY OF WITNESSES—SURVIVING PARTY TO CONTRACT.

1. Under a rule of court that the instrument in writing on which plaintiff's case is founded, if stated specially in the pleadings or notice, may be given in evidence without proof of execution, unless the opposite party shall file an affidavit denying the execution, a denial in the affidavit of defense is sufficient to put plaintiff to the proof of the execution of the instrument, thus including proof of authority to make it.

2. Act 1887, § 5, cl. e, providing that where any party to the thing or contract in action is dead, and his right therein has passed to a party on the record, who represents his interest, a surviving party to the thing or contract, whose interest shall be adverse, shall not be competent as a witness, does not disqualify one sued as surviving partner on a note signed in the firm name from testifying that the note was made by the deceased partner, without authority, for his own private benefit, and that the partnership received no value therefor.

Appeal from court of common pleas, Lancaster county; John B. Livingston, Judge.

Action by the Lancaster County National Bank against William Henning, surviving partner of the late firm of Rhodes & Henning, on a note for \$3,500, dated January 13, 1890, and signed by Rhodes & Henning. From a judgment for plaintiff, defendant appeals. Reversed.

William Henning filed an affidavit of defense, in which he specifically alleged that he never made the note in suit, and never authorized any one to do so for him, and that he was not a partner with Charles J. Rhodes, and did not do business with him under the firm name of Rhodes & Henning, at the time the note was made; but that he and Charles J. Rhodes were partners under the firm name of Rhodes & Henning in the town of Lostant, Ill., until October, 1883, when the said firm was dissolved, and that no business of any kind was transacted after said dissolution, and that the said firm was not then indebted to C. B. Herr, the payee, nor was the note in suit a renewal or payment of any firm liability existing at that time. He further alleged that Charles J. Rhodes had used the said firm name of Rhodes & Henning without authority, to raise money for his own benefit, and had received the whole proceeds thereof, and had appropriated the same to his own private account. Upon the trial of the cause the plaintiff offered the note in evidence without proof of its execution, to which objection was made by the defendant, because the above-mentioned affidavit had been filed, denying that Henning ever signed the note, or was liable on the same, and also denying the partnership, and the existence of the firm of Rhodes & Henning, at the time the note was made. The rule of court as to proof of instruments in writing was as follows: "Sec. 20. In all cases where the plaintiff's cause of action or the defendant's set off is founded in whole or in part on any bond, note or other instrument in writing, and stated specially in the pleadings or notice in writing given fifteen days before the first day of the week for which the cause is fixed for trial, the same may be given in evidence without proof of its execution, or of the handwriting of any party thereto, unless the opposite party shall at least eight days before said week file an affidavit denying such execution or handwriting; provided that this rule shall not apply to actions by or against executors, administrators or other persons acting in a

fiduciary capacity." And as to proof of partnerships the rule of court was: "Sec. 21. In all actions by or against partners it shall not be necessary on the trial to prove the partnership, but the same shall be taken to be admitted as alleged on the record as prima facie proof of the same, unless one of the defendants shall at or before the time of filing their plea make and file an affidavit denying the existence of the partnership as alleged, and stating to the best of his knowledge and belief whether there is any partnership in relation to the subject matter of the action, and who are the parties."

William Henning was called in his own behalf. The plaintiff objected to his competency, except as to matters occurring between him and the bank. The defendant proposed to prove by him: (1) That the partnership of Rhodes & Henning existed from 1878 to October, 1883, when its assets were all sold by the sheriff, and the partnership dissolved. That during the existence of the partnership the business of the firm was carried on entirely at Lstant, La Salle county, Ill., and that no business was ever done between the partnership and the Lancaster County Bank or C. B. Herr. (2) That the note in suit was not signed by the defendant, nor by any one else, during the existence of said partnership; nor was any one authorized to sign to it the firm name of Rhodes & Henning; and that defendant had no knowledge of the said note, or of any claim against Rhodes & Henning held by the plaintiff, until after the death of Charles J. Rhodes. (3) That neither the partnership nor the defendant ever received any value for said note. (4) That none of the partners were authorized to act as liquidating partners of the said late firm of Rhodes & Henning. And also that no moneys were ever borrowed by the partnership of Rhodes & Henning during its existence from C. B. Herr, and that no firm liability of any kind was due to him by the firm; also that Charles J. Rhodes, who had been a partner in the firm of Rhodes & Henning, after the dissolution of the said partnership, borrowed the money for which this note was given for his own private benefit, and signed the old firm's name fraudulently, and without the authority of the defendant, and without his knowledge. The offers were disallowed by the court, and the defendant excepted. The court then directed the jury to find a verdict for the plaintiff for the full amount claimed.

A. H. Fritchey and Chas. I. Landis, for appellant. Wm. A. Atlee and Geo. Nauman, for appellee.

MITCHELL, J. The cases of Hogg v. Orgill, 34 Pa. St. 344, and Reiter v. Fruh, 150 Pa. St. 623, 24 Atl. 347, appear to have escaped the notice of counsel as well as of the court below. In the former it was expressly held that, under a rule of court substantially

the same as that in the present case, a denial in the affidavit of defense was a sufficient affidavit within the rule to put plaintiff to the proof of execution of the note. And in Reiter v. Fruh the same effect was given to the denial of partnership in the affidavit of defense, and it was said, referring also to Adams v. Kehoe, 1 Wkly. Notes Cas. 232, that Hogg v. Orgill had settled the construction of the rule, and the practice under it. While this court usually accepts the construction by other courts of their own rule, yet, in the case of a rule like the one under discussion, which is of quite general existence throughout the state, to permit a different construction from that twice expressly given to it in this court, would do great injustice to parties who might rely on the settled practice. It is true that in Reese v. Reese, 90 Pa. St. 89, Mr. Justice Trunke uses the expression that "filing an affidavit of defense is not the requisite notice to put a party to proof of execution of the writing. But that was no part of the ground of decision, and was not intended to be so taken or, indeed, to be considered as of any importance, as appears from the words which follow in the same paragraph: "It would be an extreme case which would require reversal because of error in admitting a writing without preliminary proof of signature when, in a subsequent stage of the trial, positive evidence was given of its execution. He then proceeds to consider the substantial questions in the case, on which finally the judgment was reversed. Hogg v. Orgill was not cited in that case, and we may certainly conclude that, if it had been, the expression now relied on by appellee would not have been used. It was error, therefore, to admit the note sued on in evidence without due proof of its execution, and this would include proof of the authority to make it at the time it was made. Henning was a competent witness. He was not within the exceptions in clause e of section 5 of the act of 1887: "Nor where any party to a thing or contract in action is dead * * * and his right therein has passed * * * to a party on the record who represents his interest * * * shall any surviving party to the thing or contract * * * whose interest shall be adverse * * * be a competent witness," etc. The rights of the alleged partner, deceased, had not passed to the plaintiff. It did not represent his interest in the note in suit, but was claiming adversely against his interest as well as against Henning. Nor was Henning's interest adverse to that of his deceased partner in this suit. The note was sued on as a firm note. Henning was called to testify that it was not made by the firm, and therefore his testimony was in exoneration of both partners, so far as the present action was concerned. If the interest of the deceased partner should be incidentally affected by the testimony, not as a partner, but by virtue of an indi-

vidual act in another capacity, that would not render Henning incompetent. The interest of the deceased would be in the question, not in the immediate result of the suit. His representative was not a party to the suit, and the judgment could not operate upon his rights, one way or the other. *Dickson v. McGraw*, 151 Pa. St. 98, 24 Atl. 1043. Judgment reversed, and venire de novo awarded.

BLIEM et al. v. SCHULTZ et al.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

**CHURCH LITIGATION—IMPOSITION OF COSTS—
RIGHT TO CONTRIBUTIONS.**

1. Where litigation arises as to the ownership of church property, each faction claiming in good faith to represent the constituted authorities of the church, the imposition of costs is in the sound discretion of the court.

2. Where a large part of a congregation refuse a pastor regularly sent them by the duly-constituted church authorities, and adhere to another pastor, and retain possession of the church property, it is improper to compel them thereafter to deliver to the duly-appointed pastor not only contributions and collections for general church purposes, but also contributions voluntarily made by them for the specific purpose of paying the salary of the pastor to whom they adhered.

Appeal from court of common pleas, Northampton county; W. W. Schuyler, Judge.

Bill by Rev. J. C. Bliem and others against Rev. Henry D. Schultz and others for an injunction to restrain the defendants from preventing the plaintiff Bliem from occupying the church and parsonage of the St. John's Evangelical Church at Bethlehem, Pa., and from exercising the functions and duties of the pastorate. From a decree for plaintiffs, defendants appeal. Modified.

F. W. Edgar, for appellants. William S. Kirkpatrick, Edward Harvey, and James S. Biery, for appellees.

DEAN, J. *Krecker v. Shirey*, 163 Pa. St. 534, 30 Atl. 440, in which our Brother Williams, in an exhaustive opinion, passed finally on every material question raised by this unfortunate litigation, leaves nothing for consideration here on the main question. That opinion practically affirms that of the learned judge of the court below in this case, both as to the decree and the reasons therefor. But, subsequently to the first decree in *Krecker v. Shirey*, supra, we, on further reflection, concluded it should be modified so far as to impose the costs of the suit upon the church corporation. This case is the same as *Krecker v. Shirey*. The master here finds as a fact that these defendants, the officers of St. John's Church, and a majority of the congregation, adhered to Mr. Schultz as pastor, and made defense to the suit in good faith. This being the fact, the costs are in the sound discretion of the court, and we are of opinion they should be imposed on the corporation. We therefore modify the seventh clause of the final decree, and order

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and direct that St. John's German Church of the Evangelical Association at Bethlehem, Pa., pay the record costs of this appeal; this not to include witness fees. Further, the fifth clause of the decree enjoins and restrains defendants from paying any collections or church funds to Rev. Schultz as pastor or preacher, and they are ordered to pay all such moneys which are payable to the pastor to Rev. J. C. Bliem. A large majority of the congregation—200 out of 255 members—adhered to the defendant pastor, Mr. Schultz. The minority—nearly 50 in number—withdrew, and under Mr. Bliem formed a separate organization. The contributions of those who adhered to Mr. Schultz in payment of his salary as pastor should not, it seems to us, be turned over to plaintiffs. Such contributions were voluntary, and for a specific purpose, to which they have been already, since March, 1891, appropriated. This part of the decree is therefore modified so as not to affect such voluntary payments made by defendants to Mr. Schultz as pastor's salary from March, 1891; but as to contributions and collections for general purposes of the church corporation, such as missionary, educational funds, etc., no modification is made. As by the decision in *Krecker v. Shirey*, supra, the St. John's German Church of the Evangelical Association at Bethlehem is composed of those who adhered to the general conference which met at Indianapolis in 1891, the plaintiffs are the legal church organization. They alone are entitled to moneys contributed for general church purposes. The decree made by the learned judge of the court below was framed and suggested by correspondence between him and counsel; he at Lock Haven, they at Easton. Doubtless, if it had been the result of a full hearing as to the form of a decree, it would have taken the shape we have given it. Let the decree be affirmed as modified by this opinion.

MACKRELL et al. v. WALKER.

(Supreme Court of Pennsylvania. Nov. 8, 1895.)

CONSTRUCTION OF WILL—TERMINATION OF TRUST.

Testator devised his real estate to his wife, in trust for his grandchildren, the trustee to hold the property and receive the rents and profits thereof, and to use them in her discretion for the maintenance and education and benefit of said grandchildren, and for the improvement of their said trust estate, with power to aid any one or all of them by paying to them or any of them such sums as she shall think proper after they shall arrive at legal age, "or the said trustee may otherwise use or apply the said trust estate for their benefit in case she shall be of opinion that the same will be safe and proper." He then provided that, in case of the death of his wife, the trust and powers thereunder should devolve upon a trustee to be appointed by the court. *Held*, that the trust was to continue during the minority of the grandchildren, and might, when they arrived at legal age, be terminated by the trustee if she believed this to be safe and proper.

Appeal from court of common pleas, Allegheny county; White, Judge.

Action by J. C. Mackrell and others against E. W. Walker. From a judgment for plaintiffs, defendant appeals. Affirmed.

The opinion and judgment of the lower court were as follows:

"This is an action of assumpsit to recover \$3,650, consideration for the purchase of a lot of ground in Pittsburgh sold by the plaintiffs to defendant. The question is, can the plaintiffs convey a good title? The plaintiffs are the grandchildren of James Mackrell, who died in 1879, leaving a will dated February 28, 1877; and they claim title under that will, and a deed from the trustee in the will executed May 29, 1895. The material parts of the will touching this controversy are as follows: 'Fifth. Subject to the said devise to my wife and to my granddaughter Nancy Mackrell, I devise all my real estate to my said wife, Agnes, and to her successor, in trust for the use, benefit, and behoof of my grandchildren James C., Elizabeth, and Anna Cole Mackrell, children of my son, Henry C. Mackrell, and the survivor or survivors of them and their lawful issue, but subject to the control of said trustee, and not subject to the control, contracts, or liabilities of said James C., Elizabeth, and Anna Cole Mackrell, or any of them; the said trustee to hold said property, and receive and hold the rents, issues, and profits thereof, and to use the said income and profits in her discretion for the maintenance, education, and benefit of my said three grandchildren, and for the improvement of their said trust estates, as in her judgment and discretion shall be right and proper, with power to aid any one or all of them by paying to them, or any of them, such sums of money as she shall think proper after they or either of them shall arrive at legal age, or the said trustee may otherwise use or apply the said trust estate for their benefit in case she shall be of opinion that the same will be safe and proper; but she, the said trustee, may retain control of the whole income for the time being, or whenever in her judgment the interest of such devisees would be promoted by so doing. In case of the decease of my wife, or other inability to act as such trustee, then the trust and powers herein created shall devolve upon a trustee to be appointed by the court of common pleas No. 1 of the county of Allegheny.' The widow afterwards married M. P. Schrenkle. The two granddaughters married men by the name of Hornberger. After the three grandchildren came of age, the trustee, Agnes Schrenkle, on May 29, 1895, executed a deed to them for the trust property, each to have the one undivided third part. In that deed she recites the will and trust, and describes the property, and says: 'And whereas said Agnes A. Schrenkle, trustee as aforesaid, is of opinion that it is safe and proper to use and ap-

ply said trust estate for the benefit of said cestuis que trustent by conveying to each of them the one undivided third of said land above described, and that no reason remains for the further continuance of said trust, and it is for the interest and advantage of each of said cestuis que trustent that the same should be so conveyed.' In pursuance thereof the deed was executed, and signed by her as 'trustee.' The deed is strictly in conformity to the words, terms, and conditions of the trust, as to the discretionary powers of the trustee, contained in the will. It was expressly executed in pursuance of the trust.

"Had she power to execute this deed? The duration of the trust is not expressly declared in the will. If it was intended to be perpetual, it would be against the policy of the law, and fail. In that event each of the grandchildren would have taken a vested fee simple to the one undivided third, the same as declared in the deed. But I do not think the trust was to be perpetual. From the language and terms used, I think it was to continue only until the grandchildren came of lawful age. That view harmonizes with all the expressions used. The provision for the common pleas appointing a successor strongly sustains this view. 'In case of the decease of my wife, or other inability to act as such trustee,' evidently refers to the minority of the grandchildren.

"One clause in the will may raise some doubt or uncertainty. The trust is for the use, benefit, and behoof of the three grandchildren, 'and the survivor or survivors of them and their lawful issue,' but subject to the control of the said trustee, and not subject to the control, contracts, or liabilities of the said grandchildren. The words 'their lawful issue' do not refer to the lawful issue of the survivor, but the lawful issue of one that might die before coming to lawful age. In other words, the trust was for the use, benefit, and behoof of the three grandchildren, to the survivor or survivors and the lawful issue of such as may decease before coming of age. If one or two died before coming of age, not having lawful issue, the trust was then for the benefit of the survivors or survivor and the lawful issue of the deceased. The subsequent clause in the trust confirms this view. The trust was 'for the maintenance, education, and benefit of my said three grandchildren, and for the improvement of their said trust estates, * * * with power to aid any one or all of them by paying to them, or any one of them, such sums of money as she shall think proper after they or either of them shall arrive at legal age.' Then follows the other clause, on which the deed was made: 'Or the said trustee may otherwise use or apply the said trust estate for their benefit, in case she shall be of the opinion that the same will be safe and proper.' All these expressions seem to contemplate that the trust shall con-

tinue during the minority of the grandchildren, and may, when they arrive at legal age, be terminated by the trustee if she believe it to be safe and proper for them.

"We believe, for the reasons given, that the law is with the plaintiffs, on the case stated. It is therefore ordered that judgment be entered for the plaintiffs against the defendant on the case stated, for \$3,650, with interest thereon from June 22, 1895, with costs of suit."

Frank Thompson, for appellant. John D. Shafer, for appellees.

PER CURIAM. The questions presented in this case stated were fully considered and rightly disposed of by the learned judge of the court below, and the judgment is affirmed on his opinion. Judgment affirmed.

COLUMBUS LAND CO. v. McNALLY.

(Supreme Court of Pennsylvania. Nov. 8, 1895.)

ACTION BY CORPORATION—SUBSCRIPTION TO STOCK—DEFENSES.

In an action on a contract of subscription to a corporation, an affidavit of defense admitting that defendant wrote his name to the contract, but stating that he did not fill out any number of shares in the company which he was willing to take, and not denying that he wrote opposite his name the figures appearing on the contract indicating the amount of the stock for which he subscribed, is insufficient.

Appeal from court of common pleas, Allegheny county.

Action by the Columbus Land Company against James A. McNally on a contract of subscription to the stock of said company. From a judgment for plaintiff, defendant appeals. Affirmed.

The affidavit of defense was as follows:

"Personally before me came James A. McNally, the defendant in this case, and, being by me duly sworn, says that he has a just and legal defense to the whole of plaintiff's claim, the nature of which, among other things, is as follows: 'It is not true that I agreed to subscribe, and did subscribe, for twenty (20) shares of the capital stock of the Columbus Land Company, of the par value of fifty dollars (\$50.00) a share. It is true that I wrote my name to the paper dated March 9, 1893, of which a copy, I believe, is annexed to the affidavit of claim; but I did not fill out any number of shares in the company which I was willing to take. I signed the paper without any examination of its contents, and with the understanding that it was a paper to be used as a feeder to see how many persons were willing to go together and raise sufficient money to purchase, as I understood, a lot on Penn avenue, in the city of Pittsburgh, for use as a club house for the Columbus Club. After I signed the paper, it seems some person, without my knowledge or consent, has filled out the twenty (20) shares of stock for me; and subsequently, without my knowledge or

consent, and some six (6) months after I had signed the paper, an application was made for a charter for a company, having for its purpose the purchase and sale of real estate, and also the holding, leasing, and selling of real estate. I was not consulted about the formation of the company, nor the purpose for which it was to be organized; and I gave no authority to any one for me to assent to the organization of any such company with any such powers. I deny that I attended any of the meetings of the stockholders of the Columbus Land Company. As I believe, I did not receive any notices or any calls for payments to stock of the Columbus Land Company. For several years prior to 1893 there had been efforts made by members of the Columbus Club in reference to the purchase of property for a club house, but, as I always understood, the purchase was to be by the club itself, and was to be the property which I thought to be peculiarly fitted for such a purpose, on Penn avenue. I never authorized the purchase of the present property on Sixth avenue, and I did not approve of the same, and I did not subscribe to any company to aid in the purchase of such property, and, so far as I was concerned, I opposed the purchase of the Sixth avenue property.'"

James A. Pierce and Watson & McCleave, for appellant. A. V. D. Watterson and A. B. Reid, for appellee.

PER CURIAM. While the defendant admits that he "wrote" his name to the paper, a copy of which is annexed to the affidavit of claim, he says he did not fill out any number of shares in the company which he was willing to take; but he does not deny that he wrote, opposite his name in the money column, "1000," indicating that the amount or par value of the stock for which he subscribed was \$1,000. The affidavit of defense is evidently evasive, and the court below was clearly right in treating it as insufficient. Judgment affirmed.

FRAIM v. LANCASTER COUNTY.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

LOCAL ACT—REPEAL BY GENERAL ACT.

1. The rule that a general affirmative act, without express words of repeal, will not repeal a previous special or local act on the same subject, even though the two be inconsistent, is not a rule of positive law, but one of construction only.

2. Act May 23, 1893, recites in the preamble that "whereas no uniform fee bill for the several counties throughout the commonwealth now exists relating to" magistrates and constables, and then enacts that there shall be uniformity throughout the commonwealth in such charges, and that their fees shall be "as follows." Held that, in view of such preamble and enactment, a subsequent clause repealing all acts inconsistent with these provisions extends to the repeal of local and special as well as of general acts.

Appeal from court of common pleas, Lancaster county; Livingston, Judge.

Action by H. H. Fraim against the county of Lancaster. From a judgment for plaintiff for a part of his claim, he appeals. Reversed.

The act of April 2, 1868 (P. L. p. 3), related in part to the fees of the aldermen, justices of the peace, and constables elected or appointed in Lancaster county. The act was local to Lancaster and certain other enumerated counties of the state. The act of May 23, 1893 (P. L. p. 117), was by its terms and title an act "to regulate and establish the fees to be charged by justices of the peace, aldermen, magistrates and constables in this commonwealth." It recited that no general fee bill had been enacted since the act increasing the jurisdiction of justices, and that no uniform fee bill for the justices of the peace, magistrates, aldermen, and constables existed throughout the commonwealth; and it enacted specific fees for all the services of all these officers, to the end, as was expressly stated, "that there shall be uniformity throughout the commonwealth in the charges of justices of the peace, aldermen, magistrates and constables."

Under these conditions, it was contended by the plaintiff, a constable of the county of Lancaster, that his fees were to be regulated by the new and general act, and to determine this question the facts were set forth in a case stated between him and the county. The court below, in an opinion filed by Livingston, P. J., held that the general act of 1893 did not repeal the local act of 1868, and entered judgment for only so much of the claim as was in accordance with that act, refusing to enter judgment for the increased amount which would have been due had the fees been prescribed by the general act of 1893.

Brown & Hensel, for appellant. George A. Lane and Thos. Whitson, for appellee.

MITCHELL, J. The question of the repeal of a statute by a later one is essentially a question of legislative intent. While, therefore, the rule undoubtedly is, as the learned court below held, that a general affirmative act, without express words of repeal, will not repeal a previous special or local act on the same subject, even though the provisions of the two be inconsistent, yet it is never to be lost sight of that it is not a rule of positive law, but of construction only, adopted, as our Brother Williams accurately expresses it in *Com. v. Macferron*, 152 Pa. 244, 25 Atl. 556, "in order to settle judicially the legislative intent, in the absence of words declaring such intent." In accordance with this rule, the presumption is that the act of May 23, 1893 (P. L. p. 117), being a general act, does not repeal the act of April 2, 1868 (P. L. p. 3), which is clearly, as held by the learned court below, a local or special statute. But, equally in accordance with the purpose and limitations of the rule, such presumption must give way to a plain manifesta-

tion of a different legislative intent. Of such intent the act of 1893 leaves no room for doubt. The preamble is: "Whereas, no general fee bill for justice of the peace has been enacted since the act increasing the jurisdiction of justices; and whereas no uniform fee bill for the several counties throughout the commonwealth of Pennsylvania now exists relating to justices of the peace, magistrates, aldermen and constables." The natural office of a preamble being to set out the mischief of existing law which is intended to be remedied, nothing could be clearer than the mischief here recited,—the want of a "uniform fee bill for the several counties throughout the commonwealth"; i. e. the existence of local and special fee bills in the different counties, to the destruction of uniformity. Then follows the enactment, which is equally clear: "Therefore be it enacted," etc., "that there shall be uniformity throughout the commonwealth in the charges of justices of the peace, aldermen, magistrates and constables, and that their fees shall be as follows," etc. Uniformity throughout the commonwealth means in each and every county thereof, and the legislative intention would have been no more clearly manifested to that effect had that form of expression been used. Both the preamble and the enactment indicate beyond doubt that when, in section 3, all acts and parts of acts inconsistent with these provisions were repealed, the repeal was meant to include local and special as well as general acts. To hold otherwise would be to perpetuate the very mischief set forth in the preamble, and to nullify the force of the enactment which was meant to cure it. Judgment reversed, and judgment directed to be entered on the case stated for the appellant, for \$23.95.

DOUGHERTY v. PHILADELPHIA & R. R. CO.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

ACTION AGAINST RAILROAD COMPANY—NEGLIGENCE —CARRYING OF EXPLOSIVE—RULES OF COMPANY—ADMISSIBILITY.

1. Rules issued by defendant company are not admissible to show negligence on the part of its employes in acting in disregard thereof when it appears that they were not placed in the hands of the employes until after the accident, although they in terms provided that they should take effect on a date previous to the acts.

2. It is error to exclude oral evidence that the rules were not distributed at the date of the accident, on the ground that the receipts signed by the employes on receiving the rules are the best evidence as to the date at which each employe received his copy.

Appeal from court of common pleas, Northumberland county; Jeremiah Lyons, Judge.

Action by Miles Dougherty against the Philadelphia & Reading Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

S. P. Wolverton and C. M. Clement, for appellant. P. A. Mahan and James Scarlet, for appellee.

WILLIAMS, J. The accident from which the plaintiff in this case suffered was, to say the least, an extraordinary one. A car loaded with blasting powder, while being moved over the defendant's railroad as part of one of its freight trains, was exploded. The plaintiff's house, which stood 68 feet below the track, and at a distance of 400 feet from it, was affected by the explosion. His furniture was damaged, and his wife quite seriously hurt. This action was brought to recover for the loss sustained by him. The defense alleged that the accident was unavoidable, and, if unsuccessful in this position, that the injury complained of was not a natural or probable result of the accident, which it was the duty of the company to foresee and provide against. Both questions were, upon the evidence in this case, questions of fact for the jury; and the sixth assignment of error, which asked a binding instruction in favor of the defendant, cannot therefore be sustained. Whether the explosion was an unavoidable accident, or was due to the defendant's negligence, was not a question of law; and the learned judge was right in submitting it, upon the evidence, to the decision of the jury. Nor do we think that just complaint can be made at the manner in which the question was presented to them.

The serious questions for the appellee are presented by the first and second assignments of error. On the trial the plaintiff undertook to show affirmatively the negligence of the defendant's employes by showing that, in placing the car containing the powder in the train, they disregarded the rules the company had provided for their guidance. It appeared that one set of rules had been in force up to some time in May, 1888. Another set had been adopted by the officers, which had been intended to take effect on the 1st day of May, 1888, but which, for some reason, had not been promulgated until after the 20th. The accident happened on the evening of the 5th of May, 1888. The plaintiff offered the latter set of rules, regulating the making up of trains, the signals to be used, and the precautions to be taken in case of the parting of a train while on its journey, on the supposition that they were in actual use on the 5th of May. It appeared, however, that they were not distributed or placed in the hands of employes until near the close of the month. For this reason the learned judge rightly rejected them. They were again offered, without any accompanying testimony as to the time of their delivery, and were admitted, notwithstanding the testimony that had been previously given upon this subject, tending to show that the actual delivery of these rules to the employes did not take place till about the 26th of the month. The reason given for this action by the learned judge

was that the book of rules bore on its first page a statement that the rules contained in it were to take effect May 1, 1888, and that it was to supersede the book of rules dated January 1, 1876. This he held to be evidence *prima facie* that the rules offered were in full force on the 1st day of May, 1888. But the testimony which had been given to the court in support of the offer of the same set of rules was in the case. Upon its practically conclusive showing that these rules were not in force at the time of the accident, the learned judge had rejected them, and sealed a bill of exceptions to his ruling, at the request of the plaintiff. Unless testimony fairly overcoming the effect of that on which his rejection of the book of rules had been based was presented for his consideration, or he had become convinced that his rejection of the book was an error, his admission of it was inconsistent with his former ruling, and it was in the face of the testimony already on the record. It was erroneous, and requires us to sustain the first assignment of error. For the same reason the second assignment must be sustained. The defendant company offered the first book of rules, alleging that the rules contained in it were in force on the 5th day of May, 1888, and that this appeared in the testimony of the plaintiff. The defendant also called witnesses to show that the book of 1888 was not issued to the employes until after the accident, but that the book of 1876 was that which was in force at that time, and by which the employes were governed.

In the course of the examination of one or more of these witnesses, it appeared that they had, on receiving the new book of rules, been required to sign a receipt therefor in the office of the company at Tamaqua. The learned judge rejected the offer, holding that, because the written receipts would show the exact date on which each employé received his copy of the new rules, the company was bound to produce the receipts, and, not having done so, could not show the fact that the new rules were not in force on the 5th of May, 1888, in any other manner. He characterized the receipts of the employes as "the best evidence of the time when these rules went into effect," although the receipts only stated when the copy came into the hands of the employé who signed it. When they should take effect was for the company to determine, and to announce by some general order or circular letter, such as one of the witnesses testified accompanied each book of rules. But the fact that the new rules were not in force and had not been put in the hands of the employes until after the accident happened was susceptible of proof by the testimony of any one who knew it. On the part of the plaintiff the only evidence for the jury upon this subject was the recital on the first page of the new book of rules that they were framed to take effect on the 1st day of May, 1888. To this *prima facie* show-

ing, it was perfectly competent to reply that the book was not in fact put in the hands of the employes for use until a later period, and that on the 5th day of May, when the accident happened, it was not in the hands of the trainmen who had charge of the train in which the car load of powder was. The exact date when the new rules went into operation was not important. The question was, were they in operation on the 5th day of May? A violation of the rules in force at the time would be evidence upon the question of negligence on the part of the employes which the court could not withhold from the jury. It might not be conclusive, but upon the subject of its competency the learned trial judge was right. It became important, therefore, to inquire what rules were in force when the train to which the accident happened was made up, and were the rules in force at the time substantially followed by the persons in charge of the train. If so, negligence would not ordinarily be imputable to them. The result of the rulings brought to our attention by the first and second assignments of error was that the jury had necessarily to determine this question of the negligence of the trainmen in the management of their train by the application of a set of rules which were not in force at the time, and the requirements of which they were not bound to know or obey. To what extent this mistake controlled the verdict it is not possible now to determine, but that it may have influenced it is a sufficient reason for reversing the judgment. The other assignments of error are overruled. The judgment is reversed, and a venire facias de novo awarded.

COMMONWEALTH v. BOWMAN.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

CRIMINAL LAW—REVIEW ON APPEAL—HARMLESS ERROR.

An error by the court in saying that five witnesses had testified to a certain fact when but two had done so is not ground for reversal when there would have been no necessary conflict in their testimony if all such witnesses had so testified, and their statements would have corresponded exactly with that of the appellant.

Appeal from court of oyer and terminer, Luzerne county; John Lynch, Judge.

William P. Bowman was convicted of murder in the first degree, and appeals. Affirmed.

T. R. Martin, Joseph Moore, and J. D. Farnham, for appellant. D. A. Fell, Jr., Dist. Atty., and John M. Garman, for the Commonwealth.

FELL, J. It was admitted that the appellant was present when the murder of which he was convicted was committed. The fatal shot was fired either by him or by his companion, Metzgar. He testified that Metzgar did the shooting, that there was no prearrangement or concert of action between them,

that he had no previous knowledge of Metzgar's intention, and that he ran when the first shot was fired, and was followed by Metzgar, who overtook and passed him. Two witnesses whose attention was attracted by the noise of the first discharge of the pistol saw the shots afterwards fired, and observed the movements of the parties at the time. Two who did not witness the shooting saw Bowman and Metzgar as they ran from the scene of the murder. Another heard the shots, but saw nothing of the occurrence. Speaking of these five witnesses, the learned judge, in charging the jury, said: "Rothermal, Disque, and Turner (the two last, you will remember, were in the field, cutting corn), and Sulsinger and Nagle, who were in the gondola car, state that when they saw the two men running from the scene of the shooting the heavier man was ahead,—was before the other one; and it is testified that Metzgar was the heavier man." This statement was inaccurate, as only two of the witnesses, Sulsinger and Nagle, had so testified. The others had witnessed a part of the occurrence, but had not seen Bowman and Metzgar running from the scene. This inaccuracy is the subject of the third assignment of error, and to it the elaborate and able argument of the appellant's counsel is mainly directed. The error complained of was not in misstating the testimony as to an alleged occurrence, but in saying that five witnesses had testified to it when but two had done so. The fact was not in dispute. The appellant had admitted that as they ran from the scene of the murder he was in advance of Metzgar. The effect of the error, then, was not to establish a fact prejudicial to the defense, and it was harmless, unless it tended to weaken the defense by raising an apparent contradiction in the testimony as to other material matters. Neither Bowman nor Metzgar was identified by any of the witnesses except by their apparent size. Bowman was the smaller. Disque had testified that the larger man had the revolver, and did the shooting, and that the smaller man ran after the first shot. To some extent this testimony was confirmed by Rothermal, and the testimony of these two witnesses harmonized with and tended to strengthen Bowman's statement. Under all the testimony, it was probable that the one of these two men who remained longer committed the murder and robbery. The effort of the defense was to show that Bowman left the scene first. Its weakness was in the fact, which was established beyond dispute, that at a point 40 or 50 yards from the place where the crime was committed, and when they were both running to effect their escape, Bowman was behind Metzgar. His explanation was that he had stopped to see what Metzgar was doing, and had been overtaken by him. The occurrences of which the witnesses spoke were distinct, and it is only by blending them into one that any uncertainty or doubt arises. Three witnesses testified to

what took place at the time the shots were fired, and two to the position of the parties at the time of their flight. It was of the latter that the learned judge spoke. If all of these witnesses had testified as they were erroneously stated to have done, the defense would not have been weakened thereby, as there would have been no necessary conflict in their testimony, and their statements would have corresponded exactly with that of the appellant. A misstatement in the charge of material evidence, which may have injured the accused, is ground for reversal; and it need not appear that it did prejudice the defense; it is sufficient if it may reasonably have had such an effect. But there is no ground for reversal where the error is harmless, and could not have misled the jury. It is unnecessary to consider the remaining assignments in detail. We find no adequate reason for sustaining any of them. The trial was carefully conducted, and the charge contains a full and fair presentation of the defense. The judgment is affirmed, and it is directed that the record be remitted, in order that the sentence may be carried into execution according to law.

BARNSDALL v. BARNSDALL.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)

DIVORCE—CRUEL AND BARBAROUS TREATMENT.

1. Act May 8, 1854, authorizing the grant of a divorce on the application of the husband where the wife has by cruel and barbarous treatment of him rendered his condition intolerable, or life burdensome, does not require that the acts of the wife shall be such as to endanger the husband's life.

2. In determining whether there was cruel and barbarous treatment within the meaning of the statute, the whole conduct of the wife towards her husband during the period of the alleged ill treatment should be considered, and evidence descriptive of it is admissible.

Appeal from court of common pleas, McKean county; A. G. Olmsted, Judge.

Petition by Theodore N. Barnsdall against Louisa A. Barnsdall for a divorce. From a decree for defendant, libellant appeals. Reversed.

Berry & Edgett, M. F. Elliott, and Mullin & Mullin, for appellant. R. B. Stone, for appellee.

MCCOLLUM, J. The learned judge of the court below thought the libellant was not entitled to a divorce from his wife under the act of May 8, 1854 (P. L. 644), unless he showed that her treatment of him endangered his life. While this was his view of the law governing the case, he considered that the respondent had done all she could to render the condition of the libellant "miserable and wretched," and that it would be better for them and the public if they were divorced. In short, the learned judge would have gladly submitted the case to the jury

if he had believed the evidence was sufficient to carry it there, and he would have done so in the hope of a verdict that would have authorized a severance of the marital relation between the parties. These conclusions are drawn from the charge, in which the reasons for a peremptory instruction to the jury to find for the respondent were clearly stated. While we do not question the soundness of his views respecting the conduct of the respondent, we cannot concur in his construction of the statute under which the proceeding was instituted. This statute expressly authorizes the court of common pleas of the proper county to grant a divorce on the application of the husband, where his wife has, by cruel and barbarous treatment of him, rendered his condition intolerable, or life burdensome. The cruel and barbarous treatment mentioned in the statute includes acts which endanger life, but it is not restricted to them. It is sufficient that the wife's treatment of her husband renders his condition intolerable, and his life burdensome. *Jones v. Jones*, 66 Pa. St. 494, and *Hellbron v. Hellbron*, 158 Pa. St. 297, 27 Atl. 967. In the case before us the libel, as amended, conforms to the provisions of the statute under which the proceeding was instituted, and the material averments in it are flatly denied by the answer. The respondent desiring to have the issue thus formed tried by a jury, it was so ordered by the court, and a trial was had, which resulted as above stated. We do not deem it necessary to consider separately each specification which calls in question the rulings upon offers of evidence. These rulings appear to have been influenced by a construction which, as we have already seen, was erroneous. We think it is clear that in cases of this character whatever directly tends to show a course of treatment which renders the condition of the libellant intolerable, and his life burdensome, is admissible. We think, too, that in determining whether there was cruel and barbarous treatment within the meaning of the statute the whole conduct of the wife towards her husband during the period of the alleged ill treatment should be considered, and that evidence descriptive of it should be received. Neither the court nor the jury can intelligently and justly dispose of the case without the assistance which such evidence affords. We are not prepared to say that any error was committed in the ruling complained of in the first specification. The rejected offer suggests a line of inquiry which might create distinctions and produce results not within the letter or spirit of the statute. Besides, we agree with the learned trial judge that it was for the jury, and not for the libellant, to say whether his condition was rendered intolerable, and his life burdensome, by the treatment he received from his wife. To the extent that the rulings complained of are in conflict with the views herein expressed regarding the construction of the act of 1854 and the evidence relevant and ma-

terial to the issue, the specifications are sustained. Judgment reversed, and venire facias de novo awarded.

HALLOWELL v. LIERZ.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)

CONTRACT FOR ADVERTISING—PAROL EVIDENCE—REPRESENTATIONS OF AGENT.

In an action under a written contract for the cost of advertising in plaintiff's theater programme, defendant contended that he signed the contract on the statements of plaintiff's agent that he would furnish him theater tickets, and would change his advertisement when desired. This statement was not in the written contract when signed by defendant, but the agent stated to defendant that he had entire control of the matter. The contract contained a positive notice that the proprietors of the programme were not bound by any agreement other than that expressed upon the face of the contract, and stated that no verbal agreement would be recognized, and the contracting parties were plaintiff and defendant. *Held*, that the defense based on such statements by plaintiff could not prevail, as it would involve the alteration of a written instrument by parol.

Appeal from court of common pleas, Philadelphia county; Thomas K. Finletter, Judge.

Action by C. E. Hollowell, trading as Hollowell & Co., against Henry Lierz, upon a written contract for advertising in the National Theater programme, of which plaintiff was the owner and publisher. From a judgment for defendant, plaintiff appeals. Reversed.

J. Martin Rommel, for appellant. J. Campbell Lancaster and Wm. Henry Lex, for appellee.

GREEN, J. The defendant resists payment of the plaintiff's claim because he says the plaintiff's agent promised to send him two theater tickets every week, and said that he could change his advertisement whenever he wanted to. This was not contained in the written contract, and the defendant testified that, when he called the attention of the agent to the omission, the latter replied that he was the "boss of the programme," and "I am the man who is running this business." It is apparent, therefore, that the omitted part of the contract was not left out of the instrument by any mistake or by any fraud. The defendant knew it was not in before and at the time he signed it, and he accepted the agent's assertion that he was the "boss" as a sufficient provision for the absence of the omitted term of the contract. But the contract contained on its face in plain words a positive notice that "the publishers are not bound by any agreement other than that expressed on the face of this contract"; also the words, "No verbal agreement recognized." And the contracting parties were "Hollowell & Co., Publishers," and "Henry Lierz." The contract was a direction to Hollowell & Co., signed

by Lierz, to insert his advertisement in the National Theater programme for 40 weeks, at \$2 a week. The defense was that the agent who made the contract said he was the "boss of the programme," and that he agreed to send the defendant two theater tickets weekly, and that the defendant might change his advertisement whenever he wished, nothing of which appeared in the contract, and the whole of which was supported only by the oath of the defendant, and flatly contradicted by the other party. To allow such a defense to prevail against such a contract, and in the circumstances stated by the defendant, would be simply to revolutionize the law as to the alteration of written instruments by parol as it has been settled by all our modern cases. In *Thomas v. Loose*, 114 Pa. St. 35, 6 Atl. 326, we refused to permit just such a defense to be made to a written contract, which contained a similar notice to the one appearing on this instrument. In an elaborate opinion by our late Brother Trunkey, the whole subject was reviewed carefully, and the judgment was reversed, because the court below had permitted the parol testimony to go to the jury in circumstances very like the present. The assignments of error are all sustained. Judgment reversed, and new venire awarded.

BLOOD v. CREW LEVICK CO. (two cases).

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

SALE OF LAND—ASSUMPTION OF MORTGAGE—LIABILITY OF VENDEE.

1. A clause in a deed reading, "It is hereby agreed between the parties" that the party "of the second part accepts the title to the" land and oil rights described, "subject to the payment of the mortgages" above mentioned, "but does not assume the payment of the various outstanding notes given for the debts secured by said mortgages," is in effect a covenant by the purchaser to pay the amount due upon the mortgages without the duty of haunting up the notes and paying the same to the holders, so that the payment to the holder of the mortgage should discharge their obligation.

2. An action may be brought in the name of the covenantee, upon such covenant, to the use of the party entitled to receive the money.

3. One purchasing "under and subject to the payment of" a mortgage given by his vendor is a purchaser, as between himself and his vendor, of the entire estate, and is liable to pay the mortgage as part of the purchase money.

4. Where the deed is made subject to the lien of a mortgage the land is primarily liable for the payment of the mortgage money, and its value must be fairly and in good faith applied to that purpose.

5. The vendor of land "under and subject to the lien of" a mortgage has no right of action against the purchaser on account of such stipulation until he has actually paid the mortgage debt, or until the land has been withdrawn from the reach of the holder of the mortgage, and the fact that the holder of the mortgage is indebted to the vendor in an amount greater than the mortgage debt is immaterial.

Appeal from court of common pleas, Warren county; Charles H. Noyes, Judge.

Action by Clara S. Blood, executrix of A. R. Blood, deceased, against the Crew Levick Company. From the decree rendered both parties appeal. Affirmed.

The agreement as to facts and case stated was as follows: "And now, May 31, 1894, it is hereby agreed by and between the parties to the above-entitled case that the following case be stated for the opinion of the court, in the nature of a special verdict: That prior to May 18, 1891, A. R. Blood, the plaintiff's testator, had purchased and was in possession of several estates of freehold and leasehold in certain oil-producing lands in Mead township in said county. That in the purchase of some of said freeholds and leaseholds he had given his negotiable promissory notes for the purchase money, which were secured by mortgages on said freehold and leasehold estates respectively. That upon a certain freehold estate thus purchased by said A. R. Blood from P. J. Bayer and W. E. Rice there remained unpaid by him May 1, 1891, \$21,974.86 of the purchase money, with interest from September 1, 1890, payable in monthly installments of \$520.83 each, secured by mortgage upon the property conveyed. That upon a leasehold estate so purchased from C. W. Scofield by E. J. Lesser for said A. R. Blood there was on May 1, 1891, an unpaid balance of purchase money of \$38,750, with interest from October 3, 1889, payable in monthly installments of \$1,250 each, for which payments the said Blood was personally liable by reason of his indorsement of the notes given to Scofield by said Lesser to the order of said Blood for the said monthly installments. That on the 19th day of May, 1891, said A. R. Blood, by two deeds, conveyed the said freehold and leasehold estates respectively, along with others, to the defendant company, copies of which deeds are hereto attached, marked Exhibits A and B, and submitted to the court as part of this case stated. That in addition to the consideration of one dollar, as stated in each of said two deeds, the defendant gave the said A. R. Blood, as a consideration, a certain amount of its capital stock. That said defendant accepted said deeds and entered into and took possession of said lands, and from time to time, until about the 1st of February, 1892, paid the promissory notes secured by said mortgages as they fell due, but since said last-mentioned date has refused to make further payments thereon. That there remains due and unpaid upon the mortgage to P. J. Bayer and W. E. Rice the sum of \$17,708.22, with interest from September 1, 1890, and there remains due and unpaid upon the mortgage to C. W. Scofield the sum of \$6,650, with interest from October 3, 1889. That at the time the said property was conveyed by the said P. J. Bayer and W. E. Rice to the said A. R. Blood the said A. R. Blood executed upon the same a mortgage in the sum of

\$25,000 to secure notes of that amount made by said A. R. Blood. Under proceedings on the said mortgage the said premises were sold at sheriff's sale, subsequently to the conveyance, to the defendant. That the plaintiff on the 1st of February, 1894, settled the said claim of P. J. Bayer and W. E. Rice by giving them in payment of their claim against said estate fifty shares of the capital stock of the defendant, of the par value of five thousand dollars, and the notes of A. R. Blood to them, secured by said mortgage, have been given to plaintiff. That the plaintiff has not yet paid or settled for the claim of C. W. Scofield for \$6,650. That the said A. R. Blood died December 1, 1891, insolvent, and said Scofield is insolvent, and indebted to the estate of the said A. R. Blood to the amount exceeding \$6,650. If the court should be of the opinion upon the facts submitted that the plaintiff is entitled to recover from the defendant the entire balance remaining due and unpaid upon the mortgage to Bayer and Rice, then judgment to be entered in favor of the plaintiff for \$17,708.22, with interest from September 1, 1890, and if the plaintiff is only entitled to recover amount paid by her to Bayer and Rice, in settlement of their claim, the judgment to be entered for the plaintiff in the sum of \$2,500, with interest from February 1, 1894. And, if the plaintiff is entitled to recover the amount remaining due and unpaid upon the mortgage to C. W. Scofield, then judgment to be entered in favor of the plaintiff for \$6,650, with interest from October 3, 1889; but, if the plaintiff is not entitled to recover on any of the above-stated grounds, then judgment for defendant, costs to follow judgment. And either party entitled to appeal to the supreme court."

Allen & Sons and Theodore F. Jenkins, for appellant. Samuel T. Neill, for appellee.

WILLIAMS, J. These appeals may be most readily considered together, as they are from the same judgment. The action was assumpsit. The plaintiff's right to recover depended on the following facts and circumstances, which appear in a case stated filed in the court below: The plaintiff is the widow and executrix of A. R. Blood, deceased. Prior to the 18th day of May, 1891, Blood was the owner of certain oil properties situated in Mead township, Warren county. On that day he sold these properties in two blocks. Of the several properties included in one of these blocks he was the freehold owner. Of those included in the other block he was a lessee. In the purchase of the several pieces that made up these blocks he had undertaken to pay the purchase money in installments running over considerable time. He had given to his vendors his promissory notes for these installments, and secured each batch of notes by a mortgage on the property purchased, conditioned for the payment of the notes that

represented the purchase money. The freehold estates, or some of them, had been purchased from Bayer and Rice, who held a mortgage upon the lands sold by them, covering and securing the notes given to them by Blood for the purchase money. The leasehold estates were bought from Scofield, who held notes secured by a mortgage for the unpaid purchase money due to him. The deed made by Blood to the defendants for the property held by him in fee was made "under and subject to the lien" of the mortgages for the unpaid purchase money due from Blood to his vendors. But to settle all question about the duty of the purchasers the following stipulation was also incorporated into the deed: "It is hereby agreed between the parties to this instrument that the said party of the second part accepts the title to the foregoing and described pieces and parcels of land and all rights subject to the payment of the mortgages herein above mentioned, but does not assume the payment of the various outstanding notes given for the debts secured by said mortgages." It is well settled that the words "It is hereby agreed" make of the words that follow a covenant. This stipulation is therefore a covenant to pay to the mortgagees the amount due upon the mortgages referred to, followed by a provision that the covenant shall not impose upon the purchasers the duty of hunting up the notes and paying the same to the holders, but that payment to the holder of the mortgage should discharge their obligation. We have then both an implied covenant to indemnify, arising from the "under and subject to the payment of" clause, and an express covenant in the stipulation, beginning with the words "It is hereby agreed," to pay the mortgage debt to the holder of the mortgage. We can see no reason why an action in the name of the covenantee might not have been brought upon it, to the use of the party entitled to receive the money. *Ardesco Oil Co. v. North American Oil Co.*, 66 Pa. St. 376; *Taylor v. Preston*, 79 Pa. St. 436; *Merriam v. Moore*, 90 Pa. St. 78. The purchaser did not keep his covenant. The plaintiff has for that reason been compelled to pay money upon a mortgage which it was the duty of the purchasers to pay under an express covenant with him. To the extent of such payment it is very clear that the plaintiff is entitled to recover in this action. The general rule is that one purchasing under and subject to the payment of a mortgage given by his vendor is a purchaser, as between himself and his vendor, of the entire estate, and is liable to pay the mortgage as part of the purchase money due from him. Thereafter the relation of his vendor to the mortgage is not that of primary debtor, but of surety, the vendee becoming primarily liable therefor. The holder of the mortgage is not bound by an arrangement to which he is not a party, and he may therefore pursue the mortgagor if he

chooses; but in that event the mortgagor is entitled to subrogation, or he may proceed on the covenant of indemnity which the "under and subject to the payment of" clause implies. We must therefore overrule the assignments of error filed on behalf of the defendants below, and affirm the judgment, so far as their appeal is concerned. The general principles applicable to the question involved will be found to be well stated in several cases, among which are *Kearney v. Tanner*, 17 Serg. & R. 94; *Campbell v. Shrum*, 3 Watts, 60; *Burke v. Gumme*, 49 Pa. St. 518; *Metzgar's Appeal*, 71 Pa. St. 330.

A question of more difficulty is presented by the appeal of the plaintiff. The deed for the leasehold estates was made "subject, nevertheless, to all the terms and conditions of the said leases, * * * and under and subject, nevertheless, * * * as to the premises twelfth, thirteenth, and fourteenth above described, to the lien of a mortgage given by E. J. Lesser to C. W. Scofield, dated Oct. 3rd, 1889, * * * upon which there remains unpaid at this date the sum of thirty-eight thousand seven hundred and fifty dollars, with interest thereon from Oct. 3, 1889." This was not understood by the parties to be a sale of the equity of redemption alone, but of the whole estate, the purchaser assuming to pay, as part of the purchase money due to his vendor, the entire sum stated to be due upon the mortgage, to the holder thereof. The vendee was to take the property cum onere, and to perform the covenants and pay the incumbrances made and suffered by his vendor. This the law would require from him. *Sugd. Vend.* 304. It is a principle of equity that one who obtains possession of a leasehold and of the income derived therefrom, by means of an assignment or other conveyance, must indemnify his vendor against the payment of rent, at least so long as he continues to hold the estate. *Walker v. Physik*, 5 Pa. St. 193; *Academy of Music v. Smith*, 54 Pa. St. 130. And this notwithstanding that the conveyance may be silent on the subject. Here, however, the vendees take the estate subject to the rents and to the lien of the mortgage, by a stipulation in the conveyance under which they acquire title. The effect of this stipulation was to make the land primarily liable for the payment of the mortgage money, and to require its value to be fairly applied, without objection and in good faith, to that purpose. A collusive sale, or other trick or artifice by which it is sought to take the land out from under the lien of the mortgage, to the disadvantage of the vendor, is a fraud upon him, which a court of equity will correct. The legal import of the "under and subject to the lien of" clause is that the vendee will discharge the lien of the incumbrance by payment, or in default thereof that the land shall remain liable therefor, and shall be, as between himself and his vendor, primarily liable to the extent of its actual

value. If the mortgage money is more than the value of the land, the vendor will be liable to his creditor for such surplus, and will be without recourse to his vendee for the amount so paid, but if the vendee neglects or refuses to pay, and the holder of the mortgage proceeds, upon the bond or otherwise, against the mortgagor, the implied covenant to indemnify him to the extent of the value of the land is broken, and his vendee is liable to him upon it. As between themselves, as we have already stated, the land, in the hands of the vendee, is primarily liable, and up to the amount of its value the vendor is in the position of a surety, and is entitled to subrogation to the rights of his creditor, in order to enable him to reach the mortgaged premises; or he may avail himself of the implied covenant to indemnify him that grows out of the "under and subject to the lien of" clause. But the mere fact that he is liable as surety is not enough to support an action against his vendee, for by the terms of his conveyance he assumed the inconveniences to which that relation may subject him. He may, however, require the mortgagee to proceed upon the mortgage in the same manner that a surety may do in other cases, and collect the debt out of the land bound by it. If the notice is disregarded, and the debt, or any portion of it, collected from the mortgagor, he may be subrogated to the rights of the creditor, as any other surety might be, for it is against equity that the vendee should be permitted to retain land and escape the burden he had impliedly assumed at the time of the purchase. But in this case, as we understand the facts, the mortgagor has not as yet paid any portion of the mortgage. The case stated informs us that Scofield was indebted to Blood at the time of his death in an amount greater than the mortgage debt. The inference sought to be drawn from this fact is that, when the plaintiff attempts to collect the debt due from Scofield to her husband's estate, he will seek to set off the amount of the mortgage debt upon it, instead of proceeding against the premises in the hands of his vendees. But this has not yet been done. It is by no means certain that it will be. The land has not been withdrawn from the reach of the holder of the mortgage, so far as the case stated informs us, nor has the vendor, the surety, been compelled to pay any portion of the mortgage debt. It is not easy to see, therefore, how he is entitled to proceed against his vendee, either upon the implied covenant, or upon his rights as surety for the mortgage debt.

The learned judge reached a correct conclusion as to the right of the plaintiff to recover for this part of his claim, although we cannot concur in all the views expressed by him. Upon the whole case we hold as follows:

1 That the express covenant in the deed for the freehold estates is not identical with that

which is implied from the "under and subject to the lien of" clause. It goes much further. It is an express covenant to pay.

2. The plaintiff's right to recover, as to this part of his claim, may safely rest on the implied covenant growing out of the "under and subject to the payment of" clause, or upon the express covenant introduced by the words, "It is hereby agreed between the parties to this instrument."

3. As to the amount still due and unpaid on the mortgages on the freehold estates, the plaintiff cannot recover to her own use until she has been compelled to make payment, and then only to the extent of the payments actually made. An action might be maintained by the holder of the mortgage, in the name of the covenantee, for his use, upon the express covenant to pay contained in the deed; and I see no reason why an action might not be brought by the covenantee to recover damages sustained by reason of the breach.

4. As to the mortgage on the leaseholds, the vendor took no express covenant, and must depend on that which the law implies from the "under and subject to the lien of" clause. The effect of the implied covenant is to make the land primarily liable for the mortgage debt, the vendor becoming, as between himself and his vendee, a surety for the sufficiency of the land bound to provide for the payment of the mortgage. The vendee undertakes, on the other hand, that the land shall remain liable to seizure and sale for the payment of the mortgage debt, and that he will do no act that shall tend to withdraw it from the reach of the creditor, or prevent the fair application of its full value to the debt, if that should be necessary to its payment.

5. The act of 1878 plays no part in this case. The action is not brought by the holder of the mortgage to assert a personal liability against the vendee, and for that reason the act does not apply. *Lennox v. Brower*, 160 Pa. St. 191, 28 Atl. 839. But, so far as the mortgage on the freehold estates is concerned, it is an action by the vendor against his vendee upon an express covenant. So far as the mortgage on the leaseholds is concerned, it is upon an implied covenant. The trouble does not grow out of the act of 1878, but out of the fact that as to the mortgage on the leaseholds the implied covenant does not seem to have been broken.

The facts contained in the case stated are not as full as might be desired, but they do not show that the plaintiff has been compelled to pay the leasehold mortgage, or any part of it, either in money, or by an application of it to the extinguishment of any demand due to the estate of her deceased husband, nor that the land has been withdrawn from the reach of the holder of the mortgage. For these reasons the judgment must be affirmed.

BLOOD v. CREW LEVICK CO.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

SALE OF LAND—ASSUMPTION OF MORTGAGE—REMEDY IN EQUITY.

A bill reciting the sale to defendant by plaintiff's testator of certain property, by which sale it became defendant's duty to pay certain mortgages upon such property and to save harmless the estate of said testator therefrom, and that defendant has not done this, but that the holders of said mortgages have threatened to proceed against the said estate for the mortgage debts, does not state a cause of action entitling plaintiff to relief in equity.

Appeal from court of common pleas, Warren county; Charles H. Noyes, Judge.

Bill by Clara S. Blood, executrix of the estate of A. R. Blood, deceased, against the Crew Levick Company. From a decree for defendant, plaintiff appeals. Affirmed.

R. & H. E. Brown and Samuel T. Neill, for appellant. Allen & Sons and Theodore F. Jenkins, for appellee.

WILLIAMS, J. The relief sought in this case is specific execution. The bill recites the sale by A. R. Blood to the defendant of the same pieces of oil property that were conveyed by the two deeds considered in an action of assumpsit between the same parties, in which an opinion has just been filed. 33 Atl. 344. It sets forth the existence of the mortgages on the properties conveyed by the deed in fee simple, as also those resting on the leaseholds which were conveyed by a separate deed. It alleges that under the terms of these deeds it became the duty of the defendant to pay all the mortgages enumerated, and to save harmless the estate of the said A. R. Blood therefrom; that this has not been done, but that the holders of said mortgages have threatened to proceed against the said estate for the collection of the said mortgage debts. Upon these facts it asks an ascertainment of the amount due upon the unpaid mortgages, and "that it [the defendant] be ordered and directed to pay the said balance and to protect the estate" of the said A. R. Blood from being called upon for the mortgage money. The defendant demurred to the bill as setting forth no cause of action cognizable in equity, and the learned judge of the court below entered judgment in favor of the defendant in the demurrer. Our question is therefore whether the bill states a case that entitles the plaintiff to relief in equity. As to the first deed, we have held in the case just referred to that the deed contained an express covenant to pay the mortgages enumerated therein, upon which an action would lie in the name of the covenantee for the use of the beneficiary, if proceedings upon the mortgages failed to realize the full sum due upon them, and upon which the plaintiff could sustain an action for the recovery of any sum or sums which she had been compelled to pay by reason of the defendant's default. So far as that part of the cause of action is concerned which rests on what has been called the "Free-

hold Deed." "the remedy is at law, upon the facts stated in the bill, and not in equity." So far as that part of the cause of action is concerned that rests on the deed for the leasehold estates, there is no remedy in equity or at law until the plaintiff has been compelled to pay. This deed contains no express covenant, but conveys "under and subject to the lien of" the mortgages enumerated. The effect of this clause has been fully considered in the opinion already referred to, and it is not necessary to repeat what was then said. The learned judge was right in sustaining the demurrer and dismissing the bill, and the decree is affirmed; the appellant to pay the costs of this appeal.

BLOOD v. CREW LEVICK CO.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

SALE OF LAND—ASSUMPTION OF MORTGAGE—CONSTRUCTION OF DEED.

A clause in a deed recited, "it is hereby agreed between the parties" that the "party of the second part accepts the title to the" land and oil rights described, "subject to the payment of the mortgages" above mentioned, "but does not assume the payment of the various outstanding notes given for the debts secured by said mortgages." Held, that this was a covenant by the purchaser to pay the amount due upon the mortgages, on which the vendor could sue to the use of the party entitled to receive the money.

Appeal from court of common pleas, Warren county; Charles H. Noyes, Judge.

Action by Clara S. Blood, executrix of A. R. Blood, deceased, in part for the use of the Brown Oil Company, against the Crew Levick Company. From a judgment for defendant, plaintiff appeals. Reversed.

For statement of facts, see *Blood v. Crew Levick Co.*, 33 Atl. 344.

R. & H. E. Brown and Samuel T. Neill, for appellant. Allen & Sons and Theodore F. Jenkins, for appellee.

WILLIAMS, J. This is an action brought upon the express covenant in the deed conveying the freehold properties sold by A. R. Blood to the defendant. In so far as it is for the use of the holder of either of the mortgages enumerated in said deed, it is properly brought and the use plaintiff is entitled to recover, so far as this record enables us to judge. We have no doubt that the defendant's express covenant to pay, the effect of which was considered in an action between these parties in which an opinion has just been filed (33 Atl. 344), may be enforced by action resting thereon brought in the name of the covenantee for the use of the holder of any one of the said mortgages. Without repeating what was said in the opinion referred to, we are satisfied that the court took too narrow a view of the effect of the covenant in the deed for the freehold properties. The judgment is therefore reversed and the record remitted, so that judgment may be entered in favor of the use plaintiff for the amount due to it upon the mortgage held

by it, unless other legal or equitable cause be shown to the court why such judgment should not be entered.

CAPITAL CITY MUT. FIRE INS. CO. v. BOGGS.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)

STOCK ASSESSMENT—LEVY BY RECEIVER—COLLATERAL ATTACK—AFFIDAVIT OF DEFENSE.

1. An order of court authorizing the receiver to make an assessment equal to the sum of prior assessments does not authorize him to include a penalty for the nonpayment of a previous assessment by an individual member of the company.

2. An order authorizing a receiver of a mutual insurance company to make a specific assessment on a policy, if within the jurisdiction of the court, cannot be questioned in a collateral or ancillary proceeding.

3. In an action for money due on an assessment levied by the receiver of a mutual insurance company, an affidavit of defense averring that defendant was never a member of the company, because his acceptance of a policy was induced by fraud, and that no equities in other parties have intervened which require him to be held liable, and that the losses for the payment of which the assessment is levied occurred before his policy was taken out, is sufficient.

Appeal from court of common pleas, Butler county; John M. Greer, Judge.

Action by John A. Kramer, receiver of the Capital City Mutual Fire Insurance Company against H. C. Boggs, for the recovery of three several assessments, numbered 2, 3, and 4, levied by such receiver upon a policy of insurance issued to said Boggs by the company. From a judgment for defendant, plaintiff appeals. Affirmed.

Assessment No. 2 was levied by the officers of the company before the appointment of the receiver, and assessment No. 3 was levied by the receiver on his own volition, and, on refusal to pay these assessments, penalties amounting to \$15 were added thereto, under the provisions of the policy. Assessment No. 4 was levied by the receiver, pursuant to authority granted by court permitting the receiver to levy an assessment equal in amount to all other assessments theretofore made.

J. C. Durbin and Joseph B. Bredin, for appellant. Lev. McQuistion, J. C. Vanderlin, and McJunkin & Galbreath, for appellee.

MITCHELL, J. The statement does not entitle plaintiff to a judgment, because it fails to show a complete right to recover the sum claimed. It sets out the order of the court of common pleas of Dauphin county, authorizing the receiver to levy an assessment "equal in amount to all other assessments heretofore levied." This, of course, means all assessments theretofore legally and properly made. The statement then enumerates three prior assessments, two of them made by the board of directors in accordance with the by-laws, the third by the receiver, and then a fourth by the receiver,

under the order of court referred to. No authority in the receiver to make the third assessment is shown, unless it is to be inferred from the general language of the act of May 1, 1876, § 49 (P. L. 67), the adequacy of which is doubtful. But, even conceding the receiver's power as to the third assessment, the fourth is excessive. It is for \$75, being equal in amount to the second assessment of \$30, the third of \$30, and \$15 penalty for failure to pay said assessments within 30 days after notice. For this last item there is no warrant in the order of court, which authorizes only an amount equal to the prior assessments, and does not include penalties or other debts which may be owing by individual policy holders. While the order of court is sufficient authority for what it covers, it must be strictly followed, and the receiver cannot go beyond its terms. On the face of the statement, the fourth assessment should not have exceeded \$60.

Turning now to the affidavit of defense, the objections set up to the incorporation and entry into business of the company, its failure to comply with the requirements of the insurance department, and the purposes and necessity of the last or fourth assessment, are not maintainable as to that assessment. The common pleas of Dauphin county, on the relation of the attorney general, had taken charge of the affairs of this company, appointed a receiver, and authorized him to make a specified assessment. That order was within the jurisdiction of that court, and was conclusive of all prior matters involved in it. It cannot be questioned in any collateral or ancillary proceeding, such as the present. As to the second and third assessments, the rights of the receiver are no greater than those of the company, and the defendant may make all defenses that he might have made if the action had been brought by the latter to its own use; but, as to the fourth assessment, the necessity and amount are concluded. But even as to the last assessment the rest of the affidavit set up a valid defense. The order of the Dauphin county court is conclusive upon the validity and the amount of the assessment, but it does not touch the liability of the defendant to pay. It could not do so, as he has not been heard, and therefore cannot be concluded as to defenses which are personal to himself. The affidavit avers that defendant was never a member of the company, because his application for and acceptance of a policy were induced by fraud on the part of the company's agent; and (to meet the rule in *Dettra v. Kestner*, 147 Pa. St. 566, 23 Atl. 860, and *Howard v. Turner*, 155 Pa. St. 349, 26 Atl. 753) that no equities in other parties have intervened which require him to be held; and, further, that the losses for the payment of which these assessments were levied occurred before defendant's policy was taken out. In the absence of any special agreement or clause of the by-laws, such as existed in In-

insurance Co. v. Stauffer, 125 Pa. St. 416, 17 Atl. 471, defendant would not be liable for such losses. These defenses are upon individual grounds, which were not concluded by the order of the Dauphin county court, and on which, therefore, defendant is entitled to a hearing. *Akers v. Hite*, 94 Pa. St. 394; *Insurance Co. v. Humble*, 100 Pa. St. 495; *Hoffman v. Whelan*, 160 Pa. St. 94, 28 Atl. 498. Judgment affirmed.

MILLER v. ROYAL FLINT GLASS WORKS et al.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)

JUDGMENT BY CONFESSION—ENTRY ON WARRANT—NOTE SIGNED BY PARTNER—EFFECT ON FIRM.

1. Act Feb. 24, 1806, requiring the prothonotary to enter a judgment by confession on a warrant of attorney "against the person or persons who executed the same," does not restrict him to the names appearing in full on the face of the warrant, but he may inquire who are the legal makers of the instrument liable thereon, though they did not put their own hands to it, and their names do not appear on its face.

2. If one partner sign and seal an instrument in the firm name with the assent of the other, the latter is as much bound as if he had signed and sealed it himself.

3. A promise by a partner to pay his part of a note signed in the firm name, and containing a warrant for the confession of judgment, is evidence of knowledge by him of the existence and nature of the note, and of assent to it in the form in which it stood.

4. Appellant cannot complain that, in answering a request by the jury for further instructions, the court directed the reading of only a portion of certain testimony, unless he at the time asked for the reading of such other part as he thought relevant and material.

Appeal from court of common pleas, Beaver county; John J. Wickham, Judge.

Proceeding by William Miller against the Royal Flint Glass Works, Henry Wagner, and others, by confession of judgment by warrant of attorney on a judgment note. The judgment was afterwards opened, and defendant Wagner permitted to defend. From a judgment against him, rendered on a verdict, he appeals. Affirmed.

The note was as follows: "\$326.00. West Bridgewater, Pa., May 7th, 1883. One day after date we promise to pay to the order of William Miller eight hundred and twenty-six dollars, without defalcation, value received. And further, we do hereby empower any attorney of any court of record within the United States or elsewhere to appear for us, and, after one or more declarations filed, confess judgment against us, as of any term, for the above sum, with costs of suit and attorney's commission of — per cent. for collection and release of all errors, and without stay of execution; and inquisition and extension upon any levy on real estate is hereby waived, and condemnation agreed to, and the exemption of personal property from levy and sale on any execution hereon is also hereby expressly waived, and no benefit of exemption be claimed under and

by virtue of any exemption law now in force, or which may be hereafter passed. Witness our hand and seal: Royal Flint Glass Works. [Seal.] J. Elsoffer, Treasurer. [Seal.] William McKibben, President."

John M. Buchanan and Wm. A. McConnel, for appellant. Thomas M. Henry and Jennings & Wasson, for appellee.

MITCHELL, J. The duty of the prothonotary in entering a judgment by confession on a warrant of attorney, under the Act of February 24, 1806, is to enter it "against the person or persons who executed the same," but this does not restrict him to the name or names appearing in full on the face of the warrant. If it did, then a confession by a partnership in the firm name only could never be entered up so as to be a valid lien against subsequent creditors. *York Bank's Appeal*, 36 Pa. St. 458. In *Overton v. Tozer*, 7 Watts, 331, the warrant was signed "T. C. Smart, Jr., & Co.," and was executed solely by Marshall, one of the partners; but the validity of the judgment was held to depend on the authority of Marshall to sign for the others. The prothonotary, therefore in entering the judgment, may inquire who are "the persons who executed the warrant," in the sense of who are the legal makers of the instrument liable thereon even though they did not put their own hands to it, and their names do not appear on its face. In the present case the note was made in the firm name, which did not disclose the individual names of the partners. The plaintiff's attorney filed a formal declaration against the partnership by its title, and naming the individual members, and the judgment was confessed by him, and entered by the prothonotary in this form. There was nothing irregular on the face of it, and the court below was not bound to strike it off. The appellant having made affidavit that the note was made, and the judgment confessed, without his authority, the court opened it, to let in this defense. This was all that appellant was entitled to ask. At the trial the issue turned entirely on a question of fact, whether Elsoffer and McKibben had authority from the appellant, either at the time, or by subsequent ratification, to make the note. That appellant was a member of the firm, and was liable for the original debt to the plaintiff, was not disputed. In *Fitchthorn v. Boyer*, 5 Watts, 159, it was held that if one partner sign and seal an instrument in the firm name, with the assent of the other, the latter is as much bound as if he had signed and sealed it himself, and his assent can be proved by "any of the usual modes of evidence." And this rule has never been departed from. *Kramer v. Dinsmore*, 152 Pa. St. 264, 25 Atl. 789.

The portions of the charge contained in the third and fourth assignments of error

are in exact accord with the settled rule above referred to. The learned judge told the jury explicitly that there was no implied authority in his partners to bind appellant by such a note, but that, if he knew and assented to it, he would be bound. He further instructed the jury that, although appellant did not know of the giving of the note at the time, yet, if he subsequently assented to and ratified it, he would be equally bound. In this there was no error. There was a conflict of testimony as to the principal act of ratification alleged, the appellant claiming that he had only agreed to pay his pro rata share of the debt, while the plaintiff testified that the agreement was to pay his share of the note. The learned judge called the attention of the jury specifically and clearly to this difference, and left it to them to say which was the truth. He could not have done otherwise. Appellant's promise to pay his part of the note, if the jury found that such was his promise, was certainly evidence of knowledge of its existence and its nature, and of assent to it in the form in which it stood. Even if he was ignorant of the legal effect of such a note, in making him liable with the others for the whole debt, that would be an ignorance of the law, and not a want of knowledge of the facts which would deprive his act of its force as evidence of ratification.

The eighth assignment is without merit. The jury came in for further instructions. The question they asked does not appear in the record, but the judge, after having directed the reading of a brief portion of appellant's testimony by the stenographer, gave some further instructions upon it, and then asked if that sufficiently answered their question, to which the jury assented. There was no error apparent in this. If the appellant thought the part of the testimony read was an inadequate response to the jury's request, he should have asked for the reading of such other part as he thought relevant and material. Judgment affirmed.

FREDONIA NAT. BANK v. COLLINS.

PERRIN et al. v. WATERHOUSE.

Supreme Court of Pennsylvania. Nov. 4, 1895.)
MORTGAGED PROPERTY—PARTIAL SALE—APPLICATION OF PROCEEDS—RIGHTS OF PURCHASER.

The owner of land subject to a mortgage sold timber thereon, with the knowledge of the mortgagee, and without interference from him, and the notes given for the price were deposited with the cashier of a bank for collection, and were paid by the purchaser to the bank. The land was then being operated for oil, and by arrangement between the landowner and the holders of the mortgage notes the proceeds of the oil were being paid to the cashier, to be applied on the mortgages. The purchase money for the timber was handed by the cashier to the landowner. Held, that the fact that the latter used such money in paying the costs of operating the land for oil did not raise an equity to have it treated as if it had been applied directly to the

payment of the mortgage, so as to release the timber from the lien thereof, the landowner having the absolute control of the money and the right to use it as he wished.

Appeal from court of common pleas, Forest county; Charles H. Noyes, Judge.

Actions by the Fredonia National Bank, assignee of J. A. Waterhouse, against H. P. Perrin and A. Borden, and by H. P. Perrin, A. Borden, and H. J. Pemberton against J. A. Waterhouse and W. B. Hooker, to foreclose certain mortgages, in which Truman D. Collins was permitted to appear and defend as terre-tenant. From judgments for plaintiffs, said Collins appeals. Affirmed.

T. F. Ritchey and Samuel T. Neill, for appellant. M. H. Byles, P. M. Clark, and D. I. Ball, for appellees.

MITCHELL, J. Though the transactions involved in these cases were somewhat complicated, the really essential facts may be stated in brief compass: Waterhouse was the owner of the premises in question, subject to the mortgages now in suit. There appears also to have been a prior mortgage to Pratt and Phillips, with which we are not now concerned. In September, 1891, Waterhouse sold the timber on the mortgaged land to Collins, the appellant. The price was paid by check and notes, which were deposited by Waterhouse with Green, the cashier of the Fredonia National Bank, for collection, and were subsequently paid by appellant to that bank. At that time the land was being operated for oil, and, by arrangement between the owner of the land and the holders of the notes secured by the mortgages, the proceeds of the oil were paid to Green, to be applied to the reduction of the mortgages. The purchase money of the timber was handed over by Green to Waterhouse, and used in defraying the expenses of operating the land for oil. The appellant's claim is that as his money, paid for the timber, was used for the expenses of operating, and thereby increased the profits from the oil, which went to the reduction of the mortgages, it should in equity be treated as if it had been applied directly to that purpose, and the timber thereby released from the lien of the mortgages, in accordance with the principle heretofore laid down in this case in 153 Pa. St. 45, 27 Atl. 855, and 166 Pa. St. 177, 30 Atl. 975, 976. It is not contended by the appellant that there was any express agreement by Waterhouse or Green or the bank to make such application of the proceeds of the timber. The duty to do so must arise, if at all, from the equity of the circumstances; and at this point we are met by the most unsatisfactory portion of the case,—the character and extent of the trust held by Green in regard to the operations on the land and the application of the proceeds. All that the learned judge below was able to find on the subject was that there was "some arrangement," and he expressly says in his supple-

mental finding at the request of appellant that "there is no evidence of the agreement creating [the trust], nor who were the parties to it, nor what were its terms, except the statements of Green as to his understanding of its import as affecting particular matters." The absence of specific evidence on these matters is the appellant's misfortune, for the burden of proving his case rested on him; and without information as to the parties, or the terms of the trust, no chancellor could safely say that the knowledge of Green and of Borden, one of the mortgagees, and their consent to the sale of the timber, raised any duty or any equity that the proceeds should be applied to the mortgages. In the legal aspect of the case the crucial fact is that the money belonged to Waterhouse, and unless a clear equity to the contrary be shown his right to the control and disposition of it cannot be questioned. He was the owner of the land, in possession. He sold the timber, received the check and notes for it, and put them in the bank for collection merely. The money, therefore, was his. Appellant made no stipulation as to the application of it, for he bought without knowledge and without inquiry as to incumbrances. The mortgagees, if they knew of the sale at all, did not interfere. They were not bound, though they would have had a right, to do so, if they thought their security was being impaired. As already said, there is no evidence of any such trust in Green as made it his duty to interfere. Waterhouse's control, therefore, was absolute. He might have used it to pay his personal debts, or he might have directed it to be applied to the mortgages, but he did not do so, and the fact that he used it for operating expenses on the land, standing, as it does, by itself, is not sufficient to raise an equity which we can apply in relief of the appellant. It is a hard case for him, but it is the case of every purchaser of a title subject to incumbrances against which he has not provided. It is hardly necessary to say, that when this case was here before (166 Pa. St. 177, 30 Atl. 975, 976) it was decided on the facts as they appeared in the affidavit of defense. On the trial the appellant failed to establish the principal averment that the proceeds of the timber were paid over to and received by the bank, and the case as now presented fails in its most important point. Judgment affirmed.

JESSOP v. IVORY.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)

WRITTEN CONTRACT — MODIFICATION BY PAROL — FRAUD AND MISTAKE.

1. In an action on a parol agreement by a seller of stock to take back the stock, and refund the price paid, if the purchaser should become dissatisfied, where defendant avers that the only agreement was contained in a written receipt given to the purchaser, and gives evidence

of such a receipt, it is proper to charge that such a receipt would stand as the agreement of the parties, unless it is shown that any part of the agreement was omitted by fraud, accident, or mistake.

2. A receipt signed by one party is not a written agreement incapable of modification by parol evidence.

3. The refusal of a change of venue is not reviewable, except for abuse of discretion.

Appeal from court of common pleas, Armstrong county; Calvin Rayburn, Judge.

Action by C. J. Jessop against R. B. Ivory. From a judgment for plaintiff, defendant appeals. Affirmed.

Neale & Painter and J. M. Hunter, for appellant. M. F. Leason, for appellee.

MITCHELL, J. The main contention of appellant, that the jury should have been directed to find a verdict in his favor, was decided adversely to him when the case was here before. 158 Pa. St. 71, 27 Atl. 840. The plaintiff's action was upon a parol agreement to take back the stock, and refund the price paid, if the purchaser should become dissatisfied, and desire to rescind. The defense was a denial of the contract set up, and, in corroboration of that denial, an averment that the contract was in writing, and contained the only condition on which it was to be rescinded. This paper was not produced, but appellant gave evidence of its contents. The question was, therefore, necessarily for the jury to decide whether the real contract was as the plaintiff or as the appellant claimed. When the case was here before, we were obliged to hold that the court below had not given the writing its proper weight in putting it before the jury, but we said clearly that it was a matter for the jury, with instructions that the writing is presumed to contain the whole contract between the parties, and they must so find unless satisfied by clear and convincing evidence that another part of the agreement was in fact made at the time, but omitted from the writing by fraud, accident, or mistake. The learned judge gave this instruction to the jury by the affirmance of defendant's fourth point. He could not have gone further, and directed for the defendant, because, the writing not being in evidence, the burden of proving its contents was on the defendant, and his testimony on that subject was inferentially, if not expressly, denied by the plaintiff. In this class of cases it is common experience that the lay mind takes a different view from the legal one. Juries nearly always give more weight to the words of the living witness before them than they do to the writings made even by the same witness at another time. It is quite probable that in the present case the verdict was against the weight of the evidence, but it was a question for the jury, they were rightly instructed as to the law, and the correctness of their verdict was for the court below, not for us, to determine.

On the present argument the learned coun-

sel for the appellee called our attention to the fact that the writing in question was not an agreement signed by the parties, but merely a receipt by the defendant, and therefore the rule as to the modification of written agreements by parol evidence should not apply. The distinction is well founded, and, if the verdict had gone the other way, we should probably be obliged to hold, in favor of the appellee, that the rule was laid down too strictly against him. But the substance of the charge, that the writing, when admitted or proved, is presumed to contain the whole agreement of the parties, was entirely correct, and, if the requirements of the evidence to overcome the presumption were stated too strongly, it was an error in appellant's favor which affords him no just ground of complaint.

The other branch of the defense, that, even if the contract was as plaintiff claimed, he had waived his rights by acts of ownership subsequent to the alleged breach, was fully discussed when the case was here before, and he learned judge appears to have followed the opinion of this court closely in his charge and his answers to the points.

The refusal of a change of venue is not reviewable, except for abuse of discretion, of which there is not the slightest hint here. *Felts v. Railroad Co.*, 160 Pa. St. 503, 28 Atl. 33. Judgment affirmed.

BERWIND v. WILLIAMS.

Supreme Court of Pennsylvania. Nov. 4, 1895.)

SALE OF LAND—MERGER—POSSESSORY PROCEEDINGS—EXECUTION OF WRIT—RESTITUTION OF POSSESSION.

1. A written agreement for the sale of land merges all prior equities of the purchaser.

2. After possessory proceedings for land had resulted in a judgment against defendant, and during the pendency of the execution of a warrant for the delivery of possession, the plaintiff agreed to convey the land to defendant if the latter paid him a certain sum in two weeks, defendant to deliver possession if this sum was not paid at that time. *Held*, that this agreement gave defendant merely an option to buy, and was not a bargain and sale of the land.

3. After the sheriff had formally delivered possession of land under a writ therefor, the plaintiff in the writ consented that the defendant should put his goods back on the premises, and continue his actual occupation of the land. *Held*, that the burden of proving that such occupation was the resumption of defendant's former possession, and a reinstatement of his equitable title, divested by the previous proceedings, as upon him.

Appeal from court of common pleas, Jefferson county; E. Heath Clark, Judge.

Ejectment by Edward J. Berwind, substituted for William J. Smith, against William C. Williams and Joseph Clawson. From a judgment for plaintiff, defendant Williams appeals. Affirmed.

The evidence established the following facts, viz.: William C. Williams was the owner of the land now in dispute prior to

the year 1880, and J. U. Gillespie held several judgments against William C. Williams, upon which writs of execution were issued, and the property sold by the sheriff to J. U. Gillespie, to whom a deed was duly executed, dated the 11th day of February, 1880. Williams refusing to deliver up the possession, proceedings to dispossess him were commenced by Gillespie on the 14th day of July, 1880; and on the 21st day of July, 1880, Williams confessed judgment therein, and amicably delivered possession of the land, and entered into a written lease of the same for a period of three months. Williams refused to remove from the premises at the expiration of the lease, and on the 4th day of August, 1881, proceedings were commenced, under the landlord and tenant act; and, during the pendency of the said action, Williams came into the justice's office, by his counsel, and alleged that Gillespie had made a parol agreement with him to take his money and convey Williams the land, and, in pursuance of such agreement, a tender of \$500 in money was made, and to enter into a written agreement of purchase, agreeing to pay the sum of \$3,600,—\$500 in hand, and the balance in payments of \$500 a year, with interest,—which was accepted by Gillespie. To make the tender of \$500, Williams borrowed from William J. Smith the sum of \$200 for a short time, and was to return it the same day. Gillespie accepting the tender, Williams was not able to return the money borrowed from Smith, and, to secure the amount so loaned, Smith went to Gillespie, and purchased Gillespie's title, paying him the \$3,600, less the amount already paid. On the 26th day of April, 1882, William J. Smith entered into an article of agreement with William C. Williams and Anna M. Williams, his wife, to sell them the land upon the same terms and conditions as agreed by Gillespie, thus carrying out the alleged agreement between Gillespie and Williams, and a credit of \$500 was entered upon the contract, being the hand money. On the 11th day of October, 1882, a judgment was entered by confession against William C. Williams, and in favor of M. J. Dinsmore, for use of J. M. Hadden, to No. 122, of May term, 1882, which judgment became a lien upon the equitable interest of William C. Williams, the appellant, in the lands in controversy. On the said judgment a writ of fieri facias was issued to No. 80 of December term, 1885, on which writ the equitable interest of William C. Williams, the appellant, was sold by the sheriff to W. N. Hadden, who received a deed therefor, dated the 21st day of December, 1885, thereby vesting the entire interest of the appellant in the said W. N. Hadden. Hadden, being desirous of having the possession of the land so purchased, gave notice, pursuant with the act of assembly of June 16, 1836 (P. L. 780), after which an information was made in accordance with said act before John St. Clair,

a justice of the peace, on the 29th day of April, 1886, and the said cause was proceeded with to final judgment in favor of W. N. Hadden; and on May 10th a warrant was issued, directed to the sheriff to deliver possession. Pending the execution of the warrant, negotiations were commenced between W. N. Hadden and William J. Smith, the holder of the legal title, for the purchase of Hadden's equity, which resulted in a sale by deed, dated the 12th day of June, 1886, from W. N. Hadden and wife, to W. J. Smith, thereby vesting the entire title in W. J. Smith. The first warrant was returned by direction of the plaintiff, and the case remained until the 8th day of November, 1886. Williams still refusing to deliver the possession, another warrant was issued, directing the sheriff to deliver the possession; and, during the pendency of the execution of the said warrant, William C. Williams, desiring to purchase the land, made the writing of January 7, 1887, with William J. Smith, wherein it was stipulated that, if Williams paid Smith the sum of \$6,000 in two weeks, he (Smith) would convey to him the land; if not paid in that time, he (Williams) agreed to deliver up and remove from the possession of the land. No payment or offer to pay was made by Williams.

G. A. Jenks and Winslow & Calderwood, for appellant. H. Clay Campbell, C. Z. Gordon, W. M. Fairman, and A. J. Truitt, for appellee.

MITCHELL, J. All prior equities of the appellant in the land, whether against Gillespie or Smith, were merged in the agreement of April 28, 1882, and thereupon Smith held the legal title, and Williams an equity, under the terms of that agreement. This equitable title of appellant became vested in Hadden by the sale under execution in 1885; and in June, 1886, Hadden conveyed it to Smith, who thereby became vested with both the legal and equitable titles, discharged of all claims by appellant. The agreement of January 7, 1887, between Smith and appellant, is therefore the starting point of any present equity that appellant may have against Smith or his vendee, the plaintiff. This is virtually conceded by the appellant's fourth prayer, for instruction to the jury that they should render a verdict for the plaintiff to be released on the payment of \$6,000, with interest from January 7, 1887. This agreement of January, 1887, is an agreement by Smith to sell on stipulated terms, but there is no agreement by Williams to buy. The only covenant that it contains on his part is that, if he does not pay the price before the date fixed, he will move out; and to that end he authorizes the sheriff to deliver possession to Smith. To explain this last provision, it is only necessary to recall the situation of the parties at that time. Williams' equitable title had, as already not-

ed, been sold by the sheriff to Hadden, and conveyed by Hadden to Smith; thereby merging it in the legal title previously in Smith. Possessory proceedings before a justice of the peace had resulted in a judgment against Williams, and the sheriff was present, with a writ of habere facias possessionem. Williams, therefore, had no interest in the land; nothing but a bare possession, which had been judicially declared at an end, and which the sheriff was about to terminate in fact. In this situation of affairs, the agreement gave him an option to buy; nothing more, for there was no obligation on his part to do so. It was not a bargain and sale of the land, either present or future, but a stay of proceedings in a writ of possession, upon conditions named, the performance of which was entirely optional on the part of Williams. To take advantage of the option, he was bound to comply with its terms, and this it is conceded he never did.

Down to this point the case is perfectly clear, and shows that the appellant's entire interest in the land was terminated on January 21, 1887, when the sheriff executed his habere facias, and delivered possession to Smith. It appears, however, that the sheriff's delivery of possession was formal only; and, after Williams' goods were set out, he was allowed by Smith to put them back again, and continue his actual occupation of the land. He now claims that such occupation was a resumption of his former possession, and a reinstatement of his equitable title, which had been divested by the previous proceedings. The burden of proof of such claim was, of course, upon him; and, in support of it, besides his own testimony that his original agreement with Smith had never been regarded by either party as abandoned, he produced several witnesses, who testified to declarations by Smith, at times not very definitely fixed, but apparently subsequent to January, 1887, that all he (Smith) wanted out of the land was his money and interest. Against this is the testimony of Smith that at the time of his purchase of the Hadden title, he gave express notice that he was buying now for himself; his positive denial that after that purchase, he ever made any agreement with Williams for the sale of the land except that of January 7, 1887; and his explanation of allowing Williams to continue his actual occupancy of the land after the sheriff's delivery under his writ of possession, on the ground that, it being winter, and Williams having no other place to go, he was allowed to remain until April, on the express agreement to go out then, or remain as tenant, at a rent to be fixed at that time. In this last matter Smith is corroborated by Sheriff Chamberlin. On this evidence, the chancellor, even without reference to the case of April 22, 1856 (P. L. 533), would feel justified in decreeing an equitable title in Williams.

The learned judge below, having given the

proper construction to the agreement of January, 1887, and there being no sufficient evidence before him to show any new equity in appellant, was right in directing a verdict for the plaintiff. Judgment affirmed.

SAGER et al. v. MEAD.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

SALE OF DECEDENT'S LAND—VALIDITY—ADEQUACY OF PRICE—FRAUD.

1. If the sale of decedent's land for the payment of debts is necessary, the parties interested in the estate may furnish the money for the payment of the debts and take deeds for the land in severalty.

2. A deed made and delivered in pursuance of an order of sale granted by the orphans' court, under which possession has been taken, the purchase money paid, and title unquestioned for 18 years, cannot be set aside merely because three witnesses say that in their opinion the property was worth more than the price at which it was sold, when six witnesses say that it brought its full value.

3. A party to proceedings for the sale of land, who continues to keep the benefits derived by her therefrom, cannot attack the sale as fraudulent.

Appeal from court of common pleas, Warren county; C. J. Mayer, Judge.

Ejectment by Elizabeth Sager and others, trustees of the estate of George A. Cobham, deceased, against George Mead. From a judgment for defendant, plaintiffs appeal. Affirmed.

D. I. Ball and Allen & Sons, for appellants. M. F. Elliott, H. McSweeney, Wilbur & Schnur, and Hinckley & Rice, for appellee.

GREEN, J. The land for which the present action of ejectment is brought was part of a large body of land, containing in the whole about 1,000 acres. According to the testimony of all the witnesses on both sides, the great bulk of it was wild land, quite hilly, steep and rocky on the river side, most of the timber cut off in 1872, and according to the testimony of the plaintiffs saving about 150 to 200 acres of cleared and, but according to the testimony of the defendant having at the time only about 100 acres of cleared land, about 60 acres of which was in a good state of cultivation. There was a large frame dwelling house upon it, and quite a large barn. Two witnesses for the plaintiffs, Brassington and Shaler, testified that they thought the whole property, improvements and all, was worth from \$15 to \$20 per acre in 1872. Another witness, Lauffenberger, said he thought the wild land was worth \$10 an acre, but gave no estimate as to the cleared land and improvements. The only remaining witness for the plaintiffs, Sweeting, said he thought he cleared land, including the improvements, would be worth not less than \$7,000 or \$8,000, and, with some reluctance, said he thought the wild land was worth about \$20

an acre. On the part of the defendant, one witness, Irvine, a farmer who had known the property for over 50 years, testified that in 1872 it contained about 100 acres of cleared land, of which about 50 acres were fit for cultivation, the other 40 being plowed over and grown up to briars and sprouts. He said he would not consider the whole property worth over \$3,500 to \$4,000, and gave his reasons for it. Another witness, Wetmore, who had known the property for many years, and whose business was farming and lumbering, said the cleared land was in a poor state of cultivation; that the wild land was very hilly, part of it barren; and that the value of the entire property was not over \$4 an acre. Another witness, Mowris, who had lived in the township since 1865, and had known the property from about 15 years before George A. Cobham's death, said about 100 acres were under cultivation,—not good cultivation, however; that the wild land was rough and hilly and rocky; and that he considered the entire property was not worth more than from \$4 to \$5 an acre. Another witness, Walters, who had known the property for 40 years, said all the choice timber had been cut off before Cobham's death; that not more than 100 acres was cleared, and only 60 acres of that was so it could be plowed, and that was partly stumps and stones; and that the value of the whole property in 1872 was not more than \$4 per acre. Another witness, Eldred, said the cleared land was much grown up with brush; that the most of the wild land was hill land, and that he did not consider it worth anything in 1872, with the timber off; and that he would not have been willing to give \$5 an acre for the whole property at that time. Another witness, Smith, testified that he had purchased and removed all the pine timber, about 400 acres, before Cobham's death, and that another man, named Ballard, had purchased and cut all the oak. He said also that practically all the valuable timber had been cut off before Cobham's death, and that the small and inferior timber that was left was of very trifling value.

This being the condition of the property, a petition was presented to the orphans' court for an order to sell it for the payment of debts of the decedent, by the administrator de bonis non, on December 13, 1871. The order was granted the same day, and on March 6, 1872, the administrator returned to the court that he had sold the land to George N. Parmlee for the aggregate sum of \$4,275, he being the highest and best bidder, upon the terms set forth in the order. The petition set forth "that the available personal assets of the decedent that have come to the hands and knowledge of your petitioner are entirely insufficient to pay the debts owing by said estate, as appears by the accounts and claims duly authenticated and filed with him"; that the whole amount of personal property, after deducting the exemption

claimed and retained by the children, was \$921, and the debts presented and filed with the petitioner amounted to \$5,124.64, leaving a balance over and above the assets of \$4,203.64, besides interest and costs of administration. When this case was here before we held this petition and proceeding to be a sufficient compliance with the law. 164 Pa. St. 131, 30 Atl. 284. An agreement had been made by all the parties then interested in the estate to withdraw from the register the application for the probate of the will; that William M. Lindsey should take out letters of administration on the estate of the deceased, and dispose of the estate for the payment of debts; that George N. Parmlee should purchase the property at the sale, and should hold it for redemption and distribution to and among the parties according to their original rights and equities, in the same way as if the deceased had died intestate. For the purpose of settling all disputes and differences, the whole question of distribution was referred to the final arbitration of three selected gentlemen of reputation and integrity, whose action should be binding and conclusive upon all the parties, and that they should furnish the money necessary to extinguish the indebtedness of the decedent. There were some other details of the agreement, not important to mention. As a matter of course, this agreement and all the proceedings were prepared and conducted under legal advice, the gentleman who acted for the parties in the premises being one of the most distinguished and honorable lawyers of the commonwealth. It will be perceived at once that the foundation of the whole adjustment was the sale for the payment of debts. If that was legal all title under the will would be divested. The fact being that the personal estate was insufficient for the payment of debts, there was no legal difficulty in the way of selling the property under an order of sale out of the orphans' court, and that course was adopted manifestly because it was a clearly legitimate and proper way in which to divest the title of claimants under the will. It is simply impossible to say that there was any fraud either in the conception or execution of such a plan of procedure. If a sale was necessary for the payment of debts the estate could not be settled without doing that very thing, and the mere doing of it is not the slightest evidence of fraud. Hence the chief inquiry in the case is, was the proceeding in the orphans' court for the sale of the property for the payment of the debts of the decedent a valid proceeding? On its face it most assuredly was. The necessary facts to give the court jurisdiction to grant the order appear on the record, and the proceeding was most strictly regular and correct in every respect. It was followed by an account subsequently filed by the administrator, which shows how the entire estate was disposed of. The accountant charged

himself with the whole of the personal estate as contained in the inventory, and which came to him thereafter, and with the whole proceeds of the real estate sold, the total amount being \$5,922.11. Taking credit for the goods and chattels retained by the heirs, \$1,070.70, and the cash paid them, \$738.43, and for the various debts and expenses paid, there was a balance due the accountant of \$21.05. This account was filed on July 9, 1878. So far as any testimony in this case is concerned, no exceptions were ever filed to it, nor was any question ever raised as to its correctness. Under the law it was duly confirmed in regular course during the year 1878, and has remained unimpeached from that time to the time of this trial,—a period of about 16 years. All the parties in interest, including Elizabeth Sager, one of the present plaintiffs, had the opportunity of attacking the sale, but they never did. The question which now arises is, was the sale of that real estate a valid sale? If it was, the plaintiffs have no case.

A very weak and feeble attempt was made on the trial to impeach its validity. A little evidence was given, the purpose of which was to show that there was some personal property more than appeared in the inventory. If the testimony rendered that fact clear, and yet the additional property was not sufficient to yield money enough to pay the debts with, it could not invalidate the sale. But the evidence did not establish the fact. It was said there was some hay not accounted for, but the proof did not support the assertion, nor did it specify the quantity of the hay, nor its value, nor whether it really belonged to the decedent. Mrs. Sager's husband said he told Mr. Lindsey, the administrator, that one Curtis had 100 head of sheep that he took from the deceased on shares, that the sheep mostly all died and that Mr. Cobham had said Curtis should pay him \$400; that Lindsey said Curtis had paid him, without stating any amount. Mr. Lindsey testified that he had collected \$100 from Curtis, and it was charged in the account. Sager also said he told Lindsey that one Laufenberger owed money to the estate. Lindsey testified that he had settled that matter, and it was charged in the account. Sager also said he told Lindsey there was \$5,000 or \$6,000 worth of personal property, and Lindsey says he never told him anything of the kind, or anything else about the amount of personal property on the premises. It is upon such flimsy and worthless testimony as this that it is now asked to invalidate an orphans' court sale of real estate 16 years after it was finally confirmed, when the very witness and his wife and all the other parties acquiesced in it during all that time, and never sought to surcharge the administrator when his account was filed, or at any time after. Of course, the attempt is preposterous.

Then it was sought to prove that the sale was invalid because the real estate was worth much more than the price at which it was

sold. Such a reason would be of no account if it were true, if the sale was properly conducted, although the effort to set the sale aside had been made immediately after the sale. But after 16 years of acquiescence, and after the title had passed under the sale for that length of time, the proposition to declare it invalid for such a reason is ridiculous. There is, however, a still more conclusive reason against it, and that is that the proof does not establish the fact. A large preponderance of the testimony proves that the property brought all it was worth, and it is no answer to say that the jury should have determined this. The question is, shall a deed made and delivered under and in pursuance of an order of sale granted by an orphans' court, under which possession has been taken, purchase money paid, and title unquestioned for 16 years, be set aside and avoided because three selected witnesses say that in their opinion the property was worth more than the price at which it was sold, when six witnesses say it brought all it was worth? There can be but one answer to such a question. No trial judge could permit a verdict setting aside such a deed upon such testimony to stand. It would be his duty, sitting as a chancellor, to pronounce the evidence insufficient for such a purpose, and therefore, as a trial judge, to give a binding instruction to the jury. This is what the learned judge of the common pleas did, with eminent propriety and correctness.

As to the general charge of fraud in the whole transaction, there was absolutely no evidence to support it. If the sale of the property for the payment of debts was necessary, it was entirely competent for the parties interested in the estate to furnish the money for the payment of the debts, and to take deeds for it in severality. The necessity for the sale was adjudged by the court which granted the order, and if the present plaintiff, Elizabeth Sager, or any of the other persons interested, desired to question its validity, then was the time to do it. If, having the opportunity to do so, as they all had, they acquiesced in the sale, and took by and permitted title to be taken, a division of the property into several parcels to be made, and an acceptance of title by each distributee of the parcel allotted, and possession to be taken and maintained for 16 years, such persons cannot now call in question such title. Another reason especially applicable to Elizabeth Sager is that she was herself, together with her husband, a party to the original agreement, and has accepted an allotment of the land according to its terms, and is at this time enjoying the full benefit of its provisions. It would be a scandal upon the administration of justice to permit a person so circumstanced to impugn successfully the validity of an agreement to which she was a party, to the performance of the terms of which by the other parties she assented, and

under which she claimed and received and now enjoys, all the benefits it gives to her. It is no answer to say that she is only acting as a trustee. She cannot in such a matter do as a trustee what she cannot do as an individual. And as to her and both the other trustees, it is enough to say that they were not appointed for any such purpose. In fact they were appointed upon her petition, presumably for the furtherance of her interests. Her petition sets forth that certain moneys which had come into the hands of a receiver appointed by the court of chancery in England, belonging to the estate of her father, could not be distributed to the persons entitled in this country unless trustees were appointed under the will of George A. Cobham, who could properly receive the same and make distribution of them under the will, and for that purpose, and to enable her to get her share of those moneys, these trustees, she being one of them, were appointed. The original trustees were parties to the proceedings under the caveat against the will, and they assented to the withdrawal of the will from probate. Two others subsequently died and two resigned, but neither the whole of them, nor any of them, ever made any attempt to interfere with the family settlement, or with the orphans' court sale. In the exercise of their official functions they evidently never considered it necessary to take any such action. The period of their inaction, therefore, must be counted as laches, as well against their successors as themselves. A period of 16 years without any action must be taken as gross laches, which cannot be condoned by a fresh appointment of trustees. Contemplated, therefore, in any aspect, the case of these plaintiffs is destitute of merit. There was no actual fraud in the original agreement, the orphans' court sale was a valid and effective proceeding to divest all title under the will, and no present allegations against it are sufficient to avoid it or affect it in any way, and the laches in the institution of any proceeding to invalidate the title acquired by the orphans' court sale is such that it cannot now be entertained. As Elizabeth Sager is the one person who can be benefited by a recovery in this case, and as she was a party to all the proceedings now sought to be invalidated, and as she still continues to hold and keep all the benefits which came to her out of those proceedings, she is bound by them if they were not fraudulent, and she cannot be permitted to attack them if they were, either directly by herself or indirectly by trustees appointed at her instance. She cannot be permitted to assert her own fraud and obtain a judicial decree founded thereon.

These considerations make it unnecessary to discuss or decide the question of jurisdiction as to the appointment of the trustees. The assignments of error are all dismissed. Judgment affirmed.

KUHLMAN v. SMELTZ, Mayor, et al.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

ASSESSOR FOR COUNTY PURPOSES — TERM OF OFFICE.

Act May 9, 1889, providing that the qualified voters of each ward in a city of the third class shall elect "a properly qualified person, according to law, to act as county assessor under existing laws, who shall serve for three years," does not establish a new office of county assessor, or provide for the election of a new officer of that name, but merely lengthens the term of the official charged with making the assessment for county purposes to three years, whatever may be his legal title.

Appeal from court of common pleas, Lancaster county; Brubaker, Judge.

Amicable action of mandamus by Marcus Kuhlman against Edwin S. Smeltz, mayor of the city of Lancaster, and another, to determine the right of plaintiff to make the assessment in the Seventh ward of said city for city tax purposes. From a judgment adverse to plaintiff he appeals. Reversed.

Section 29 of the act of April 5, 1867 (P. L. 794), which was an amendment to the charter of the city of Lancaster, declared, *inter alia*, "The office of city assessor is hereby dispensed with." Lancaster is a city of the third class. The act of May 8, 1889 (P. L. 133), authorizes the triennial election of ward assessors in cities of the third class, extending the term of assessors in conformity with the law and usage throughout the state to three years. Prior to the passage of that act there was but one assessor in each of the wards of the city of Lancaster, elected annually, and, by the express terms of the act of 1867, having the power and duty of making the assessment "for state, county, and city purposes." The office of county and city assessor had been consolidated in one person for each ward as assessor for state, county, and city purposes. It was therefore contended by the appellant and plaintiff below that the act of 1889 simply extended his term of office to three years, without in any way restricting or modifying his rights, powers, or duties. The court, however, held that the act of 1889, extending the term of assessor in Lancaster city to three years, was a repeal of the act of 1867, which dispensed with and abolished the office of city assessor, and that its effect was to revive and re-establish the office of city assessor, and to deprive the general assessor of the right to make the city assessment.

Brown & Hensel, for appellant. John E. Snyder and J. W. Brown, City Sol., for appellees.

MITCHELL, J. An officer or tribunal to put an official valuation on property which is called upon to contribute to the public revenue is a necessary part of the equipment of every municipal body having the power of taxation, and such officer has been known in Pennsylvania from the earliest times as

an "assessor." The title occurs in the first act of the laws made by Gov. Fletcher, with the advice and consent of the council and representatives in general assembly at Philadelphia in 1693 (Duke of York's Laws, pp. 221, 222), and has been in use continuously since that time. The act of April 11, 1799 (Smith's Laws, p. 393; 4 Dall. Laws, 508), directs that the "citizens of every ward, township and district within the city of Philadelphia, and the several counties of the state, shall annually * * * elect one citizen to be an assessor for the term of one year, and in 1801 and every third year following two other citizens to be assistant assessors for the term of one year"; the provision for the latter being evidently with reference to the increased labor and importance of the triennial assessment on which the rate for the county levy was to be fixed. This system remains in force, as to its chief features, to the present day. The act of April 13, 1834 (P. L. 511), relating to county and township rates and levies, directs the county commissioners in 1834 and every third year thereafter to issue their precepts "to the assessors of the respective townships, wards, and districts," and another act of the same date (P. L. 552), expressly includes annual assessors and triennial assistants among township officers. Assessors and assistants for boroughs are recognized, and their election provided for by the general borough act of April 3, 1851 (P. L. 325). We have thus gone somewhat back of the actual inquiry in the present case, to get as clear a view as practicable of the state of the law when the act of 1867 was passed. Its general features are as above noted, and the only special provision for Lancaster that we find in Mr. Giles D. Price's very useful Index to Local Legislation in Pennsylvania is an act of April 18, 1853, § 9 (P. L. 531), providing that the voters of the several wards shall elect an assessor for each ward. The act of April 5, 1867 (P. L. 783), is an amended charter for the city of Lancaster, and the twenty-ninth section provides for the election by the qualified voters of each ward of "one person as assessor for state, county, and city purposes," declares there shall be no assistant assessors elected in said city, and repeals so much of any act as authorizes such officers so far as the same may apply to Lancaster, and closes with the enactment that "the office of city assessor is hereby dispensed with." The first observation to be made on this act is the specific dispensing with the office of city assessor. I have not been able to find any previous provision in regard to such officer. The most diligent search of the digests—on which we must rely in such investigations—fails to disclose any trace of his existence by statute, and, if by local ordinance, the paper books fail to give us any reference to it. This point will be taken up again later. The general intent of the section is perfectly plain. It is to secure to the taxpayers of the

city a uniform basis of assessment for city and county purposes, and incidentally to avoid the duplication of officers for identical duties. The section expressly provides for the presentation of the assessment to the city councils for purposes of city taxation, and, as the assessors are "to do and perform within their respective wards all the duties that by the usages and laws of this commonwealth are now enjoined upon the assessors and assistant assessors," they would, of course, receive the precepts, and make return to the county commissioners for county purposes, under the act of 1834 already mentioned. The act of May 9, 1889 (P. L. 139), is entitled "An act to authorize the triennial election of county assessors in cities of the third class," and provides in two short sections that the qualified voters of each ward shall elect a "properly qualified person, according to law, to act as county assessor in each of said wards under existing laws," and vacancies shall be filled by the county commissioners. The real question raised by this act is whether it is intended to create the office of county assessor in cities of the third class, or only to regulate the election to such office where it already existed. And here we are met by the same difficulty as in the act of 1867,—the absence of any such office by name from the law. So far as our researches have informed us, there is not, and never has been, in Pennsylvania, a county assessor by name. The policy of the law has always been to keep the office confined to small localities, with the manifest view of securing an officer who could bring to the discharge of his duties a personal acquaintance with all the properties he was to assess. Accordingly, the act of 1799, above quoted, prescribes the election of assessors in wards, townships, and districts, and, so far as appears, this system has never been altered. The act of 1889 does not in terms provide for the election of a county assessor, but of a person "to act as county assessor"; in this respect being less embarrassing than the act of 1867, which in express terms dispenses with the nonexistent office of city assessor. But the question remains, did the act create a new officer where none existed before, or did it merely use the popular designation of the officer, not with reference to the legal title of his office, but only to the duties to be performed, and was its purpose therefore only to regulate the election—i. e. to lengthen the term—of the officer performing that function, whatever his formal title might be? We are clearly of opinion that the latter was the whole purpose and scope of the act. The objections to the first view are plain and weighty. As already said, the election is not to be of a county assessor, but of a person "to act as" such,—an indirect method of creating a new office, which would hardly be adopted in view of the fact that the office would be a

departure from the settled policy of the state for a century. Then there is no direct prescription of his duties as would be required in the creation of a new officer; and, further, he is "to act as county assessor in each of said wards," showing that his duties, whatever his title, are only intended to be those of a ward officer. Turning now to the other view, we find that it relieves us of most of the difficulties suggested. In the first place, it explains the apparent solecism in the act of 1867, and puts both acts in a clear light, by showing that they used the terms "city assessor" and "county assessor" not as legal titles, but as the popular names of the officers who performed the respective functions of making assessments for city and county purposes. Next, it relieves us of the necessity of holding that the legislature has made a new office, in departure from the traditional policy of the state, by indirection only, and without prescribing its duties. The clause, "elect a properly qualified person, to act as county assessor under existing laws, who shall serve for three years," while indefinite, and altogether inadequate as prescribing the duties of a new office, is sufficiently precise and comprehensive if only meant as an identification, by reference to his duties, of an existing officer, whose term was merely to be lengthened. That this was the purpose of the act is further corroborated by the correspondence in the form of expression with that used in several acts passed in the same session, the object of which was clearly nothing more than the extension of the term. Thus the act of February 14, 1889 (P. L. 7), is entitled "An act to authorize the election of assessors for three years in the several boroughs and townships of this commonwealth," and directs that the qualified voters of every borough and township, and of each ward and district when they have been divided, shall elect an assessor, who shall serve for three years. As these officers already existed in the same territorial divisions, and the act does not prescribe any new duties, but merely directs that they are to "perform all the duties of assessors under the laws," it is plain that the only effect of the new act was to lengthen the term from one to three years. The same form was used, and the same intent is manifest, in the act of February 14, 1889 (P. L. 6), in reference to constables. We are therefore of opinion that the act of May, 1889, did not establish a new office of county assessor, or provide for the election of a new officer of that name, but left the duties of making the assessment for county purposes in the same hands where they were before, and merely lengthened the term of the officials, whatever their legal title, to three years. It did not, therefore, interfere in any other way with the act of 1867. Judgment reversed, and mandamus directed to be issued in favor of appellant as stipulated in the case stated.

BROADHEAD et al. v. CORNMAN.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)
 LEVY ON EXECUTION — POSTPONEMENT TO JUNIOR
 LEVY—STAY OF PROCEEDINGS—INTERVENTION
 OF ASSIGNEE FOR CREDITORS.

The fact that an assignee for the benefit of creditors intervenes, and, by arrangement with the sheriff and a first execution creditor or of the assignor, takes possession, and makes sale of the goods levied on, does not postpone the levy of such creditor to a junior levy, provided the intention of the first execution creditor is not to get security, or hinder other creditors, but merely to realize the full value of the goods levied on, by means of sales by the assignee, for the satisfaction, firstly, of his own execution, and, secondly, of those entitled under the assignment.

Appeal from court of common pleas, Cumberland county; Edward W. Biddle, Judge.

Amicable action and case stated for the opinion of the court between Leon Kahn and William Broadhead and sons, plaintiffs, and Theodore Cornman, defendant, to determine the respective rights of the parties, as judgment creditors of one S. B. Kissell, to the proceeds of the sale of the assets of said Kissell. Judgment for plaintiffs, and defendant appeals. Reversed.

Theodore Cornman and J. M. Weakley, for appellant. F. H. Hoffer, for appellee.

MITCHELL, J. The ground on which a senior may be postponed to a junior levy is that it is not being used in good faith for its legal purpose, but in fraud of the rights of other creditors. The rule is thus stated in *Corlies v. Stanbridge*, 5 Rawle, 286: "If the plaintiff delivers an execution to the sheriff, with direction not to levy at all, or not till further orders, it creates no lien on the defendant's personal property as against a creditor issuing and proceeding with a subsequent execution. The rule is the same if there is a levy, accompanied with instructions to stay proceedings. In both cases the plaintiff's object is considered to be to obtain security, not satisfaction for his debt, and the employment of an execution for this purpose is a perversion of its design, and a fraud against third persons." This rule has undoubtedly been enforced with strictness. The presumptions are all against a levy under such conditions. And, similarly, where the sheriff has by the plaintiff's direction, or with his concurrence, permitted the defendant or his clerks to sell at private sale, a long line of cases might be cited in which the levy has been postponed. Of these the severest, probably, is *Parys's Appeal*, 41 Pa. St. 273, where it was said by Thompson, C. J.: "Possession and control remaining after levy as before, and private sales, are both in contravention of the law, and, when they result from arrangements made by the execution creditor, he will be postponed to a junior execution. Such arrangements are so evidently for the benefit of the debtor, rather than a means of collecting the debt according to law and the exigence of the writ,

and they present such strong temptation to do wrong, not only in making sales, but to carry off and conceal the property, that the law forbids them altogether, not alone for fraud in fact, but as being a fraud in law." But, though the rule has been strictly enforced, it has not been pushed beyond its reason, nor allowed to become a conclusive presumption of fraud, *juris et de jure*, regardless of its actual character. Thus the mere act of the sheriff in not taking manual possession, and removing the goods from the custody of the defendant, is not, as in England, a badge of fraud; and it is said by Rogers, J., in *Com. v. Stremback*, 3 Rawle, 341, though regretting the latitude to which the practice had run: "There is no certain rule how long the goods may with safety to the execution creditor be permitted to remain in the possession of the debtor. The cases have varied from one day to upwards of two years [citing them]." In general, however, any direction by plaintiff to stay proceedings, etc., will postpone him. But even this rule will not always be enforced where the absence of fraudulent or illegal intent is affirmatively shown. Thus in *Landis v. Evans*, 113 Pa. St. 332, 6 Atl. 908, where the plaintiff had directed the sheriff not to go to defendant's house that day, and the next day told him again, that, as the ladies were cleaning up, he had better not go till afternoon, and in the meantime another execution had come into the sheriff's hands, it was held that the plaintiff was not postponed; the present chief justice saying in the opinion: "The facts show nothing more than a disposition on the part of the plaintiff to treat the family of defendant in the execution with due consideration, by not subjecting them to unnecessary inconvenience or annoyance." In the same line of view, having regard to the basis of the rule, and the real intent of plaintiff's action, there is a class of cases which stand a little apart, and that is where an assignee for the benefit of creditors has intervened, and, by arrangement with the sheriff and the first execution creditor, has been permitted to take possession, and make sale of the goods. To such cases the reasons so forcibly stated by Chief Justice Thompson, *supra*, do not apply. The assignee is an officer of the law, subject to the supervision and control of the court, and having, presumably, no interest but to get the most out of the property, for the benefit of those entitled by law. Such arrangements have accordingly been sustained in *Kent's Appeal*, 87 Pa. St. 165, in *re Mathew's Estate*, 144 Pa. St. 139, 22 Atl. 903, and in *re Leidich's Estate*, 161 Pa. St. 451, 29 Atl. 90. The present case belongs to this class. The facts do not justify any suspicion that the appellant's design was merely to get security, or hinder other creditors, but, on the contrary, to realize, as nearly as possible, the full value of the goods levied on, by means of sales by the assignee, for the satisfaction, first, of his

own execution, and the benefit, secondly, if there should be any surplus, of those entitled under the assignment. Under such arrangements, if at any time there should be ground to suspect that in fact there was a fraudulent or collusive use of the execution, or undue delay or action of any kind by the assignee, to the hindrance or injury of other creditors, there is always ample power in the court having control of the execution and of the assignee to apply a remedy; but it would be a perversion of a rule, itself founded in equity, to apply it as an unyielding formality to a case not within the mischief it was intended to cure.

Judgment reversed, and judgment directed to be entered for the defendant, in the case stated, with costs.

ROYER v. BOROUGH OF EPHRATA.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

ACTION AGAINST CITY — PUBLIC IMPROVEMENT — DAMAGES.

1. On an issue as to damages sustained by a plaintiff through the widening of a street through his property, evidence that there was a parol gift of the land to him from his father; that he took possession and maintained it for 15 years; that he erected a house and improvements thereon; and that, after the death of the father, the other heirs quitclaimed the land to him,—is sufficient, when uncontradicted, to justify the court in telling the jury that plaintiff is the owner of the land.

2. A claimant is not an incompetent witness merely because a former owner of the thing or contract in action is dead, but only when his right thereto has passed to a party on the record who represents his interest."

3. On an issue as to damages caused by widening a street, the judge charged the jury that "the fair test is, what was the market value of this land—of this property—before this street was widened, and what was it worth after? And, when I say 'before,' I don't mean just a day or two before, but three or five or six months before or afterwards." *Held*, that the words defining the meaning of "before" were not ground for reversal; the judge having given the proper rule to the jury in a previous part of the charge, and these words being apparently intended merely to prevent a consideration by the jury of evidence wrongfully introduced as to an offer for the property several years before.

Appeal from court of common pleas, Lancaster county; Brubaker, Judge.

Proceeding by Henry S. Royer against the borough of Ephrata to determine the damages sustained by plaintiff through the widening of a street through his land. From a judgment finding damages in favor of plaintiff, defendant appeals. Affirmed.

A. B. Hassler and B. F. Davis, for appellant. Brown & Hensel, for appellee.

MITCHELL, J. The statement declares that the plaintiff is the owner of the land in fee, and in possession, but we are not furnished with a copy of the plea, so that there is nothing before us to indicate that plaintiff's title was in contest further than as it was a part of his case to be proved to enable him to recover.

For this purpose all he was required to do was to show a prima facie title, and this he did by showing a parol gift from his father, possession taken and maintained for 15 years, the house erected and improvements made, death of the father, and quitclaim deed from the other heirs to himself. This would have been enough to take the case to the jury, even in a direct issue on his title, and, being entirely uncontradicted, fully justified the learned judge below in telling the jury that plaintiff was the owner of the land. The case of *Railroad Co. v. Knowles*, 117 Pa. St. 77, 11 Atl. 250, relied on by appellant as showing the strict rule as to the grade of evidence required to establish title by a parol gift between parent and child, was very different from the present. In that case the railway company had a deed from the plaintiff's mother, and the title was the main issue in the contest. Both parties claimed under the same source of title,—one by deed, and the other by prior parol gift; and, of course, the evidence of the gift was required to be of the same grade as if the plaintiff was claiming against the mother, the alleged donor, herself. In the present case there was no opposing title, and, as already said, plaintiff was only bound to make out a prima facie case.

Plaintiff was a competent witness to prove his title. He was not claiming adversely to his deceased father. The statute does not make a claimant an incompetent witness merely because a former owner of the thing or contract in action is dead, but only when "his right thereto has passed to a party on the record who represents his interest." The right of plaintiff's father did not pass to the appellant borough, and the latter did not represent his interest in any way. Such interest, whatever it was, would be totally unaffected by this judgment.

The answer of the witness Musser, contained in the fourth assignment, was irregular and inadmissible, but it was not brought out by any improper question what he would give for the property, but was the witness' own form of expressing his opinion of what the property was worth. It is doubtful if he meant anything more than that. It would have been more regular to have struck it out, but the record does not show any direct request to the judge to do so, but only an exception to the answer, for the form of which neither the appellee nor the court was responsible. It was a mere irregularity, and we are not convinced that it did appellant any harm.

The learned judge, in commenting to the jury on a part of the evidence relating to the measure of damages, referred to the time of the taking, but added: "I don't mean just a day or two before, but three or five or six months before or afterwards." This was an inaccurate, and, no doubt, an inadvertent, expression; but, taking it in connection with the context, we do not think the jury could have been in any way misled by it. The proper rule had been carefully given to the jury in

the early part of the charge. But the plaintiff, in testifying, had mentioned "accidentally," as the judge described it, an offer for the property several years before. This, the jury were told explicitly, was not evidence, and the judge again repeated the rule as to the value before and after the taking, and then added the words excepted to. In their connection, we think they were merely intended—and must have been so understood—to prevent the jury from considering too remote a time, and to confine their attention to a period at or about the taking. In that there was no error.

The last assignment is hypercritical. The witness expressed his judgment as to the amount of plaintiff's damages, and was immediately cross-examined as to his estimate of values before and after the taking. The form of the question was somewhat irregular, but the substance of the testimony was competent, and the error did no harm.

Judgment affirmed.

REINHOLD v. BOROUGH OF EPHRATA.
(Supreme Court of Pennsylvania. Oct. 7, 1895.)
ACTION AGAINST CITY—WIDENING STREET—DAMAGES.

On an issue as to the damage caused plaintiff by the widening of a street through his land, the submission to the jury of his testimony that he had made a parol sale of the lot for \$4,000 before the taking of part of it by the borough is not ground for reversal, when his testimony as to the amount of damage is similar to that of eight other witnesses, and all the evidence is impartially submitted to the jury, with not only an express statement that if they believe his statement as to the sale it would be evidence of the selling price of the property before the taking to be considered in connection with the other testimony, but also a clear statement of the general rule for the measure of damages for such a taking.

Appeal from court of common pleas, Lancaster county; Brubaker, Judge.

Action by Jacob G. Reinhold against the borough of Ephrata to determine the amount of damages sustained by the widening of a street through plaintiff's property. From a judgment for plaintiff, defendant appeals. Affirmed.

B. F. Davis and A. B. Hassler, for appellant. Brown & Hensel, for appellee.

MITCHELL, J. The three assignments of error all relate to the same matter,—the submission to the jury of plaintiff's testimony that he had made a parol sale of the lot for \$4,000 before the taking of part of it by the borough. It is important to keep in view the precise testimony, and the way in which it was introduced. Plaintiff, being on the stand, and having given his opinion of the value of the whole lot before the taking, was asked, "How do you know that?" and replied that he knew because he had sold it or contracted it to Mr. Carpenter. This, it will be observed, was not making the parol

sale the basis of any claim for the loss of the bargain, but merely mentioning it as a circumstance tending to sustain his opinion of the value, already admitted in evidence. If it had been brought out in cross-examination, in the effort to test the grounds and the accuracy of the witness' opinion, there could be no question of its entire competency for such purpose; and although it belongs to a class of evidence not usually admitted in behalf of the party himself, and not to be encouraged on his part, yet we do not think it was so entirely erroneous, as matter of law, as to require a reversal in a case where it is nearly certain that it did no harm. The plaintiff's estimate of his damages, based, as already said, on the contract price to Carpenter and the actual sale after the taking, was \$775. Of his witnesses who testified on the subject of damages, five estimated them between \$700 and \$800, two at \$800, and one at \$1,000. All this, with the opposing evidence for the borough, was submitted to the jury by the learned judge below, very carefully and impartially, with a very pointed reference to them of the credibility of the alleged sale, and the direction that, if they believed it, it "would be evidence of the actual selling price of the property before the change was made,—evidence for you to consider in connection with all the other testimony." This, following a clear and accurate statement of the general rule laid down in our cases for the measure of damages for such taking, gave the appellant no ground for just complaint. Judgment affirmed.

POST et al. v. KINZUA HEMLOCK R. CO.
(Supreme Court of Pennsylvania. Nov. 4, 1895.)
NEGOTIABLE INSTRUMENT—WHAT CONSTITUTES—OBLIGATION FOR RENT.

The instrument in suit read: "On the first day of July, 1891, without grace, there will be due to the A. Company, or order, \$250. for rental of rolling stock under contract of lease and conditional sale, of even date herewith." *Held*, that since the sum named would not become due unless the stock was delivered to the lessee in accordance with the contract, the liability of the maker was contingent and qualified, and hence the instrument was not negotiable.

Appeal from court of common pleas, McKean county; T. A. Morrison, Judge.

Action by Henry A. V. Post and others, doing business as Post, Martin & Co., against the Kinzua Hemlock Railroad Company, on the following note: "\$250.00. Kane, Pa., March 5th, 1891. On the first day of July, 1891, without grace, there will be due to the American Car and Equipment Company, or order, two-hundred fifty and 00-100 dollars, for rental of rolling stock, under contract of lease and conditional sale of even date herewith, payable at the office of the American Car and Equipment Company, in the city of New York, with interest at 6 per cent. per annum added. Kinzua Hemlock R. R.

Co., by Thomas L. Kane, Prest. Series B. 87. No. 1, due July 1st, 1891." Indorsed: "The American Car & Equipment Company." From a judgment for defendant, plaintiffs appeal. Affirmed.

Rufus B. Stone, for appellants. J. N. Apple, D. H. Jack, and G. L. Roberts, for appellee.

MCCOLLUM, J. The single question in this case is whether the instrument declared upon is a negotiable promissory note. If it is, the plaintiffs are entitled to maintain their suit as it was brought, and the learned court below erred in the ruling complained of in the first specification. If it is not, both specifications must be overruled. In passing upon the question of the negotiability of the paper, it will be observed that the sum referred to in it represents rent to accrue under a contract of lease and conditional sale of rolling stock, and that the plaintiffs' contention, if successful, will enable them to avoid a defense available against the payee. In other words, if the plaintiffs are bona fide purchasers of the paper before maturity, and it is negotiable, they may recover the sum named in it, although the maker may have a good defense against the payee, arising from the latter's noncompliance with the terms of the contract. But for the protection the negotiability of the instrument would afford them against such a defense, they might as well have brought suit upon it, on the contract, in the name of the payee to their use. We allude to this, not as a matter affecting the question before us, but as explanatory of what might otherwise seem to be a merely technical and unnecessary contest.

The instrument in suit, and the contract to which it refers, were executed and delivered on the same day, and the former is more in the nature of a statement of a stipulation in the latter than of an independent undertaking for a past or present consideration to pay a sum certain at the time stated in it. It says, in substance, that under a contract of lease and conditional sale, "of even date herewith," there will be due to the payee or order, on the 1st of July, 1891, for rental of rolling stock, two hundred and fifty dollars, "with interest at 6 per cent. per annum added," payable at the office of the payee in New York. The payee in the instrument on which the action is based was the lessor in the contract, and the sum to become due on the 1st of July was rental for the rolling stock that was leased. If the lessor refused to deliver the stock to the lessee in accordance with the terms of the contract, the rent reserved for the use of it did not become due on the 1st of July, or at any time. What the lessee said in the paper in question regarding the sum to become due on the 1st of July for rental of rolling stock was based on compliance with the

lease, and is not applicable to a repudiation of it. We cannot therefore regard the paper in suit as creating a liability independent of and unaffected by the contract to which it refers. We think it embraces a contingency which renders it nonnegotiable, and, if the maker is liable upon it to the plaintiffs or to the payee, the liability is qualified and measured by the "contract of lease and conditional sale." Nothing is better settled than the rule which requires that an instrument, to be negotiable, shall be free from contingencies and conditions. *Overton v. Tyler*, 3 Pa. St. 340; *Sweeney v. Thickstun*, 77 Pa. St. 131; *Woods v. North*, 84 Pa. St. 407; and *Bank v. McCord*, 139 Pa. St. 52, 21 Atl. 143.

The specifications of error are overruled, and the judgment is affirmed.

IN RE LEFEVRE'S ESTATE.

Appeal of WITMER.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)
CONSTRUCTION OF WILL — CHARGE ON DEVISE — ASCERTAINMENT OF BENEFICIARIES.

Testator devised to his nephew F., in trust, certain store property, "subject to the payment to my estate of the sum of \$5,000 within six months from the time of my decease"; such nephew, after paying the taxes and insurance and the interest on the "aforesaid mortgage or charge," to apply the balance of the rents to the extinguishment of the "said charge of \$5,000," after which the net income was to accumulate, and to pass to the children of said F. upon the arrival of the youngest at the age of 21. The will further provided that, should all F.'s children die during minority without heirs, the said premises and the entire fund which may have accumulated should pass to testator's niece M., subject to an annuity of \$500 to be paid to F. and his wife. Then followed a clause, "All the devises of this item of said premises * * * are hereby made subject to the payment of the amount of said charge, and of any balance thereof at any time remaining unpaid, in annual payments of \$500 each, one half thereof to my nephew W.," and "the other half to my niece M.," said charge to bear interest at the rate of 4 per cent. per annum. *Held*, that testator gave the \$5,000 charge on the store property to W. and M. specifically, payable in annual installments of \$500, and that the executors were bound to so apply it.

Appeal from orphans' court, Lancaster county.

Petition by George Witmer against Henry C. Harner and others, executors of Christian H. Lefevre, deceased, to determine the liability of said executors to pay to the petitioner a legacy under the will of said decedent. From a decree in favor of the executors, petitioner appeals. Reversed.

The twenty-second item of the will was as follows: "Twenty-Secondly. My lot of ground situated on the northeast corner of North Queen and Orange streets, in said city of Lancaster, with a three-story brick building and appurtenances, occupied as two stores, a dwelling, and fruit and confectionery stand, being known as 'Nos. 101 and 103 North Queen Street,' subject to the payment to my

estate of the sum of five thousand dollars within six months from the time of my decease, I do give and devise my said store property at the northeast corner of North Queen and Orange streets, in said city of Lancaster, unto my nephew Franklin P. Lefevre, and to his successor or successors in the trust hereinbelow named, such successor or successors to be appointed, in case of a vacancy, by the orphans' court of Lancaster county, Penna., in trust, however, to have and to hold the said premises, and, at his and his family's option, he and his family to occupy same in part; and to manage and to lease said premises, and keep them well insured and in good repair, and out of the rents and profits thereof received to pay the taxes, insurance, repairs, and needful expenses of administration, and the interest on the afore-said mortgage or charge, and from whatever is left to retain one hundred dollars per annum for his services in connection with said trust, and the balance or net income to apply to the extinguishment of the said charge of five thousand dollars upon said premises until the same be fully discharged and paid. After which the said net income, as it may from time to time accrue, shall be added by the said trustee or trustees to the corpus of the said trust estate, to be held and kept safely invested and reinvested by the said trustee or trustees, to the best advantage of the trust, until the youngest child living of the said Franklin P. Lefevre, being one of his heirs, shall have arrived at the age of twenty-one years. When the youngest child and heir living of the said Franklin P. Lefevre shall thus have arrived at the age of twenty-one years, I give, bequeath, and devise the said premises, and the entire fund which may have been accumulated as afore-said out of the rents and profits thereof, and interest on the same, unto the children, being heirs of my said nephew Franklin P. Lefevre, then living, and to the issue of such as may be dead, absolutely, as tenants in common, in fee simple, subject, however, to an annuity of five hundred dollars per annum, to be paid in two semiannual payments of two hundred and fifty dollars each; one of said semiannual payments to be made to my said nephew Franklin P. Lefevre, and the other to his present wife, while both are living, and the whole to the survivor after the death of either; the heirs of such as may be dead, however, to take by representation among themselves, without limit, such share as their parents would have taken if living. And should all the children, being heirs of my said nephew, have died during their minority without leaving heirs, then I do give and devise and bequeath the said premises, and the entire fund which may have accumulated, to my niece Mrs. Martha Shertz, née Lefevre, wife of my friend Mr. H. Hartman Shertz, for and during her life, with remainder to her children, being living heirs, and to the heirs of such as may be dead, as

tenants in common, in fee simple, subject, however, to the payment of an annuity of five hundred dollars per annum, to be paid in two semiannual payments of two hundred and fifty dollars each, one of said semiannual payments to be made to my said nephew Franklin P. Lefevre, and the other to his present wife, while both are living, and both said payments to be made to the survivor of them after the death of either, should they or either of them outlive their children. All the devises of this item, of said premises on the northeast corner of North Queen and Orange streets, are hereby made subject to the payment of the amount of said charge, and of any balance thereof at any time remaining unpaid in annual payments of five hundred dollars each, one half thereof to my nephew George Witmer, hereinbefore named, and the other half to my niece Mrs. Martha Shertz, hereinbefore named, during her life, and after her death to her husband, H. Hartman Shertz, in trust for his children, being heirs of my said niece Mrs. Martha Shertz, and for their heirs. And after the death of my said nephew George Witmer one-half of said annual payment shall be made to his son Jacob Witmer, in trust for himself and his sisters, and in case of his death then to Mrs. Root, a daughter of my said nephew George Witmer, in trust for herself and her sisters and their children and for the heirs of her brother Jacob Witmer. Said charge upon said premises shall bear interest at the rate of four per cent. per annum, said interest to commence one year after my decease, at which time the first payment of said charge is to be made." The premises described in this item are of great value. The income received one year was \$3,841, as testified to by the trustee, who received it.

John M. Groff and M. Brosius, for appellant. A. O. Newpher, for appellees.

MITCHELL, J. As remarked by the learned auditor, the twenty-second item of the will was written with so great an effort at precision as to make it obscure. We may not expect, therefore, to get it entirely consistent and clear of difficulty, but must take what appears to be the main intent. On that there is fortunately no room for serious doubt. The appellant and Mrs. Shertz were to get \$5,000 out of the North Queen and Orange streets property. The words of the will are to that extent as plain as language can make them, and the process by which this purpose of the testator is reasoned away will not bear a moment's examination. "All the devises of this item of said premises, on said northeast corner of North Queen and Orange streets, are hereby made subject to the payment of the amount of said charge and of any balance thereof at any time remaining unpaid, in annual payments of five hundred dollars each, one half thereof to my nephew George Witmer, hereinbefore named,

and the other half to my niece Mrs. Martha Shertz." The only real doubt that arises on this clause is whether the \$5,000 mentioned is the same sum to the payment of which the devise to Franklin P. Lefevre was made subject in the beginning of the item, or is an additional charge. The latter alternative was not considered at all by the learned auditor, and he was of opinion that it could not be the former, because—First, the "payment" to which the property was first subjected was to be made "to my [testator's] estate * * * within six months from the time of my decease"; and, secondly, because it was the "devises" in the item that were made subject to the \$5,000 last mentioned in the will, and the first charge was not one of the devises. The testator's language is, subject to the payment of "the said charge, and of any balance thereof at any time remaining unpaid." These words of themselves ought to be conclusive. They are not appropriate to the introduction of a new charge, not previously mentioned, as the word "said" implies, and if meant for new there was no occasion for reference to any balance remaining unpaid. If newly created by this clause, it would all be unpaid. But on the other hand these words are exactly appropriate to the first charge. It was another and the only other charge of that amount mentioned in the item, and therefore appropriately referred to as the "said" charge. The devisee, Franklin Lefevre, was to devote the net income of the devised property "to the extinguishment of the said charge," showing an intention for its payment by installments, which makes the reference to a balance remaining at any time unpaid both clear and appropriate. The testator's schemes for the payments in both cases are the same. As to the first charge, the devisee is to pay the interest, and out of the net income of the property gradually to extinguish the principal; as to the second, it is to bear interest, and the principal is to be paid in annual installments of \$500. Taking these incidents in connection with the identity of the amounts, the failure to provide for any other mode of raising the second charge, and the omission to direct any other application of the first, and the specific direction in items 24 and 27 to the executors to raise any money that may be required for the general fund of the estate by mortgage on the Strasburg farm, the conclusion would seem to be clear that both parts of the item referred to the same charge. Against this conclusion we have only the difficulty raised by the two words "payment" and "devises." The testator does call the first-mentioned sum a "payment to my estate * * * within six months after my decease," but a few lines further on in the same sentence he refers to it as "the interest on the aforesaid mortgage or charge," and directs the application of the net income "to the extinguishment of the said

charge of five thousand dollars upon said premises until the same be fully discharged and paid." Literally, these expressions are repugnant, but if we read the word "payment" as meaning what it is afterwards called, a mortgage or charge, and the six months as applicable to the time when it is to be made or secured, we not only avoid the repugnancy, but make the whole consistent with the subsequent direction to pay the annual installments to appellant and Mrs. Shertz, without disappointing any part of the testator's purpose. The difficulty in the word "devises" is not serious. The testator had in that item of his will made successive devises to Franklin Lefevre in trust till his youngest child should come of age, then to the surviving children in common, and, contingently on there being no survivors, to Mrs. Shertz. Each of these was coupled with certain conditions and stipulations, and when the testator, who was not a lawyer, though he seems to have had some acquaintance with law terms, came to express his intention that everything given, either as an estate or a charge, should be subject to the primary charge of \$5,000 in favor of appellant and Mrs. Shertz, he used the word "devises," not in its technical sense, but as including everything that had gone before, and being equivalent to "all the provisions of this item are hereby made subject," etc. On the whole case we are quite clear that the testator gave the \$5,000 charged on the property in question to appellant and Mrs. Shertz specifically, payable in annual installments of \$500, and it was the duty of the executors to have so applied it. Not having done so, they must be surcharged in favor of appellant. Decree reversed; account to be restated in accordance with the views herein expressed.

WILDASIN v. BARE.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

LEVY ON LAND — SUFFICIENCY OF DESCRIPTION — WRONG TOWNSHIP — PAROL EVIDENCE.

1. Defendant in a writ of execution, when asked by the sheriff for a description of his land, named the quantity as 98 acres, which in fact included one tract of 85 acres in H. township, and another of 13 in P. township, which, though separated by a strip 300 yards wide, not owned by the defendant, were used by him as one farm. He also gave the sheriff the names of the adjoining of both tracts, all of whom did not adjoin either one of the tracts alone, but he did not state that there were two tracts. The levy was in terms "on all the following, described tract of land situate in W. township," containing 98 acres, "adjoining lands of," etc. *Held*, that the levy was sufficient as describing both tracts, the fact that the wrong township was named not having misled the purchaser or any bidder at the sheriff's sale.

2. Where the levy describes the land levied on as one tract of 98 acres, adjoining certain other lands, parol evidence is admissible to show that two tracts, one of 85 acres and the other of 13, used by the owner as one tract, are intended.

Appeal from court of common pleas, York county; John W. Bittenger, Judge.

Action by Alfred Wildasin against Samuel M. Bare. From a judgment for defendant, plaintiff appeals. Affirmed.

Perry J. M. Heindel, for appellant. E. W. Spangler and W. A. Miller, for appellee.

DEAN, J. This suit is an ejectment against defendant for the possession of 13 acres of land in Penn township, York county. This, and a tract of 85 acres, described as in West Manheim township, on 25th of September, 1891, belonged to Philip Sterner. On a judgment against him an execution went into the hands of Sheriff Findley, who, by virtue of this writ, made the following levy: "On all the following described tract of land situate in West Manheim township, York county, Pennsylvania, containing ninety-eight acres, more or less, adjoining lands of Henry Dusman, John Brillhart, Michael Wildasin, and others, and the public road leading from Hanover to Black Rock, with the improvements thereon,"—having thereon a dwelling house, grist mill, orchard, etc. The property was regularly condemned, vend. ex. issued, and sold to S. M. Bare, this defendant, for \$2,755. The sheriff made return of the sale, and on December 16, 1891, duly acknowledged his deed to the purchaser for the land described in the levy. It appeared from the evidence, defendant, at the date of the levy, was the owner of two tracts, which were separated by an intervening strip of land, three to four hundred yards wide, of which last he was not the owner. Both tracts, however, were farmed together by him as one farm, and, although conveyed to him by two deeds, both were delivered to him the same day. Three townships adjoin very near to that location, and while, as now appears, the smaller tract is in Penn township, the levy describes the 98 acres as in West Manheim. Afterwards, on the 11th of January, 1892, the plaintiff in the first writ, the sale thereon not having paid his judgment, issued an alias fi. fa., and levied on the 13-acre tract, describing it by adjoiners, and as in Penn township. After condemnation it was sold on a vend. ex. by the sheriff to Alfred Wildasin, the plaintiff, for \$230, and deed to him duly acknowledged. Bare, the purchaser at sheriff's sale, having in the meantime gone into possession of both tracts, Wildasin brought this ejectment against him on his sheriff's deed for the smaller one.

At the trial, the learned judge of the court below was of opinion that, although the levy was ambiguous, yet, if it was actually on both tracts, and the description was intended to and did include them, the plaintiff could not recover; and whether the description did include both tracts could be answered by evidence dehors the levy, showing adjoiners, boundaries, and quantity, not to contradict, but to explain, the ambiguity. He therefore

submitted the evidence to the jury to find whether, from the description in the levy, both tracts had been seized and sold. The verdict was for defendant, the purchaser at the first sale, and plaintiff now appeals, preferring 11 assignments of error, which do not call for separate consideration. It may be admitted that neither the officer nor counsel for plaintiff, in the execution, in view of the importance of having an accurate descriptive levy, performed properly the duties devolving on them. The description of defendant's land was in his deeds, either of record or in his possession, which should have been resorted to before indorsing the levy; but this neglect, although probably the cause of this litigation, does not vitiate the sale, if the description in the levy can, with reasonable certainty, be fitted to the land sold. The sheriff called on the defendant in the writ, and asked him for a description of his land. He named the quantity, 98 acres, which included both tracts, then gave him the adjoiners. The adjoiners are those of both tracts. All of them would not adjoin the larger tract. "The public road leading from Hanover to Black Rock" does not adjoin the large tract, while it does the small one. The lands of Dusman and Aaron Wildasin do not adjoin the 98 acres, but only the 85 acres. Those of Brillhart and Michael Wildasin adjoin both tracts. So that description by adjoiners identifies, with reasonable certainty the two tracts taken together, but does not describe either separately. In admitting evidence tending to identify both tracts as the land described in the levy, there was no contradiction of the levy as returned and made part of the record, but a mere application of it to the subject of it. That this may be done in the case of an ambiguous description in a sheriff's levy of real estate is held in *Spang v. Schneider*, 10 Pa. St. 193; *Erb v. Scott*, 14 Pa. St. 20; *Sheetz v. Fitzwater*, 5 Pa. St. 126; and in many cases both before and since the decisions in these. The owner of the two tracts, the defendant in the writ, testified positively that he used both pieces as one farm, and there is no contradiction of his testimony in this particular. In *Buckholder v. Sigler*, 7 Watts & S. 154, where the owner of a larger tract, subsequent to his first deed, purchased from other parties one acre, and the sheriff had described the land in his levy by adjoiners, with no reference to the one acre, this court held that "as he occupied and used both parcels as one tract only, and never otherwise, * * * it was unquestionably sufficient, in order to include both, for the sheriff to describe them generally as one tract of land, in the manner he has done in his levy." That these two tracts did not actually adjoin does not change the reason of the rule for so holding, which is, land used as one farm, or for one purpose, ought to be sold as a whole, unless it appear that it would sell to a better advantage when offered in parcels. Here, taking both tracts together,

was a small farm of 98 acres, used as one farm by the former owner, with buildings and improvements adapted to the farm. There is nothing in the evidence to show they ought to have been levied on or sold separately. The plaintiff in the writ, if the description was uncertain, should have moved the court to set aside the sale before deed acknowledged; but he made no objection, and then issued an alias writ, and levied on the smaller tract. This second sale passed no title if the tract was included in the first levy, and the jury, on competent evidence, have found it was. Nor do we think the fact that the smaller tract was not in the same township as the larger affects the validity of the sale. It appears now there was a misdescription in the location by township of both tracts. The whole tract of 98 acres is described as in West Manheim township, while in fact the 13-acre tract is in Penn. and the 85-acre tract in Heidelberg. The three townships corner at about that point, hence the mistake. But the mistake in the name of the township, it is not alleged, misled the purchaser or any bidder. The error is not of that gravity which would of itself be destructive of title. Nor was the plaintiff, the purchaser at the second sale, misled. Bare, the purchaser at the first sale, gave distinct notice to all bidders at the second that the smaller tract had been purchased, and was claimed by him, under the first levy. So, with his eyes open, he took the risk, and has now no ground of complaint. We are of opinion, therefore, the court below, upon the special facts of this case, committed no error, either in the admission of evidence tending to show the land levied on and sold to Bare included both tracts, or in submitting it to the jury to find whether the levy actually did include both. We do not intend to disturb the general rule that a levy upon land should be fairly descriptive. The assignments of error are overruled, and the judgment is affirmed.

**METTFETT v. MOHN (REILLY et al.
Interveners).**

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

LABOR CLAIM CREDITORS—CONTROL OVER EXECUTION.

The act of assembly providing that wage earners' claims shall be preferred and first paid out of the proceeds of sale gives holders of such claims no right to object to the staying of a writ of execution issued on a judgment obtained by another person against their debtor.

Appeal from court of common pleas, Lancaster county; Brubaker, Judge.

Action by Frank Mettfett against D. C. Mohn, in which a judgment was obtained against defendant, under which an execution issued, which was stayed by plaintiff. P. J. Reilly and others intervened, and petitioned for a rule to strike off the stay of the writ,

which rule was made absolute by the court, and from such decree plaintiff appeals. Reversed.

Brown & Hensel, for appellant. J. W. Johnson, for appellees.

STERRETT, C. J. In December, 1893, plaintiff had a judgment in the above-entitled case against D. C. Mohn, on which he then issued an execution. Before any levy was made, an arrangement was effected between plaintiff and defendant, whereby it became unnecessary to proceed with the execution, and the writ was accordingly ordered stayed by plaintiff's attorneys. In January following, the appellees, P. J. Reilly and others, labor-claim creditors of said Mohn, interposed, and, claiming the right to control plaintiff's execution, obtained a rule to show cause why the indorsement on the execution staying the writ should not be stricken off, and the sheriff ordered to proceed, etc., for the purpose of paying said laborers their respective claims. In May following, the rule to show cause was made absolute. In his opinion, making the order, the learned assistant law judge of the court below says: "We are of opinion that, the moment the levy was made, the liens of the claimants for wages attached, and were entitled to be paid, under the writ of execution in this case." This is a mistaken view of the law. The plaintiff, acting in good faith, had an undoubted right to settle and adjust his claim against Mohn, and order his writ stayed in accordance therewith, without consulting the labor-claim creditors. It was not their affair, and, in the absence of any authority, statutory or otherwise, these creditors had no right to interfere with the execution. The act of assembly, under which they claim the right to do so, provides that wage earners' claims, properly within the scope of its provisions, are simply "to be preferred and first paid out of the proceeds of sale," etc.; in other words, there is no preference until the sale, either judicial or in connection with the winding up of their debtor's business. This appears to have been clearly settled in *Wilkinson v. Patton*, 162 Pa. St. 12, 29 Atl. 293, in which our brother Fell, speaking for the court, said: "The method provided for the enforcement of the claim for wages is that 'it shall be preferred and first paid out of the proceeds of such sale.' This evidently refers to a sale effected by legal process, where a fund is raised for distribution." It was never intended that there should be a specific lien on the property in the hands of the owner or of the vendee.

There is nothing in the case that requires extended discussion. The contention of the labor-claim creditors in this case was wholly unwarranted, and hence the learned judge erred in striking off the order staying the execution. Both assignments of error are sustained. Decree reversed, and order stay-

ing the execution reinstated; costs in the court below and here to be paid by the appellees P. J. Reilly and others.

COMMONWEALTH v. HENDERSON.

(Supreme Court of Pennsylvania. Nov. 8, 1895.)

LEGISLATIVE ACT — UNITY OF SUBJECT-MATTER — CONFERRING OF SON'S PRIVILEGES.

1. Act March 14, 1873 (P. L. 290), entitled "An act to confer upon M. H. all the rights, powers and privileges of a son of B. H.," by section 1 conferred upon M. H. "the same rights, powers and privileges which he would have" if he were the son of B. H., and by section 2 provided that the estate which the said M. H. should receive or inherit from the said B. H. should be subject only to such tax as would be payable if the said M. were the son of said B. H. *Held*, that the grant of all the privileges of a son in section 1 necessarily included the privilege of exemption from the collateral inheritance tax given by section 2, and hence this latter section was germane to the subject of the act as expressed in the title.

2. The provision of the act, that the estate which the said M. H. should receive or inherit from B. H. should be subject only to such tax as would be payable if the said M. H. were the son of B. H., necessarily exempted M. H. from the payment of the collateral inheritance tax on property devised to him by said B. H.

Appeal from orphans' court, Mercer county; S. H. Miller, Judge.

Proceeding by the commonwealth of Pennsylvania against Matthias H. Henderson, executor of Branton H. Henderson, deceased, to determine the liability of the latter, as executor and devisee, for a collateral inheritance tax upon the property devised to him by decedent. From a judgment in favor of the commonwealth, said Matthias H. Henderson appeals. Reversed.

The case stated was, in effect, as follows: "That Branton H. Henderson, late of the borough of Sharon, Mercer county, died March 1, 1894, having first made his will, which has been duly probated, and is recorded in Will Book —, page —, a true copy of which is to said appeal attached and made a part thereof, wherein and whereby he devised and bequeathed all of his estate, real and personal, to the said Matthias H. Henderson, his nephew; that the said testator devised and bequeathed to said Matthias H. Henderson real property appraised at \$33,250, and personal property, consisting of money, bills, stocks, ground rents, bonds, horses, cows, vehicles, etc., appraised at \$140,088.76,—in all, \$173,338.76; that the said Matthias H. Henderson is a nephew of the said testator, born November 23, 1845; that on the 14th day of March, 1873, the general assembly of the commonwealth passed the following act: 'An act to confer upon Matthias H. Henderson all the rights, powers and privileges of a son of Branton H. Henderson. Whereas, Branton H. Henderson, of Sharon, in the county of Mercer, Pennsylvania, is desirous of having conferred upon his nephew, Matthias H. Henderson, of the same place, who is aged 27 years, all such rights, powers

and privileges as the said Matthias would be entitled to if he were the son of the said Branton H. Henderson: Section 1. Be it enacted,' etc., 'that upon Matthias H. Henderson, of Sharon, in the county of Mercer, is hereby conferred the same rights, powers and privileges which he would have, enjoy and possess if he were the son of Branton H. Henderson. Sec. 2. All the estate of the said Branton H. Henderson which he may bequeath or devise to the said Matthias H. Henderson or which the said Matthias shall receive, take or inherit from the said Branton H. Henderson shall be subject only to such tax as would be payable if the said Matthias were the son of the said Branton H. Henderson. P. L. 290. Approved the 14th day of March, A. D. 1873.' It is also agreed that the enrollment tax due on the passage of the above act was paid by Henderson on March 15, 1873. If the court be of the opinion that the estate devised or bequeathed to said Matthias H. Henderson is subject, under the law, to the payment of collateral inheritance tax, then judgment to be entered for the plaintiff, for the sum of \$8,666.93, but, if not, then judgment to be entered for the defendant. Each party reserves the right to appeal from the judgment entered herein."

Tanner & Whitla and D. B. Kurtz, for appellant. H. H. Zeigler and S. R. Mason, for appellee.

STERRETT, C. J. Analysis of the act of March 14, 1873 (P. L. 290), fails to show any real lack of unity in its subject-matter. The "one subject" which it contains relates to the status of M. H. Henderson as a son of Branton H. Henderson. "The rights, powers, and privileges" which the title of the act proposes, and the first section confers, are intended to be descriptive of the attributes of a son in fact,—the right to inherit, and the powers and privileges incidental to its enjoyment. The second section expresses what had already been implied. In our, as in the Roman, jurisprudence, a "privilege" means the exemption of a person or class of persons from the operation of any law. Cent. Dict. Thus it is settled that the right of a debtor or widow to exemption is a personal privilege. The right of a son in fact to exemption from any species of taxation, which is equally a privilege, was implied in the title and first section, and expressed in the second section, of this act, as being the "one subject" of grant. The grant of all the privileges of a son necessarily included this privilege of exemption, and its specification in the second section of the act is therefore germane to the subject, and those who read the title to the act must be presumed to have had notice of the purpose to confer it. *City of Philadelphia v. Ridge Ave. Ry. Co.*, 142 Pa. St. 484, 21 Atl. 982. The act was clearly within the amendment of 1864. When the act of 1873 was passed, uniformity of taxation was not required by the constitution, and hence the legislature, which had the power to im-

pose, could exempt individuals from liability for taxes on inheritance. "The right of inheritance at all is, so far as the administration of justice is concerned, purely statutory, and one of the results from the power to grant this right is that the legislature may prescribe the terms of taking." *Burroughs, Tax'n*, § 81. No intent is shown in the act of 1873 to charge collateral inheritance tax on M. H. Henderson. On the contrary, he was not only given "all the rights, powers, and privileges" of a class which, at the time of the grant, was exempt from its payment, but it was expressly declared that such estates as he should take by virtue of the act should be subject only to such tax as would be payable by that class. The purpose to exempt is so clearly expressed as to leave no doubt. This feature distinguishes the present from that class of cases in which there has been a grant of the right to inheritance simply. As was said by this court in *Com. v. Nancrede*, 32 Pa. St. 389: "Giving an adopted son a right to inherit does not make him a son in fact, and he is so regarded in law, only to give the right to inherit, and not to change the collateral inheritance tax law." But here there was a necessary implication of exemption, and therefore Matthias H. Henderson took the estate which he received from Branton H. Henderson exempt from the payment of collateral inheritance tax.

Judgment reversed, and judgment is now entered for the defendant, in accordance with the terms of the case stated.

In re SCHOOL COMMITTEE OF TOWN OF JOHNSTON.

(Supreme Court of Rhode Island. Nov. 15, 1895.)

STATUTES—CONSTRUCTION—CONSTITUTIONAL LAW—TAXATION.

Const. Amend. art. 7, § 1, authorizes registry voters to vote at town meetings on all questions, except on the election of a city council, and propositions for imposing a tax or expending money. P. L. c. 447, provides that school districts may be abolished "at any town meeting," and that thereupon the school property of the several districts shall vest in the town, and a tax be levied to pay each district for the property taken. *Held*, that such law was not unconstitutional in authorizing registry voters to vote on a proposition imposing a tax or expending money.

Petition by the school committee of the town of Johnston to enforce the abolishment of school districts under authority of a town meeting. Decree for petitioner.

F. W. Tillinghast, for petitioner. B. M. Bosworth, for certain tax-paying voters.

STINESS, J. At a town meeting of the town of Johnston, held on the first Monday of June, 1895, it was voted to abolish school districts in said town. By the agreed statement of facts it appears that the meeting was regularly and legally called, and that notice of the subject was inserted in the warrant for said meeting, pursuant to the provisions

of P. L. c. 447. It also appears that both registry and tax-paying voters were allowed to vote upon the subject, and that a majority of the tax-paying voters did not vote in favor of the proposition. A tax-paying voter of the town objects to the legality of the action taken, and raises the following questions: "Does a registry voter, under the provisions of chapter 447 of the Public Laws,¹ have a right to vote upon the question of abolishing school districts?" "If said chapter 447 confers such right, is said chapter constitutional, so far as it provides for the vesting of school property in the town, for the assessment and remission of taxes, for the payment of the same, and for the adjustment of differences in the value of school property, upon a vote to abolish?" Under the provisions of the constitution, registered voters have the right to vote on all questions in all legally organized town meetings, excepting the election of the city council of any city, or upon any proposition to impose a tax, or for the expenditure of money. The proposition to abolish school districts is not a proposition to impose a tax or to expend money. It is a question of the management of schools by a school committee or by trustees, in which registry voters are liable to be as much interested and affected as taxpayers. But it is said that this is practically a vote to impose a tax, because, under the law, a tax equal to the amount of the appraisal of the school property is to follow. While this is true, it is, nevertheless, quite different from an ordinary tax. None of the amount so assessed goes to the town, but it is all remitted to the taxpayers of the several districts, in proportion to the value of the district property taken by the town, for the purpose of equalizing the contributions thus made. It is a scheme for equalization, rather than a tax. In *re Town Council of Cranston*, Index NN, 44, 28 Atl. 608. It does not follow that a registry voter is disqualified because the ultimate result of action taken may affect taxation. For example, dividing a school district would affect the expense of maintenance and the area of taxation. In 1854 a question arose whether registry voters could vote upon this question. The commissioner, Hon. Elisha R. Potter, afterwards one of the justices of this court, held that they could, and the decision was approved by Chief Justice Greene. The whole opinion was as follows: "If the question of the propriety of dividing a school district be proposed in district meeting, registry voters have a right to vote, because it merely amounts to an expression of opinion, and the whole power to divide rests with the school committee, to whom the vote of the

¹ P. L. c. 447, provides that school districts may be abolished "at any town meeting," whereupon the property of the several districts shall vest in the town, and a tax shall be levied on the whole town to pay each district for the property taken.

district is a mere recommendation, to be weighed according to its deserts; and registry voters can by law vote upon all questions, except taxing or expending money." R. I. School Manual, 1882, p. 85, decision 17. While the decision rests upon the fact that the vote was merely a recommendation, the concluding sentence assumes the right to vote upon all questions, except those of taxing and expending money. We think that this is correct. The right to vote should not be curtailed, except by the clear provisions of the constitution; and, where the limitation is not clear, the constitution should be liberally construed, especially in matters relating to public schools. When, in the opinion of the voters of a town, the schools can be better managed by the school committee than by districts, the law vests all the school property in the town, and provides for the equalization of values by the tax referred to. Education being a public duty, the legislature has the power to do this, and it is done by force of the law, rather than by the action of the town. The vote of the town is the thing which sets in motion the operation of the law. *Whitney v. Stow*, 111 Mass. 368; *Rawson v. Spencer*, 113 Mass. 40.

Our conclusion is that P. L. c. 447, was intended to give the right to vote to all voters in town meeting assembled; that the question submitted is not included in the proviso of article 7, § 1, of the amendments to the constitution;² and hence that the act, and the action under it, is not in conflict with the provisions of the constitution in this respect.

The remaining question, whether the act is in other respects constitutional, is, so far as any objections have been called to our attention, sufficiently answered in *Re Town Council of Cranston*, Index NN, 44, 28 Atl. 608.

COSGROVE v. MERZ et al.

(Supreme Court of Rhode Island. Nov. 12, 1895.)

JURISDICTION—EJECTMENT.

Judiciary Act Aug. 22, 1893, c. 8, § 23, vests in the district courts exclusive original jurisdiction over all actions properly brought within their districts for the possession of tenements or estates held at will or by sufferance. *Held*, that a judgment for plaintiff, in an action for possession of land, against a tenant by sufferance, brought in October, 1893, in the common pleas division of the supreme court of Providence county, was void.

Bill by Ellen Cosgrove against John C. Merz and others to set aside execution sales. Case submitted on the question of the sufficiency of the plea of respondent Elizabeth Rohrich. Plea overruled.

Herbert Almy and James M. Gillrain, for complainant. Henry J. Dubois, for respondents.

² Const. Amend. art. 7, § 1, authorizes registry voters to vote at town meetings on all questions except the election of city councils or propositions for expending money or imposing a tax.

PER CURIAM. This is a bill to set aside two execution sales, on the ground that the judgments on which the executions were issued and the sales on the executions were fraudulently procured by the respondents while the complainant was of unsound mind, for the purpose of getting the complainant's property at a grossly inadequate price. Since the filing of the bill the complainant has died, and the suit is now prosecuted by her heirs at law. The respondent Elizabeth Rohrich, who holds the record title to the land under the execution sales, has filed a plea to the bill, in which she sets forth that on October 4, 1893, being seised in her demesne as of fee in the land, she brought an action for the possession of the land against the complainant, in the common pleas division of the supreme court for the county of Providence, at its September session, 1893, in which action judgment was rendered in her favor on November 18, 1893, for possession and costs; that execution was issued on the judgment, and she was put into possession of the estate on December 20, 1893; that this judgment has not been annulled or reversed, but now remains in full force; and that she is now, and has since been, in possession of the estate.

The case has been submitted on the question of the sufficiency of the plea. We think, as contended by the complainant, that the plea must be overruled, since the common pleas division had no jurisdiction to render the judgment set forth in the plea. By the judiciary act (chapter 8, § 23), which went into effect August 22, 1893, prior to the bringing of the suit of the respondent Elizabeth Rohrich in the common pleas division, exclusive original jurisdiction over all actions properly brought within their districts, for the possession of tenements or estates held at will or by sufferance, was vested in the district courts. *O'Conner v. O'Brien*, Index O, 31, 28 Atl. 765. Assuming that the judgments and execution sales, under which the respondent Rohrich claims title, were valid, the complainant, at the time of the bringing of the suit by the respondent Rohrich in the common pleas division, was a tenant by sufferance of the land (*Johnson v. Donaldson*, 17 R. I. 107, 20 Atl. 242); and hence, the land being situated in Providence, suit to recover its possession should have been brought in the district court of the Sixth judicial district, which embraces the city of Providence. Plea overruled.

CROSS v. BROWN et al.

(Supreme Court of Rhode Island. July 5, 1890.)

PLEDGE—TRANSFER OF NOTE—RETENTION OF SECURITY.

Where collateral was deposited to secure the payment of certain notes, "or any other liability" of the maker, the depositary had the right to sell the notes to a third person, and re-

tain the collateral as security for the payment of any other debt.

Assumpsit by John A. Cross against Brown, Steese & Clark on two promissory notes. A statement of the facts will be found in 33 Atl. 147. There was a judgment for plaintiff, and defendants petition for a new trial. Denied.

James Tillinghast, for plaintiff. Colwell & Barney, for defendants.

PER CURIAM. The notes that were deposited by the defendants with the International Trust Company as collateral security for the notes in suit were so deposited by them under a contract, by virtue of which they were to be collateral security for the payment of the notes in suit, "or any other liability or liabilities of ours to said trust company, due or to become due, or that may be hereafter contracted." We are of the opinion that under this contract it was competent for the trust company, at its option, to apply the proceeds of the collateral either to the payment of the notes in suit, or to the payment of any other liability or liabilities of the defendants to it, and that, therefore, it might sell and transfer the notes in suit to a third person, and retain the collaterals as security for the other notes or liabilities of the defendants which it held. This being so, we do not see how a new trial would be of any avail to the defendants, and we are therefore of the opinion that it should be denied and the petition dismissed, with costs.

SMITH et al. v. BOROUGH OF WILKINSBURG.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)

POWERS OF MUNICIPALITY—SUBMISSION TO ARBITRATION—CLAIMS AGAINST BOROUGH.

1. Unless restrained by positive enactment, municipal corporations may submit disputed claims to the arbitration of referees; and they are as much bound by such submissions, and the awards thereon, as are natural persons.

2. After a sewer on a street was paid for by assessments on the abutting property, the borough adopted a general sewerage system, which rendered the former sewer useless, whereupon the property owners asked that what they had paid for the former sewer be refunded, as they would have to share in the cost of the new system. The council referred the matter to a committee to recommend a plan whereby "any persons equitably entitled to compensation for taxes" should "receive such equitable compensation from the borough." The committee recommended that "said claims" be submitted to arbitration, and the council passed a resolution reciting the pendency of the claims of the property owners for reimbursement for their outlay on the sewer, and providing that the "said claims in dispute" should be submitted to arbitration. *Held*, that the "equitable" claims of the landowners were submitted to the arbitrators, and the latter were not restricted in their inquiry merely to the "legality" of the claims.

Appeal from court of common pleas, Allegheny county; White, Judge.

Action by C. W. Smith and others against the borough of Wilkesburg on an award made by arbitrators. From a judgment for plaintiffs, defendant appeals. Affirmed.

The opinion of the court below was as follows:

"The plaintiffs had paid the expense of constructing a sewer in the street on which their properties abutted. It was constructed by the borough in pursuance of the petition of the property holders, and paid for by assessments under the borough law. Two or three years afterwards the borough adopted a general sewerage system, and constructed another sewer on that street, which rendered the first sewer useless. The plaintiffs will have to pay their share of the expense of the new sewer, in the way of taxes, as the general system is at the public expense. The plaintiffs petitioned the borough council to have refunded to them the whole or a part of what they had paid for the first sewer, alleging it was unjust and inequitable to do away with that sewer, and compel them to pay for another, which was not necessary and of no advantage to them. By resolution of council, an agreement was authorized and signed by the property holders, and the burgess, on behalf of the borough, to refer the claims to three arbitrators, whose award should be final and conclusive. They made an award in favor of the plaintiffs. This suit is on the award. All the parties in whose favor the award was made join in this action. No objection is made on that ground. It is conceded that, if one is entitled to recover, all are; and, to avoid a number of suits, the case is to be heard and decided as if the plaintiffs had a joint action.

"The grounds of demurrer are: (1) The borough had no power to agree to a submission of the case to arbitrators; (2) that the arbitrators found there was no legal lien on the part of the borough; (3) that the award was not in accordance with the terms of submission.

"The first ground cannot be sustained. That a municipality may submit a disputed claim to arbitration, and be bound by the award, is sustained by numerous decisions. *Smith v. City of Philadelphia*, 13 Phila. 177; *Canal Co. v. Swann*, 5 How. 83; *Kane v. City of Fond du Lac*, 40 Wis. 495; *City of Shawneetown v. Baker*, 85 Ill. 564; *Paret v. Bayonne*, 39 N. J. Law, 559; 1 Dill. Mun. Corp. §§ 4, 477.

"The second and third grounds may be considered together. The arbitrators do not find there is no legal liability on the part of the borough. They express an opinion to that effect. But they expressly find, in pursuance of the submission, against the borough, a certain amount due each of the plaintiffs. The history of the proceedings shows that the arbitrators were not limited to the question of the strictly legal liability of the borough, but were to consider the

claims of the plaintiffs on an equitable basis, and on that basis they made the award. All the facts contained in the statement of claim are admitted by the demurrer. The statement sets forth that the sewer constructed in 1889, which was paid for by the plaintiffs, was in successful operation until council ordered the construction of the new sewer, in 1892, under the general system, to be paid for by general taxation; that the plaintiffs requested their sewer to be made a part of the general system, which was refused, and the new sewer was laid side by side with the first one, and the plaintiffs required to disconnect with the first, and connect with the second; that the plaintiffs made application to council for the purpose of reimbursing them whatever might be found to be properly due to them by reason of the double payment of the costs of construction and connecting with the new sewer. In pursuance of that application, the council by resolution of June 30, 1893, referred the matter to a committee to formulate and recommend to council a plan whereby any persons 'equitably entitled' to compensation for taxes paid by them shall receive such 'equitable compensation' from the borough. The committee reported to council a recommendation that a contract be entered into by the borough 'with all claimants, submitting said claims for adjudication to three arbitrators,' mutually to be chosen, and that 'the award of said arbitrators be final and conclusive on the parties.' In pursuance of that recommendation, the council passed a resolution to that effect reading: 'Whereas there are certain claims pending against the borough by certain of her citizens and property owners for reimbursement for certain money paid by them for the construction of what is known as the "South and Wood Street Sewer," the validity and legality of which claims are disputed by the borough'; and 'whereas the borough authorities and said claimants are mutually desirous of having said dispute settled without tedious and expensive litigation: It is hereby agreed * * * that the said claims in dispute shall be submitted for adjudication to three arbitrators; * * * that the award of said arbitrators to be final and conclusive on the parties hereto.' The first meeting of the arbitrators was on February 1, 1894, when they were duly qualified, and entered upon their duties. The second meeting was on February 5th. It seems there was some uncertainty as to the powers of the arbitrators,—whether they were confined to the 'legality' of the claims. Thereupon the council, on February 8th, passed this resolution: 'Resolved, that it is the sense of the council of the borough of Wilkinsburg that they desire to have the arbitrators of the South street sewer pass upon and decide what, if anything, the property owners, as claimants, are entitled to upon the basis of the original resolution offered by Mr.

Balch, and adopted by council June 30. That resolution, as stated above, was to require and decide whether the claimants were equitably entitled to compensation, whether they shall receive such equitable compensation from the borough. In these proceedings and resolutions of council, it is manifest that the submission to the arbitrators was of the equitable claims of the claimants, and the arbitrators were not limited to the legality of the claims. The award was accompanied with a schedule showing the sum awarded each of the plaintiffs, aggregating a total sum of \$4,700. An award was made February 24, 1894.

"That a municipal corporation may sue and pay a claim which is honest, just and equitable, although there may not exist a strictly legal liability, is within the discretionary powers of the corporation, as sustained by numerous decisions. *Mee v. City of Buffalo*, 29 N. Y. 188; *Nelson v. Inhabitants of Milford*, 7 Pick. 18; *Beane v. Inhabitants of Jay*, 23 Me. 117; *Matthe v. Westboro*, 134 Mass. 555; *Campbell v. Upton*, 113 Mass. 67. After the case of *Wilkinsburg* agreed to the submission, appeared, and contested the claims before the arbitrators, and waited until after the award had been made, it is very doubtful if the borough can call in question its own award or the justness of the award. *Co. v. Burlington & M. R. R. Co.*, 47 Vt. 66; *Sillsby Manuf'g Co. v. City of Lowell*, 153 Pa. St. 319, 26 Atl. 646; *Atwood v. Brall*, 124 Ill. 312, 16 N. E. 230. It must be that the amounts awarded the plaintiffs were too much. It seems reasonable that some distinction should be made from the original assessments for the time they were used for the use of the sewer. But that was a question heard and passed upon by the arbitrators, and, as their award was to be final and conclusive upon the parties, we have no power to reconsider it or make any change." "And now, June 22, 1895, after agreement and consideration, the demurrer is overruled and judgment is entered in favor of the plaintiffs against the defendant for \$4,700, the aggregate amount of the award distributed among the plaintiffs; each plaintiff to receive the sum allowed by the arbitrators, as set forth in the schedule accompanying the award."

William G. Stewart and Thomas Jefferson Brown, for appellant. R. A. & James H. for appellees.

PER CURIAM. The facts of this case sufficiently appear in the opinion of the learned judge of the court below, and the questions arising thereon appear to have been rightly decided in favor of the plaintiffs. Unless restrained by positive authority, municipal corporations possess inherent power to submit disputed claims to the arbitrament of referees, and they

as much bound by such submissions, and the awards made in pursuance thereof, as are natural persons. Dill. Mun. Corp. §§ 477, 478. If there was any doubt as to the scope of the arbitrators' authority under the original resolution, it was entirely removed by the resolution of February 8, 1894: "That it is the sense of the council of the borough of Wilkinsburg that they desire to have the arbitrators of the South street sewer pass upon and decide what, if anything, the property owners, as claimants, are entitled to, upon the basis of the original resolution, * * * adopted by council June 30, 1893."

Under that resolution, they were to inquire and decide whether the claimants were "equitably entitled" to compensation, and whether they shall receive such "equitable compensation" from the borough. Considering the proceedings and resolutions of council together, it is very evident that it was the "equitable" claims of the plaintiffs respectively that were submitted to the arbitrators, and the latter were not restricted in their inquiry merely to the "legality" of the claims. Without pursuing the subject further, we are clearly of opinion that judgment was rightly entered in favor of the plaintiffs. Judgment affirmed.

COMMONWEALTH ex rel. RONEY v.
WARWICK, Mayor, et al.

(Supreme Court of Pennsylvania. Nov. 8, 1895.)

LEGISLATIVE POWERS—CONSTRUCTION OF STATUTES.

Act Feb. 2, 1854, provided that when a legislative officer of the city of Philadelphia should die, or be incapable of fulfilling the duties of his office, his place should be filled by a joint vote of the city councils until the next city election, and the qualification of the successor in office. *Held*, that a subsequent act, providing that the words "next city election" should be construed to mean the election at which the voters would elect a successor in office had no vacancy occurred therein, was unconstitutional, as seeking to compel the courts to construe the previous act in a way contrary to its letter and spirit.

Appeal from court of common pleas, Philadelphia county.

Petition by William J. Roney, receiver of taxes, as relator, for a writ of alternative mandamus, upon the mayor of the city of Philadelphia, requiring him to administer to the said William J. Roney the oath of office as receiver of taxes for the term of three years from the first Monday of April, 1895; and also, as against the councils of the said city, requiring them to approve the bond of the said William J. Roney as receiver of taxes for the said term. From a decree for relator, defendants appeal. Affirmed.

On the 21st day of February, 1893, John Taylor was elected receiver of taxes of the city of Philadelphia for a term of three years, commencing the first Monday of April,

1893. The said John Taylor died on February 5, 1895. On January 9, 1895, the select and common councils, in joint session, elected William J. Roney, the relator, receiver of taxes, to fill the vacancy caused by the death of the said John Taylor. The selection of the said councils was for the unexpired term of John Taylor, to wit, until the first Monday of April, 1896. The oath of office was administered to the said William J. Roney, and his bond was approved as required by law. On the 19th day of February, 1895, the electors of the said city voted for candidates for the office of receiver of taxes for the full term of three years, beginning with the first Monday of April, 1895. The said William J. Roney, the relator, receiving the highest number of votes, was returned as elected. In pursuance of the said election, namely, on the 30th day of March, 1895, the said relator presented himself before Edwin S. Stuart, mayor of the said city, for the purpose of subscribing to the oath of office, as required by the act of February 2, 1854. The said Edwin S. Stuart, mayor, refused to administer the oath, on the ground that, as the councils of the said city had selected William J. Roney receiver of taxes for the unexpired term of John Taylor, deceased, and as that term would not expire until the first Monday of April, 1896, there was no vacancy to be filled by the election held on the 10th day of February, 1895; and, as the oath of office for that term had been duly administered to the said William J. Roney, it was not incumbent upon the said mayor to administer another oath to the said relator. Subsequently, Charles F. Warwick, mayor of the said city, also declined to administer the oath, for similar reasons. The councils of the said city also refused to approve the bond of the said William J. Roney for the full term of three years from the first Monday of April, 1895, because they had already approved the bond of William J. Roney for the unexpired term of John Taylor, deceased, and that term would not expire until the first Monday of April, 1896. The said William J. Roney, on the 25th day of May, 1895, filed his petition in the court of common pleas for Philadelphia county, setting forth these facts, and praying for a writ of alternative mandamus against Charles F. Warwick, mayor of the said city, and the select and common councils, directing the said mayor to administer to the said petitioner, William J. Roney, the oath of office as receiver of taxes, and commanding the councils of the said city to approve the bond of the said William J. Roney as receiver of taxes. The writ of alternative mandamus was allowed, returnable the first Monday of June, 1895. On June 13, 1895, the respondents made return to the writ of alternative mandamus, setting forth the reasons why the mayor had not administered the oath of office to the said William J. Roney, and why the councils of the said city refused to approve his bo

On September 28, 1895, after argument upon the said petition and return, the court of common pleas No. 3 entered judgment in favor of the relator. The act of February 2, 1854, § 46 (P. L. p. 21), provides that, in the case of a vacancy in any elective office of the said city, the councils of the said city, by a joint vote, shall fill the vacancy until the next city election. The act of April 18, 1867 (P. L. p. 1299), entitled "A further supplement to the act of February 2, 1854," etc., after various recitals, provides "that the words 'next city election,' in the 46th section in the act, entitled 'An act to incorporate the city of Philadelphia,' approved the second day of February, 1854, shall be construed to mean the election at which the qualified voters of the city of Philadelphia would, in accordance with existing laws, elect a successor in office had no vacancy occurred therein." The term of office of the receiver of taxes, which, by the act of February 2, 1854, had been fixed as two years, was, by the act of June 5, 1883 (P. L. p. 79), increased to three years.

F. L. Wayland, James Alcorn, and John L. Kinsey, for appellant. M. J. O'Callaghan, for appellee.

STERRETT, C. J. It was unavoidable, in their earlier administration, that conflict should have arisen between the legislative and judicial branches of our government. The form of government was new, and the exact limitations of duty and power were imperfectly understood. Even their co-ordination of power was doubted by some (Eakin v. Raub, 12 Serg. & R. 330); and the feeble resistance offered by the judiciary naturally encouraged encroachments by the legislature. The mischief which resulted became so great that this court was compelled, in *Dorman v. Heist*, 5 Watts & S. 171, and *Bolton v. Johns*, 5 Pa. St. 145, to take a stand in assertion of the power which the constitution had conferred. "The functions of the several parts of the government are," said Gibson, C. J., in *De Chastellux v. Fairchild*, 15 Pa. St. 18, "separate, and distinctly assign the principal branches of it,—the legislative, the executive, and the judiciary,—which, within their respective departments, are equal and co-ordinate; and hence the principle was declared, and has become firmly established in a bead-roll of cases, that "the legislative direction to perform a judicial function in a particular way would be a direct violation of the constitution." *O'Conner v. Warner*, 4 Watts & S. 223. Tested by this principle, the act of 1867 is not legislative, but expository, in its character. It does not purport to amend, alter, or change the language of the act of 1854. It offers no substitutionary clause, but declares what that act "shall be construed to mean." It is, on its face, a legislative mandate to the courts to perform their judicial function in a particular way. The appel-

lant insists that this court has recognized an exception to the rule of expository prohibition in cases of doubtful construction. There are, it is true, dicta to that effect, but no precedents have been cited in which it was made the basis of decision. In *O'Conner v. Warner*, supra, it was placed on the ground that no injury had been done the parties. In *Lambertson v. Hogan*, 2 Pa. St. 22; *Reiser v. Association*, 39 Pa. St. 137; *Denny v. Same*, Id. 154; *Blackburne's Appeal*, Id. 160; *Haley v. Philadelphia*, 68 Pa. St. 45; and *Titusville Iron Works v. Keystone Oil Co.*, 122 Pa. St. 627, 15 Atl. 917,—certain expository statutes were denied retroactive effect; while in *Re East Grant St.*, 121 Pa. St. 596, 16 Atl. 366, an act was held invalid so far as it undertook to declare the meaning of a prior act, but, so far as it provided a substitutionary clause, was effective in repeal. Nor is it apparent how an exception can be reconciled with the theory of exclusive legislative and judicial functions. Its existence is an invitation to, and has resulted in many attempted, encroachments on the province of the latter; and, if it extend to cases like the present, has no limit in its application, and puts in the power of the legislature the abrogation of the principle to which it is said to be an exception. But, concede the legislative power to pass expository acts. Its exercise was said in *Haley v. Philadelphia*, supra, to be limited to statutes whose construction is "really doubtful." "It would be monstrous," said Mr. Justice Sharswood, "to maintain that, where the word and intention of an act were so plain that no court had ever been applied to for the purpose of declaring their meaning, it was therefore in the power of the legislature, by a retrospective law, to put a construction upon them contrary to their obvious letter and spirit." "The word and intention" of the act of 1854 are so plain that there is no room for construction, and therefore no occasion for the passage of an expository statute existed. It declares, so far as relates to the subject under consideration, that, "whenever any legislative officer of said city shall die, or become incapable of fulfilling the duties of his office, his place, except where other provision is made for filling the vacancy, shall be filled by a joint vote of the city councils until the next city election and the qualification of the successor in office: provided, that such vacancy shall exist at least thirty days before the next city election, otherwise such vacancy shall be filled at the next election thereafter"; while the act of 1867 declares that it "shall be construed to mean," what is obviously contrary to its "letter and spirit," that such appointee shall hold during the unexpired term.

It was also contended that, "as the constitution prescribed no form or order into which the legislative expression was to be cast," neither form nor order were material, and this court should therefore give effect to the "purpose" of the act of 1867. But the "pur-

pose" of every statute, as of all other instruments, must be gathered from the language used, and this act undertakes to give a new and final interpretation to the act of 1854, and direct the courts to adopt that interpretation in all cases which come before them. Obedience to this order is an abandonment of a principle which is vital to the preservation of our system of government. "As the legislature cannot," says Judge Cooley in Const. Lim. 114, "set aside the construction of the law already applied by the courts to actual cases, neither can it compel courts for the future to adopt a particular construction of a law which the legislature permits to remain in force." One of the fundamental principles of all our governments is that the legislative power shall be separate from the judicial. If the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and cannot be done by a mandate to courts, which leaves the law unchanged, but seeks to compel the courts to construe and apply it, not according to the judicial, but to the legislative, judgment. The practical effect of the act of 1867 in the present case would be to compel this court to "construe" the expression "the next city election," used in the act of 1854, to mean not the "next," but the "next but one." It was clearly beyond the legislative power to thus usurp judicial functions, or to distort language.

Judgment affirmed, and it is now ordered that a writ of peremptory mandamus be issued, as prayed for in the petition, directed to the defendant Charles F. Warwick, mayor of the city of Philadelphia, commanding him to administer to the relator, William J. Roney, the oath of office of receiver of taxes for the city of Philadelphia, as required by law, and to the said defendants members of councils of the city of Philadelphia, commanding them to consider the form and sufficiency of the bond required to be entered by said relator for the city of Philadelphia, and that the costs be paid by the defendants.

MITCHELL, J., dissents.

IN RE GRIEL'S ESTATE.

Appeal of WILL.

(Supreme Court of Pennsylvania. Oct. 7, 1895.)

STARE DECISIS—AFFIRMATION BY DIVIDED COURT—CLERK OF ORPHANS' COURT—FEES.

1. A decree of the lower court, affirmed by a divided court, is not a decree or judgment of the supreme court, in support of which the rule of stare decisis can be invoked.

2. Act Feb. 22, 1821, provides that: "The fees to be received by the clerk of the orphans' court shall be as follows: * * * All proceedings for the sale of real estate, recognition or confirmation, recording and copy, three dollars." *Held*, that the clerk is entitled to such fee of three dollars for each of a number of sales of the real estate of one decedent.

Appeal from orphans' court. Lancaster county; Brubaker, Judge.

Proceedings for the sale of lands belonging to the estate of Jacob Griel, deceased. From a decree sustaining the exceptions to the auditor's report, which were filed on the part of the legatees and others, and dismissing the exceptions on the part of I. N. S. Will, late clerk of the orphans' court, so far as they related to the fees due said Will for his services in such proceedings, he appeals. Reversed.

The following is so much of the auditor's report as is necessary to give a full understanding of the case:

"I. N. S. Will, late clerk of orphans' court, presented bill for costs in proceedings for sale of real estate, consisting of eighty purparts, \$240. On the 29th day of September, 1891, the said executors presented a petition to your honorable court, praying for an order to sell the real estate of the decedent for the payment of debts. This petition covered twenty written pages, and described eighty different purparts, and is recorded in Record Book 1892-1893, page 100. The court awarded the sale as prayed for; the first sale to be held October 29, 1891, and to be continued from time to time thereafter at the discretion of the executors. Any portion of said real estate was ordered to be sold in whole or in parts, as might be deemed best for the estate. Return to said order of sale was made December 21, 1891, showing twenty-seven purparts sold to twenty-four different purchasers. The said order was continued, as to the unsold property, to the third Monday in March, 1892. A second return to said order of sale was made March 21, 1892, showing five purparts sold to four different purchasers. Return was also made at the same time showing two purparts sold at private sale to two different purchasers. On the 6th day of June, 1892, the court ordered and decreed a private sale of part of purpart No. 75 to Joseph H. Dubbs. On August 15, 1892, an alias order of sale was awarded, returnable the third Monday in December, 1892, to sell the unsold property specified in the order at times named, or as sale might be continued from time to time; purparts Nos. 73, 74, 75, 76, 77, 78, 79, and 80 to be sold either in whole or in parts. Return to said order of sale was made December 19, 1892, showing eight full purparts and part of purpart No. 75 sold to eight different purchasers. Said alias order of sale was continued to the third Monday in March, 1893. On the 20th day of March, 1893, a second return was made to said alias order of sale, showing eighteen full purparts and part of purpart No. 78 sold to eight different purchasers. The said alias order of sale was continued to the third Monday in June, 1893. On the 19th day of June, 1893, a third return was made to the said alias order of sale, showing four full purparts and part of purpart No 75 sold to four different pur-

chasers. The said alias order of sale was continued to the third Monday in September, 1893. On the 18th day of September, 1893, a fourth return was made to the said alias order of sale, setting forth that no sales had been made under the same. The said alias order of sale was continued to the third Monday in December, 1893. On the 18th day of December, 1893, a fifth return was made to the said alias order of sale, showing that five different parts of purpart No. 75 and two different parts of purpart No. 78 were sold to seven different purchasers. On August 26, 1892, the court decreed a private sale of purpart No. 72 to J. H. Flennard. On the 24th day of October, 1893, the court ordered and decreed a private sale of purparts Nos. 57, 58, 59, and 60 to Samuel H. Henry. On the 23d day of December, 1893, the court ordered and decreed the sale of purparts Nos. 31, 66, and 67 to Sarah E. Wisner, Christian Stiffel, and Mary C. Streaker, respectively, at private sale. On the 31st day of March, 1893, a petition was presented for amending and correcting petition for sale of real estate and order granted as prayed for. Sixty-two purparts were sold in whole at public sale, ten purparts were sold in whole at private sale, seven parts of purpart No. 75 were sold at public sale, three parts of purpart No. 78 were sold at public sale, and one part of purpart No. 75 was sold at private sale. As shown by the returns of public and private sales, eighty-three distinct parcels of land were sold out of and from the real estate described in eighty purparts in the petition of September 29, 1891. Six returns were made of public sales and five of private sales. There were fifty-five different purchasers at public sales, and eight different purchasers at private sales, to all of whom their purchases were confirmed. In the act of assembly of June 12, 1878, § 7 (P. L. p. 19; Purd. Dig. 1893, p. 733), it is provided that clerks of orphans' courts shall receive for 'all proceedings for sale of real estate, \$3.00.' In the case of *Ramsey v. Alexander*, 5 Serg. & R. 337, there was a return of an inquisition in the orphans' court of Franklin county, by which the estate of an intestate was divided. The heirs refused to take, and the real estate of the decedent was sold in twelve parcels. The clerk charged four dollars on each, under provisions of the then existing act of assembly allowing such fee for 'all proceedings for the sale of real estate, recording and copy.' Gibson, J., held that a separate fee could be charged on each sale actually made. 'Each sale is a distinct proceeding,' says the justice, 'and has its appropriate duties, which the officer is bound to perform, and in proportion to the number of sales are those duties multiplied. I think it, therefore, a fair and reasonable construction, to allow him a fee for each sale, it being his only compensation for recording and copy. * * *

Were the construction otherwise, the officer

would, in almost every case, be inadequately rewarded. * * * I am of opinion the appellant be allowed four dollars on sale.' In the present instance, there are thirty-three separate purchasers, several parts being returned in a single return struck down to one bidder. Where the return is of this character, the several parts returned as disposed of to the purchaser should be considered as one and the clerk entitled to one fee of dollars thereon. In this view of the question in hand, and following Justice Gibson in the case just cited, the auditor allowed the clerk of orphans' court three dollars on three sales, respectively, making a total of one hundred and eighty-nine dollars."

Brown & Hensel, for appellant.
Landis, for appellee.

STERRETT, C. J. This appeal involves the construction of section 8 of the act of February 22, 1821 (P. L. p. 57), prescribing inter alia, that: "The fees to be received by the clerk of the orphans' court shall be as follows: * * * All proceedings for the sale of real estate, recognizance or commitment, recording and copy, three dollars." The facts, so far as they are material, are sufficiently set forth in the report of the clerk of the orphans' court, and need not be restated. He states that under the original and subsequent orders of sale 83 distinct parcels of land were sold, and sales confirmed to the respective purchasers, and that "there were 55 different purchasers at public sales and 8 different purchasers at private sales," making in all 63 purchasers, some of whom bought 2 or more of the 83 parcels of land. Adopting the opinion of Mr. Justice Gibson in *Ramsey v. Alexander*, 5 Serg. & R. 337, and treating the sale of said purchases as a separate sale, the clerk was awarded to the appellant, clerk of the orphans' court, a fee of \$3 on each of said sales, making a sum of \$189. This was excepted to, and the learned judge of the orphans' court, considering himself bound by the opinion of Justice Tilghman in *Ramsey v. Alexander*, supra, sustained the exception, and awarded the appellant a single fee of \$3 "for the proceedings," treating the several different sales to different purchasers as merely one sale of decedent's real estate. In doing so, he said: "If we were permitted, as the auditor has done, to consult our own opinion in the matter, irrespective of the decision of the court of stale decisions, we should sustain his ruling and dismiss the exceptions, as, in our opinion, the compensation allowed by law is entirely inadequate for the services of the clerk in this case. But the court is bound by the rulings of the supreme court, and, until the case of *Ramsey v. Alexander*, supra, is overruled, it is our own plain duty to obey the law as it is interpreted by our highest court." If the single fee now before us had been expressly

by this court in the case referred to, there would be some force in the position assumed by the learned judge; but neither that nor any other question of similar import was passed upon by this court, because, as to the construction of the clause above quoted, the two judges who alone heard and considered the case differed in opinion, and hence the decree of the orphans' court was permitted to stand, except as to matters in which both judges concurred. In other words, as to the question of construction now before us, the decree of the court below stood as affirmed by a divided court. That is not a decree or judgment of this court in support of which the rule of *stare decisis* can be successfully invoked. That principle applies only to actual judgments or decrees of this court, and not to judgments or decrees of inferior tribunals, which are necessarily allowed to stand as final because of an equally divided appellate court. It therefore follows that in construing the clause above quoted we are not embarrassed by any prior decision involving the same, or even a similar, question. We are clearly of opinion that the clause referred to was rightly construed by the learned auditor, and his report awarding appellant \$189, or a fee of \$3 for each of the 63 separate sales of decedent's real estate, made and confirmed to the respective purchasers. As was clearly shown by Mr. Justice Gibson in the case above cited, that is the only construction of the clause in question that gives proper effect to the legislative intention. Decree reversed, with costs to be paid by the appellees, and it is ordered and decreed that the report of the auditor be confirmed, and the fund be distributed in accordance therewith.

MAUSEL v. NEW YORK, C. & ST. L. RY. CO.

(Supreme Court of Pennsylvania. Nov. 4, 1896.)

EXECUTION AGAINST RAILWAY PROPERTY—VALIDITY OF PROCEEDING.

In order to authorize the special *fiel facias* allowed by Act April 7, 1870, against the property of a railway company, compliance with the conditions precedent to the issuance of a writ of sequestration, as prescribed by Act June 18, 1836, § 73, is necessary.

Appeal from court of common pleas, Erie county; Frank Gunnison, Judge.

Action by Debby Mausel against the New York, Chicago & St. Louis Railway Company, in which a judgment was obtained by plaintiff. From an order discharging a rule to show cause why proceedings on a *fiel facias* should not be stayed or set aside, the defendant appeals. Reversed.

The specifications of error were as follows:

"(1) The court erred in not granting the prayer of the petition of the New York, Chicago and St. Louis Railroad Company, as set forth in

its said referred-to petition, to wit, that said named plaintiff, Debby Mausel, should not, by virtue of her writ of *fiel facias*, issued against the New York, Chicago and St. Louis Railway Company, sell the property belonging to it, the New York, Chicago and St. Louis Railroad Company. (2) The court erred in discharging the rule to show cause why proceedings should not be stayed on *fiel facias* No. 17, Nov. term, 1894, wherein Debby Mausel was plaintiff, and the New York, Chicago and St. Louis Railway Company was defendant. (3) The court erred in not granting the prayer to stay said writ of *fiel facias*, for the reason that the plaintiff in said writ had caused the sheriff to levy on the property of the New York, Chicago and St. Louis Railroad Company, instead of the property of the defendant in the writ, as required by law. (4) The court erred in not granting the prayer of the petitioner to stay said referred-to writ of *fiel facias*, for the reason that on the 10th day of September, 1894, said writ of *fiel facias* was issued, and was the first writ issued on the said referred-to judgment, and, by virtue of said referred-to writ, the sheriff did not make a demand upon said defendant company for the amount of the debt, etc., sought to be collected by virtue of said writ, and did not make a levy on personal property as required by law. (5) The court erred in not staying, etc., said writ of *fiel facias*, for the reason that the sheriff, without first having made a demand and a levy upon the property of the defendant, and without having returned his writ unsatisfied in whole or in part, he proceeded to advertise the sale of the property, real estate, etc., of the defendant, in Erie county, contrary to the procedure provided by law."

S. A. Davenport, for appellant. J. Ross Thompson, for appellee.

MCCOLLUM, J. Debby Mausel obtained a judgment in the court of common pleas of Erie county against the New York, Chicago & St. Louis Railway Company, and, by virtue of a writ of *fiel facias* issued thereon, levied upon and advertised for sale its road-bed, right of way, depots, grounds, sidings, etc., in said county, together with its franchises. The case is now before us on the appeal of the defendant company from an order of the court below discharging a rule to show cause why the proceedings on the *fi. fa.* should not be stayed or set aside. As the record stands, the material question to be considered is that which is raised by the second and fifth specifications of error. It is obvious that the levy in this case was not warranted by the writ on which it was made, and that the court below should have set it aside on the motion of any party injuriously affected by it. That the defendant company is such a party cannot be denied by the plaintiff, because she alleges that it is the owner of the property levied upon. It is well settled

that the franchises and other property essential to the existence and proper operation of a railway company cannot be seized and sold on an ordinary *fi. fa.* The special *fiel facias* allowed by the act of April 7, 1870 (P. L. p. 58), and on which such property may now be sold, is a substitute for the writ of sequestration under section 73 of the act of June 16, 1836; and compliance with the conditions precedent to the issuance of the latter is necessary to authorize the former. As the plaintiff in this case did not comply with these conditions, we are constrained on the appeal of the defendant company to sustain the second and fifth specifications of error.

On the argument at bar, a motion was made to amend the record by substituting the New York, Chicago & St. Louis Railroad Company as appellant in place of the New York, Chicago & St. Louis Railway Company. This motion was resisted by the plaintiff, and, upon consideration of the same, we declined to allow it. The specifications based on the claim of the New York, Chicago & St. Louis Railroad Company need not therefore be considered on this appeal. If the plaintiff proceeds in conformity with the act of April 7, 1870, to levy upon and sell the property unlawfully seized on the *fi. fa.* allowed by section 72 of the act of June 16, 1836, and the New York, Chicago & St. Louis Railroad Company, claiming to have a clear title to the same, intervenes to prevent a sale of it, the question suggested by the remaining specifications can be properly presented, considered, and disposed of. Whether the nature of the property and the interest the public has in the operation of the road, together with the complications which might arise from a sale upon the special *fi. fa.* under such circumstances, would afford ground for equitable relief, is a matter in regard to which we express no opinion at this time.

Decree reversed, and levy set aside, at the cost of the appellee.

CITY OF ERIE v. LAND ON EIGHTEENTH STREET et al.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)

STREET IMPROVEMENT—LIEN ON ABUTTING LAND.

A street-railway company was, by its contract with the city, bound to pave and keep in repair the space between its tracks and one foot outside of each rail. An ordinance was duly passed providing that the street should be paved "with asphalt from curb to curb," and a contract was made in accordance therewith. Subsequently, the city, as it had authority to do, agreed that the railway company might pave with stone the part of the street which it was bound to maintain, and the contractor acquiesced in this arrangement, and paved the balance of the street with asphalt. *Held*, that there was not such a failure to comply with the ordinance and the contract as would exempt abutting properties from liability for their proportion of the cost of the improvement.

Appeal from court of common pleas, Erie county; Frank Gunnison, Judge.

Proceedings by the city of Erie, to the use of the Erie Paving Company, against a piece of land fronting on Eighteenth street, in the city of Erie, and Mary E. Moody, owner or reputed owner, to subject such land to a lien for the cost of a street pavement. From a judgment nonsuiting the plaintiff, it appeals. Reversed.

Griffith & Crosby and Theo. A. Lamb, for appellant. Joseph M. Force, for appellee.

MCCOLLUM, J. The plaintiff was nonsuited in the court below, on the ground that the street was not paved in compliance with the ordinance enacted by the select and common councils of the city in March, 1890, nor in accordance with the contract entered into between the city and the use plaintiff on the 14th of May of that year. The ordinance and contract referred to called for the paving of Eighteenth street, from Peach street to Liberty street, "with asphalt from curb to curb." The street between these points was of the width of 32 feet, and the center of it was occupied by the tracks of the Erie City Passenger Railway Company, which, by its contract with the city, was bound to pave, repave, and keep in repair the space between its tracks and one foot in width outside of each rail. The space which the railway company was thus required to maintain was the width of seven feet, and this deducted from the entire width of the street between the curbs left 25 feet of it to be maintained by the city. If the railway company neglected or refused to comply with its contract in regard to the paving, repaving, and repair of the street, the city was authorized by it to cause the required work to be done at the company's expense. The company was also bound, in paving or repaving, to lay the same kind of pavement used in the balance of the street, unless the contracting parties should otherwise agree. After the contract was made with the use plaintiff for the construction of the pavement in question, the city agreed that the railway company might pave with Medina stone so much of the street as it was bound to maintain. The use plaintiff acquiesced in this arrangement, and, under its contract with the city, paved the balance of the street with asphalt. The work done upon the street by the railway company was such as the city might lawfully authorize under its contract with the former, and it was clearly in the interest of the owners of the abutting property, as well as in the interest of the municipality, because it relieved them from liability for at least seven-eighths of one-fourth of the cost of the entire improvement. The city could not have held the railway company responsible for any part of the cost of it without proof that the latter had neglected or re-

fused to construct its share of it, "after reasonable notice from the city engineer" to do so. If this notice had not been given, it was not only competent, but it was entirely proper, for the city to arrange with the railway company for the paving of its portion of the street in such manner and with such material as was mutually deemed fitting and satisfactory. We conclude, therefore, that there was nothing in the action of the city, the use plaintiff, or the railway company, in regard to the paving of the street, which can be held to exempt the abutting properties from liability for their proportion of the cost of the improvement. We think, also, that the city's consent that the railway company might pave its part of the street with Medina stone was sufficiently manifested by the resolution of councils. In arriving at these conclusions, we have not overlooked the cases cited to sustain the appellee's contention, nor disregarded or qualified any principle on which either of them was decided. Neither of them is applicable to the case at bar. In *Western P. Ry. Co. v. City of Allegheny*, 92 Pa. St. 100, the claim of the city embraced the cost of a wall, one-half of which was built on the company's land, and it was held that in so building it the city was a trespasser. It was also held that the wall so erected was an unlawful structure, and as the portion of it within the line of the street was not self-sustaining, nor of any value to the public, the railway company was not liable to the city for any part of the cost of it. In *Ferguson's Appeal*, 159 Pa. St. 39, 28 Atl. 130, the decree of the court below was reversed, and the record remitted for further proceedings, on the ground that the assessment for benefits was not made in compliance with the provisions of the curative act of May 16, 1891 (P. L. p. 71), but there was no denial of the right of the city to make an assessment in conformity with the act. In *Scranton City v. Bush*, 160 Pa. St. 499, 28 Atl. 926, the sufficiency of an affidavit of defense to a municipal claim was questioned; but, as it was stated in it that the work on which the claim was based was not authorized by the city, it was held sufficient to prevent judgment. It will be seen from this reference to the cases cited that they do not govern the case at bar. Judgment reversed, and *procedendo* awarded.

ROTHSTEIN v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)

ACTION AGAINST CARRIER—INJURY TO PASSENGER—ALIGHTING FROM MOVING TRAIN.

1. The fact that plaintiff's act in getting upon the wrong train was due to the negligence of the defendant railroad company did not justify him in alighting from the train while it was moving at a rapid speed.

2. The fact that a train official, on telling plaintiff that he was on the wrong train, said that it was going slow, and that he could jump from it, does not subject the company to liability for the consequences of his jumping.

3. One jumping from a rapidly moving train, about 11 o'clock at night, when it is so dark that he cannot see where the jump will land him, merely in order to escape being carried to the next station, when he desires to go in an opposite direction, is guilty of contributory negligence.

Appeal from court of common pleas, McKean county; T. A. Morrison, Judge.

Action by Myer Rothstein against the Pennsylvania Railroad Company for personal injuries. From a judgment for defendant, plaintiff appeals. Affirmed.

Eugene Mullin and T. F. Mullin, for appellant. J. Ross Thompson, for appellee.

MCCOLLUM, J. The plaintiff got upon the platform of one of the Pullman cars as the train was moving from the station at Altoona towards Pittsburgh, and, having requested a trainman to give him a berth for New York, he was told that he was on the wrong train, that it would not stop to let him off, but that it was going slow, and he could jump from it. He was on the car about a minute and a half after the train started from the station, and the rate of speed it had attained when he stepped or jumped from it is best described in his own language. He said: "The train went so swift that it pulled the feet from under me." It is a reasonable conclusion from his testimony in regard to the speed of the train, and the time he was on it, that it was moving at the rate of from 10 to 15 miles an hour when he jumped from it. It is well settled that to jump from a moving train is an act of negligence, which will defeat a suit for an injury caused by it, unless it plainly appears that the circumstances connected with and surrounding it justified or excused it. In this case the plaintiff was safe upon the train, and, if his getting upon it instead of the New York train was due to the negligence of the company, he might have had an action against the latter for the expenses he incurred, and the inconvenience to which he was subjected in consequence of its fault. But his presence on the train through the negligence of the company furnished no warrant or excuse for jumping from it as he did. We must therefore, for the purposes of this suit, consider his presence there as due to his own unassisted mistake, and regard the act of jumping from the car in the light of what occurred after he had gotten upon it. The sole attempted extenuation of the act lies in the conversation with the person called by the plaintiff a trainman, but whether this person was the conductor of the train, a brakeman, or a Pullman car porter does not appear. It does appear, however, that he did not order the plaintiff to jump from the car, and that what he said amounted, at most, to a suggestion or expression of opinion that

he might do so. In this conversation, therefore, there was no warrant for the act under consideration, and nothing to subject the company to liability for the consequences of it.

The plaintiff jumped from a rapidly moving train, about 11 o'clock at night, and when it was so dark that he could not see where the jump would land him. He did so to escape being carried to the next station, when he desired to go in the opposite direction. This desire was the sole cause of his rash and entirely voluntary act, and he must be considered as having deliberately accepted the risks involved in it. It is essential to the safety of the traveling public that the railroad company shall be held to a strict accountability to its passenger for an injury resulting from its negligence, but common justice requires that it shall not be held liable to him for an injury caused by his own negligence, or violation of its rules.

We find nothing in the cases cited by the plaintiff to sustain his contention, which is at variance with the views expressed and the conclusion reached by the learned court below. The specifications of error are overruled, and the judgment is affirmed.

O'BRIEN v. BENNY.

(Court of Errors and Appeals of New Jersey.
Nov. 21, 1895.)

CONTESTED ELECTIONS—APPEAL TO COURT OF ERRORS AND APPEALS.

An act respecting writs of error, passed May 24, 1894 (P. L. 1894, p. 491), is valid legislation, and effectually prohibits the removal into this court of judgments rendered in the supreme court on appeal from the judgments of circuit courts in cases of contested elections. Revision, p. 355, §§ 100-109.

(Syllabus by the Court.)

Writ of error by William J. O'Brien from a judgment in favor of Allen Benny in a contested election. Dismissed.

Allen Benny, pro se. Thos. F. Noonan, Jr., opposed.

GARRISON, J. This writ of error must be dismissed. It is brought directly in the face of an act of the legislature forbidding "the bringing of any writ of error to reverse any judgment of the supreme court rendered on any appeal taken to the supreme court from the judgment of any circuit court in any case of contested election." P. L. 1894, p. 491.

The judgment sought to be brought here by this writ is such a judgment. The appeal given by the legislature from the circuit to the supreme court is by the act above recited made final. This whole procedure has been held to be, in legal effect, a legislative creation ancillary to the operation of canvassing votes, and producing a temporary effect only as to the result of any election.

Conger v. Convery, 52 N. J. Law, 417, 20 Atl. 166.

The right thus declared is inconclusive, and establishes nothing beyond a prima facie title.

In the creation of governmental apparatus of this sort, the legislature may, in its discretion, give or not give an appeal to the aggrieved party. If by one statute an appeal is given, it may by another be taken away. If successive appeals were provided, the second may be withdrawn, leaving the result of the first final and conclusive. This is the case here.

The notion that any judicial prerogative is infringed, or even drawn into controversy, by the legislation in question, is set at rest by the case in the supreme court to which reference has been made.

The writ is dismissed, with costs.

VAN STEENBURGH et al. v. THORNTON. (Court of Errors and Appeals of New Jersey. Nov. 19, 1895.)

INJURY TO EMPLOYEE—IMPUTED NEGLIGENCE.

1. A master who employs a servant to work in a sewer trench must exercise reasonable care in the adoption of such means and appliances as will give reasonable safety and protection to the servant in his employment.

2. The care which the employer is bound to use in such a case he can give through another only at his own risk. The negligence of such person will be imputed to the employer.

(Syllabus by the Court.)

Error to circuit court, Hudson county; before Justice Lippincott.

Action by Rose Thornton, administratrix of Michael Thornton against William Van Steenburgh and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Warren Dixon and Samuel Kallsch, for plaintiffs in error. Thos. J. Lintott, for defendant in error.

VAN SYCKEL, J. Michael Thornton, the plaintiff's intestate, was the servant of the defendants, engaged in digging for them in a sewer which they were constructing for the township of Kearney, when one side of the sewer trench caved in upon him, and crushed him to death. The sewer trench was about 11 feet deep, and the sides were not braced. A few years prior to this accident, a trench had been opened, and a water pipe laid in this street, buried 4 or 5 feet under ground. The sewer trench was parallel with the water pipe and about 3 feet distant from it. The earth excavated from the sewer trench was piled up on the side next to the water pipe, and it caved in on that side. The writ of error in this case is prosecuted to review the judgment for damages recovered by the plaintiff on the trial below. The error relied on for a reversal is that the trial judge refused to nonsuit or direct a verdict for the defendants.

The trial court correctly charged the law to be that the duty of the defendants, as employers of the deceased, as their servant, was to exercise reasonable care to provide a safe place for the deceased to work in, and to furnish and adopt such means and appliances for the work to be performed by the deceased that he might be insured reasonable safety and protection in his work, subject to the further rule of law that the deceased took upon himself, as an employé or servant of the defendants, all the risks of danger incident to the employment, and which were obvious, or could have been perceived by him by the exercise of his senses and the use of ordinary care and circumspection. Whether the employer was guilty of negligence in not using reasonable care to keep the ditch in a safe condition was a question for the jury, depending upon various facts which were in dispute in the case. The care which the employer was bound to use in such a case he could give through another only at his own risk. He attempted to perform this duty by a boss employed by him, and put in charge of the work. There was evidence tending to show that this boss knew, or from which the jury might have inferred that he should have known, of the dangerous condition of the ditch, and that he did not take proper precaution to avert such danger, and protect the deceased. In this respect the negligence of the boss was the negligence of his employer. He failed in a duty he was required to perform as representative of his superior. This is in accordance with the last declaration of this court upon this subject, in the case of *Ingebregtzen v. Steamship Co.* (March, 1895) 31 Atl. 619. The case was properly submitted to the jury, and the judgment below should be affirmed.

S. H. Grey and M. P. Grey, for plaintiff in error. C. H. Sinnickson and Wm. E. Potter, for defendants in error.

GARRISON, J. The first assignment of error is based upon a bill of exceptions which certifies that the plaintiff below, against the objection of the defendant, was permitted to put in the minute book of the borough of Woodstown, in order to prove the passage of an ordinance requiring the defendant to maintain at all times a flagman at the crossing at which the plaintiff's intestate was killed, and that notice thereof was directed to be given to the defendant corporation.

This testimony was clearly illegal. The matter was res inter alios, even if any proof had been offered of the legal existence of the municipality in question, or of its legislative authority to impose the regulation prescribed.

The injurious nature of the testimony is likewise apparent. The decedent was a resident of Daretown, who was killed by being struck by a locomotive of the defendant at a road crossing near Woodstown. The question of his contributory negligence entered largely into the issue. Upon this point, the fact that a municipality near the crossing had made a requisition upon the defendant to protect at all times passengers upon the highway from the dangers of this crossing was a most persuasive argument in favor of the view that otherwise travelers would be exposed to extraordinary dangers. This was a question to be decided by the jury upon competent proof. Upon such a point, the opinion of the neighboring municipal authorities could not be deemed to be without its influence on the jury.

No serious effort is made to justify the admission of this proof, other than that the objection to it was not sufficiently specific. An effort was made, however, to nullify its injurious effect by a reference to the stenographer's notes, which show that after the allowance and sealing of the exception the plaintiff's counsel asked to withdraw the proof. The notes further show that to this proposition the trial court replied: "You have offered the ordinance and the record of the direction given by the borough council to notify the company; then you ask leave to withdraw, which I have not ruled upon." And no ruling was at any time made upon this offer, nor was any exception asked to the failure to permit it.

This colloquium formed no part of the judicial certificate, and hence is not properly before us for any purpose. If, however, we accept the history of the trial as given in the transcript of the stenographer, it does not in the least degree alter the situation. The testimony was offered for a specific purpose. It was objected to, was legalized by its admission, and was never afterwards eliminated from the proofs. Whether any use was made in the arguments of the facts thus established is not known; nor would the fact that it was not adverted to have any influence upon a decision, on error, as to its legality. A judgment

WEST JERSEY R. CO. v. PAULDING et al.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1895.)

RAILROAD COMPANIES—ACCIDENT AT CROSSING— EVIDENCE OF NEGLIGENCE.

In an action against a railroad company for negligently killing plaintiff's intestate at a public crossing, the plaintiff, against objection, was permitted to prove that the municipal authorities of a near-by borough had passed an ordinance requiring the railroad at all times to maintain a flagman at the crossing in question, and had directed notice to this effect to be given to the company.

Held: (1) That the admission of this proof was injurious error.

(2) That this error was not cured by a subsequent request for permission to withdraw the proof, which was not acted upon by the trial court.

(Syllabus by the Court.)

Error to supreme court.

Action by Helen M. Paulding and others, administrators, against the West Jersey Railroad Company. Plaintiffs had judgment, and defendant brings error. Reversed.

based upon a verdict rendered on proofs of which this was one is inevitably tainted with illegality, and cannot be permitted to stand when challenged in this respect. The judgment must therefore be reversed, and a venire de novo awarded.

In view of this determination, no practical purpose would be served by reviewing in detail the other assignments of error.

HOBOKEN PRINTING & PUBLISHING CO. v. KAHN.¹

(Court of Errors and Appeals of New Jersey. Nov. 18, 1895.)

LIBEL AND SLANDER—EVIDENCE IN MITIGATION.

In mitigation of damages, the defendant in a libel suit may show that he did not originate the calumnious charge.

(Syllabus by the Court.)

Error to circuit court, Hudson county; before Justice Lippincott.

Action by Gustave Kahn against the Hoboken Printing & Publishing Company. Plaintiff had judgment, and defendant brings error. Reversed.

William T. Stuhr, for plaintiff in error. Collins & Corbin, for defendant in error.

BEASLEY, C. J. The ground of the action was a libel published by the plaintiff in error. There is but a single exception relied on for the reversal of the judgment, and that is the offer of the publishing company that was the defendant in the suit to prove that neither it nor its agent had originated the calumnious statement, but that it had been received from other persons in the way of common gossip. This offer of proof was overruled by the trial judge, and in such action, we think, there was error. In the books there is much contrariety of judicial opinion expressed, but in this state it is deemed that the rule of practice in the respect in question has long since been at rest. In my own experience, extending over a period of 50 years, it has never, to my knowledge, been called in question. The admissibility of such testimony was sanctioned by the supreme court in a case that was fully considered, and which had been argued by members of the bar whose learning and ability have never been surpassed by any of their successors. The decision referred to is that of *Cook v. Barkley*, of the date of 1807, and which is reported in 2 N. J. Law, 156. Nearly 50 years afterwards, Chief Justice Green refers to this decision in terms that plainly show that, in his opinion, it had entirely established the rule of evidence in this particular. In his opinion in the case of *Sayre v. Sayre*, 25 N. J. Law, 235, he thus communicated his views, viz.: "Evidence touching the plaintiff's character, in mitigation of damages, may be offered to show that the defendant merely repeated rumors that

were in circulation, and that the slander was not wantonly originated by him, with the view of showing the animus with which the words were spoken, in order to diminish the extent or to qualify the character of the defendant's malice, and thereby to diminish the damages. With this view the evidence was offered, and held by this court to be admissible, in *Cook v. Barkley*, 2 N. J. Law, 169; and, with the same view, it has frequently been admitted in the English courts." Under these circumstances, this court does not think that the subject is open to debate, and consequently the judgment must be reversed, and a venire de novo awarded.

BROOK et al. v. VAN NEST.

(Court of Errors and Appeals of New Jersey. Nov. 19, 1895.)

NEGOTIABLE INSTRUMENTS—INDORSEMENT AND TRANSFER—CONFLICT OF LAWS.

1. The indorsee of a promissory note indorsed it "for discount and credit of himself." Before maturity, he took it out of the bank which discounted it for him, and passed it away with this special indorsement. *Held*, that the person to whom it was so passed acquired a valid title under such indorsement.

2. The validity of a transfer made in this state of a note made payable in New York must be governed by the law of this state.

(Syllabus by the Court.)

Error to circuit court, Mercer county; before Justice Abbott.

Action by William I. Van Nest against Brook, Oliphant & Co. Plaintiff had judgment, and defendants bring error. Affirmed.

Jas. S. Aitkin and G. M. Robeson, for plaintiffs in error. W. D. Holt and Wm. M. Lansing, for defendant in error.

VAN SYCKEL, J. This is an action to recover the amount due upon the following promissory note: "\$4,986²⁵/₁₀₀. Trenton, N. J., Jany. 30, 1891. Four months after date, we promise to pay to the order of ourselves forty-nine hundred and eighty-six ²⁵/₁₀₀ dollars, at the office of Wm. B. Brook & Co., at No. 40 John street, New York City, value received. Brook, Oliphant & Co." Indorsed: "Brook, Oliphant & Co." "For discount and credit of the Central Rubber Selling Co. John H. Britton, Treas." This note was executed by Brook, one of the firm of Brook, Oliphant & Co., in fraud of the said firm, and passed to the Central Rubber Company without consideration. It was discounted in New York for the Central Rubber Company, and was taken up by that company before it was due, and put in its safe at Trenton in this state. The manager of the Central Rubber Company after that, and before the maturity of the note, passed it to Van Nest, who is the plaintiff below. The makers of the note set up in defense in the trial court—First, that the plaintiff below acquired no legal title to the note under the

¹ For dissenting opinion of Garrison, J., see 33 A. 1060.

pecial indorsement of the treasurer of the Central Rubber Company; secondly, that the plaintiff below was not a bona fide holder for value.

It is undoubtedly true that, if the note had fallen into the hands of any one before it had reached the bank which discounted it, he could not have acquired or passed to another any valid title to it. The special indorsement would have been notice of an affinity in the holder's title. But after that indorsement had served its purpose, and the note came back to the Central Rubber Company, that company, by passing it to Van Nest, gave him as good a title as if the indorsement had not been special, but general.

The trial judge properly ruled that, under the circumstances, the burden was cast on Van Nest to show that he was a bona fide holder for value. The circumstances under which he acquired the note were these: On the 6th of May, 1891, he loaned to the Star Rubber Company, of which one Thomas A. Bell was manager, the sum of \$5,000 in cash. He took the note of that company for the amount so loaned. Within a week after that date, Bell, on behalf of the same company, applied to him for another loan of \$7,000. To induce Van Nest to make this loan, Bell, who was also secretary and manager of the Central Rubber Company, gave to Van Nest the note sued on, to pay the aforesaid loan of \$5,000; and thereupon, on the 13th of May, 1891, Van Nest loaned the said sum of \$5,000 to the Star Rubber Company. This transaction was made in Trenton.

In *Allaire v. Hartshorne*, 21 N. J. Law, 35, the court of last resort in this state settled the law to be that, where one takes a negotiable note before maturity as security for a precedent debt, he is a bona fide holder, and may recover upon it. The law of this state must govern this controversy. The validity of a contract depends upon the laws of the state where the contract is made. *Armour v. McMichael*, 36 N. J. Law, 92. But a transfer of personal property which is valid by the law of the place where such transfer is made is sufficient to pass a valid title to it. *Frazier v. Fredericks*, 24 N. J. Law, 162; *Runyon v. Groshon*, 12 N. J. Eq. 6. The consideration given by Van Nest for the note being sufficient, according to the rule which pertains in this state, to constitute him a bona fide holder for value, it is not necessary to discuss the New York cases. There is no error in the proceedings below, and therefore the judgment should be affirmed.

ed to the builders and used in the construction of the house. Afterwards, in order to secure the plaintiffs for the price of these materials and for other debts, the builders assigned to them all their rights under the contract between the builders and the owner for the erection of the house, and under other contracts, to hold until the debts were paid. Held, that by accepting the assignment the plaintiffs had not lost or impaired their lien for materials.

(Syllabus by the Court.)

Error to circuit court, Essex county; Childs, Judge.

Action by Albert W. Stevenson and others against Whitmell T. Taliaferro and others. Plaintiffs had judgment, and defendant Taliaferro brings error. Affirmed.

Johnson & Pitch and Mr. Taliaferro, for plaintiff in error. Hayes & Lambert, for defendants in error.

DIXON, J. The plaintiffs, Stevenson & Clark, brought suit against Meeker & Vausey, as builders, and Taliaferro, as owner, to enforce a lien for a debt owed to them by the builders, for materials used by the builders in erecting a house under a contract between the builders and the owner. On the trial in the Essex circuit it appeared that after the debt had become due, and while the house was still unfinished, the builders, being indebted to the plaintiffs in the sum of \$2,000, and wishing to secure the payment thereof, assigned to the plaintiffs all their rights under said contract and other contracts, and all moneys due and to grow due thereon, to have and to hold the same until out of the same the said sum of \$2,000 should be paid in full. The owner thereupon contended that the acceptance of this assignment precluded the plaintiffs from enforcing their lien. The validity of this contention is the matter for our determination. Evidently, the indebtedness from the builders to the plaintiffs is in no way affected by the assignment. According to the terms of the instrument, it merely gave to the plaintiffs collateral security for the payment of the debt, without barring or suspending the right of action upon it. But the owner insists that the acceptance of the assignment put the plaintiffs in the position of the builders, with regard to the contract assigned, and thus bound them to finish the house for the contract price, and save the owner from all building liens outside of that price. The language of the assignment, however, affords no ground for holding that the obligations of the assignors were transferred to the assignees. It assigns merely the rights of the assignors. Although those rights might not become valuable until certain obligations imposed by the contract were discharged, yet it by no means follows that the parties acquiring the rights were personally charged with the performance of the obligations. Such a charge would arise only when the assignees had agreed to assume the duties of the assign-

TALIAFERRO v. STEVENSON et al.

Court of Errors and Appeals of New Jersey.
Nov. 18, 1895.)

MATERIAL MEN'S LIEN—WAIVER.

The plaintiffs became entitled to a lien on a house and curtilage, for materials furnish-

ors. In the cases of *Jones v. Foster*, 87 Wis. 296, 30 N. W. 697; *Whitney v. Josling*, 108 Mass. 103; and *Abbott v. Nash*, 35 Minn. 451, 29 N. W. 65,—upon which the plaintiff in error relies, the assignee had so agreed, either by the terms of the assignment itself, or by subsequent arrangement with the owner. But, in the absence of such an assumption by the assignee, the duties of the assignor remain incumbent on himself alone, notwithstanding the transfer of his rights. *Devlin v. Mayor, etc.*, 63 N. Y. 8. This position of the plaintiff in error is therefore untenable.

He further contends that the lien which the assignees, on performance of the contract, would have for the purpose of enforcing payment of the moneys accruing under the contract, would be inconsistent with the lien which they now seek to establish, and that, as they cannot be entitled to two inconsistent liens, the present lien must be defeated. In this argument the superior right is made to give place to the inferior. The only inconsistency there is between these two liens lies in the fact that the existence of the lien now prosecuted would suspend, and its enforcement would defeat pro tanto, any lien for moneys earned by the builders under the contract, for the contract requires that before such moneys be claimed all other liens shall be extinguished. But no rights accruing to the builders under the contract can impair the plaintiffs' lien for their materials. So far, therefore, as inconsistency exists, it works detriment only to the lien which the builders might set up on the contract. There is no reason for holding that it at all affects the present claim. The judgment of the circuit court in favor of the plaintiffs was lawful, and is affirmed.

WESTERN UNION TEL. CO. v. McMULLEN.

(Court of Errors and Appeals of New Jersey.
Nov. 19, 1895.)

INJURY TO SERVANT—ASSUMPTION OF RISK— LATENT DEFECTS.

1. A servant assumes the ordinary risks incident to his employment, and also risks arising in consequence of special features of danger known to him, or which he could have discovered by the exercise of reasonable care, or which should have been observed by one ordinarily skilled in the employment in which he engages.

2. The employer is bound to use reasonable care to protect the servant from unnecessary risk, and is liable for damages occasioned to him through some latent danger of which he should have warned him.

(Syllabus by the Court.)

Error to circuit court, Essex county; Childs, Judge.

Action by Edward McMullen against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. P. Douglass and Rush Taggart, for plaintiff in error. Saml. Kallsch, for defendant in error.

VAN SYCKEL, J. In June, 1893, McMullen, who was plaintiff below, was in the employment of the Western Union Telegraph Company, engaged in helping to set poles, string wires, put up cross arms, and connect wires. While in the performance of his duty, and as he was about to attach a new wire, he received such a strong current of electricity from the Western Union wire that he was knocked insensible, and received most painful injuries. The writ of error in this case is prosecuted to review the judgment recovered by McMullen below in compensation for the injuries received by him. The pole upon which McMullen was working at the time he was injured was the property of the telegraph company. It appeared in the case that, in the ordinary use of the telegraph wires, the current of electricity was not sufficient to do injury to the person handling the wires. It further appeared that in various parts of Jersey City, and not far from where McMullen was injured, there were poles of the telegraph company to which were attached electric light wires, heavily and dangerously charged with electricity, and that such electric light wires were in such close proximity to the wires of the telegraph company as to be dangerous, but no electric light wire was attached to the pole on which McMullen was injured. He had been in the employ of the company but one month and five days when he was injured, and had never worked in Jersey City before. It did not appear that the company gave any warning to McMullen of the danger in stringing its wires by reason of their close proximity to electric light wires at other points. The trial court charged the jury that McMullen, when he entered the service of the company, assumed the ordinary risks incident to the employment, and he also assumed risks arising in consequence of special features of danger known to him, or which he could have discovered by the exercise of reasonable care. He left it to the jury to say whether the placing of electric light wires upon some of the poles of the company, near to the telegraph wires, was a special feature of danger known to McMullen, or which should have been observed by one ordinarily skilled in the employment in which he was engaged. If the jury found in favor of McMullen upon these questions, then it was instructed to inquire whether the company had been guilty of actionable negligence. On this part of the case the jury was instructed that the duty imposed on the company by the contract of hiring was not to subject McMullen, without his knowledge or consent, to risks not assumed by him; that an employer contracts with his employee to use reasonable care to protect him from

unnecessary risks, and is responsible to the employé for damages resulting to him by reason of the want of such care. The jury was directed to charge the company with negligence if it found that McMullen was injured through some latent danger, of which he should have been warned, and that the injury resulted from the fact that the electric light wires placed on the poles of the company were the proximate cause of the injury. All these instructions are in accordance with the established rule in this state. *Foley v. Light Co.*, 54 N. J. Law, 411, 24 Atl. 487; *Newman v. Fowler*, 37 N. J. Law, 89; *Ingebretsen v. Steamship Co.* (N. J. Err. & App.) 31 Atl. 620. Upon each and every of the controlling questions in the case there was sufficient evidence to go to the jury, and therefore there is no error in law in the trial below. The judgment should be affirmed.

BABCOCK et al. v. STANDISH.

(Court of Errors and Appeals of New Jersey.
Dec. 5, 1895.)

PARTNERSHIP—PAYMENT OF INDIVIDUAL DEBTS.

Money paid by one partner to his individual creditor in satisfaction of a just debt, and received by the creditor without knowledge or notice that it is partnership money, may be retained by such creditor against the claims of the partnership or the other partners, although it was in fact money derived from the sale of partnership property; aliter as to partnership property transferred in payment of an individual debt. 29 Atl. 327, reversed.

(Syllabus by the Court.)

Appeals from court of chancery.

Bill by William P. Standish against Caroline M. Babcock and Frederick A. Babcock, her husband. From the decree (29 Atl. 327), complainant and Caroline M. Babcock appeal. Reversed.

Frank Bergen, for complainant. Cortlandt Parker, for defendants.

MAGIE, J. The decree appealed from charged upon lands of Caroline M. Babcock the sum of \$921.50, with interest from January 10, 1889, in favor of William P. Standish, and directed that unless that sum, with costs, should be paid within a stated time, said lands should be sold to raise what was thus charged thereon. Caroline M. Babcock, who was one of the defendants below, appeals from the decree, on the ground that it was erroneous to charge her lands with any part of that sum. William P. Standish, who was complainant below, appeals from the decree, and contends that it was erroneous in not charging on said lands a larger sum. These appeals have been argued together.

To make intelligible the conclusions I have reached upon the case presented, a brief statement of the pleadings, showing the issues between the parties, is necessary. The bill was filed by Standish against Caroline

M. Babcock and Frederick A., her husband. It charged that Frederick A. Babcock, Joseph W. Moyer, and Standish, in 1884, entered into a written agreement of partnership in the business of purchasing and selling coal lands in Schuylkill county, Pa.; that, under that agreement, lands were purchased and sold at a profit, and the proceeds of the sale were received by Frederick A. Babcock; that, in 1890, Standish filed a bill in our court of chancery, against Babcock and Moyer, for an accounting and settlement of the partnership affairs, and it was thereon decreed, on October 10, 1892, that Babcock was indebted to Standish in \$4,941.73, said sum being Standish's share of said profits; that said profits arose from the purchase and sale of lands in said county which were bought in 1884, and sold to one Frisbie on January 8, 1889, for \$15,000, which sum was then paid to said Babcock; that on January 10, 1889, said Babcock, out of said sum so received, paid off a mortgage which then incumbered lands of his wife, amounting to \$3,500, of principal and the interest then due thereon. The bill also charged that the decree remained unsatisfied, and that Frederick A. Babcock had property which could not be reached by execution, and there was a prayer for discovery against him. As to Caroline M. Babcock, the prayer was that the sum paid by her husband in satisfaction of the mortgage on her lands should be made a charge and lien on said lands in favor of Standish, and that they might be sold to raise and pay him that amount. The bill did not call for answers without oath. Caroline M. Babcock, by her answer, denied knowledge or information justifying belief whether the agreement of partnership set out in the bill was ever entered into, or whether, under it, lands were purchased and sold at a profit, or whether the proceeds of any such sale were collected and received by her husband. She admitted that Standish had filed a bill in the court of chancery against Moyer and her husband for an account and settlement of the affairs of the alleged partnership, but averred that it was also filed against her and one Edward M. Babcock, and, after having been duly tried, had been dismissed upon the merits as to her. She admitted on information and belief that such a decree as was set out in the bill had been made in that cause. She denied knowledge or information in respect to the purchase of land and the subsequent sale to Frisbie, or the receipt by her husband of \$15,000 as the proceeds of that sale, and she left complainant to make proof thereof. She admitted that the mortgage on her lands had been paid off, but denied that it was paid by her husband, averring that, being under foreclosure, it was paid by her son Edward M. Babcock. By the answer, she further averred that the previous bill of Standish had charged that her husband had applied part of the money received

by him from the sale to Frisbie to the satisfaction of the mortgage on her lands, and had prayed relief by charging as a lien upon her said lands the amount so paid, and by selling said lands to discharge such lien. She averred that, by her answer to that bill, an issue was presented upon those charges, which was duly tried, and a decree made thereon that the bill should be dismissed as against her, with costs. She thereupon claimed that the matter thus established by that decree was conclusively established as against Standish, and prayed to have the same benefit of this defense as if she had pleaded the decree in bar. To this answer was appended an affidavit containing the customary averments of affidavits to answers, and the further averments that the proceedings and decree in the former suit were correctly set forth in the answer, and that a copy of the decree annexed to the answer was true and correct. There was no affidavit or certificate of counsel such as is required to be annexed to a plea or demurrer (Revision, p. 109, § 27); but the complainant below filed a general replication, and the cause went to hearing upon those pleadings.

The evident purpose was to interpose the defense of *res adjudicata*. If the answer in that respect stood for a plea, the burden of proving its truth devolved upon the party pleading, for it is plainly an affirmative plea. 1 Daniell, Ch. Prac. 718; Swayze v. Swayze, 37 N. J. Eq. 180. If it is to be deemed a defense set up by answer, it must be sustained by proof; for, if this answer was called for and put in under oath, it will not be evidence of new matter set up in defense. In either aspect, proof of the former suit, including the pleadings, which would show what issues were there tried or triable, and the decree thereon, was necessary to support the defense. The case before us discloses no proof whatever of this sort. The learned vice chancellor, who tried this case, indicates by his opinion that he conceived that he had before him the proceedings in the former cause, and that they showed that the dismissal therefrom of Caroline M. Babcock was ordered by the court *ex mero motu*, and without considering the issue presented by her answer, because she was not a proper party. If the record disclosed such a dismissal, it would probably fail to establish the truth of the plea or answer. If the record did not disclose the ground of dismissal, extrinsic evidence could make it clear. Russell v. Place, 94 U. S. 606. But here we have not the record of the former cause, and, in its absence, there is nothing to support the defense of *res adjudicata*.

Although this defense was not made out by proof, it is also true that the proof which appears to have been made in this cause was insufficient to justify a decree in favor of Standish. By his bill, he asserted that, in equity, the lands of Caroline M. Babcock

should be recharged with the burden from which they had been gratuitously relieved by her husband's use of partnership funds for that purpose, and made to satisfy Standish for his share as one of the partners. Under the answer, he was required to prove the partnership, the resulting profit, and particularly that the \$15,000 received by Frederick A. Babcock was the result of the sale of partnership property. Without such proof, the equity here asserted was not established. But the case before us is barren of proof upon these points. While the decree in the former cause was not put in evidence, yet, as Caroline M. Babcock had set it out in her answer, and appended a copy thereto, Standish had a right to rely upon it as evidence against her, if it possessed evidential force in that regard. But it was not competent proof against her of the facts essential to his case; for, although she was originally made party to that suit, she was dismissed therefrom. She was not bound by the decree, and its adjudications on the essential facts do not estop her from contesting them, and requiring other proof. If she was a proper party in that cause, Standish could have appealed from the order dismissing her therefrom, and by its reversal would have bound her by the decree. But, after dismissal, the decree was as ineffective against her as if she had not been originally a party to the suit. As the decree is thus unavailable as proof, the case is left without proof on these essential points. Indeed, the only evidence upon the subject is that of Frederick A. Babcock, who, when called as a witness by Standish, repeatedly declared that the \$15,000 which he received from Frisbie was the proceeds of the sale of railroad bonds and stock, and not of the coal lands. While it is true that he is estopped from this defense by the decree in the former cause, yet he is admissible to testify in defense of his wife, who is not estopped thereby.

The result is that there is no evidence to support the decree appealed from. But this result is by no means satisfactory. The learned vice chancellor, who advised the decree, evidently deemed that he had before him evidence that raised the legal questions which he decided. Indeed, his opinion indicates that he believed that he had before him, not only the pleadings and decree, but also the evidence taken in the former cause; for he states facts that nowhere appear in proof of this cause. If we assume, as he did, that it appeared that the \$15,000 paid by Frisbie to Frederick A. Babcock was the price of lands belonging to the partnership, a question is presented decisive of the case. Although the charge of the bill was that Frederick A. Babcock had paid off the mortgage on his wife's lands out of the \$15,000 received by him, the facts proven in this cause do not support this charge. The truth was that, shortly after the receipt of that

sum, Frederick A. Babcock paid \$6,000 of it to his son Edward B. Babcock; and the latter, almost immediately, applied enough of that sum to discharge the mortgage on his mother's lands. It is suggested by Standish's counsel that these circumstances point to fraud, and justify the inference of collusion to invest the discharge of the mortgage with an appearance of filial generosity, while in reality it was a scheme to divert partnership funds to an unlawful purpose. But the vice chancellor failed to draw any such deduction from any evidence before him, and our review of the evidence before us convinces us that in so doing he was not in error. The evidence that the payment of \$6,000 to Edward was a payment upon a just debt, honestly due, is uncontradicted. The circumstances supposed to be suspicious are explainable by the near relationship of the parties, and will not justify an inference of fraud. There is ample corroboration of the ability of the son to make the advances to his father out of which arose the indebtedness upon which the \$6,000 was paid. It must be considered as established that the payment was made upon a debt honestly due. We also think that the evidence before us plainly shows that the son received that payment without any knowledge that the money paid was or was claimed to be partnership funds; nor is there anything discoverable in the evidence which shows that he was put upon inquiry on that subject. His evidence is uncontradicted that he supposed the money thus paid him was from the proceeds of the sale of some railroad bonds and stock made by his father.

The question, then, is whether Edward B. Babcock can retain money paid to him by his father upon an honest debt, and received by him without knowledge or notice that the money belonged to a partnership of which his father was one. The solution of this question is not affected by the subsequent application of part of this money by way of a gift to his mother; for, if Edward had acquired a right thereto, he could dispose of it at his pleasure. The question was solved by the court below by the application of the well-settled doctrine of the law of partnership that each partner has a lien on partnership property for the payment of partnership debts, and upon the surplus after such payment for his share. 1 Lindl. Partn. § 352. It was considered that it followed from this doctrine that one partner might follow money belonging to the partnership into the hands of a creditor of an individual partner, who had received it in payment of his debt without knowing that it was partnership money, and might require such creditor to restore the money so received to the partnership, or at least to account for his share thereof; and this decree, if made upon the facts deemed to have been before the vice chancellor, can only be supported upon that proposition. There can be no doubt that one

partner cannot give away partnership property or things procured by partnership money, and that the donee will be deemed to be a trustee for the partnership, and required to account for such gifts. *Shaler v. Trowbridge*, 28 N. J. Eq. 595; *Partridge v. Wells*, 30 N. J. Eq. 176, 31 N. J. Eq. 362. Nor can one partner give a partnership obligation in payment of his individual debt without the consent of the other partners, and it has been held in this state that the creditor who thus accepts partnership obligations from one partner has the burden cast on him to prove the consent of the other partners. *Mecutchen v. Kennady*, 27 N. J. Law, 230; *Dob v. Halsey*, 16 Johns. 34. Nor can a partner transfer or create a lien upon partnership property for the payment of his individual debt to a creditor who has knowledge that the property so transferred or pledged is partnership property. *Matlack v. James*, 13 N. J. Eq. 126; *Clements v. Jessup*, 36 N. J. Eq. 569. And this doctrine will apply to partnership money paid by one partner to his individual creditor, if the latter knows that the money belongs to the partnership. *Piercy v. Fynney*, L. R. 12, Eq. 69; *Kendal v. Wood*, L. R. 6 Exch. 243; 17 Am. & Eng. Enc. Law, 1250; *Davis v. Smith*, 27 Minn. 390, 7 N. W. 731; *Dob v. Halsey*, ubi supra. In the opinion delivered in the supreme court in *Mecutchen v. Kennady*, ubi supra, Chief Justice Green indicated his approval of the doctrine declared by the supreme court of the United States in *Rogers v. Batchelor*, 12 Pet. 221. That doctrine was that a partner could not apply partnership property to the payment of his individual debt, so that the title of the partnership thereto would be divested, even if the individual creditor was ignorant that the property received by him belonged to the partnership. Mr. Justice Story, who delivered the opinion in that case, put the doctrine upon the ground that the true question was whether the title to the property had passed from the partnership to the individual creditor. The reasoning is that the implied agency of one partner to dispose of partnership property extends only to its disposition for partnership purposes, and not to its application to the purposes of one of the partners. An individual creditor, receiving property upon his debt, may, by inquiry, discover the title of his debtor, who thus applies such property, and may in this mode be chargeable with the knowledge which would be acquired upon such inquiry. But if this doctrine, supported by such authority, be admitted to be correct (as to which no opinion need be expressed), the question remains whether it applies when a partner uses, not property, but money of the partnership, in the discharge of his individual debt. In my judgment, there is a marked distinction between the two cases. This results, not from the old notion that money has no "earmark," but because money has the quality of currency, passing

hand to hand in all bona fide transactions, without the necessity of inquiry on the part of him who receives it as to the title of the party who pays it. When property thus passes, the recipient may be put upon inquiry as to its title; when money thus passes, no inquiry is required. In the former case the knowledge which inquiry would produce would charge the recipient; in the latter case nothing but actual knowledge will charge him. It was forcibly said by Lord Justice Fry in *Insurance Co. v. Whipp*, 26 Ch. Div. 482, that "the proposition that money obtained by fraud can be followed into the hands of persons who take it in satisfaction of a bona fide debt without notice is, in our judgment, devoid of support from principle or authority." *Perry, Trusts*, § 837; *Lewin, Trusts*, § 892.

The result is that, if this case appeared before us as it seems to have appeared to the vice chancellor, in my judgment his conclusion was erroneous, and the decree made thereon cannot be supported. It has been deemed best to state this conclusion, as the contrary view, expressed in the court below, will tend to greatly limit dealings with persons who are copartners. If a creditor of any individual partner cannot retain money paid upon his debt if the money so paid was in fact partnership money, although not known to be so by the creditor receiving it, dealings with individual partners will be seriously affected. For the reasons above set forth, the decree must be reversed, with costs.

DODSON et al. v. SEVERS.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1895.)

EQUITY—JURISDICTION OF CLAIM AGAINST DECEDENT'S ESTATE.

1. A creditor who has failed to present his claim to the executors of his debtor within the time limited by the orphans' court cannot apply to the court of chancery to have certain bequests and devises subjected to his claim, it appearing in his bill that on final settlement there was a large residue left in the hands of the executors.

2. Defects in the proceeding commented on.
(Syllabus by the Court.)

Appeal from court of chancery.

Bill by Truman M. Dodson and Charles M. Dodson, surviving partners of Weston, Dodson & Co., against James Severs and George Price, surviving executors of the will of James Taylor, deceased, and others, for an injunction, accounting, the appointment of a receiver, and other relief. From the decree rendered (30 Atl. 477), plaintiffs appeal. Affirmed.

John H. Backes, for appellants. W. M. Lanning, for appellee.

BEASLEY, C. J. This case is before the court on an appeal from a decree sustaining a demurrer by James Severs, the respondent, who was one of several defendants in the

court of chancery. The general aspect of the bill is this: The complainants in the bill below are creditors at large of the estate of the late James Taylor, and, in laying the ground of this proceeding, they allege that the executors of his estate settled their accounts finally in the orphans' court, having obtained a decree that all creditors who had not presented their claims within the time limited by a rule taken and published should be barred. They further declare that they did not present their claim now in question with the executors within two years after this final settlement and decree. It likewise appears that the executors thus settled, they charged themselves, after the payment of all debts, with a balance of \$61,399.60; and what balance of this sum is not told. The demand sought to be enforced is less than one-fourth of that amount. That being the situation, the complainants exhibited this bill for the purpose of compelling the executors to take possession of certain personal property that was specially bequeathed to the widow and grandchild of the testator, and to sell a certain tract of land that the will directed to be sold for the benefit of certain members of his family, among whom the proceeds were to be divided. This is the entire scope of the bill, with the exception that it prays the removal of the executors from their office without assigning anything to justify a removal so rigorous.

It should be observed that this bill does not call for an examination of the state of the assets of the estate, or even attempt to do so, why it is necessary to resort to the procedure of law. Regarding, then, this bill, its general aspect, it is deemed manifest that it stands upon a theory which has no foundation in law or equity. That theory is nothing but this: That a creditor who fails to put in his account before the settlement of the estate in the orphans' court cannot apply to the court of chancery to have his debt paid out of any part of the estate, or devise he may select, and this without any reference to the amount of the debt, or the assets which have been or which remain in the hands of the executor. The general principle is that the personal property undisposed of by the testator must be applied before the realty bequeathed or the land devised can be applied to; but the theory in question is constructed on the basis that the creditor is refusing to subject his claim to the ordinary course of administration occupies the valid ground of being possessed of the prerogative to disregard the equitable rules touching the marshaling of the assets in the payment of the claims of ordinary creditors. He can appropriate whatever he may devise or bequest he may select. There is nothing in our laws to warrant such contention, and the bill is therefore defective for that reason.

There are other defects in this bill which appear to have escaped notice. The chancellor, in his opinion, says: "The bill states that the remaining personality was bequeathed

solutely to Mrs. Taylor, with the proviso added that if she should die intestate, leaving part of it undisposed of, then his executors were to convert it into money, and distribute it. This statement of the will shows an absolute gift for an indefinite time, with unlimited power of alienation. Such a gift is construed to carry to its recipient the absolute ownership, and a gift of that which remains undisposed of over is void." There can be no doubt of the view thus expressed, and it is established by the authorities cited. The status, therefore, in this respect, is that the personality in question passed, on the death of Mrs. Taylor, to her personal representative, and yet he has not been made a party to the suit. No decree could be made in this respect in the absence of such a necessary party.

So, also, with regard to the tract of land mentioned in the bill. The title is in the heirs at law of James Taylor, the testator, a power of sale merely being given to the executor; and who such heirs are is not shown, and the court could not divert them of title in their absence.

None of the foregoing views are embraced in the brief of the counsel of the respondent. Had they been suggested in the court below, it is probable that the decree would have had a wider scope; but, as the case stands in this appeal, all that this court can do is to affirm the decree as it appears upon the record.

MYERS v. HOLBORN.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1895.)

PHYSICIANS—LIABILITY FOR ANOTHER PHYSICIAN'S
ACT—ACTION FOR DEATH BY WRONG-
FUL ACT—WHO MAY MAINTAIN.

1. M., a practicing physician, promised H. to attend his wife at her confinement. Instead of doing so, however, he sent P., another physician, in his stead, who, by his unskillfulness, caused the death of the child. The shock from the child's death was such as to seriously affect the health of the mother, thereby depriving H. of her society and services, and causing him to incur expenses to which he would not otherwise have been put. *Held*, that P., being engaged in a distinct and independent occupation of his own, was not the servant or agent of M. in this matter, and that, therefore, M. was not liable for his unskillful or negligent acts.

2. No action will lie, in this state, for an injury caused by the death of a human being, except that which is given by the act of March 3, 1848 (Revision, p. 294), to the personal representatives of the decedent, for the purpose of recovering, for the benefit of the widow and next of kin, the pecuniary loss which they have suffered by such death.

3. The case of *Grosso v. Railroad Co.*, 13 Atl. 233, 50 N. J. Law, 317, approved.
(Syllabus by the Court.)

Error to circuit court, Hudson county; Lipincott, Judge.

Action by Frank Holborn against Samuel I. Myers. Plaintiff had judgment, and defendant brings error. Reversed.

Collins & Corbin, for plaintiff in error.
William H. Speer, Jr., for defendant in error.

GUMMERE, J. This writ of error brings up for review a judgment of the Hudson circuit court rendered in favor of Holborn, the plaintiff below, and against Myers, the defendant below. The principal facts which were proved at the trial of the cause are as follows: The defendant, a practicing physician of the city of Bayonne, promised the plaintiff, who resided in that city, to attend his wife professionally during her confinement. A short time before that event took place he left the city for a three-days vacation; having first visited the wife of the plaintiff, and made an examination of her condition, from which he concluded, as he informed her, that his services would not be needed for a few days. Before his return, however, she was confined. The plaintiff, when his wife's travail came on, telephoned to the house of the defendant for him to come at once; and in response to this message one Dr. P. arrived, stating that Dr. Myers was out of town, and that he represented him, and proceeded to take charge of the case, and to deliver the plaintiff's wife of her child, without any objection being made. It was not suggested that his treatment of the wife was unskillful, but evidence was offered to show that after the birth of the child he improperly severed the umbilical cord so close to its body that it was impossible afterwards to tie it, and that the child consequently died, in a short time, of umbilical hemorrhage. The shock caused by her child's death under these circumstances, it was testified, so affected the mother as to seriously injure her health, and render her an invalid for many months, thereby depriving the plaintiff of her services and companionship, and making it necessary for him to incur expenses which he would not otherwise have been called upon to meet; and this suit was brought to recover compensation for such loss of services and companionship, and for such expenses, on the theory that Dr. P. was the agent and representative in this matter of the defendant, and that, therefore, he was legally liable for these results of Dr. P.'s unskillfulness. The trial judge adopted this theory, advanced on behalf of the plaintiff, in his charge to the jury, and so instructed them. In this, it seems to me, there was an error. Dr. P. and the defendant were each of them practicing physicians of this state, having no business connection with one another, except that Dr. P. was attending the patient of the latter while he was temporarily absent. Even if it be admitted, therefore, that Dr. P. was employed by the defendant to attend upon the wife of the plaintiff, that fact did not render the defendant liable for his neglect or want of skill in the performance of this service, for an examination of the authorities will show that a physician employing a person who follows a di-

Independent occupation of his own is not responsible for the negligent or improper acts of the other. *Laugher v. Pointer*, 5 Barn. & C. 547; *Milligan v. Wedge*, 4 Perry & D. 714; *De Forrest v. Wright*, 2 Mich. 368; *Wood, Mast. & Serv.* § 311.

But even if I had reached the conclusion that Dr. P. was the agent of the defendant, in his attendance upon the wife of the plaintiff, I should nevertheless consider that there could be no recovery in this case for the losses sustained by the plaintiff. He does not complain that his wife was unskillfully treated by Dr. P., and that he thereby lost her services and companionship, and incurred expenses on that account to which he would not otherwise have been put. His claim is that such unskillfulness caused the death of his child, and that the shock of its death caused the sickness of the mother, with the consequent deprivation of her services and society, and the increase of his expenses. The gravamen of the action, it will be perceived, is the death of the child; and the injury sustained by the father, for which damages are sought to be recovered, is the result of that death. Since the decision of the supreme court in the case of *Grosso v. Railroad Co.*, 50 N. J. Law, 317, 13 Atl. 233, it has been considered as settled law in this state that no action will lie for an injury caused by the death of a human being, with the exception of that provided by the act of March 3, 1848 (Revision, p. 294), which permits a recovery by the personal representatives of the decedent, for the benefit of the widow and next of kin, of the pecuniary loss resulting to them from such death. The decision in that case was rendered after a careful and exhaustive consideration, and the views expressed by Magle, J., in delivering the opinion of the court, must be accepted as a correct exposition of the law on that subject. The judgment of the circuit court should be reversed.

SMITH v. VAN SCIVER et al.

(Court of Errors and Appeals of New Jersey.
Nov. 21, 1895.)

INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE.

The plaintiff was engaged in taking bricks and mortar, by an elevator, up into a building being erected by a contractor or a subcontractor of the defendants, who were the owners of the building and the elevator. The plaintiff was employed by the contractor or subcontractor; and after the elevator had been unloaded by means of a wheelbarrow operated by the plaintiff, on and along a narrow plank leading from the elevator to the scaffolding, where other workmen were engaged, he walked hurriedly backward along the plank, without looking to see whether the elevator had descended or not, and fell into and down the shaft, and was injured. *Held*, that his conduct was such that he was chargeable with negligence contributing to his injury, such as debarred him from a recovery of damages for his injuries, whatever negligence may have existed arising

from other sources in sending the elevator down at the time when it descended.

(Syllabus by the Court.)

Error to circuit court, Camden county; Miller, Judge.

Action by George Smith against Joseph B. Van Sciver and another. Judgment for defendants. Plaintiff brings error. Affirmed.

John W. Westcott and Francis D. Weaver, for plaintiff in error. Henry S. Scovel, for defendants in error.

LIPPINCOTT, J. The plaintiff in error sued the defendants to recover damages for personal injuries, alleged to have been received by him in falling down the shaft of an elevator in the building of the defendants. The defendants were engaged in the erection of an addition to a building, owned by them, on Federal street, in the city of Camden, in this state. One Finley, as a contractor or subcontractor of the defendants, was constructing the brickwork of this addition. The plaintiff was engaged as one of the workmen of Finley, in taking brick and mortar up into the building by an elevator, which had been constructed by the defendants in the building. The defendants were also at times using the elevator for other purposes, and they, by such use, had to some extent interfered with or delayed Finley in his work. On May 12, 1890, the day of the accident and injury to the plaintiff, Finley had remonstrated against this interference and delay; and one of the defendants, in the presence of the plaintiff, told Finley to go ahead with his work, and that he should not be further disturbed in the use of the elevator. Finley then directed the plaintiff to proceed with its use in the work of carrying bricks and mortar up into the building. The bricks and mortar were taken up in loads on the elevator, and then taken out in a wheelbarrow, along and on a narrow plank, to the scaffolding, on which other workmen were engaged. On this day, after the last load was taken up, the plaintiff proceeded in the usual manner to take it from the elevator, along this narrow plank, to the scaffold; and, after emptying the last wheelbarrow load, he, without looking to see if the elevator was still there, walked backward, hurriedly, along the plank, and into the elevator shaft; the elevator, for some purpose or other, having descended. It does not appear by the evidence whether the elevator was lowered by the workmen of the defendant or the workmen under Finley. The only evidence in the case is that of the plaintiff, and it is, in substance, that this was his last load for the day; that he looked at the hour, and saw that it was about time to quit; that he had but a few minutes to get down, and clean up, and get away on time; and that he came hurrying backward along the plank, thinking that everything was all right, and backed into the shaft of the elevator. In his evidence he emphasizes the fact that he was hurrying backward. The plaintiff was seriously injured.

The trial justice, upon these facts, determined that the plaintiff was guilty of negligence contributing to his injury, and, on motion of counsel for defendants, directed a judgment of nonsuit to be entered. The plaintiff, by his writ of error, seeks a reversal of this judgment.

A discussion of the question of whether the defendants were guilty of any neglect of their duty to the plaintiff, contributing to his injury, seems to be entirely useless. There exists no phase of the case as presented under which the plaintiff can be entitled to a recovery. Whatever relations, arising out of the facts, subsisted between him and the defendants, he was bound to exercise reasonable care in his conduct to avoid injury, and a failure on his part to exercise that degree of care, resulting in injury, leaves him remediless. He was in no event insured against accident and injury, and his own evidence reveals that, in the presence of dangers obvious and inseparable from his occupation and position, he was guilty of a high degree of carelessness, contributing directly to the accident by which he was injured. His conduct on this occasion was such as would be condemned as negligent by men of ordinary care and prudence; and contributing, as it did, to his injury, under principles well established in this state, he is debarred from a recovery. If he had not been negligent, he would not have received any injury from negligence arising from any other source. *Railroad Co. v. Moore*, 24 N. J. Law, 824; *Express Co. v. Nichols*, 33 N. J. Law, 434; *Railroad Co. v. Righter*, 42 N. J. Law, 180; *Railroad Co. v. Matthews*, 36 N. J. Law, 531; *Railroad Co. v. Toffey*, 38 N. J. Law, 525; *Smith v. Irwin*, 51 N. J. Law, 507, 18 Atl. 852; *Gaffney v. Brown*, 150 Mass. 479, 23 N. E. 233; *Beach*, Contrib. Neg. § 301. The judgment of nonsuit must be affirmed.

FATH et ux. v. THOMPSON.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1895.)

TRIAL — INSTRUCTIONS — RULINGS ON EVIDENCE — WAIVING ERROR.

1. The court, in the trial of an issue, is not required to rule upon abstract questions, not dispositive of the rights of the parties. If the real issue be pointed out to the jury, the judgment will not be disturbed because of the judicial refusal to adopt some particular mode of presenting the issue, or to give conclusive effect to otherwise faultless legal formulæ applicable to a group of facts isolated from the rest of the case.

2. Whether testimony shall be ruled upon before it is actually delivered is a matter that rests in sound judicial discretion.

3. Where testimony has been given without objection, and no motion to strike out has been made, acquiescence in its introduction will be presumed.

(Syllabus by the Court.)

Error to supreme court.

Action by William J. Thompson against Frank Fath and wife. Plaintiff had judgment, and defendants bring error. Affirmed.

D. J. Pancoast, for plaintiffs in error. Alfred Hugg, F. A. Rex, and G. M. Robeson, for defendant in error.

GARRISON, J. This is an action of ejectment brought by Thompson against Fath for the possession of a narrow strip of land lying along the river Delaware, at Gloucester City, and forming the easterly bank of the river at that point. The locus has as its westernmost boundary a stone wall, upon the westerly face of which the river Delaware marks high water. Possession of this ripa is claimed by Thompson, the plaintiff, as the grantee of William Hugg, the elder, by virtue of sundry conveyances of the "Fishery," which the said Hugg owned in connection with the land that extended along and back from the river. To this same grantor the defendant Fath traces his right, claiming title through mesne conveyances of land so owned by the elder Hugg. A common source of title existing, the question in controversy is whether the locus passed with the Fishery to the plaintiff, or by other conveyances to the defendant. Judgment having been entered for the plaintiff upon the verdict rendered at the trial, the defendant below brings up with his writ of error a bill of exceptions covering certain rulings made upon the admission of testimony, many portions of the charge of the trial court, as well as its refusal to rule and to charge as requested by the counsel for the plaintiff in error.

An examination of the exceptions upon which error has been assigned discloses a diversity of legal view concerning the course pursued at the trial that is fundamental in its character. Of 31 assignments of error, more than one-half have reference to motions addressed to the trial court requiring that questions dispositive of the issue between the parties be disposed of by the court by ruling as to the force and effect of documentary proof, or by the direction of a verdict in favor of the plaintiff in error. Inasmuch as the course pursued was contrary to these requests, and resulted in submitting to the jury the several matters raised by the exceptions, it is evident that the judgment recovered can rest upon nothing less than a distinct affirmation of the legal propriety of the judicial conduct in this respect. The nature of the controversy was as follows: The plaintiff below showed in William Hugg, the elder, title in fee simple to land bounded on the west by the river Delaware, and also such title to a fishery in the river as was susceptible of private ownership. He then showed that upon the death of Hugg all of the said real estate was partitioned among his children and grandchildren by proceedings in the orphans' court of the county of Gloucester. The record constituting this partition was admitted, and called "Division of the Hugg Estate." From this it appeared that the commissioners, in making the division, had set off and allotted to each of the shares a lot or lots of

land in severalty, and that to all the heirs, in common and in undivided proportional parts, they had assigned and set off "all the residue and remainder of the real estate held in fee simple by said William Hugg, the elder, consisting of the Fishery and two lots of land laid off for the use of the same, as mentioned and numbered on the map hereto annexed." The two lots of land herein mentioned do not concern the present controversy; but the Fishery, as assigned and set off by this conveyance, included, the plaintiff contends, a strip of shore land extending back from high water to the land set off in severalty, which line would thus constitute at once the westerly limit of the lots set off in severalty and the "base line" of the Fishery. The commissioners concluded their report by certifying that "the foregoing are all the lands and real estate of the said William Hugg, the elder, deceased, held in fee simple in the said county of Gloucester, and known unto us, whereof we could make division." The lots set off in severalty were described by the commissioners by metes and bounds, and upon the map filed by them are delineated by a line to the east of, and not coincident with, the river, as shown on the map. The strip of land thus shown between the river and the lots set off in severalty is claimed by the plaintiff below as grantee of the tenants in common, to whom, he contends, it was allotted by the commissioners as real estate following the Fishery, and not included in any conveyance in severalty. It is amply established that whatever title in common the Hugg heirs got by this division is gathered up in the plaintiff below, while the title in severalty to those lots that, if extended to the river, would cover the locus, is in the defendant Fath. A controlling question therefore, was whether this title in severalty went to the water; the case of the plaintiff below resting in part upon the failure of any description of the land in severalty to call for the river, or by necessary or even admissible implication to go to the water's edge. The stone wall that now constitutes the westernmost boundary of the locus in quo was erected in 1846 or 1847, and does not affect the questions of law now under review.

The Hugg division, in fixing the westernmost line of those titles through which the defendant below makes his claim, uses this language, viz.: "Beginning at a stake on the bank of the river, standing north, 5 degrees east, 11 links from a poplar tree marked as a witness, and runs thence," etc., "to the place of beginning." It is clear that this is not a call for the river. The commissioners' map shows a tree, and refers to a stone answering this description, both of which are in the line of the lots conveyed, and not shown as being in or on the river itself. There was also oral testimony as to the location and history of the poplar tree, from which differing inferences as to the position of the stake might be drawn. Upon the Hugg di-

vision, therefore, standing alone, the question whether the locus was included in the lands set off in severalty, or whether it went with the residue, to be held in common, could not have been decided by the court adversely to the title that ran back to the tenancy in common. The submission to the jury of the plaintiff's claim in this respect was not only proper, but was the only possible way of disposing of the testimony he had offered. Assuming that it was a question for the jury whether, by the Hugg division, the locus went to the grantors of the plaintiff, or to those of the defendant, all questions upon documentary testimony arising in the courses of these two chains of title must, if admitted at all, be treated either as transmitting title to one party or the other, or else as limiting or interpreting the title so transmitted, either by estoppel, admission, or practical location. Apart from these purposes, the language of mesne conveyances could be possessed of no legal efficacy to increase the estate of a grantee by terms of description more extensive than the title possessed by the grantor. This was the theory consistently applied by the court below. The testimony of the plaintiff tended to show continuous user in the chain of his title, in harmony with his contention as to the effect of the Hugg division. On the other hand, the defendant was permitted to prove his title, and to offer proof with respect to the language used, which he contended was in some instances distinct calls for the river Delaware at the locus in quo.

The chain of title thus adduced included a deed from the tenants in severalty to Arthur Powell in 1833, in which, beginning at a corner fixed with relation to the poplar tree, the words, "thence along the edge of the Delaware river," are used; also a deed from said Powell to Charles Robb in 1844, which calls for "a corner on the shore of the river Delaware, and thence along said river," etc.; and also the deed by which the Robb title was conveyed by metes and bounds to Mrs. Fath.

In addition to these, sundry other conveyances of interests in the Fishery were introduced, in which the terms "in the Delaware river," and "adjacent to the shore," etc., are employed.

Upon the refusal of the trial court to give any binding force to the language of these conveyances otherwise than as instruments of proof, to be considered by the jury in connection with the initial partition of the Hugg estate, rests the entire group of exceptions now under review. After careful consideration, the course pursued by the judge who tried the cause meets with our unqualified approval. It was not only the proper mode of directing the trial, but was even more favorable to the defendant than would have been the only other course open to the court, viz. a direction to the jury to the effect that in the state of the proofs the defendant's predecessors in title could not, by adding to the descriptive terms of their conveyances, en-

large the boundaries of the land conveyed so as to give to their grantees more than the grantors themselves received from the source which lay at the inception of their title, viz. the Hugg division.

It is true that certain of the requests to charge were based upon the language of conveyances which, in the isolated state thus presented, were capable of being treated as proper subjects for interpretation by the court; but, taken in connection with the issue to which alone the testimony was relevant, the matter was one of fact for the jury throughout.

The court, in the trial of an issue, is not required to rule upon abstract questions not relevant to the issue, or to give directions to the jury with respect to matters not dispositive of the rights of the parties. If the real issue be pointed out to the jury, and no competent testimony excluded, the judgment will not be disturbed because of the judicial refusal to adopt some particular mode of presenting the issue, or to give undue or conclusive effect to otherwise faultless legal formulae applicable to a group of facts isolated from the rest of the case.

As an apt illustration of the foregoing may be cited the eighteenth assignment of error, viz.: "That the said court erroneously refused to charge the jury that the call in the deed from Powell to Robb for the shore of the river is equivalent to a call for the ordinary high-water mark." Standing alone, and if dispositive of the issue, this refusal would be of significance; but taken in connection with the question submitted to the jury, namely, whether Powell had a title extending to the water, it was clearly the duty of the court to refuse to charge it.

In view of this determination thus reached, it is unnecessary to review in detail the several assignments covering the line of rulings now affirmed. The principle enunciated covers them all, and no error in its application appears to any of the exceptions taken at the trial.

A further assignment of error touching the admission of testimony was one that was argued as if it raised the right of a witness to testify from data obtained from an unproved copy of a coast survey map not in evidence. The question is thus presented by the bill of exceptions: "Mr. Harrison, a witness called for the plaintiff, upon his examination in chief, was about to state the result of certain measurements made with respect to a line described upon a copy of a coast survey map, when an objection was interposed. The judicial certificate then proceeds as follows:

"The Court: I think he can go on and narrate what he did, and on what basis. If I think it is incompetent, I will rule it out.

"Mr. Pancoast: I object to any statements of this witness based upon data obtained from this government map.

"The Court: I do not rule on that at present.

"Exception by defendant, which is allowed and sealed."

The bill of exceptions thus sealed discloses no legal error. Whether testimony shall be ruled upon before it is actually given is a matter that rests in sound judicial discretion. In the present instance the trial court simply declined to make any ruling in advance. If the testimony, when given, proved to be incompetent, the defendant was at liberty to renew his objection, and thus to obtain a ruling not resting in discretion, or involving the mere order of procedure, but settling the specific question of the competence of the proof. The ruling objected to in this case deprived the defendant of no substantial right. On the contrary, it left him in a position where he could either object to the testimony during its deliverance, or move to strike it out after it had been given, or, if he desired, acquiesce in its presentation. A reversal of the judgment below upon the preliminary ruling would sanction a course by which the defendant might remain silent after incompetent testimony had been given, and then overthrow an adverse judgment upon the ground that the testimony should have been ruled out. Such a course does not commend itself as just, and is not in accord with established practice.

Another assignment calling for special mention concerns an agreement made in 1884 between Frank Fath, the male defendant, and Hugg and others, to whose rights the plaintiff Thompson succeeded. The substance of this agreement is that Fath should pay \$50 a year upon consideration that he be not compelled to comply with an order of the chancellor adjudging him in contempt. It appears that in 1883 Fath had erected a wharf or float, the easterly end of which rested on the westerly edge of the stone wall at the locus in quo. A bill in equity was thereupon exhibited by Hugg and others, as owners of the Fishery, to restrain Fath from erecting and extending this float so as to interfere with the fishing operations of the complainant. In this cause proceedings were had by which Fath was adjudged to be in contempt of an order of the chancellor, and ordered to pay a fine and costs, and also to remove certain additions he had made to the float in question, so as to put it in the same condition in which it was when a certain order in the cause was made. Fath paid his fine and costs, and then entered into the agreement in question, by which the party of the first part agreed to "forego and give up their rights to have the said building restored to its original condition according to the above-recited order of the court"; and they further agreed to "allow said Fath to go on and finish the said building by strengthening the foundations and adding another story thereto, in the way and manner contemplated, but not to enlarge the dimensions of the foundations so as to occupy any more space in the river than the same now does, provided he shall pay for this right and privilege the sum of fifty dollars in advance for each and every year from

the date of this agreement until the termination of the said suit." The \$50 provided for by said agreement having been paid, not only to said Hugg, but also to the plaintiff, Thompson, after he became the owner of the Fishery, and the suit in equity not having been terminated, it was strenuously insisted by the plaintiffs in error that this agreement was for "the possession and use of the premises," and an effectual bar to the present action on the part of Thompson, who succeeded to the title of the complainants in the equity suit, with knowledge of the agreement. The fallacy in this contention is that it assumes that the parties to this agreement undertook by it to deal with the "possession." Such is not the case. Fath was in possession without reference to the agreement, nor was there any aspect in which the suit in chancery could challenge his possession, or draw his title into controversy. A simple test of the scope of the agreement is to consider the effect of a default by Fath in the payment of the \$50 annually in advance. If a right of entry or of maintaining summary proceedings for the possession for nonpayment of rent would result, then the contract was one that would, until such breach, bar an action of ejectment; but if, as is undoubtedly the case, the only effect of a breach of the stipulation would be to revive the right to enforce the provisions of the order of contempt, nothing in the nature of a demise can be predicated upon it.

The remaining assignments, namely, those that allege error in the charge of the court in its definitions of the words "shore" and "adjacent," as well as those concerning the riparian lands and their elimination from the consideration of the jury, have been examined, but fail to sustain the allegation of error made concerning them.

This covers the case as made by the exceptions brought up with this writ.

Finding no error, the judgment of the supreme court is affirmed.

ROE et al. v. MEDING.

(Court of Errors and Appeals of New Jersey.
Nov. 19, 1895.)

CHATTEL MORTGAGE—VALIDITY AS TO CREDITORS—RECORDING.

1. The fourth section of the chattel mortgage act of May 2, 1885 (Supp. Revision, p. 491), applies, not alone to "judgment creditors," but to all creditors of the mortgagor.

2. Under the said fourth section, unless the mortgagee takes possession or records his mortgage immediately, his mortgage is postponed as to all creditors, whether they become such before or after the mortgage is recorded or possession taken.

3. Immediate possession or immediate recording means as soon as may be by reasonable diligence and dispatch, under the circumstances of the case.

4. The ninth section of the act of 1885 (Supp. Revision, p. 492), has a twofold purpose: (1) It changed the previously existing law requiring a mortgage to be refiled by providing that, when once recorded according to the

act, it should be valid until canceled enables the mortgagee, who fails to re-record his mortgage immediately, to preserve his mortgage against all persons who become creditors of the mortgagor after the mortgage is recorded, and in that respect puts him on the same footing with one who purchases a mortgage after the prior mortgage is recorded.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill by Charles E. Meding, receiver of Butler Silk Manufacturing Company, an insolvent corporation, against Madeline and others to declare void a chattel mortgage on its property. From a decree for (30 Atl. 587), defendants appeal. Affirmed.

John W. Griggs, for appellants.
Stevenson, for respondent.

VAN SYCKEL, J. This bill is filed by the receiver of an insolvent corporation, appointed by the court of chancery, against A. Roe, who holds a mortgage upon the property of the corporation, to obtain a decree declaring the mortgage void as to creditors of the corporation between the time of giving the mortgage and the filing for record, the corporation continuing in business and incurring large liabilities which were unpaid when the receiver was appointed. This appeal is taken from the decree of the court of chancery declaring the mortgage void as to the creditors represented by the receiver. The case of Receiver v. Spielman, 120, 24 Atl. 571, which was affirmed by this court (50 N. J. Eq. 793, 27 Atl. 571), establishes the right of the receiver to set aside and annul the mortgage. The decision of the controversy involves the construction of the chattel mortgage act of May 2, 1885 (Supp. Revision, p. 491).

The fourth section of that act provides that "That every mortgage or conveyance shall be void as to creditors of the mortgagor to operate as a mortgage of goods and chattels hereafter made, which shall not be valid until recorded or possession taken, unless accompanied by an immediate delivery, followed by an actual and continued possession of the things mortgaged, and the mortgage shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage has annexed and recorded as specified in said fourth section as required by the fifth section." The language of this act is the same as the original act of 1864 (P. L. p. 493), with the addition of the provision for an affidavit of recording, except that "record" is substituted for "recorded." That these acts were intended to protect creditors at large is apparent from the fact that the draftsman did not adopt the language of the act requiring the registry of mortgages of real estate. That act provides that mortgages "shall be void and of no effect as against a subsequent judgment creditor or a subsequent purchaser or mortgagee for a valuable consideration not having notice thereof, unless recorded," etc. The omission of the words "recorded" before "creditors," in the act

and 1885, is an unmistakable indication that there is no limitation of the class of creditors to which they shall apply,—not “judgment creditors” alone, as in the real estate registry act, but all creditors without exception. Our cases uniformly hold that the object of these enactments was to give publicity to liens upon personal property, and to sweep away secret arrangements, by which creditors were embarrassed and defeated. *De Courcey v. Little*, 19 N. J. Eq. 119, 21 N. J. Eq. 357; *Bank v. Sprague*, 21 N. J. Eq. 530. And the effect as to creditors of the failure to take immediate possession or to record the chattel mortgage has been passed upon by this court. In *Williamson v. Railroad Co.*, 29 N. J. Eq. 336, Mr. Justice Depue, in delivering the opinion of the court, says: “There is a distinction made in the statute between the creditors of the mortgagor and subsequent purchasers and mortgagees, with respect to the avoidance of the mortgage for neglect to file the same, or to take immediate possession. Purchasers or mortgagees, in order to take advantage of the failure of another mortgagee of chattels to comply with the statute, must be subsequent purchasers or mortgagees, taking their title under the mortgagor in good faith. A purchaser or mortgagee acquiring his rights with notice of the existence of the antecedent mortgage does not obtain his title in good faith. Consequently, possession taken of the mortgaged property under a prior chattel mortgage, however long postponed, will give it priority over a subsequent purchase or mortgage, if possession be taken, in fact, before such subsequent sale or mortgage was made. But no such qualifications apply as against the creditors of the mortgagor. Their rights may have accrued prior or subsequent to the mortgage, and yet they will be entitled to the benefit of the statute. Knowledge of the existence of a chattel mortgage executed by the debtor will not preclude a creditor from availing himself of the objection that the mortgage is void because it was not accompanied by immediate delivery of the things mortgaged, followed by an actual and continued change of possession. The distinction between creditors and subsequent purchasers or mortgagees, in this respect, was recognized in the opinion of this court in *Bank v. Sprague*, 21 N. J. Eq. 530.” The opinion further declares that “the chancellor’s construction of the statute, holding that possession of the chattels mortgaged, taken before judgment recovered, will not give validity to the mortgage as against the execution creditor, if the mortgage was not filed according to the provisions of the act, and there was not an immediate delivery and continued change of possession of the things mortgaged, was correct.” It must therefore be conceded that the correct interpretation of the fourth section of the act of 1885 is that, if the mortgage is unrecorded, the failure to take immediate possession postpones the mortgage to all creditors of the mortgagor, as well those who become creditors

before possession is taken as those who become creditors after there has been a failure to take immediate possession. The mortgage, by the terms of the act, is invalidated, by such delay, as to creditors. I agree with the vice chancellor that the force of the word “immediate” extends throughout the sentence, and applies to the “filing or recording,” as well as to “the delivery of possession.” The protection to creditors would be slight if the mortgagee could retain his priority over creditors by filing his mortgage long after it was taken by him, instead of taking possession of the goods mortgaged. The policy of the statute cannot be so easily defeated. Immediate possession or immediate recording means as soon as may be by reasonable dispatch, under the circumstances of the case.

The effect of the ninth section of the act of 1885 remains to be considered. It is as follows: “That every chattel mortgage hereafter recorded pursuant to the provisions of this act shall be valid against the creditors of the mortgagor, and against subsequent purchasers and mortgagees from the time of the recording thereof until the same be canceled of record, in the manner now provided by law for canceling of mortgages of real estate.” This section had, manifestly, two objects in view. One was to change the law requiring a mortgage to be refiled, and to provide that, after it was recorded according to law, it should be a valid incumbrance until it was satisfied or canceled of record. The other purpose was to modify the rule which had prevailed under the interpretation previously given to the language of the fourth section of the act of 1885. As before stated, if the mortgagee fails to record his mortgage immediately, he cannot, according to the fourth section, regain his position, as against creditors of the mortgagor, by afterwards recording it, whether they become creditors before or after such recording. In my judgment, the purpose of the ninth section was to enable the mortgagee who failed to record his mortgage immediately to preserve his lien as against all persons who become creditors of the mortgagor after he records his mortgage, and in that respect to put him on the same footing with one who purchases or takes a mortgage after the prior mortgage is recorded. This interpretation is in harmony with the policy of the registry law, which is directed against secret liens, and not against known incumbrances, and it gives full effect to the words “from the time of the recording thereof until the same be canceled of record.” It is also just in its operation, as there is no good reason why the law should favor a general creditor who has notice from the record more highly than it does a purchaser or mortgagee with like notice. Unless so construed, it must be held either that these words in the ninth section have no effect whatever, so far as creditors at large are concerned, which is not permissible if reasonable effect can be given to them, or that a filing at any time, however long after the credit is

given, entitles the mortgagee to priority over the creditor. The latter construction would nullify the fourth section of the act, so far as it applies to general creditors, and sweep away the guard against secret liens. The mortgage of the appellants was not recorded as prescribed by the act of 1885, and it is therefore subsequent and subject to the claims of all persons who became creditors of the mortgagor before the mortgage was recorded, but is prior to the claims of all those who became creditors after it was recorded. In this case it appears that all the credits were given before the mortgage was recorded, and the decree should therefore be affirmed.

CITY OF NEWARK v. MT. PLEASANT CEMETERY CO.

(Court of Errors and Appeals of New Jersey.
Nov. 29, 1895.)

TITLE OF ACT—CONSTITUTIONAL LAW—EXEMPTION FROM TAXATION—RURAL CEMETERIES.

1. A statute which deals with various matters will satisfy the provisions of article 4, § 7, par. 4, of the constitution if it has one general object, and the matters enacted tend to effectuate that object, and are properly related to each other.

2. Under the title of an "act to authorize the incorporation of rural cemetery associations and regulate cemeteries," approved April 9, 1875, legislation looking to the exemption from public burdens of the property of cemetery corporations incorporated under special laws may be enacted.

3. The "act authorizing the incorporation of rural cemetery associations," approved March 14, 1851, by section 10, exempted the lands and property of any association formed thereunder from public taxes, rates, and assessments. By the Revision the act of 1851 was repealed, and its provisions were incorporated in the act of April 9, 1875, *ubi supra*, which had a broader object. By its section 8 the provisions of section 10 of the act of 1851 were extended to exempt lands and property of cemetery corporations incorporated under special laws. An act entitled "A supplement to the act authorizing the incorporation of rural cemetery associations," approved March fourteenth, one thousand eight hundred and fifty one," was approved March 14, 1879, and purported to amend section 10 of the repealed act of 1851. Quære, whether any legislative intent can be discovered in an amendment of a repealed statute; and *add* that, if any intent can be discovered in the act of 1879, it does not repeal the exemption of the property of cemetery corporations created by special laws contained in the act of April 9, 1875.

(Syllabus by the Court.)

Error to supreme court.

By the judgment brought here by this writ, the supreme court vacated an assessment imposed by the city of Newark on lands of the Mt. Pleasant Cemetery Company for the expense of repaving Belleville avenue. No opinion was rendered in that court, but the following memorandum was filed: "The relator is incorporated under a special act, January 24, 1844. A supplement, February 9, 1861, exempts it from taxes and assessments until board of chosen freeholders otherwise directs. That exemption held good

in 52 N. J. Law, 539, 20 Atl. 832. June 19, 1891, the freeholders resolved that thereafter the said association should be subject to taxes and assessments. The assessment for repaving now certified was subsequently imposed. The act of 1851, which is a general act for the incorporation of cemetery companies, exempts cemetery associations formed under that act from taxes and assessments. See, also, Supp. Laws 1868, p. 832. Under this act the relator is not within the exempting clause, because it is not incorporated under the act of 1851, but by a special charter. In the revision of the laws the language of this exempting clause in the cemetery act was changed, and it now provides that cemetery associations formed under this act, 'or otherwise incorporated,' shall be exempt. Revision, p. 102, par. 8. This clearly takes in the relator, and entitles it to exemption from this assessment. Foster Home Case, 35 N. J. Law, 167." Affirmed.

Sherrerd Depue, for plaintiff in error. Henry Young, for defendant in error.

MAGIE, J. (after stating the facts). It is obvious that the judgment of the supreme court has proceeded upon the ground that the eighth section of the "act to authorize the incorporation of rural cemetery associations and regulate cemeteries," approved April 9, 1875 (Revision, p. 100), which enacts that "the cemetery lands and property of any association formed pursuant to this act or otherwise incorporated" shall be exempt from all public taxes, rates, and assessments, applies to the lands and property of the Mt. Pleasant Cemetery Company, and exempts them from such an assessment as was the subject of consideration and contest. That company had been incorporated by a special act passed January 24, 1844 (Laws 1844, p. 19), which enacted that the property of the incorporation thus created should not be subject to any assessment, taxes, or fines, unless otherwise directed by the board of chosen freeholders of the county of Essex. This provision was in 1890 held by this court to be obligatory and valid. *Mt. Pleasant Cemetery Co. v. City of Newark*, 52 N. J. Law, 539, 20 Atl. 832. The case shows that on June 19, 1891, the board of chosen freeholders of Essex county passed a resolution that the lands and property of the cemetery company should thereafter be subject to all taxes and assessments imposed thereon by virtue of the laws of this state. The assessment which was vacated by the supreme court was confirmed December 31, 1892. It has not been contended here that the conclusion of the supreme court could be pronounced erroneous if the act of April 9, 1875, possesses validity and remains in force. The contention is that the act in question either lacks constitutional validity, or has been repealed so far as it affects cemetery associations incorporated un

der special acts, and that the assessment in question, having been imposed after the passage of the resolution of the board of chosen freeholders, was not within the exemption of the act creating the Mt. Pleasant Cemetery Company.

It is first argued that the title of the act of April 9, 1875, is not in conformity to the constitutional requirement that, "to avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object and that shall be expressed in the title." Const. art. 4, § 7, par. 4. It is insisted that the law in question fails to accord with this provision of the constitution, first, because it embraces two objects. The constitution itself discloses the reason for the restriction on legislation contained in the provision in question. It is because of the influences which might result from the inclusion in one act of matters not properly related to each other that it requires every law to embrace but one object. The evil intended to be guarded against was not the inclusion in one act of more than a single matter, but the inclusion therein of matters not properly related among themselves. So, by its obvious construction, this constitutional provision justifies and permits legislation by one statute, looking toward a single general object, although it contains and enacts various and multiform matters, if those matters are properly related to each other, and tend to effectuate the general object. This is the view of the provision in question taken in this court. *Payne v. Mahon*, 44 N. J. Law, 213. The same construction has been repeatedly given it in the supreme court and in the court of chancery. The cases will be found collected in the able opinion of the learned chancellor in *Stockton v. Railroad Co.*, 50 N. J. Eq. 52, 24 Atl. 964. It results that, when a court is called on to determine whether a statute conforms to this requirement of the constitution, the first duty is to scrutinize its provisions to see if they disclose the general object of the legislation. Then, if that object be one, and the various provisions of the statute tend to carry it out, and are not incongruous or improperly related, this requirement will have been complied with. Turning to the act of April 9, 1875, I find in its provisions a clear and definite general object, viz. the establishment and maintenance of cemeteries for the burial of the dead. Moreover, I find that its provisions, though various, all tend to promote that object, and are not improperly related to each other. Thus, it first authorizes the formation of associations to take, hold, and use land for cemetery purposes, and regulates the associations thus to be formed. The tendency of legislation had for many years been towards the creation of corporations by general rather than by special laws.

On the preceding day the legislature had submitted to the people the amendment to the constitution, afterwards adopted, which prohibits the grant of corporate powers otherwise than by general laws. But, while thus authorizing the acquisition of new corporate powers to effectuate the general object of the act, it was within legislative knowledge that cemeteries for the burial of the dead had previously been established by corporations created by special laws or the general law of 1851, hereafter mentioned, and it was obvious that the cemeteries thus established, and those which might thereafter be established by corporations formed under this act, needed legislation in many respects, at least, identical in character. Provisions making such regulations with respect to cemeteries established or to be established tend to effectuate the object of the act, and are not improperly related to the provisions for the incorporation of associations for the establishment of such cemeteries. In my judgment, the object of the act is single, within the meaning of the constitution.

It is next contended that the object of the act, so far as it has a purpose to exempt from public burdens cemeteries incorporated under special laws, is not expressed in the title, and it is therefore out of conformity with this provision of the constitution. The insistent is that the words "and regulate cemeteries" are not broad enough to cover a grant of exemption from taxes and assessments, and that, if the act is constitutionally valid in other respects, it falls and is invalid in that respect. *Rader v. Union Tp.*, 39 N. J. Law, 509; *Bumsted v. Govern*, 47 N. J. Law, 368, 1 Atl. 835; *Govern v. Bumstead*, 48 N. J. Law, 612, 9 Atl. 577. But this argument is based upon a too-limited meaning of the word "regulate," which is conceived to be applicable only to the imposition of restrictions. But the word is of far broader meaning, and includes all direction by rule of the subject-matter. As applied to property devoted to cemetery purposes, it would naturally include, not only the making of rules for its management by those having it in charge, but also the making of rules governing the conduct of others in respect thereto, and of the public in respect to public burdens thereon. The result is that the act of April 9, 1875, is not out of conformity with the clause of the constitution in question.

But it is then contended that the act in question, if not constitutionally objectionable, has been repealed, so far as it operated to exempt from taxes and assessments the cemetery property of corporations organized under special laws. This contention is not supported. By the provision of an "act authorizing the incorporation of rural cemetery associations," approved March 14, 1851, associations might be formed to take and hold

property for cemetery purposes. By section 10 the cemetery lands and property of any association formed pursuant to the act were declared to be exempt from all public taxes, rates, and assessments. The act of April 9, 1875, included in substance the provisions of the act of March 14, 1851; but section 10 of the latter act became section 8 of the revised act, and its exemption was extended to the lands and property not only of associations formed under the act, but also of those otherwise incorporated. This was a plain, and, as has been said, a constitutionally valid, expression of the legislative will to thus exempt the property of corporations like the Mt. Pleasant Cemetery Company. On the same day the act of March 14, 1851, was repealed. Revision, p. 1396, § 465. Notwithstanding the absolute repeal in 1875 of the act of 1851, the legislature in 1879 passed a supplement to that act, which supplement was approved March 14, 1879. Supp. Revision, p. 80. It recited at length the tenth section of the act to which it was declared to be a supplement, and then enacted that said section should be amended so as to read "that the cemetery lands and property of any association * * * formed pursuant to this act and actually used for cemetery purposes, shall be exempt from all public taxes, rates and assessments," etc. The amendment consisted in the insertion of the words, "and actually used for cemetery purposes." It would seem to be impossible to contend that there could be a valid amendment to a nonexistent and defunct statute, but the contention is that although the act of March 14, 1851, was absolutely repealed, yet, because its provisions were re-enacted in the act of April 9, 1875, the supplement of 1879 must be considered as being in effect an amendment of the latter act, rather than of the act of 1851, as it purports to be. Counsel for plaintiff in error has cited many cases which he claims support this contention. One of these cases, decided in Massachusetts, will show the ground of the decisions. In that case the ninth section of chapter 57 of the Public Statutes was in 1885 amended so as to read differently. In 1886 another act passed, declaring that section 9 of chapter 57 of the Public Statutes should read "as follows," etc. In each case the enactment covered the whole subject of the original section. Upon these facts the court upheld the law as enacted in 1886. For, while it conceded that the amendment of 1885 impliedly repealed the ninth section, it found the intention of the legislature to be plain that after 1885 the section as then amended should be in force, and after 1886 the section as then amended should be in force. This was put upon the ground that the sections in each statute were complete in themselves, and, being substitutes for each other,

stood like independent enactments. *Com. v. Kenneson*, 143 Mass. 418, 9 N. E. 761. It is unnecessary to express any opinion as to the correctness of these decisions. For the facts of this case are different. The act of 1851 was not merely re-enacted in 1875. Its provisions were incorporated in a statute having a broader purpose and object. Its tenth section, which provided for exemption from public burdens, was not merely superseded by the eighth section of the act of 1875, for the latter section extended the exemption beyond the scope of the act of 1851. No legislative intent to amend the act of 1875 by striking from its eighth section the exemption thereby extended to the property of cemetery companies incorporated under special laws can be discovered in the act of 1879. By express terms its provisions were limited in application to associations formed under the act of 1851, of which, doubtless, there were some in existence. If it were impossible to infer an intent to apply its provisions to associations formed under the act of 1875, it is plain that the intent would be limited to such associations, and would operate to restrict their exemption to lands and property actually used for cemetery purposes. No intent can be perceived to make its provisions apply to cemetery associations otherwise incorporated, and if such was its object the title of the act failed to express it. Nor does the act of 1879 exhibit any intent to enact legislation applicable to all cemetery incorporations, and superseding all previous legislation on the subject. On the contrary, it expressly applies only to one class of such associations. It cannot be deemed a substitute for legislation respecting another class.

It may be suggested that the act of 1879, if it has the scope claimed for it, may be of doubtful validity. As construed in this argument, it would operate to exempt from public burdens the property of one class of cemetery corporations, leaving the property of another class of such corporations subject thereto. The constitutional provision requiring property to be assessed for taxes under general laws impliedly requires exemptions from taxation to be granted by general laws. And a law exempting property of certain corporations, leaving property of other corporations identical in the characteristics which justify exemption, can hardly be said to be general. But this point was not argued, and no opinion is designed to be expressed thereon. For the other reasons given, I am of opinion that the provisions of the act of April 9, 1875, have not been repealed; and, as they operated to exempt the property of the Mt. Pleasant Cemetery Company from such an assessment as was imposed on it, the judgment of the supreme court must be affirmed.

FEEDER v. VAN WINKLE.

(Court of Errors and Appeals of New Jersey.
Dec. 3, 1895.)

FIXTURES—WHAT CONSTITUTES—MORTGAGE.

1. Chattels must, to constitute them fixtures, be actually annexed to the real estate, or something appurtenant thereto. They need not necessarily be attached to the building. That is one way of annexing them to the soil, but not the only way.

2. To satisfy this test, it is not material whether the substructure is brick or wood, or whether the machinery is annexed to the building, or rests upon a foundation securely laid for it in the soil, and to which it is fastened.

3. The fact that the chattels in controversy may be removed and sold for other uses, or that they were not made for special adaptation to the buildings in which they are placed, is not decisive of their character. Those qualities are mere circumstances to be considered.

4. There must be actual annexation with an intention to make a permanent accession to the freehold, but it is not necessary that there be an intention to make the annexation perpetual. The intention must exist to incorporate the chattels with the real estate for the uses to which the real estate is appropriated, and there must be the presence of such facts and circumstances as do not lead to, but repel, the inference that it is intended to be a temporary annexation.

5. The chattels in this case were actually annexed to the freehold. They were fitted for and applied to the use to which the real estate was appropriated, all being designed for and necessary to the prosecution of a common purpose. Thus, the machinery and land became unified, and incorporated together as a whole, subject to the lien of the real-estate mortgage.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill by John A. Van Winkle, receiver, against Charles Feeder. From a decree confirming the report of a special master, defendant appeals. Reversed.

John W. Griggs, for appellant. Eugene Stevenson, for respondent.

VAN SYCKEL, J. The controversy in this case is between the appellant, who has a real-estate mortgage, and John A. Van Winkle, receiver of the Riverside Bridge & Iron Works, an insolvent corporation, and relates to certain machinery which was used in its business of manufacturing structural and bridge iron. The said company had been engaged for 14 or 15 years in carrying on its business prior to its insolvency. It occupied a tract of about two acres of land, on which the buildings in which the business was carried on were erected. The buildings were: (1) The main shop, 60 by 160 feet (it was a mere shed, having no floor except the natural earth); (2) the office building; (3) the blacksmith shop, which also had no floor; (4) the storehouse; (5) the foundry, which had no floor; (6) the machine shop, which was part of the main shop, and had a wooden floor; (7) the templet shop, in the second floor, over a part of the main shop; (8) the engine room, from which power was supplied to the different machines. All the

buildings were frame, and were practically joined together as one inclosure; the pipes, shafting, and other appliances running from one into the other. The appellant holds a mortgage given May 15, 1889, which covered the real estate by its description, and also contained the following clause: "Also all steam engines, boilers, shafting, belting, pulleys, hoisting apparatus, and all other machinery whatsoever, with all connections, fixtures, and appurtenances thereto belonging upon said premises or in the buildings erected thereon, or any of them." This mortgage was duly recorded as a real-estate mortgage on the day it bears date.

In order to establish the claim of the mortgagee to the machinery as against the receiver, it must appear (1) that the chattels were actually annexed to the real estate, or something appurtenant thereto; (2) that they were applied to the use or purpose to which that part of the realty with which they were connected was appropriated; (3) that they were annexed with the intention to make a permanent accession to the freehold.

This case must be adjudged by the law as propounded in the following cases in this court: *Blancke v. Rogers*, 26 N. J. Eq. 563; *Insurance Co. v. Semple*, 38 N. J. Eq. 575; *Speiden v. Parker*, 46 N. J. Eq. 292, 19 Atl. 21. The difficulty arises in applying the rule. Each case must be determined according to its particular facts and circumstances. The chattels must, to constitute them fixtures, be actually annexed to the real estate, or something appurtenant thereto. They need not necessarily be attached to the building. That is one way of annexing them to the soil, but not the only way. A steam engine set upon a brick foundation laid in the earth, without any attachment to the building, is unquestionably a fixture. In *Speiden v. Parker*, supra, a derrick set in the ground to hoist stone, and a truck laid on ties in the ground on which cars were run, were held to be fixtures. So that, to satisfy this test, it is not material whether the substructure is brick or wood, or whether the machinery is annexed to the building, or rests upon a foundation securely laid for it in the soil, and to which it is fastened. Neither is the fact that the things in question may be removed and sold for other uses, or that they were not made for special adaptation to the buildings in which they are placed, decisive of their character. Those qualities are mere circumstances to be considered, but the presence of them does not necessarily withdraw machinery from the real-estate mortgage. A steam engine, to take on the qualities of a fixture, need not be made specially for the building in which it is planted. It may, like any other piece of mechanism, be removed, and used with equal advantage in any other establishment, for which it will furnish sufficient power. The same observation will apply to other articles which in the court below were proper-

ly adjudged, in accordance with almost all cases on this subject, to be fixtures. There must be actual annexation, with an intention to make a permanent accession to the freehold, but it is not necessary that there be an intention to make the annexation perpetual. A test so severe would be impracticable in its application. The intention must exist to incorporate the chattels with the real estate for the uses to which the real estate is appropriated, and there must be the presence of such facts and circumstances as do not lead to, but repel, the inference that it is intended to be a temporary annexation.

In *Blancke v. Rogers* two machines were the subject of controversy,—“a number one, four-sided, inside molding machine, and a number one clipper, planer, and matcher.” The opinion says that no adjustment was made of them to fit in any wise to the place where they were put for use. They were placed in the building upon the floor of a room, without support. One was not attached in any way to the soil or building; the other was partially bolted to the floor with screw bolts. They were movable in the building, and were moved about at the convenience of the owner, and run from different parts of the shafting. See pages 565 and 568. The learned justice who delivered the opinion of the court was clearly right in saying that while such chattels may be so annexed to and incorporated into the realty as to become, through the manner of annexation and the purpose of the owner, a part of the freehold, yet there was an absence in that case of evidence to show such annexation and intention. In *Insurance Co. v. Semple* the machines were fastened to the floor by small screws to steady them, and in their use some were moved from one place in the building to another. This court said: “There was no evidence in any act of the owners, or in any circumstance growing out of the organization or manner of conducting the manufacturing establishment, showing a design on the part of the owners to make a permanent addition of the property in dispute to the realty.” The later case of *Spelden v. Parker* was a controversy respecting the character of certain appliances used in connection with a stone quarry and dock in Essex county. They consisted of three boilers, two engines, two hoisting gears, three derricks, and a steam pump, with connecting pipes, valves, and pulleys, all located in or near the quarry, and a railroad track laid from the quarry to the dock on Passaic river, to transport stone, and two derricks at the dock, to transport the stone to boats. The stationary machinery was fastened in the ground, and was used for the only purposes to which the real estate was put. Upon these facts this court rested its conclusion that these appliances were attached to the freehold with the intention of making them part thereof. The opinion of this court was unanimous, and was concurred in by Justice Knapp, who delivered the opinion of the

court in the two cases last cited. Not one of the implements involved appeared to have been specially adapted to the place in which it was used. Some were set in the earth, and all could have been removed and applied to the prosecution of a like business elsewhere. The decision must rest upon the facts that the appliances were actually annexed; that they were adapted to and used in the business for which the realty was held by the owner; that a common purpose was to be promoted by attaching the chattels to the freehold; that the just inference was that the annexation was intended to continue so long as the business was prosecuted on those premises; and that the enterprise was intended to be “permanent” in the sense in which that term is used in business transactions,—“permanent” as contradistinguished from “temporary.” It will be necessary, therefore, to look at the controlling facts of this case before us to determine whether there was an absence of intention to incorporate the machinery with the real estate, as in the *Blancke Case*, or the presence of such intention, as in the *Spelden Case*.

The following is a brief statement of the machines included in the petition of appeal, and the manner of their annexation: Nos. 1, 2, 4, 5, 8, 10, 12, 13, 20, 21, 25, 26, and 52 are heavy machines, most of them weighing from 2,000 pounds to 6,000 pounds. They rest upon large timbers laid in the earth to their full depth, and they are fastened to them by bolts running down through the timbers. Nos. 49, 50, and 51, in addition to the heavy timbers to which they are fastened at the base, are also fastened down into a sub-foundation of concrete, and for them the building was adapted by cutting holes, and running pipes from the boilers in the boiler house, 100 feet away. Nos. 15, 16, 17, and 30 are fastened to columns of the shop by bolts, and other fastenings in some cases. Nos. 5, 14, and 48 are fastened by iron or wooden rods, or both, let down from the beams or rafters above. Nos. 28, 29, 40, 41, 42, and 45 are fastened to the floor by lay screws, which are heavy bolts with a screw. The lightest in weight is 400 pounds, and the heaviest is 8,000 pounds. Nos. 1 and 2 have power applied by a belt coming through a hole in the roof. Nos. 45 and 46 were adapted for use by the adjustment of timbers and braces in the building, and the cutting of holes through the floor for running the belt. In view of these facts, I am of the opinion that these chattels did not retain the character of personalty, as in the *Blancke Case*, but were transmuted into realty, and passed to the mortgagee, as in the *Spelden Case*. In no respect was that case stronger for the mortgagee than is this. If all the tests necessary to constitute the chattels fixtures were satisfied in that case, they surely are in this case. The various appliances were actually annexed to the freehold. They were fitted for and applied to the use to which the real estate was appropriated.

all being designed for and necessary to the prosecution of a common purpose. Thus, the machinery and land became unified, and incorporated together as a whole. The business had been carried on for 14 years, and, save for business disaster, might, and probably would, have been prosecuted indefinitely. The machinery employed, the mode of its annexation, and manner of its use, in connection with the realty as an entirety, indicated, not a temporary, but a permanent, accession. The fact that the machines might be removed and utilized elsewhere will not, under the circumstances of this case, serve to sever them, in legal contemplation, from the freehold. The decree below should be reversed as to all the articles above specified, and a decree rendered in accordance with the views herein expressed.

BENNETT v. FINNEGAN et al.

(Court of Chancery of New Jersey. Nov. 21, 1895.)

BILL TO ESTABLISH LIEN ON LAND—SUFFICIENCY—LIMITATIONS.

1. A bill by a husband against the heirs of his deceased wife to establish a lien on land of which she died seised alleged that he gave his sole bond for a balance due for the purchase money of such land, secured by a mortgage on the land, which he afterwards paid, and which was canceled under a mistake and misapprehension of his legal and equitable relation to the property and indebtedness of his wife; and that the debt for which the bond was given was actually the debt of his wife, being a part of the consideration money due from her to the vendor on the conveyance. *Held*, that the bill was good as against a demurrer for want of equity.

2. Where a husband pays a mortgage on his wife's land, given to secure his sole bond for unpaid purchase money, and is entitled to be subrogated to the rights of the mortgagee, the fact that the husband can sue the wife only in equity does not constitute a sufficient reason for refusing to apply to such cause of action the statute of limitations.

Bill by Peter Bennett against Bridget Finnegan and others to establish a lien on land. Heard on demurrer to the bill. Sustained.

Mr. Trimble, for complainant. Adrian Riker, for demurrants.

EMERY, V. O. This is a bill filed by a husband against the heirs at law of his deceased wife to establish a lien upon lands of which the wife died seised. The lien sought to be established is for a portion of the purchase money of the lands in question, for which, at the time of the purchase and the conveyance of the lands to the wife, the husband gave his sole bond, which was secured by a mortgage upon the premises executed by the husband and wife. This mortgage the husband subsequently paid off with his own money, and upon this payment the mortgage was canceled of record. The conveyance to the wife, and the bond and mortgage for the purchase money, were made on March 22,

1866, and the mortgage was paid by the husband about May 20, 1868, and canceled of record May 25, 1868. Bridget Bennett, the complainant's wife, died on March 9, 1894, and the bill alleges that until that date complainant and his wife lived together in the joint possession of the property, and since her death he has been in sole possession. The wife died intestate, and without issue, and, her heirs at law having commenced an action of ejectment against the complainant, this bill was filed, and a preliminary injunction restraining the suit of ejectment was granted by the late Vice Chancellor Van Fleet. The bill is based upon the theory that the complainant is to be treated in equity as the surety of his wife to the extent that the purchase money of the land conveyed to her has been paid by his money, and that, to the extent of such payment and interest, he is entitled to a lien upon the lands, and to be subrogated to the rights of the mortgagee under the mortgage. The cancellation of the mortgage is alleged to have been made under a mistake and misapprehension of his legal and equitable relation to the property and indebtedness of his wife. The defendants have now demurred to the bill, assigning for causes of demurrer, first, the statute of limitations, and, second, want of equity.

So far as relates to the second cause of demurrer, I am inclined to think that the allegations of the bill are sufficient, at least upon general demurrer for want of equity, without further specifications. The ground of objection in this respect is that the bill only shows a payment of the husband's money for lands conveyed to the wife, and that, when a conveyance is made to the wife under such circumstances, the presumption is that a settlement upon or gift to the wife is intended. *Lister v. Lister*, 35 N. J. Eq. 49, affirmed on appeal, 37 N. J. Eq. 331. But this presumption is a presumption of fact, and not of law, and is subject to be rebutted by competent and sufficient evidence that the money was advanced by the husband as a loan to the wife, and that the debt for the purchase money was intended to be the wife's debt, and not the husband's. The bill in this case contains the allegation "that, although he [complainant] gave his bond [for part of the purchase money], the debt for which said bond was given was actually the debt of his wife." Under this allegation, I think, complainant would be entitled to make competent proof rebutting the presumption of gift; and the subsequent clause added to this allegation, viz. "being a part of the consideration money due from her to Brown, the vendor, on the conveyance," may be construed, I think, as one reason why complainant alleges it to be the wife's debt, or as a description of the character of the wife's debt, rather than as a limitation of the general allegation that the bond was really the wife's debt. The question, perhaps, is a close one, but, in view of the present rule requiring specifications of

demurrer, a general demurrer for want of equity, without further specification, should not be sustained unless the defect is clear to the court. *Paper Co. v. Greacen*, 45 N. J. Eq. 504, 19 Atl. 466.

The objection based on the statute of limitations is more serious, and the question is important. This objection, it is now settled, may be taken by demurrer as well as by plea or answer, and must be considered, if so raised. 1 *Daniell*, Ch. Prac. (6th Ed.) *560; *Partridge v. Wells*, 30 N. J. Eq. 176, affirmed 31 N. J. Eq. 362. The defendants claim that, the purchase money having been paid by the complainant in 1868, and the mortgage then canceled, no rights as to the lands can, after 20 years, be asserted under the mortgage, either at law or in equity, either in favor of the mortgagee or of the complainant, by subrogation to the rights of the mortgagee. As between surety and principal generally, the application of the statute to the assertion of legal equitable rights by the surety against the principal is clear, and in many of the cases in which the right of subrogation and the application of the statute has been considered it has been held that the obligation of the principal to the surety arises solely by reason of the payment of the money by the surety, and is, in its nature, a simple contract obligation, which must be prosecuted within the time limited for suits on such contracts. The right to sue is not, in these cases, considered as extended to the time for bringing suit upon the securities to which the surety, for his reimbursement, claims to have been subrogated. 24 *Am. & Eng. Enc. Law*, p. 322. In the present case this question is not involved or considered, for the reason that the rights of the original mortgagee, to whom complainant claims to succeed, are also barred by the statute, if it is applicable to the case of husband and wife. The debt claimed to be due from the estate of the wife to the husband for money paid by him as surety for her is one for which, as between surety and principal generally, the remedy is legal; and any equitable rights, either by reason of the payment, or upon the mortgage to which subrogation is claimed, would necessarily be barred by the statutes which barred the legal remedies on the mortgage. *Kirkpatrick v. McElroy*, 41 N. J. Eq. 539, 7 Atl. 647; *Smith v. Wood*, 42 N. J. Eq. 563, 7 Atl. 881, affirmed *Smith's Adm'r v. Wood*, 44 N. J. Eq. 603, 7 Atl. 1104. Does the fact that the husband can sue the wife only in equity constitute a sufficient reason for refusing to apply the statute? I think that it does not. In certain cases, such as those of direct and express trusts, the courts of equity have held that the statutes of limitations are not applicable (*Partridge v. Wells*, supra), but where the whole basis of the equity jurisdiction is founded, not on the nature of the rights involved, but on the existence of the marital relation between the parties, and the continuance of the common-law disabilities as to

suits at law arising from this relation, it seems to me that the court of equity, in deciding the substantial question of right between the husband and wife, or persons claiming under them, must apply the same principles which should be applied in deciding upon the same questions if at issue between other persons than husband and wife. This would include the application of the statute of limitations, which, as between other persons than husband and wife, would clearly be applicable to the present case. No case was cited by counsel bearing upon the point, but I find that the same conclusion as to the application of statute of limitations in suits in equity between the husband and the representative of the wife was reached by the court of appeal in a recent English case. In *re Hastings* (1887) 35 Ch. Div. 94. In this case a loan made by the husband to the wife was held to be barred under the statute of limitations, at the death of the wife, more than six years after the loan. There are no allegations in this bill which show any facts excluding the operation of the statute, either at law or in equity. The allegation as to the joint possession of the property by the husband and wife from the purchase to the date of her death cannot be taken to have this effect, for such possession did not prevent the prosecution of the claim for subrogation if it existed; and after the cancellation of the mortgage the possession cannot be considered as an assertion against the wife's estate of a claim under the mortgage. The demurrer on this point, therefore, must be sustained.

The mortgagee to whose rights subrogation is claimed was not made a party to the bill, nor was any objection made on that account. He may be a necessary party (see 24 *Am. & Eng. Enc. Law*, p. 324), and, should the bill be further prosecuted by amendment, or should a different view as to the application of the statute be taken upon appeal, it will be advisable for the complainant to consider this point.

FLYNN v. O'MALLEY et al.

(Court of Chancery of New Jersey. Nov. 21, 1896.)

ADMINISTRATION—RIGHTS OF WIDOW—PARTITION—ACCOUNTING—RENTS—TAXES.

1. Where a widow leases a part of the mansion house she is entitled to the rents until assignment of her dower.

2. Where a widow, prior to assignment of her dower, uses, as the head of a family consisting of herself and children, a tenement owned by the children in whole or in part, she cannot be required to pay rent, though such tenement is not a part of the mansion house.

3. Where a widow, on behalf of her children, pays taxes on a tenement owned by them and a cotenant, in adjudging a partition of the property the amount paid by her should be taken into account.

Bill by Cecelia Flynn against Edward A. O'Malley and others for partition and other relief.

Edward Kenny, for complainant. Charles T. Glen, for defendants.

REED, V. C. The bill in this cause is filed by the complainant primarily to obtain a partition of a tract of land of which her father died seised. It incidentally claims other relief. The facts set out in the pleadings and proved on the hearing are that Charles Flynn died on March 16, 1878, seised of a house and tract of land, about an acre in area, inclosed as a curtilage of the house; that he left a widow, Mary, and four children, viz. Annie, Catharine, Cecelia, the complainant, and Joseph. The house consisted of one part of one and a half stories in height, and another of one story in height. At the time of the death of Charles Flynn, he, with his wife and children, lived in the one and a half story portion of the house. In the one-story portion of the house lived Edward A. O'Malley, one of the defendants in this suit. O'Malley at that time was paying for the portion of the house which he rented the sum of eight dollars per month. Soon after the death of Charles Flynn, by an arrangement between O'Malley and the widow, they interchanged the portions of the house which they had occupied, O'Malley moving into the part theretofore occupied by Charles Flynn and his family, and Mary Flynn and her family moving into the part theretofore occupied by O'Malley. The rent which O'Malley had theretofore paid was raised from \$8 to \$12 per month. Affairs continued on this basis until 1886. In that year Annie, having married, sold her undivided one-third interest in the property to O'Malley; Joseph, her brother, having died in April, 1878. Thereafter O'Malley ceased paying rent at the rate of \$12 a month, and paid at the rate of \$9 a month up to May, 1893. It appears that the dower right of the widow in the premises has never been assigned to her. It appears that she has collected some rents for the pasturage of the lot; that she has paid taxes to the amount of \$99.48, and she says she has done some repairs. O'Malley also, since his purchase of Annie's interest, has paid taxes to the amount of \$21.36. The bill prays that an account may be taken of the rents, issues, and profits of the premises in the possession and occupation of O'Malley; that he be decreed to pay \$9 a month to such person as may be appointed to receive the same, or, in case of the sale of the premises, it shall be taken account of in the division of the proceeds. The defendant O'Malley, in his answer, denies that the complainant is entitled to receive from him an equal half part of rent or compensation for his use and occupation of the premises; that Mary Flynn had not paid all the taxes, and had not kept the premises in repair; that she should account for the rents she received from him (O'Malley); that she should be charged with a reasonable rental for the use of that portion of the house which she occupied; and that O'Malley

should have his reasonable share of such rents. He also files a cross bill setting up the same facts, in which he prays an accounting.

The facts, as proved both by the admissions in the pleading and the evidence adduced at the hearing, seem to show conclusively that the rent due from O'Malley belongs to the widow. There was some evidence introduced for the purpose of showing the character of the house,—whether it was a double house or a single house. This was introduced for the purpose of showing whether that portion of the house which O'Malley occupied at the time of the death of Flynn was to be regarded as a portion of the mansion house, or was to be regarded as a separate tenement. My impression is that the whole house is a single structure, and that O'Malley rented rooms which were a part of the mansion house of Charles Flynn; but the decision of this question I do not regard as material, for, if the house is viewed as containing two distinct tenements, yet that fact does not affect the right of the widow to receive the rent due from O'Malley. As already remarked, at the time of her husband's death he was in possession of the one and a half story part of the mansion. It is incontrovertible that that part was the mansion house, and that the tract of land surrounding it was its curtilage. Now, it is entirely settled that the widow, before assignment of dower, has the right to rent the mansion house or its curtilage, or any part of it, and to collect and hold the rent. *Craige v. Morris*, 25 N. J. Eq. 467; *McLaughlin v. McLaughlin*, 22 N. J. Eq. 506. The rent that was due from O'Malley for that part of the house was due to the widow until her dower was assigned. Therefore that rent has no pertinency to this application for partition between the children of the widow, and no decree can be made in respect to it in this suit. Nor can the widow be called upon to account for the value of her use and occupation of the other portion of the tenement. It was obviously used by her as the head of her family, consisting of the children, who, until 1886, were the entire owners of the premises, and after 1886 were owners of two-thirds of the premises; and it is entirely settled that under such circumstances a tenant in common cannot be called upon to pay rent.

In respect to the other matters for which an accounting is claimed, the posture of affairs seems to be this: The widow, before assignment of her dower, by the law settled in this court, is not in as tenant of an estate for life. *Spinning v. Spinning*, 41 N. J. Eq. 427, 5 Atl. 278; *Cronley v. Cronley*, 40 N. J. Eq. 30. The taxes the widow has paid seem to have been paid on account of her children, and in adjusting the partition they should be taken into account. So far as appears, they amount to \$99.48; one-third of which should be paid by O'Malley, which

makes \$33.16. O'Malley himself paid \$21.36, and two-thirds of that should be paid by the children, viz. \$14.24. So O'Malley will be really indebted to the others the difference between these sums. As already remarked, O'Malley is undoubtedly bound to pay nine dollars a month, but it is due to the widow as dowress, and not to her as representative of the children, the joint tenants. As suggested on the argument, the matters are so simple that they should be adjusted without resorting to the expense of an accounting.

CLARK THREAD CO. v. BENNETT.

(Court of Errors and Appeals of New Jersey.
Nov. 29, 1895.)

CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where it is possible for the jury to draw another inference than that plaintiff had been guilty of contributory negligence, a peremptory instruction should not be given.

Error to supreme court.

Action by Margaret Bennett against the Clark Thread Company for personal injuries. Plaintiff had judgment, and defendant brings error. Affirmed.

R. U. Lindabury, for plaintiff in error. S. Kalisch, for defendant in error.

MAGIE, J. The argument was confined to the assignments of error based on the refusal to nonsuit, and the refusal to direct a verdict for the defendant below. No error is discoverable in these refusals.

1. There was evidence to go to the jury in respect to the liability of the company for Margaret's injury.

2. As to the negligence of plaintiff, which is alleged to have contributed to the injury, the claim is that it was established by inference drawn from the construction of the machine, and from the mode in which her hand was pulled in between the cylinders from below. The contention is that she could not have been so injured unless she had put her hand in a place of obvious danger. But it was for the jury to draw inferences from the facts, and a peremptory instruction could not be given by the trial judge, unless in a case where but a single inference could be drawn. It was so improbable that she received her injury in the precise manner she described, and so difficult to conceive how she was drawn in without her own negligence, that a new trial might well have been allowed on the ground that the jury's inference of no negligence on her part was against the weight of evidence. But as it was possible that her injury happened in a manner consistent with her description, and without negligence on her part, an instruction for a verdict against her ought not to have been given, for a second or subsequent verdict on the same evidence in her favor would doubtless not

have been disturbed. *Crue v. Cal.* N. J. Law, 215, 19 Atl. 188. The that the judgment must be affirmed.

ROWAN v. CONDON.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1895.)

MORTGAGE—FORECLOSURE—RESALE.

Mortgaged premises were bought by the mortgagee, under proceedings to foreclose, for \$10,000, the balance due on her decree. It appeared that the mortgagor paid in cash \$5,000 in fruitless endeavors to save her property, and there was some proof that a misapprehension as to time of sale, and her willingness to give \$25,000 could have been had. Held, that a resale would be ordered, and that the giving of a bond that, in the event of a resale, \$25,000 would be bid.

Appeal from court of chancery; affirmed. Chancellor.

Margaret H. Rowan appeals from a decree confirming a sale to Minerva Condon, and proceedings to foreclose a mortgage, reversed conditionally.

Collins & Corbin, for appellant.
Lewis and Albert A. Wilcox, for respondent.

GARRISON, J. This appeal is from a decree of the chancellor confirming a sale under proceedings to foreclose a mortgage. The mortgaged premises were bought by the mortgagee for the sum of \$10,000, the balance due on her decree. The attention of this court is arrested by two circumstances. First, that the mortgagor actually cashed the sum of \$4,698 in fruitless endeavors to save her property; and, second, that no proof is offered that, but for a misapprehension as to the time of sale, a purchase for \$25,000 would have been had. In view of these circumstances, our order is that the decree of the chancellor be affirmed unless, within a reasonable time after the remission of this record to the court of chancery, a prospective purchaser enters into bond, with security satisfactory to the chancellor, that, in the event of a resale, the sum of \$25,000 will be bid for the mortgaged premises, in which case the decree of the premises shall be directed to be affirmed. Chancellor.

This order is made without costs.

PERRINE v. BROADWAY BANK, BROOKLYN.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1895.)

PRACTICE—SERVICE OF CHANCERY ORDER—TEMPT.

1. The regular way of serving a writ in the court of chancery is by leaving the party a copy thereof, certified by the clerk.
2. A party will not be in contempt for refusal to obey an order not so served.

has been served in accordance with a special order of the chancellor.

(Syllabus by the Court.)

Appeal from court of chancery; Bird, Vice Chancellor.

Action by the Broadway Bank of Brooklyn against Orlando Perrine. From an order finding the defendant guilty of contempt, he appeals. Reversed.

Frank Bergen, for appellant. John S. Voorhees, for respondent.

BEASLEY, C. J. On this appeal but a single question is presented for solution. The respondent, having obtained a judgment, and an execution thereon having been returned unsatisfied, exhibited his bill in the court of chancery to compel the discovery by the appellant, the judgment debtor, of his property. By force of the statute (Revision, 121, § 90) the chancellor thereupon made an order requiring the appellant to appear and make discovery on oath concerning his property and things in action before a master, at a time and place designated. Thereupon a certified copy of this order was put in the hands of the sheriff for service, who, through the medium of an undersheriff, served the appellant by leaving a true copy of the order with him, but without showing him the original, or in any manner intimating that he had it in his possession. In this condition of things the appellant, acting on the advice of counsel, did not attend before the master as directed, and, because of such failure, was cited by the respondent to appear and show cause before the vice chancellor why he should not be adjudged to be in contempt. Upon hearing he was declared to have been contumacious, and was accordingly fined. The present appeal brings before us this sentence.

That the order in question was not served according to law is not open to question. The practice on this head has been immemorially settled. The ancient and modern course of procedure was and is as follows: Upon an order of this nature being signed, it is to be filed, and a copy certified to as true by the clerk is then to be served on the party. These steps may, of course, be modified by the special direction of the chancellor, but, in the absence of such substituted method, the correct and only mode is that just stated. So far as is known, there has never been an approved departure from the rule. In the present instance this inveterate and simple course was not taken. A copy of the order, attested by the clerk, was sent to the officer, and, instead of leaving it with the appellant, he copied it, and left such copy. The paper thus left was not certified to in any mode, nor did the officer exhibit the copy in his hands. The ground upon which the vice chancellor concluded that the appellant had placed himself in a contumelious attitude with respect to the court was that the

circumstances showed that he had no reason to doubt, and did not doubt, the authenticity of the copy of the order that was left with him, and that therefore it was his duty to obey it. The doctrine is thus expounded: "As a general rule, I think, it may be safely said that, when an order is made by a court, requiring a party to a suit pending before it to do, or to refrain from doing, a particular thing, all that is required to impose the duty of obedience is that the order shall come to his knowledge in such manner that he knows what he is required to do, or to refrain from doing, and as would lead a man of ordinary good sense to believe that the court had made it." It is obvious that, if such be the principle, then there is nothing like an established formula of practice in relation to these cases. The entire subject is in the air. Who can tell what will or will not be a sufficient service? The assurance of the lawyer of the party obtaining the order, that a paper purporting to be a transcript of the order, although entirely unauthenticated, would doubtless, in most cases, carry conviction of its genuineness. So unattested copies sent by mail would many times have the same effect. Under the prevalence of such a system, the most deplorable laxity would soon prevail, and it is not, therefore, a matter of surprise that no authorities have been cited in its support. In the brief of counsel the service of orders of this nature are likened to the service of injunctions, and it is claimed that, with respect to such procedure, the rule propounded by the vice chancellor has obtained. There can be no doubt that in certain junctures the usual rule requiring an exact service of injunctions has been relaxed, but such relaxations are applicable only to that form of such writs whereby the party is prohibited from pursuing a certain line of conduct; but such relaxations are the creatures of necessity, and therefore have no place in the regulations of mandatory injunctions. The expressions of judicial opinions on that subject in this state have all related to common injunctions; that is, writs containing an order not to do a particular thing, or series of things. They mark out deflections from the ordinary path, and are obviously the creatures of necessity, and should not transcend the limits of such necessity. In *Haring v. Kauffman*, 13 N. J. Eq. 398, Chancellor Green, with characteristic precision and accuracy, defines the usual practice touching the service of this process. He says: "To effect a regular service of an injunction, the writ itself, under the seal of the court, must be shown to the party against whom it issues, and a true copy thereof delivered to him." He then proceeds to show that, in cases where such formal service cannot be made, the court will direct a different, and less direct, method of notification to be pursued. This is the English and American practice. *Endicott v. Mathis*, 9 N. J. Eq. 114; *Railroad Co. v. Johnson*, 35 N. J.

Eq. 422; *Osborne v. Tenant*, 14 Ves. 136, 2 Ves. & B. 348; *Skip v. Harwood*, 3 Atk. 563, 567. It will be observed that in this class of cases the rule enforced is that the court will not suffer any one willfully to defeat its jurisdiction over the subject it has in hand. It treats as punishable any attempt to frustrate its authority. But outside of the scope of such a purpose the court will not dispense with the strict service of its writ. None of our own adjudications appear to have gone beyond this limit. None of them have held that a party will be in contempt by disobeying an injunction irregularly served, when the subject of the writ has been left *in statu quo*, so that the power of the court over it has not been impaired. It is obvious, therefore, that the rule in question would seldom or never regulate the practice touching mandatory injunctions. The result is that, even if the principles pertinent to injunctions were deemed to be applicable to the order now in question, the appellant could not properly have been put in contempt by his refusal to obey it, for such refusal could in no wise interfere with the jurisdiction of the court over its subject. The entire effect of such recusancy was to procrastinate the hearing for a few days.

Let the decree appealed from be reversed.

FOSTER v. ANGELL, Town Treasurer.
(Supreme Court of Rhode Island. Nov. 21, 1895.)

MANDAMUS TO TOWN OFFICER—PAYMENT OF DISPUTED CLAIM.

1. Mandamus will not lie to compel the payment by a town officer of a disputed claim.

2. Mandamus will not lie to compel a town treasurer to pay claims not audited, as required by law.

3. Pub. St. c. 34, § 11, authorizes towns to appoint such special agents as they may deem expedient to perform duties which the law does not require other officers to perform. Section 12 imposes, by implication, the duty of auditing bills against a town on the town council. *Held*, that a town ordinance requiring bills audited by the town council to be approved by a special agent appointed by it for that purpose is valid.

Petition by Thomas H. Foster against Frank C. Angell, town treasurer, for writ of mandamus to compel defendant to pay plaintiff's claims. Petition dismissed.

P. H. Quinn, for petitioner. J. C. Collins, for respondent.

TILLINGHAST, J. This is a petition for a writ of mandamus to issue against Frank C. Angell, town treasurer of the town of North Providence, to compel him to pay to the relator two certain bills of his against said town, amounting in the aggregate to the sum of \$35, which bills have been approved and ordered paid by the town council thereof, but, notwithstanding which approval, the respondent town treasurer refuses to pay. The proof submitted shows that

on June 8, 1895, at a financial town meeting held in said town, an appropriation of \$2,600 was made for town officers; that on June 10, 1895, the relator was duly elected by the town council a "complainant under town ordinances"; that his compensation was fixed at \$3.50 per week for actual services; and that he was specially directed to be on duty on the night before, and the day of, the 4th of July, 1895. It also shows that at said financial town meeting the following resolutions were passed, viz.: "That the town treasurer is hereby directed not to expend any money in payment of any bill or claim against the town, unless said bill or claim shall first have been approved by an auditing committee, to consist of the following person, Thomas W. Angell. And the holder of such bill or claim against the town shall be left to collect the same against the town by due process of law, whenever said committee shall not have approved the same. In case of any vacancy in the above committee by death, resignation, or otherwise, such vacancy shall be filled by the town council. And be it further resolved, that all expenditures to be made pursuant to votes of this town meeting shall be subject to the above conditions." Proof has been submitted on the part of the relator, on the one hand, that the services were actually rendered as set out in his bills; that he acted under the direction of the town sergeant in performing said services; that his claim is a just and reasonable one; and that his bills therefor have been approved and ordered paid by the town council. Proof has also been submitted on the part of the respondent, on the other hand, that the relator has never performed the services for which he claims said compensation; that said claim is not a just and valid claim against the town; but that there is a good and valid defense thereto, which the respondent alleges he is able and ready to maintain in a court of law; and, furthermore, that said bills have never been audited by said Thomas W. Angell, the relator not having presented the same to him for audit, and not having produced any evidence to him of the rendition of said services.

In this state of the proof, we think it is clear that mandamus will not lie to compel the payment of the claim. The reasons which lead us to this conclusion are: First. That it appears that the relator's claim is a disputed one, and hence he does not show a clear legal right to have the act done which he asks that the respondent be compelled to do. And it is well settled that mandamus will not lie in cases of doubtful right. It lies merely to command that to be done which clearly ought by law to be done. In other words, in order to obtain the writ, the applicant must show a plain dereliction of duty, and a specific and complete right which is to be enforced. *Ang. Corp. § 709; Glasscock v. Commissioners*, 3 Tex. 53; *Kent v. Buck*, 45 Vt. 18; *People v. Thompson*, 25

Barb. 76; *People v. Brooklyn*, 1 Wend. 318; *Stone-Ware Co. v. Taylor*, 17 R. I. 33, 19 Atl. 1086; *Simmons v. Davis*, 18 R. I. 46, 25 Atl. 691. And, second, the writ will not lie because the relator's bills against the town have not been audited, in accordance with the vote of the town aforesaid, and hence the respondent has no authority to pay the same. It is true that said bills have been approved and ordered paid by the town council, and hence that the relator has taken all the necessary steps to enable him to prosecute his claim against the town in an ordinary action at law. It is also true, as contended by counsel for the relator, that the town treasurer is a ministerial officer; and it is clearly his duty to pay all bills which have been properly audited, unless he can show some error or fraud in connection therewith. *Stone-Ware Co. v. Taylor*, *supra*; 2 Spell. Extr. Rel. §§ 14, 34; *Ireland v. Hunnel* (Iowa) 57 N. W. 715; *In re State House Commission and State Auditor*, Index RR, —, 33 Atl. 453. But we do not agree with the contention of counsel for relator that the town exceeded its authority in appointing an auditor, and in requiring that all bills against the town should be approved by him before payment thereof should be made by the town treasurer. Pub. St. R. I. c. 34, § 11, provides that "towns may and shall elect all such town officers as are, or may be, by law required, and may appoint such other officers as by law empowered, and such special agents, for the transaction of any town business not by law required to be performed by any officer known to the law, as they may deem expedient." The duty of auditing bills against a town is nowhere expressly devolved upon the town council thereof, although it is clearly implied from the provisions of Pub. St. R. I. c. 34, § 12; yet we see no reason why any town may not rightfully require, in addition to their approval of said bills, a further approval by such an agent as it may designate for that purpose, before the town treasurer shall pay the same. In short, the money in the town treasury having been raised by the taxpayers, they evidently have the right to surround the disbursement thereof with all reasonable safeguards. The vote hereinbefore quoted is tantamount to an ordinance of the town regulating the payment of bills; and, it being within the power of the town to pass and enact ordinances for the proper conducting of the business thereof (*Farnsworth v. Town Council*, 13 R. I. 87), said vote has the force of law, and is absolutely binding upon the respondent, until, at any rate, some power superior to that of the town shall interfere.

The case of *Dubordieu v. Butler*, 49 Cal. 322, is very nearly in point. There the relator held a warrant against the city treasurer for the payment of \$155.03, drawn by the chairman and secretary of the city water fund in due form, but not audited by the common council, as required by an ordinance of the city; and the court held that the ordi-

nance, which was pleaded by the respondent, presented a plain defense to the application of the relator for the writ. In *State v. Fuller*, 18 S. C. 246, it was held that a writ of mandamus will not issue to compel a county treasurer to pay an auditor's checks for assessment expenses, where the accounts for which the checks were issued have not been examined and approved by the county commissioners, as required by the act of 1875, § 23 (15 St. at Large, 993), and subsequent legislation. The court say: "It is well settled that the writ of mandamus can only issue to compel the performance of some act obligatory by law on the officer to whom it goes. He must have the ability to comply, and must be also under a clear duty in respect thereof." The case of *People v. Brennan*, 18 Abb. Prac. 100, is also in point. In that case the relator held a claim against the comptroller of the city of New York for services rendered, which claim had been approved and ordered paid by the common council of the corporation, but had not been audited by the "department of finances." The court held that, until the bill was properly audited, the duty of the comptroller was plain and imperative. See, also, *Schwanbeck v. People*, 15 Colo. 64, 24 Pac. 575; *State v. Mount*, 21 La. Ann. 352; 2 Spell. Extr. Rel. § 1502.

Counsel for the relator has called our attention to Pub. Laws R. I. c. 1412, passed May 1, 1895, relating to the election of certain officers in the town of North Providence, and contends that, by virtue thereof, the election of all town officers, excepting those mentioned in section 1, is devolved exclusively upon the town council. This appears to be the law relating to said town. But, as no provision is made therein for the election of an auditor, he is not an officer of the town, within the meaning of said act, and hence the powers of the town under Pub. St. R. I. c. 34, § 11, before referred to, remain the same as they existed before the passage of said act. The person appointed to audit the bills against the town was merely an agent thereof for the transaction of certain town business, not by law required to be performed by any officer known to the law. Petition dismissed.

TASKER v. COMMISSIONERS OF GARRETT COUNTY.

(Court of Appeals of Maryland. Dec. 5, 1895.)

COUNTY COMMISSIONERS—AUTHORITY.

Code, art. 81, § 23, makes it the duty of the county commissioners to make an accurate and fair account of all property of every sort within their county, and its valuation, and an alphabetical list of the owners, etc. Article 25, § 1, provides that county commissioners shall have power to appoint officers required for county purposes not otherwise provided by law or the constitution. *Held*, that the county commissioners have power to employ a person "to trace up and compile a book of abstracts of title * * * of all unassessed lands," etc.

Appeal from circuit court, Washington county.

Action by Hiram P. Tasker against the county commissioners of Garrett county on a contract for services in compiling a book of abstracts of title, for use of the county commissioners' office, of all unassessed lands in such county. From a judgment sustaining a demurrer to the declaration, plaintiff appeals. Reversed.

Argued before BRYAN, ROBERTS, BRISCOE, McSHERRY, and FOWLER, JJ.

Ferdinand Williams, Benj. A. Richmond, Alex. Neill, and J. A. Mason, for appellant. F. H. Sincell, T. J. Peddicord, and C. D. Wagaman, for appellees.

FOWLER, J. The question presented by this appeal is whether the commissioners of Garrett county are liable to be sued upon the contract which is set out in the plaintiff's declaration. This contract is evidenced by an order passed by the defendants, by which it appears that the plaintiff was authorized and directed to trace up and compile a book of abstracts of title, for the use of the county commissioners' office, of all unassessed lands in said county. It was provided by this order that, upon the adoption of the plaintiff's report, he should be allowed a fair and reasonable compensation for his said work. The first count in the declaration was struck out on motion of the plaintiff, and the defendants demurred to it as thus amended. The second count is based upon the theory that the plaintiff performed his part of the contract, and that although the defendants examined, ratified, approved, and adopted his work and reports, they refused to compensate him therefor. The third count alleges that the defendants received and examined the work of the plaintiff, but fraudulently refused to adopt it. It must be conceded, we think, that if the defendants, as commissioners of Garrett county, had power to make the contract, each count of the amended narr. sets out a good cause of action. For while it is so well settled that it is unnecessary to cite authorities to sustain it, that municipal bodies, like the defendants, act with limited corporate authority, and persons dealing with them must be held to know the extent and limit of such corporate powers, yet not every act they may do, nor every officer they may appoint, can be specifically designated in their charters. And therefore our own Code (article 25), relating to county commissioners, provides, in section 1, that they shall have power to appoint agents, officers, and servants required for county purposes, not otherwise provided by law or the constitution. And the whole question, therefore, is whether—First, it is the duty of the county commis-

sioners to assess for taxation unassessed lands; and, secondly, whether any officer whom they are, either by law or the constitution, specifically authorized to appoint, could provide them with the information necessary to enable such assessment to be effectually and properly made. That it is the duty of the commissioners to assess such lands is, of course, clear. Code, art. 81, § 10, provides "that in all cases where discoveries of assessable property are made by the collectors, or the county commissioners * * * either from the returns of clerks, registers or assessors or in any other way, the county commissioners shall assess the same." Instead of construing the conceded limited powers of the defendants so as to diminish their ability to employ agents to aid in subjecting the owners of all lands to taxation as required by the fifteenth article of the bill of rights, we should rather try to aid them in so difficult a task. It is not probable that the owners of such unassessed lands will voluntarily give the information desired, nor do we think it can be supposed that either the collectors of taxes, the assessors, or the commissioners themselves, are competent to perform in a satisfactory manner the work which the plaintiff alleges he was employed to do. That work was, in the language of the order already referred to, "to trace up and compile a book of abstracts of titles * * * of all unassessed lands," etc. It is alleged in the declaration that the lands in question were vacant, and in the possession of no one. How, then, could they be subjected to taxation? The names of the owners, and the extent of their respective holdings, had to be ascertained before assessment could be properly and fairly made. Indeed, the assessment could not be legally made at all until the names of the owners had been ascertained, for section 2 of article 81 of the Code requires all property to be valued to the owner thereof, and section 23 of the same article makes it the duty of the county commissioners to make an accurate and fair account of all property of every sort within their county, and the valuation thereof, and an alphabetical list of the owners thereof, etc. The order contemplated searches of the land records of Garrett county, and the preparation of abstracts of titles. Giving to this expression "abstracts of title," as used in said order, its ordinary legal meaning, it would be the duty of the plaintiff, under his alleged contract, to ascertain the names of the owners, and to give an epitome or short statement of the successive title deeds, or other evidences of ownership. It follows from what we have said that the defendants had power to make the contract in question, and that the demurrer should have been overruled. Judgment reversed.

SUBERS v. HURLOCK.

(Court of Appeals of Maryland. Dec. 6, 1895.)

MORTGAGE—FORECLOSURE—LIMITATIONS.

A life tenant of an undivided interest in land conveyed it in fee, and, to indemnify the grantee against failure of the remainder-men to confirm the conveyance on attaining majority, executed to him a mortgage on other land, to be void if the remainder-men, without further consideration, on attaining majority, "do or shall" execute to the mortgagee a deed of their interest, and if the mortgagor "shall in the meantime, until the said" remainder-men "shall have executed such conveyance aforesaid, and delivered the same," indemnify the mortgagee. The mortgagor died after the remainder-men attained majority. *Held*, that the 20-years limitations began to run against the mortgagee's right to foreclose from the date the youngest remainder-man attained majority, and not 20 years after the death of the mortgagor.

Appeal from circuit court, Kent county, in equity.

Bill by Burris Subers against Samuel Hurlock to enforce indemnity under a mortgage executed to defendant's assignor (plaintiff's grantor) to indemnify such grantor in case remainder-men, on attaining majority, failed to confirm the assignor's deed in fee of land in which he held only a life estate, by executing a deed of their interests. From a decree for defendant, plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

J. B. Brown and E. H. Brown, for appellant. James A. Pearce and Samuel Hurlock, for appellee.

FOWLER, J. In the year 1854 James Hazle, of Queen Anne county, conveyed to Charles W. Hendrix an undivided half interest in a farm in that county, by deed purporting to be a conveyance in fee simple; the said grantee at the same time taking from certain other persons a deed in fee of the remaining interest therein, it being conceded that the last-named grantors had a right to convey. But when Hazle made the deed above mentioned he had only a life interest in the undivided half conveyed by him, the remainder in fee being in his three children. In order to indemnify the grantee against loss by reason of his purchase, Hazle executed to Hendrix a mortgage of indemnity on a tract of land in Kent county. By several mesne conveyances, Burris Subers, the appellant, became, and is now, the owner of the land in Queen Anne county which was in part conveyed by Hazle to Hendrix, and Samuel Hurlock, the appellee, likewise became the owner of the land mortgaged in the manner above mentioned. For the purpose of this case it has been agreed that the appellant has been actually evicted by the children of said Hazle, who, he being dead, are the real owners in fee of the undivided interest conveyed by their father. By reason of this eviction the appellant claims

indemnity and remuneration of said Hurlock, by virtue of said mortgage. This claim is resisted by the appellee generally, and because the statutory plea of limitation is a bar thereto. It is also contended that this claim is stale, and without merit, by reason of appellant's laches, which will prevent any recovery by him against the appellee.

The only question we need consider is, conceding no proceedings were taken on the mortgage until more than 20 years after the youngest of said children came of age, whether the statute of limitations constitutes a bar to the claim now made. The answer to this question depends upon another, namely, when did the cause of action accrue, and the statute begin to run? In order to answer this question, we must examine the mortgage, or rather that part of it in which the parties themselves declare what is the true intent and meaning thereof. The language used is as follows: "Provided, always, and it is the true intent and meaning of these presents, and of the said parties hereunto, that if the said Joseph Benjamin Hazle, James Hazle, and Alice Ann Hazle do or shall, when and so soon as they shall have severally attained the age of twenty-one years, at the cost and charges of the said James Hazle, convey and assign unto the said Charles W. Hendrix, his heirs and assigns, by such deeds and conveyances as the said Charles W. Hendrix, his heirs or assigns, or his or their counsel learned in the law, shall approve of, all their rights, title, interest, and estate in and to the said lands and real estate contained in the said deed from James Hazle to the said Charles W. Hendrix, and hereinbefore referred to, and recorded among the land records of Queen Anne's county, without any consideration to be paid to the said Joseph Benjamin Hazle, James Hazle, and Alice Ann Hazle for so doing, and also if and in case the said James Hazle, his heirs, executors, or administrators, do and shall in the meantime, and until the said Joseph Benjamin Hazle, James Hazle, and Alice Ann Hazle shall have executed such conveyance as aforesaid, and delivered the same, save harmless, defend, keep harmless, and indemnify the said Charles W. Hendrix, his heirs and assigns, executors and administrators, and his and their goods and chattels, lands and tenements, and the said tract or parcel of land and premises (an undivided half part, as aforesaid) so to be conveyed by the said Joseph Benjamin Hazle, James Hazle, and Alice Ann Hazle to the said Charles W. Hendrix as aforesaid, and the rents, issues, and profits thereof, from all claims and demands to be made thereto by or on the part and behalf of the said Joseph Benjamin Hazle, James Hazle, and Alice Ann Hazle, then and from thenceforth these presents, and every matter and thing therein contained, shall cease, and be utterly null and void, anything herein contained to the contrary thereof in any wise notwithstanding."

It seems to us too clear for controversy that as and when the children reached the age of 21, and failed to execute the deeds provided for, the condition of the mortgage was broken, a right of action accrued to the mortgagee, and the statute commenced to run against him, and in favor of the mortgagor. This conclusion, however, as we understand the argument of counsel for the appellant, is not controverted; that is, that the failure of the children to have executed deeds as they came of age created a default, and gave the mortgagee, upon such failure, a right of action, and that, such right of action having accrued more than 20 years before the institution of these proceedings, it would be a bar to them, or to any action on the mortgage for indemnity for loss caused by such failure to execute such deeds. But it is further contended that the covenant or condition of the mortgage by which it was agreed that the deeds should be executed was not the only covenant therein, and that the appellant was not bound to sue on breach of that covenant, or within 20 years thereafter, but that he could waive that right, and wait until he was actually evicted, or at least until 20 years after the mortgagor's death, for until such death his children could make no legal claim against the mortgagee's land. This contention is based upon the theory that, in addition to the covenant respecting the execution of the deeds by the children at majority, there was another independent covenant in the mortgage, which was a covenant to indemnify against any claim or demand made by the children (the rightful owners); and this, too, without regard to the time when such claim might be made by them or on their behalf, provided only it should be made within 20 years after the death of the mortgagor. But it seems to us to be apparent that the intent and meaning of the parties to the mortgage, as therein expressed, was to provide, from the time of its execution to the majority of the children, respectively, an indemnity against loss resulting from any claim of title which should be set up by them within that time. The mortgagor was to save harmless and defend the mortgagee only against loss caused by breaches which happened before the time mentioned, and this becomes clear from an examination of the language of the mortgage itself, which we have already quoted. The condition of the mortgage provides for the execution of deeds by the children as they respectively reach the age of 21 years, and their failure so to do constitutes a breach. Indemnity is then provided for up to that period, as follows: "If * * * the said James Hazle shall in the meantime, and until the said Joseph," etc. (the children), "shall have executed such conveyances as aforesaid, * * * save harmless and defend and indemnify the said Hendrix * * * from all claim to be made by" the children, then the mortgage to be void, etc. It seems to

us that indemnity against losses by reason of any claim made by the children up to the time of their majority because of breaches happening antecedent thereto, is as clearly included within the provisions of the mortgage as indemnity for claims made for losses because of breaches happening after that time are excluded therefrom. We conclude, therefore, that, even if the provision relating to indemnity can be considered as an independent covenant, the loss now complained of is not embraced thereby. But in no proper sense can the clause of the mortgage which provides for indemnity be considered as a separate or independent covenant; for, if the condition of the mortgage is to be taken as a covenant, it is a covenant for title, and if so the breach occurred, as we have said, as and when the children severally came of age (Wood, *Lm. Act.* § 173, and note 2), and the indemnity against loss of rents which might happen because of the successful assertion of title by the children before the period fixed for making the deeds and perfecting the title of the mortgagee was incident to, and a part of, the principal undertaking. The general rule in regard to the application of the statute of limitations to the rights of mortgagor and mortgagee is thus expressed in 2 Jones, *Mortg.* § 1210: "The statute runs in favor of the mortgagor from the time the mortgagee's right of action accrues; that is, from the time the condition of the mortgage is broken. Unless the time commences to run from the time when the right to foreclose accrues, it could have no commencement, except in rare instances, and the right to foreclose might be asserted against the continued possession of the mortgagor at the most remote period. From that time the mortgagor holds subject to the right of the mortgagee to foreclose; and, if the mortgagee sleeps upon that right, if any lapse of time is to bar his claims, upon the presumption that he has been paid, the period must commence from the accruing of his right of action." The principle thus announced is familiar and settled law. Thus, in *Crook v. Glenn*, 30 Md. 55, and *Brown v. Hardcastle*, 63 Md. 484, this court, adopting the period of 20 years, as provided by the statute of 21 Jac. I., in force in this state as to proceedings against real estate, held that the statute was an absolute bar where the mortgagor has been in possession for more than 20 years without payment or recognition of the mortgage debt. These were mortgages given to secure the payment of money, but we can see no reason why the same period of limitation should not apply to proceedings on an indemnity mortgage like this. But if we should adopt the view of the appellant, which has been so forcibly presented,—that the right of action did not accrue until the death of the mortgagor,—the operation of the statute might, at the option of the mortgagee, be suspended for nearly three times the statu

tory period, for it is conceded that he could have foreclosed on failure of the children to execute deeds at the time stipulated, but it is contended that he was not bound to do so until 20 years after the mortgagee's death. We are not informed what was the mortgagee's age when he died, in 1888, but it is possible he might have lived 20 years longer (that is, until 1908), and in that event, if the appellant's construction be correct, he could have foreclosed his mortgage in 1928 (73 years after it was given). Such a construction, leading as it does to a result so contrary to the policy of the law, should not be favored. The statute of limitations operates beneficially, in "the quieting of men's estates," and we should not hesitate to apply it to a case which seems to be so clearly within its provisions as this one. If our construction of the mortgage be correct, the statute of limitations is a complete bar to the appellant's claim, for no proceedings were taken on the mortgage until over 26 years after the eldest child of the mortgagor arrived at the age of 21 years, when, as we have said, the right of action accrued. Decree affirmed, with costs.

SMYRK, City Commissioner, v. SHARP et al.
(Court of Appeals of Maryland. Dec. 6, 1895.)

PAVING ORDINANCES—REPEAL BY IMPLICATION—
EXCESSIVE APPROPRIATIONS—DUTY OF COUNCIL.

1. The rule, where there are two acts on the same subject, to give effect to both if possible, but, if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first, does not apply to successive city ordinances appropriating money for paving different streets, in case the aggregate sum appropriated exceeds the sum available for such purposes.

2. Where successive city ordinances appropriating money to pave different streets appropriate a sum in the aggregate in excess of the amount available for such purposes and the ordinance setting aside such aggregate sum provides that it shall be used for paying the costs of paving the streets "which shall be required by ordinance of the mayor and city council," it is the duty of the city council, and not of the mayor, city commissioner, or the court, to determine which of such streets shall be paved, and how and in what order the sum appropriated shall be used.

Appeal from the superior court of Baltimore city.

Petition by John C. Sharp and others for a writ of mandamus to compel Alfred E. Smyrk, city commissioner of the city of Baltimore, to comply with the terms of a certain ordinance passed to repave a certain portion of Saratoga street. From a judgment granting the writ the commissioner appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BRISCOE, ROBERTS, and BOYD, JJ.

Thomas G. Hayes and Wm. S. Bryan, Jr., for appellant. William A. Fisher and Arthur Geo. Brown, for appellees.

BOYD, J. By Act 1892, c. 138, the mayor and city council of Baltimore were authorized to issue the stock of the city to an amount not exceeding \$6,000,000 for the purpose of procuring funds with which to build a courthouse, to open, widen, repair, and pave the streets, and make other permanent improvements. An ordinance was passed, by which, among other provisions, \$1,600,000 were set apart "for paying the cost of repaving with improved pavements such streets in Baltimore city, the repaving of which shall be required by ordinance of the mayor and city council of Baltimore." It was duly submitted to and approved by the voters of the city. Beginning in February, 1893, the mayor and city council of Baltimore passed a number of ordinances appropriating various amounts and making provision for repaving different streets named in them, so that by the time the work commenced—May 1, 1893—the entire sum authorized for this purpose had been appropriated. They continued, however, after that time, to pass ordinances providing for the repaving of other streets with the money thus set apart, and by their provisions 16 or 18 streets are yet to be paved, which will cost \$650,000, while there only remain \$132,000 available for the purpose. With this condition of affairs, the present appellees, Messrs. Sharp, Francke, and Danaker, owners of certain property on Saratoga street, Messrs. Wright, Flags, and Melkie, owners of parcels of ground on Patterson avenue, and Benjamin B. Porter, the owner of a lot on McCulloh street, obtained an injunction against the mayor and city council of Baltimore, Ferdinand C. Latrobe, mayor, and Alfred E. Smyrk, city commissioner, to prohibit them from proceeding under an ordinance passed February 27, 1893, to repave certain portions of Franklin street, until the legal effect and priorities of certain other ordinances providing for repaving Saratoga and McCulloh streets and Patterson avenue were determined. That case was before this court at its last April term.¹ The important questions raised were whether the ordinances relied on by the plaintiffs as the latest declaration of the legislative will repealed the Franklin street and other prior ordinances, and whether the mayor (or city commissioner) was vested with the discretion of selecting the streets to be paved with the unexpended balance in hand. There were also some technical and other points raised, but they need not now be mentioned. When the April term of this court was about to adjourn, we said: "We hold that the mayor of Baltimore city has no authority to select which of the sixteen streets mentioned in the several ordinances referred to in the bill shall be first paved, or to designate the order in which they shall be paved.

¹ No opinion filed.

We further hold that neither the circuit court nor this court has such authority. But, inasmuch as confessedly there are not sufficient funds in the city treasury to pay for all the work, it is the duty of the city council to declare how, and in what order, the money available for this paving shall be expended. On the face of the bill, therefore, the injunction ought to be sustained until the city council shall determine in what order the streets shall be paved. An opinion will hereafter be filed in behalf of this court,"—and the order granting the injunction was affirmed. Before our conclusions in that case had been announced, as above stated, the order from which this appeal was taken was passed, directing the issue of a writ of mandamus at the instance of these appellees to the city commissioner, commanding him to comply with the terms of the ordinance passed to repave Saratoga street from Fremont street to Carrollton avenue, or so much thereof as the surplus ascertained to have been derived from Ordinances No. 42, approved March 16, 1893, and No. 102, approved May 1, 1893, shall be found by him to cover the cost of, etc. The opinion not yet having been filed, further argument was heard in behalf of the appellees in this case, but the main points were practically the same as those previously urged.

For the purposes of this opinion it will be conceded that the Saratoga street ordinance took effect in the fall of 1894, and it was proven that there is no unexecuted ordinance appropriating any part of the \$1,600,000 later in date than it. It is contended on the part of the appellees that the ordinance to repave Saratoga street must prevail over unexecuted ordinances passed prior to it, as it is the latest declaration of the legislative will. The general principle relied on by them, that "where there are two acts on the same subject the rule is to give effect to both if possible, but, if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first," is too well established to admit of question. But is it applicable to a case of this character? If the constitution of Maryland prohibited the legislature from appropriating more than some fixed sum, say \$100,000 per annum, to reformatory and other institutions, and the legislature passed acts appropriating the whole amount to five institutions, and then subsequently appropriated \$10,000 to another, could it be said that the latter pro tanto repealed the former? Might it not more properly be declared a nullity on the ground that the amount authorized had already been appropriated? Then, again, these ordinances cannot strictly be said to be on the same subject. Each provides for repaving a separate street, or part of a street, from the others. It is true that they all look to the same general source for the money, but they simply appropriate—set

apart—certain amounts for the respective streets. It is impossible for the court to say, under such circumstances, that the city council intended to give the last ordinance priority over the others, merely because it is the last appropriation of money. If we were to be governed by the order in which they were passed, it would probably seem more reasonable to assume that the members of the council intended to give the first preference, for they might be presumed to have first provided for those streets that in their opinion most needed the improvements and were most pressing. They probably supposed that there would be sufficient balances from the various appropriations to enable the authorities to pave all the streets included in the ordinances. But, when the contrary was ascertained, and there are yet 16 or more to be paved, the cost of which would be \$650,000, and there only remain about \$132,000 of the amount authorized to be so expended, the city council, and not the mayor, city commissioner, or court, should determine how and in what order it should be so used. The ordinance submitted to the people provided that the \$1,600,000 should be used for paying the cost of repaving the streets "which shall be required by ordinance of the mayor and city council of Baltimore"; not such streets as the mayor or city commissioner might designate. It seems equally clear that when the city council passed the various ordinances in February, March, April, May, June, and October, 1893, appropriating money to the different streets named in them, they never contemplated that one passed in the fall of 1894 would have priority over them, or any of them, merely because it was of later date. If they had desired to give this ordinance preference, it must be assumed they would have said so in such language as could not have been misunderstood.

But it is urged with great force that the provision made for Saratoga street was special,—was a particular appropriation of a part of this fund,—and therefore the court should give effect to it. It is true, that ordinance provides that the cost of the work contemplated is to be taken out of the unexpended balances of moneys appropriated for carrying out the provisions of Ordinances No. 42, approved March 6, 1893, and No. 102, approved May 1, 1893. But when this ordinance was passed the city council had already made appropriations out of the fund set apart for repaving the streets largely in excess of that sum. Ordinance No. 42 appropriated the sum of \$62,000, or so much thereof as may be necessary, to defray the costs of the part of the street therein named, and No. 102 appropriated \$8,000, or so much thereof as may be necessary, to the street mentioned in it. Each only appropriated so much as was necessary, fixing the maximum that could be used, and directed the commis-

tioners of finance "to sell from time to time, as may be requisite, bonds for this purpose." A great many ordinances were passed after Nos. 42 and 102, and some were passed after the work provided for in them was completed. The one for repaving part of Park avenue appropriated \$75,000, or so much thereof as may be necessary, "said amount to be taken from any money in the six-million loan for repaving streets not otherwise appropriated"; and the one for repaving Clay street appropriated \$15,000, or so much thereof as may be necessary, "said amount to be provided for and taken from any unexpended balances not otherwise appropriated for the repaving of streets out of the six-million loan." And others were passed subsequent to No. 42 and No. 102 and prior to the one now before us, in such terms, and for such amounts, as appropriated all of the fund at the disposal of the city council for the purpose. The city council could undoubtedly repeal this or any other of the unexecuted ordinances passed by them. This case is not similar to that of *Pumphrey v. Mayor, etc.*, 47 Md. 145. There an act of the legislature had been passed which "directed and required" the city to take charge of the bridge in question, while here it is in the discretion of the city council to determine which streets shall be improved. They are necessarily better able to determine which streets are in most need of these improvements than the court. If it was their intention to repave Saratoga street to the exclusion of the others, they can yet say so by a proper ordinance; but they, not the court, must determine which streets must be improved with the unexpended balances on hand.

Most of what we have said above is applicable to the injunction case as well as this, and we need only add, what we have frequently said, that the remedy by mandamus is not one which is accorded *ex debito iustitie*, and the right sought to be enforced must be clear and unequivocal, which certainly cannot be said to be so in this case. The mandamus should have been refused, and the judgment will therefore be reversed, without procedendo.

Judgment reversed, without procedendo, with costs to the appellant.

MEEK v. FRANTZ.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)

CONTRACT OF SURETYSHIP—WANT OF CONSIDERATION—FALSE REPRESENTATION.

1. Equity will not relieve a principal or surety from liability on an instrument under seal, merely for want of consideration, when no consideration was contemplated by the parties.

2. In an action against a surety on a lease, defendant testified that the lessor told him that it was the lessee's request that he should sign the agreement of suretyship, and the lessee testified that the lessor asked permission of him to

tell defendant that the lessee wished him to sign the contract, and that he refused such permission, and this was corroborated by the testimony of one present at such conversation. *Held*, that the question whether the lessor made a false representation, which induced defendant to become surety, was for the jury.

Appeal from court of common pleas, Union county; H. M. McClure, Judge.

Action by J. I. Meek against Harvey Frantz, as guarantor of the payment of rent under a lease made by plaintiff to John J. Bleber & Co. From a judgment for plaintiff, defendant appeals. Reversed.

The assignments of error were as follows:

"(1) The court erred in charging the jury as follows: 'The defendant has sought to avoid the payment of this money by evidence that, at the time the lease was executed by Bleber, false representations were made to him by Meek as to the contents of the paper. The evidence of this is not sufficient, in our judgment, to warrant a chancellor to reform the instrument. It is denied by O. W. Meek and J. I. Meek, and supported by the testimony of the paper, and by Harry Dark. The plaintiff having the instrument itself and these two witnesses, the evidence on the part of the defendant is not sufficient to reform the instrument.' (2) The court erred in charging the jury as follows: 'The same rule applies as to the signature as to Frantz and the guarantee. The testimony of all the witnesses was that he signed this without any false representations as to its contents. It is a man's duty when he signs a paper to read it if he can, and, if he cannot, to have it read to him. If he does not do that, he is guilty of negligence. Of course, if there was sufficient evidence to show that fraud had been perpetrated upon him, we would allow this case to go before you; but we do not think there is sufficient for it.' (3) The court erred in instructing the jury to render a verdict for the plaintiff for ninety dollars, with interest from April 1, 1891. (4) The court erred in the answer to the second point of the defendant, to wit: 'If the jury believe from the evidence that the lease between the plaintiff and John J. Bleber & Co. was executed at the schoolhouse, in the absence of the defendant, and that the plaintiff subsequently procured the defendant to sign the obligation sued on, without a consideration, plaintiff cannot recover.' Per Curiam: 'This point is refused.' (5) The court erred in the answer to the third point of the defendant, to wit: 'That if the jury believe that the plaintiff procured the signature of the defendant to the paper as guarantor or surety for John J. Bleber & Co., after the latter had signed the lease, by false representations that John J. Bleber & Co., the principal obligors, had requested that the defendant should go bail, this absolves the defendant from the contract, and the plaintiff cannot recover, but the verdict must be for the defendant.' Per Curiam: 'We do not affirm this point. It makes no difference, in our judgment, wheth-

er he was requested to go on by his brother-in-law or not. He went on voluntarily.'"

J. C. Bucher and Wm. R. Follner, for appellant. Andrew A. Lelser, for appellee.

McCOLLUM, J. The plaintiff leased to John J. Bleber & Co., from April 1, 1890, to March 31, 1893, "a certain lot of ground, with dwelling house, storeroom, stable, shed, etc., erected thereon," and was to receive for the same an annual rent of \$175, \$90 of which was payable on the 1st of April, and the balance on the 1st of October, of each year of the term. In a separate writing upon or appended to the lease, the defendant in this suit agreed to be responsible to the lessor or his assigns for the faithful performance by the lessees of their contract. This writing was under seal, and attested by two witnesses, and it appeared on its face that the agreement embraced in it was "for value received." The lessees abandoned the demised premises at the end of the first year, and this suit was brought against their surety to recover the rent which by the terms of the lease became due on the 1st of April, 1891. The defendant says that he ought not to be held liable on his agreement, because there was no consideration for it. He understood the lease was for one year only, and he was induced to become surety by the false representation of the lessor that the lessees desired him to do so.

We think it is clear that so much of the defense as involves a reformation of the lease, and alleges want of consideration for the defendant's agreement, must fail. The evidence is not sufficient to change a lease for three years into a lease for one year. Bleber could have read the lease before signing it, and, according to the testimony of the lessor, did read it before he executed it. True, Bleber denied having read it, but in his denial he was not directly corroborated by a single witness. The defendant's impression that the lease was for one year was not justified by anything the plaintiff said to him when he became surety, and it afforded no support to Bleber's claim that he signed the lease without reading it.

If the defendant voluntarily executed the agreement on which this suit is based, and there was no fraud practiced in obtaining it, mere want of consideration for it will not constitute a defense. There is a well-settled distinction between cases in which a valuable consideration was intended to pass, and therefore furnished the motive for entering into the contract, and cases in which such consideration was not contemplated by the parties. In the former, failure of consideration is a defense, although the contract is under seal; while, in the latter, equity will not relieve against an instrument under seal, merely on the ground of want of consideration. *Yard v. Patton*, 13 Pa. St. 278. This rule appears to be as applicable to the obligation of the surety as to that of the princi-

pal. We think, therefore, that the material and controlling question in the case is whether the defendant was induced to become surety for the lessees by the false and fraudulent representation of the plaintiff that it was their request that he should do so. In considering this question, it will be observed that the plaintiff admits the agreement of suretyship was written by him before he called upon Bleber to sign the lease, and that, after and on the day Bleber signed it, he sent for the defendant, and requested him to become surety for the lessees. He denies that he told the defendant that the lessees desired that he should become their surety, and authorized him to say so for them, or that there was any conversation between him and Bleber when the lease was signed respecting an application to the defendant to become surety upon it. The latter testified distinctly that the plaintiff told him it was Bleber's request that he should sign the agreement. Bleber testified on this point as follows: "He [Meek] asked me to allow him to tell my brother-in-law [Frantz] for me that I wanted him to sign the lease for me, to go my security. I told him he should not do so; that, if I wanted any one for my bail, I would ask them myself. And, more than that, he still continued to ask my permission to let him go and ask Mr. Frantz, and I positively refused to do so." This conversation was in the schoolhouse at the time the lease was signed, and Bleber's account of it is well sustained by the testimony of Harry Dark, who was present and heard it. Upon the evidence thus summarized, the question whether the plaintiff made a false representation, which induced the defendant to become surety for the lessees, was clearly for the jury. It is a mistake to suppose that an affirmative answer to this question involves a reformation of the agreement on which the suit is based, because no one contends for that, or suggests that there are any grounds for it. It is conceded that the defendant signed it as it is written, and the inquiry arising from the testimony is whether any fraud was practiced or resorted to by the plaintiff in obtaining his signature to it. This is not, as is suggested by the learned counsel for the plaintiff, an immaterial matter. It is important and material as affecting the rights of the defendant, because, if he became surety for the lessees on their request, they would be responsible to him for whatever sum he was required as their surety to pay to their lessor; and, if he voluntarily and without their solicitation or knowledge accepted that position, they would not be bound to reimburse him for money paid in discharge of the liability thus assumed. We conclude that, upon the evidence in the case the court should have affirmed the defendant's third point. We sustain the second, third, and fifth specifications of error, and overrule the first and fourth. Judgment reversed, and venire facias de novo awarded.

DOONER v. DELAWARE & H. CANAL CO.
(Supreme Court of Pennsylvania. Nov. 4, 1895.)

ACTION AGAINST RAILROAD COMPANY—INJURY TO BRAKEMAN—ABSENCE OF HAND HOLDS FROM CAR—CONTRIBUTORY NEGLIGENCE.

1. A freight brakeman injured by falling from a car cannot hold the company liable on the ground that the car was not provided with grab irons and hand holds on the end of the car sufficient to prevent his fall, if there were steps, for the use of brakemen, so constructed as to answer the purpose of grab irons or hand holds as well as of steps, and such cars were in common use and were sufficient if used with ordinary care.

2. In an action against a railroad company for injuries caused a freight brakeman by falling from the deadwood of a car adjoining the tender, it appeared that he had gradually approached the face of the freight car while on the tender. *Held*, that it was proper to charge that he had as good an opportunity to notice the absence of hand holds on the face of the car as he had to observe the presence of a brake and steps thereon, and, if he failed to observe the absence of hand holds, it was his fault, for the consequences of which he could not hold defendant liable.

3. A brakeman who, in uncoupling cars, for the purpose of signaling to the engineer, unnecessarily stands on a beam or deadwood of a car only four inches wide, and without anything within reach by which he can hold on, is guilty of negligence which bars his recovery in case of a fall.

Mitchell, J., dissenting.

Appeal from court of common pleas, Luzerne county; Lynch, Judge.

Action by John F. Dooner against the president, managers, and company of the Delaware & Hudson Canal Company. From a judgment for plaintiff, defendant appeals. Reversed.

Defendant's third point, referred to in the opinion, was as follows: "The plaintiff had the same opportunity to notice the presence or absence of the hand hold on the corner of the car that he had to notice the location of the iron steps and the brake, and his failure to ascertain this was negligence on his part, and the defendant is not liable."

Andrew H. McClintock and George R. Bedford, for appellant. Lyman H. Bennett and John McGahren, for appellee.

GREEN, J. The plaintiff was a brakeman in the employment of the corporation defendant, and had been engaged in that kind of service about five years prior to the occurrence of the accident in question. The last year of that time he was in the service of the defendant. He therefore had all the experience necessary to qualify him for the performance of his duties, and to apprise him of its risks and hazards. He was 28 years of age, and in good physical condition, as he testified himself. He received his injury while engaged in the act of uncoupling a freight car from the tender of the engine. He had completed the act of uncoupling, by withdrawing the pin, had gone to the side of the car for the purpose

of signaling to the engineer that all was right, by extending his hand beyond the side of the car, and was returning to the steps on the end of the car, when he lost his balance, fell from the car, and one of his legs was crushed under the wheels. He claims damages of the defendant for his injury. There was no defect alleged in any of the appliances on the end of the freight car from which he fell, and there is nothing upon which to base an allegation of negligence against the company, except the character or kind of the appliances that were fitted upon the end of the freight car for the use of the brakemen in the performance of their duties. Such an allegation is therefore made, and upon that alone the charge of negligence is based. The car did not belong to the defendant. It belonged to another company, and came to the defendant for transportation over the railroad of the defendant in the regular course of its movement. The defendant was legally bound to receive and transport it, under section 1, art. 17, of our constitution, which provides that railroads "shall receive and transport each other's passengers, tonnage and cars, loaded or empty, without delay or discrimination." When this case was here before (164 Pa. St. 17, 30 Atl. 289), our Brother Dean, delivering the opinion, said: "While every road must obey the mandate of section 1, art. 17, of the constitution, 'to receive and transport * * * cars, loaded or empty, without delay or discrimination,' of another connecting road, yet by no reasonable construction can that be held to mean cars of another road not in a condition for transportation, or not provided with the appliances which ordinary care requires for the reasonable safety of train crews in properly handling them." He also said: "The measure of duty of the receiving road as to cars turned over to it for transportation by connecting roads is settled by many cases. 'It is bound to make such inspection as the nature of the transportation requires, and if it pass and haul cars faulty in construction, or dangerously out of repair, it is answerable to its own employes who are thereby injured.'" Of course, this measure of duty cannot be higher than the duty owing by railroad companies to their own employes in respect to the appliances which they are required to furnish on their own cars. That duty is fully discharged if the appliances are such as are in ordinary use, though they may not be the best or the safest for the purpose. If the evidence in any given case shows that the appliance was such as was in common use, it is the duty of the court to pronounce upon the case on its merits, and not to send to the jury the question whether it was sufficient for the protection of the employe against accidents. This consideration renders it necessary for us to examine the testimony, and ascertain the state of the evidence on this question, in the present case.

The plaintiff's complaint is that the freight car in question was not provided with grab irons and hand holds on the end of the car sufficient for his protection from falling. The defendant's reply is that it was provided with steps for the use of the brakemen, which were so constructed as to answer the purpose of grab irons or hand holds as well as of steps, and that freight cars having such appliances were in common use, and were sufficient for the protection of the brakemen, if used with ordinary care. There is no question that the iron steps on this car were so constructed that they could be used as hand holds, and that they were sufficient if actually used. The plaintiff admitted on cross-examination, though with considerable reluctance, that in performing the act of uncoupling the car from the tender he did actually use one of the steps on the end of the freight car while he stooped down, reached the coupling pin, and withdrew it, so that the uncoupling of the car was completed successfully, and he resumed an erect position, using only the appliance provided. He was asked: "Q. You pulled the pin with one hand? A. Yes, sir. Q. What did you take hold of with the other hand? A. I had nothing to take hold of. Q. Did you take hold of anything? A. When I pulled the pin I was against the car with my hand, like that, right on the step,—on this lower step. I had hold of the step when I pulled the pin. Q. Why did you say you hadn't anything to take hold of? A. I had no handle. I had the iron step, and that had a hole in it. Q. You had that iron step to take hold of? A. I had. Q. And you did take hold of it? A. I took hold of it while I pulled the pin. Q. Did you let go of the iron step when you went over to the side? A. Yes, sir. * * * Q. What did you take hold of when you walked over to the corner? A. I walked right over with my back against the car,—my face toward the tender. Q. You could have uncoupled that car and made that fly with perfect safety if you had held onto the iron step and told the engineer to go ahead? A. If I told him. * * * Q. How many steps did you take towards the brake before you fell? A. I gave the second step. Q. Before you fell? A. Yes, sir. Q. And that was the first time that you tried to find this hand hold? A. Yes, sir." It is thus seen that, upon the plaintiff's own testimony, after he pulled the pin he stood up on the narrow beam or deadwood, with his back against the car, let go his hold of the step, stepped to the right side of the car, gave the signal to the engineer, by moving his hand up and down, beyond the side of the car, then endeavored to return to the iron step, took one step towards it, and was taking the second when he lost his balance and fell. He had passed successfully from the iron step to the side of the car on the beam, and attempted to return in the same way, when he fell, in taking the second step. Of course, he took the chances, supposing that what he had just

done he could do again. This is verified by his further direct examination: "Q. What uses are made of these handles on the front end of the car? A. To steady yourself while you are there; to get hold of to use for protection, so you won't fall off. Q. This car would have been all right, then, if it had this hand hold that you talk about on the end of the car? A. Had something there to get hold of, I don't think I would fall off. The Court: Yes, if the witness can answer the question direct, let him do so. If he cannot, let him say so. A. On the front end of the car, if there was a handle there, I think it would be all right, sure. Q. And you have seen plenty of cars like this, except you say this car did not have the hand hold? A. I have seen cars with iron steps, but I always seen handles on the front end of the car. I often seen iron steps, but I never saw iron steps as close to a brake wheel as those were on the car I was hurt on." Recross-examination: "Q. If, when you pulled that pin and took hold of that iron step, you had held onto the iron step, where you would have been entirely safe that day, and then called to the engineer, 'All right, go ahead,' and if he had not heard you, all that would have happened you would have been, you would have to try it over again? A. That is it; yes, sir. Would not have made the fly. Q. If he had not heard you, you would have to make another trial? A. Yes, sir. * * * Q. Have you seen and handled cars like that represented in the picture (Exhibit C)? A. No; I have seen cars like that, but I don't know whether I ever handled one like it or not. Q. You have seen them, have you? A. That is the only car—photograph—I could get to resemble the one I was hurt on. Q. You have seen cars like that? A. With iron steps? Yes, sir. Q. With iron steps like that? A. Yes, sir. Q. And with a stem-winder brake? A. Yes, sir. Q. And you have handled them? A. I might have handled them. I have seen them. Q. You know they were in use? A. Like that car? Yes; I have seen a car of that kind. Q. In use? A. Yes, sir. Q. This was a Pennsylvania car, was it? A. Yes."

Richard Fitzsimmons, one of the plaintiff's witnesses, having said that he had been a brakeman since 1883 on a number of different railroads, was asked by plaintiff's counsel: "Q. I wish you would tell the court and jury what are the ordinary and usual appliances on the ends of freight cars in use on different roads? A. Well, they generally get hand holds on the side. Some has got their ladder crawling up to the top on the sides. Some of them has got it in the center of the car; that is, in the middle. I have seen lots of them that had hand holds right in the center, where there was no steps for crawling up in the center. I have seen them then the opposite,—have them on the sides. I have seen them without no hand holds at all, only just the hand railing crawling up to get on top of the car; that is

what you call the 'ladder,' I suppose. * * * Q. You say that sometimes these hand holds are on the end near the side of the car? A. I have seen them without any hand holds there at all,—just that ladder there. * * * Q. Of what service is a ladder on the end of a car? A. Well it is used, as a general thing, for going up and down,—top to the bottom. Of course, you can use it— Well, I have often used it by stepping on the brake beam and hanging on that ladder and pulling the pin. Q. That is, in coupling and uncoupling? A. Yes, sir; in uncoupling. Q. So that it is a protection? A. Yes, sir." Cross-examined: "Q. Have you seen a great many more cars than the photographs these gentlemen have shown you? A. Yes, sir. Q. The Allegheny Valley Railroad and the Western Maryland Railroad have cars, also, with stem-winder brakes and iron steps? A. Yes, sir. Q. And you have seen cars like that that had a hand hold at only one corner, and none on the other? A. Yes, sir; I don't know whether it had been knocked off or not. Q. You have seen such cars in use? A. Yes, sir. Q. And you have seen a great many cars in use that had no hand holds on the end, but had them on the side near the corner? A. Yes, sir. * * * Q. And you say that even where the ladder is on the end and near the corner, as shown in Exhibit B, you have seen such cars without any handles or grab irons in use,—with nothing but the ladder? A. Well, yes; seen them with nothing but the ladder. Q. With nothing but the ladder? A. Yes, sir. Q. You have seen such cars, too, with a ladder located on the opposite side of that end? A. Yes, sir. * * * Q. The iron steps take the place of a ladder? A. Yes, sir. * * * Q. They do not have both on any car at the same end? A. I never seen where they had." As the foregoing testimony was given by the plaintiff, it must be taken as a fact proved in the case that cars were in common use which had a ladder or iron steps without any hand holds on the end of the car.

Another witness for the plaintiff, Thomas May, who was one of the brakemen on the train when the accident occurred, and who examined the freight car in question, said: "Q. The iron steps that you speak of were like these iron steps on this picture Ex. C? A. Just the same; yes, sir. Q. They were in the center of the car? A. Yes, sir. * * * Q. You were shown Ex. D, and you said the brakeman could not take hold of that horizontal rod there when he uncoupled the car. Looking at Ex. C, he could take hold of the step that had a hole in it, as plaintiff testified it had, and hold on to that while he made the uncoupling? A. Yes; a man could do that. * * * Q. If he had held onto the step he would have been safe, wouldn't he? A. I should think so; yes. * * * Q. Some have them [ladders] on the side, and none on the end? A. None on the end; yes. Q. And some cars have a hand

hold on one side of the car and none on the other,—a step and hand hold on one side, and no step and no hand hold on the other? A. Yes, sir; that is, a step and hand hold here, and step and hand hold here. None on this car, and none on that. * * * Q. Sometimes that hand hold and step will be on the left-hand side of the car, and sometimes it will be on the right-hand side of the car? A. Yes, sir. Q. There are about as many different kinds of freight cars as there are cars in a train? A. Well, you don't very often find it that way,—that thick,—but you will find a number of different cars in one train, though, often. Q. Take a month through, you would naturally find a great variety of freight cars, wouldn't you? A. Yes; in a month you would."

John Berry, another of plaintiff's witnesses, after saying he had been a brakeman for five years, and was familiar with the different kinds of freight cars in use, was asked: "Q. So that there are a great variety of freight cars in use? A. Quite a number; yes, sir; quite different. Q. And they differ in their construction? A. Mostly; yes, sir. Q. Where they have these steps, the steps take the place of a ladder? A. Yes, sir."

Thomas May, being recalled, was asked: "Q. How many different railroads that you know of use cars with the iron steps on one end and a stem-winder brake? A. Why, the Central of New Jersey uses them, and the Pennsylvania uses them. Q. The Allegheny Valley Railroad uses that style? A. I call all of them Pennsylvania cars. Q. That you include,—the Allegheny Valley? A. Yes, sir."

The foregoing testimony was delivered by the plaintiff on this subject, and it was not contradicted by any witnesses on either side. It established that there were many varieties of freight cars in common use, differing greatly as to their appliances for the use of the brakemen, some of which were only ladders at the end, with a single hand hold on the side; others with ladders on the sides, with one or sometimes two hand holds on the ends, generally at the corner; some with ladders only on the end, without hand holds; and others with iron steps instead of ladders; and that where this was the case the steps supplied the place of ladders. The testimony of the defendant was to the same effect, but a little more definite and precise in its character. Thus, Conrad Alles, a brakeman for 13 years, was asked: "Q. How many different kinds of freight cars can you recall? A. Well, some day you might have two or three. Q. Whether they had them on that train during the time this plaintiff was employed,—from day to day? A. Some days have two or three different kinds; other days, may be, six or seven. * * * Q. In a month, how many different kinds of cars? A. I could not say,—about all kinds. Q. Tell us some of the differences in the construction of these cars. A. Well,

some cars has a side ladder; on one end, have nothing; on the other end, have a brake shaft. Some cars has a platform on. Q. You say on one end is what? A. A side ladder, and nothing on the end. The other end they will have a side ladder and a brake shaft. Other cars has a step on each end of the car. Another has it on opposite corners. Q. When you say on 'opposite corners,' how many steps would that mean? A. Two; one on this corner, and another on this corner. Q. Sometimes the other way? A. Yes, sir; sometimes catch them on this corner, and the other on this corner. * * * Q. And with reference to the hand holds? A. Well, some have had hand holds on the side of the car. Another has it right on the corner of the car. Q. How many hand holds do some of them have,—that kind that you are speaking of now? A. How many? Well, sometimes catch a car has one crossways; another one up and down, right on the outside of the car. Q. Some cars have the perpendicular hand holds on the oblique corners. How many would that make on a car? A. Two. Q. Have you seen cars constructed that way? A. Yes, sir. Q. Tell how he [Dooner] could have made that flying switch? A. I should think, by keeping hold of the cast-iron step. Q. How could he have made that flying switch without going to the side of the car? A. I suppose, if he kept— He could have kept hold of the cast-iron steps and given a signal. Q. How could he have given the signal? A. Why, give it with his hand, or holler. Q. How did the brakemen do it under such circumstances, when they are right next to the engine? A. Why, a man most generally hollers. Q. Are you familiar with any freight cars in use that have a coupling pin so that it cannot be drawn all the way out? A. Yes, sir. Q. In drawing a coupling pin and making a fly, what would the brakeman have to do? A. Have to keep hold of the pin, and holler. Q. Whether you have cars of that kind in your trains right along? A. Handle them. Q. Whether you have cars in your trains with coupling pins of that kind? A. Yes, sir."

Melvin Farnham, the conductor of the train on which the plaintiff was hurt, and who had been in railroad service since 1869, and was on the train at the time of the accident, was asked: "Q. In making a fly, how does the brakeman signal the engineer, generally? A. In making a fly, he generally hollers at him. Q. Whether that could have been done in this case? A. I think it could. Q. About what is the distance from the engineer back to where the brakeman would be standing on the front of the car, ready to make a fly? A. Well, about twenty or twenty-five feet, probably. Q. In your judgment, how could the brakeman have made that flying switch, and signaled the engineer, without going to the corner of the car? A. Why, he could have taken hold of

those iron steps, and reached out beyond the corner of the car. Q. How else could he have signaled, besides that? A. He could have signaled him over the top of the tank. Q. And he could have called to him? A. Yes, sir." Looking at photographs of different kinds of freight cars given in evidence by the defendant, he was asked: "Q. Whether, from time to time, in the train of which you were conductor, you were handling cars like those represented in the photographs before? A. Yes, sir; we have handled cars like those. Q. Whether you have handled cars of different styles from those shown in any other picture before you? A. Yes, sir."

Benjamin Ross, a brakeman on the train at the time of the accident, and of six or seven years' experience, was asked: "Q. Whether you were handling cars like that shown in the picture from time to time on the train on which you were a brakeman? A. Yes, sir. Q. Look at the model I show you, and state whether you handled cars in that train, from time to time, constructed like that model. A. At that time? Q. Any time before and since. A. Yes, sir. Q. What have you to say about cars constructed like the model, with regard to having handles on the side,—how many, and where located? A. I have seen them on the side around the corner, and have seen them on the end. Q. Sometimes one place, and sometimes another? A. Sometimes one place, and sometimes another. Q. How about there being one handle? A. I have seen that handle on one corner, and not on the other. Q. How many on the car then? A. Two on the car. Q. One at each side, near the end? A. Each side, near the end. Q. Look at those photographs, and state what you have to say about handling cars on your train from time to time, then and now, like the cars represented by those pictures. A. I have handled, I guess, pretty nearly all that kind of cars. Q. Have you handled cars different from those? A. Yes, sir. * * * Q. How could he [Dooner] have done it without going to the corner? A. I have often kept hold of a ladder or handle, and given a signal to go ahead. Q. What handle do you mean? A. Step, call it. Q. On a car like this, that had the iron step? A. Well, you could take hold of that step. Q. That is the way you do it? A. I do it that way, and I do it lots of other ways, different times."

The witness Alles, being recalled, was asked: "Q. Whether you have seen cars in use on your trains like the model here? A. Yes, sir. Q. Whether you have seen cars similar to that model, with a handle on one side only? A. Yes, sir. Q. And whether, on cars that have ladders on the side, near the corner, you have seen and handled cars with out any handles on the end? A. Yes, sir."

William L. Dampman, yard master for the Lehigh Valley Railroad Company, with an experience of 17 years, after stating that there was a great difference in cars, in re

spect of the appliances for brakemen, was asked: "Q. Look at these photographs which have been offered in evidence by defendant's counsel, and state whether you are handling cars on the railroad like those represented in those pictures? A. Yes; I have handled all those kind of cars. Q. Have you handled cars different still from these shown by the photographs? A. Yes, sir. Q. Whether you have handled cars like this model I show you? A. Yes, sir."

David Beltz, who had been engaged in handling freight trains since 1869 on the Lehigh Valley Railroad, and was a conductor since 1875, was asked: "Q. Whether, on the train that you have handled, you have handled cars like that represented by this model? A. Yes. Q. Have you any idea how many different styles of freight cars, first and last, you have handled in your trains? A. Different kinds? Oh, we handle all kinds of cars,—good many different kinds. * * * Q. Will you describe briefly some of the differences in these freight cars? A. Well, there is a good deal of difference in them. Some cars have a good deal better equipment than others, in regards to hand holds, steps, and such like. After describing Lehigh Valley and Pennsylvania cars, he was asked: "Q. How about others? A. Others have a step on opposite corners,—crosswise. Q. Two on a car? A. Yes, sir; only two. Q. How about the handles? A. Only two handles. Others have a ladder on one end, and nothing on the other; that is, no handles or ladder whatever. * * * Q. Just look at those photographs which defendant put in evidence, and say whether if, on the trains you have conducted and been brakeman on, you have handled from time to time cars like those represented by these photographs? A. Yes, sir; those are all familiar, very familiar,—all those kinds."

Charles F. Stetler, a railroad hand for 20 years, of which he served for 15 as conductor of a freight train on the Central Railroad of New Jersey, was asked: "Q. Whether on your trains, from time to time, covering the years you have been conductor, you have handled cars like those shown by the photographs? A. Yes; handled all of them. Q. Have you handled cars like that represented by the model? A. Yes; we get those almost daily."

A. J. Kleeman, a freight conductor on the Central Railroad of New Jersey, with 18 years' experience, was asked: "Q. What kind of cars do you handle? A. Handle different kinds of cars,—principally freight cars. Q. Whether you have handled many or few styles of freight cars? A. Handled great many different styles. Q. Have you any idea how many? A. I could not say exactly how many different styles. Q. During the month? A. Might be fifty, might be a hundred, different styles in a month. Q. Whether you have handled cars like those

represented in the photographs which we have offered in evidence? A. Yes, sir. * * * Q. Well, in the position in which this plaintiff was, and under the circumstances he described, how, ordinarily, would the signal be given to the engineer, drawing that pin? A. A man could raise up and give a signal in this style (illustrating). Q. Standing where he was, do you mean? A. No; if he raised up properly. Q. How else could he give a signal, standing there? A. By word of mouth. Q. How often is it done by word of mouth? A. As frequently as it is by the hand."

Theodore T. Turbey, a freight conductor on the Pennsylvania Railroad of eight years' experience was asked: "Q. Have you any idea about how many different styles of freight cars you handle in a month? A. In a month? Twenty-five to fifty, I should say. Q. Look at these pictures here that I show you, and state whether, on the train on which you were conductor, you from time to time handled cars like those shown in the photographs, and whether you have been doing it during your service on the railroad. A. I think I have handled all those. Q. Whether you have handled other cars besides those shown in the pictures,—cars of various kinds? A. Yes, sir. Q. A brakeman in making a flying switch ordinarily would give what kind of a signal to the engineer? A. Well, with our people, we use the word of mouth more than anything else. It can be done more quickly. Q. By using the word of mouth, where could the witness have stood and done that on this car? A. Why, in the position he was while pulling the pin."

H. J. Miller, a railroad hand for nearly six years, was asked: "What kind of cars do you handle in that train? A. Handle freight cars and coal cars. Q. How often do you handle freight cars? A. Well, every day. We switch the freight down there. Q. State whether, on your train, you handle cars like those shown by the photographs of the defendant. A. Yes, sir; handle cars like those. Q. In making a flying switch, how do brakemen usually signal the engineer? A. Well, sometimes they give him a signal with their hand; sometimes they holler to the engineer, 'All right, go ahead.' Q. How does the frequency with which it is done compare, the one way with the other,—how often do you do it with the word of mouth? A. Why, do it oftener than with the hand."

James Ward, a railroader of 20 years' experience, testified that he handled very many different styles of freight cars, coming from different roads, and was asked: "Q. Whether, while you have been in the employ of the Delaware & Hudson, you have from time to time, for a number of years past,—five or six years past,—handled cars like those shown in the photographs which have been offered in evidence by the defendant? A. Yes, sir; handled all those kinds of cars. Q. Han-

dled cars like that represented by the model? A. Yes, sir. Q. In making a flying switch, how is it usual to give the engineer the signal? A. If when the engine is coupled on the car, and you are going to make a fly, the usual thing is to holler. When the engine is coupled on the car, and you are going to make a flying switch, you usually holler, 'All right, go ahead.' Q. You heard Mr. Dooner testify in this case? A. Yes, sir. Q. Whether, in your judgment, the signal could have been given in that way in his case? A. It could; yes, sir."

From the foregoing review of the testimony given on the trial, it is perfectly apparent that there is no one standard of appliances for the use of brakemen in common use. On the contrary, there are so many different kinds of arrangements for that purpose, all being in common use, that as to any one of them, there being from 50 to 100 in number, each kind was as much in common use as any other. Many freight cars have nothing on the end,—either ladder, steps, or hand holds. In these cases there would be a ladder or steps on one side, with a hand hold on the opposite side of the car, near the corner. In other cases there would be a ladder on the end, either in the middle or at one side, sometimes with a hand hold near one side, sometimes with none, and in these cases the rungs of the ladder were used as hand holds. In many instances there would be a hand hold on one side and another on the other side of the end of the car, and no ladder or steps. In other cases a hand hold just around the corner on the side of the car, and another either at or near the middle or on the opposite side on the end. In some cases there would be a long hand hold across the center of the end of the car, and nothing else, and in others there would be one or two perpendicular hand holds on the end, and nothing else. As a rule, where ladders were used there were no steps, and where steps were used there were no ladders. Ladders were used without steps, and steps were used without ladders; the one answering the same purpose as the other, and both serving the same use as hand holds. Where ladders only were used, without hand holds, the rungs were used as hand holds. Where steps were used, without hand holds, the steps served the purpose of hand holds. There is no contradiction of this testimony. It comes from witnesses on both sides, and it must be assumed as true. The plaintiff himself, describing the appliances at the end of the car, was asked by his own counsel: "Q. Did this have a ladder,—anything except these two iron steps? A. And a brake wheel on the left hand." So that this car was one of the kind that had the brake wheel and brake, and two iron steps so arranged as to be used as hand holds; in other words, the brake rod and wheel and two hand holds. The plaintiff was also asked: "Q. Well, the iron steps take the place of a ladder, don't they? A. Yes, sir. * * * Q.

These iron steps have holes in them? A. Yes, sir. * * * I had hold of the step when I pulled the pin." So that, upon the plaintiff's own testimony, he actually did use the step as a hand hold, and would have been in no better condition if it had been a hand hold in name as well as in fact. When it was too late he looked for another hand hold on the corner, and did not find it, and lost his balance, and fell off. But, very clearly, he should have looked for that additional hand hold before he put himself in such an extremely hazardous position. Not having done so, he assumed the risk of his act, and must take the consequences himself. He was under no obligation to take the position he did. He incurred no risk or hazard by not doing so, and there was no necessity for the action he did take. He could have signaled the engineer in other and safe modes, and, if he had not succeeded in doing so, the only consequence would have been that another attempt to switch would be made. Practically, the whole of the testimony was that if he had held onto the step he could have signaled the engineer, and been perfectly safe. There was in reality no testimony to the effect that cars with a ladder or with steps, but without hand holds on the end, were not in use, the same as other methods. The plaintiff said he had never seen any, but the other witnesses said they had. Of all the photographs given in evidence by the defendant, only two had any hand holds on the end, and they had neither ladders nor steps. Where there were ladders or steps, some were on the sides of the car, and some were on the end, but close to the side, and those cars had no hand holds on the end. And yet all of these, 18 in number, were in common use,—handled every day. The model that was given in evidence had two iron steps, arranged so as to be used as hand holds, and the brake wheel and chain, and nothing more. They were on the end of the car, and the steps were in the center, but there were no hand holds. Yet the witnesses testified that they constantly handled such cars. One witness, Stetler, said, "Yes; we got those almost daily." In the absence of affirmative testimony that cars provided with steps on the ends, but without hand holds, were not in ordinary use, there was nothing to leave to the jury bearing on the question of negligence of the defendant. But the testimony that cars of that kind were in common use was simply overwhelming, and therefore we think the seventh point of the defendant, requesting a binding instruction to find for the defendant, should have been affirmed. We think the defendant's third point should have been affirmed, with a qualification. The plaintiff was gradually approaching the face of the freight car while he was on the tender, and he certainly had as good an opportunity to notice the presence or absence of hand holds as he had to observe the presence of the brake and the steps. If he failed to observe

the absence of hand holds, it was his own fault, and he could not hold the defendant liable for the consequences of such failure. With such a qualification, the point should have been affirmed.

The rule of law in Pennsylvania in regard to the use of a particular appliance where other appliances are also used for the same purpose, as affecting the question of the liability of the employer for injuries occurring to the employé, is perfectly well settled by numerous decisions. If the particular appliance is one of several different kinds of appliances, all in common use, the employer is not liable. One of our most recent utterances on this subject, and which we regard as directly applicable to this case, is contained in the opinion delivered by our Brother Mitchell in *Kehler v. Schwenk*, 144 Pa. St. 348, 22 Atl. 910. The plaintiff received his injuries while engaged in unhitching a dump car. The evidence showed that there were several methods of hitching in common use. The plaintiff complained that the method in use at the defendant's colliery was more dangerous than other methods in use, and alleged negligence in that respect. We said: "The employer is bound to furnish machinery and appliances that are of ordinary character and reasonable safety, and the former is the conclusive test of the latter. * * * In the present case it was in undisputed evidence that there were three kinds of hitches to the dumper in common use, each having its own peculiar advantages, adapted to different conditions of the dirt bank. Much evidence was given as to whether it would not have been practicable and better, under the conditions of this colliery to use the side hitch, or the box-center hitch. This question, though made the burden of the contest, was entirely irrelevant. It was exclusively for the determination of the defendants themselves. Where, as in the present case, the evidence shows clearly that several methods are in general use, the choice being a matter of judgment, depending on the surrounding conditions, the owner has the absolute discretion to select according to his own judgment. The necessary control of his own business demands that this right shall be strictly maintained. * * * As already said, there was a large amount of evidence as to the superiority of the side or upper hitch, the admission and discussion of which tended naturally to lead the jury to suppose that they might find a verdict on their own judgment which was the best; and this was put explicitly before them by the charge that 'the proper question for you to determine is as to which of these hitches was the proper hitch for the parties to make use of at this colliery.' This was giving the jury an entirely erroneous view of the point of the case, and of their province in regard to it. They should have been told that, if they found from the evidence that the lower hitch was the one in general use upon dirt banks

with an up grade, there was no negligence in the use of that hitch by the defendants." In *Building Co. v. Nuttall*, 119 Pa. St. 149, 13 Atl. 65, the plaintiff was injured by a stick thrown from a circular saw, and claimed that by using a spreader the injury would have been prevented. The case was allowed to go to the jury on this question, and we reversed it for that reason. Our Brother Williams said: "As to the failure to provide a spreader, the case of the plaintiff is, if possible, more clearly without merit. The testimony shows that such an attachment is not in general use, and that there is no general agreement among mill owners or practical sawyers that it is a desirable or useful attachment. It is not enough that some persons regard it as a valuable safeguard. The test is in general use. Tried by this test, the saw of the defendant is such an one as the defendant had a right to use, because it is such as is commonly used by the mill owners, and it was error to leave to the jury any question of negligence based on the failure to provide a spreader." In *Titus v. Railroad Co.*, 136 Pa. St. 618, 20 Atl. 517, the negligence complained of was the placing of a broad-gauge car upon a narrow-gauge truck, and the use of an unsafe appliance in transporting it. We said: "But, even if the practice had been shown to be dangerous, that would not show it to be negligent. Some employments are essentially hazardous, as said in *Railway Co. v. Husson*, 101 Pa. St. 1, of coupling railway cars; and it by no means follows that an employer is liable 'because a particular accident might have been prevented by some special device or precaution not in common use.' All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of the implement, or nature of the mode of performance of any work, 'reasonably safe' means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his professional trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and, however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed." In *Manufacturing Co. v. McCormick*, 118 Pa. St. 519, 12 Atl. 273, we said: "The general rule requires of the master that he

provide materials and implements for the use of his servant, such as are ordinarily used by persons in the same business; but he is not required to secure the best known materials, or to subject such as he does provide to a chemical analysis, in order to settle by experiment what remote and possible hazard may be incurred by their use." In *Coal Co. v. Hayes*, 128 Pa. St. 294, 18 Atl. 387, we said: "The rule in regard to the obligation of the employer respecting the character of the tools and appliances furnished by him has been repeatedly stated in the recent decisions of this court. Thus, in *Railroad Co. v. Sentmeyer*, 92 Pa. St. 276, we said that when the employer furnishes his employ  s 'with tools and appliances which, though not the best possible, may by ordinary care be used without danger, he has discharged his duty, and is not responsible for accidents.' In *Payne v. Reese*, 100 Pa. St. 301, we said: 'An employer is not bound to furnish for his workmen the "safest" machinery, nor to provide the "best methods" for its operation, in order to save himself from responsibility for accidents resulting from its use. If the machinery be of an ordinary character, and such as can with reasonable care be used without danger to the employ  , it is all that can be required from the employer. This is the limit of his responsibility, and the sum total of his duty.' " In *Reese v. Hershey*, 163 Pa. St. 253, 29 Atl. 907, we said: "The average untrained mind is apt to take the fact of injury as sufficient evidence of negligence. Moreover, the use of a dangerous machine is very commonly considered ground for holding the employer responsible, whereas the test of liability is not danger, but negligence, and negligence can never be imputed from the employment of methods or machinery in general use in the business." In *Sykes v. Packer*, 99 Pa. St. 465, Mr. Justice Mercur, delivering the opinion, said: "An employer does not impliedly guaranty the absolute safety of his employ  . In accepting an employment the latter is assumed to have notice of all patent risks incident thereto of which he is informed, or of which it is his duty to inform himself. Whart. Neg.    206. When, therefore, he undertakes hazardous duties, he assumes such risks as are incident to their discharge, from causes open and obvious, the dangerous character of which causes he has had opportunity to ascertain."

Without continuing these citations, of which there are many more that might be quoted, it is our duty to say that, upon all the considerations above indicated, we think the plaintiff's case is without legal merit. It is true, he was grievously hurt, and all the instincts of humanity prompt the expression of a profound sympathy with him in his misfortune. But disputed contentions, involving well-settled legal principles, cannot to be determined upon feelings of sympathy or pity. In all fairness to the plaintiff, it is evident that his injury was due far

more to his own want of thoughtfulness and care than to any insufficiency of appliances. It was the extreme of rashness for him to venture to the side of the car, standing on a beam only four inches wide, and without any support of which he could lay hold. There was not the slightest occasion for his taking such a terrible risk. It is true, he succeeded in reaching the side of the car and giving the signal, and doubtless he was thereby emboldened to repeat the hazard in his attempted return. But the risk was all his own; he assumed it voluntarily and unnecessarily; and employ  s who do such things are barred from recovery for the results of their indiscretion, by the plainest and most firmly-established rules of law, which cannot possibly be surrendered. If the plaintiff had simply held onto the iron step while he gave or attempted to give the signal to the engineer, he would have been perfectly safe. Or if he had taken hold of the upper step, standing on the lower end, he could easily have seen the engineer and signaled him. But even if he could do neither of these things, and give the signal, he was nevertheless without legal excuse for assuming the very great risk which caused him the loss of his foot. In the *Sentmeyer* Case, above cited, the person injured was a flagman, who, without necessity for his so doing, got upon the top of a box car, and while riding there he was struck and killed by the timbers of a bridge under which the train passed. We held that it mattered not whether the bridge was lower than it should have been; the flagman had no right to expose himself to such a risk. He could have ridden on the engine or in the caboose, but he chose to ride on the top of the car, and for that reason there could be no recovery. Gordon, J., in delivering the opinion, said: "When men are hired, something must be predicated of their judgment and prudence; and hence, when the employer furnishes them with tools and appliances which, though not the best possible, may by ordinary care be used without danger, he has discharged his duty, and is not responsible for accidents. But, again, the defendant was liable for the consequences of such dangers as it subjected the employ   to, and not for those to which he subjected himself." Our books of reports abound with cases in which we have uniformly refused to permit a recovery in damages where the party's own carelessness, in assuming unnecessary risks, was the occasion of his injury. It is not necessary to cite them. The underlying principle of all of them is the same, and is without dispute.

So, too, upon the other question,—the common usage of this class of appliances. The doctrine is undisputed, and it matters not, in a given case, whether the appliance was the best and the safest. It is enough to know that it was in common use. It was so fully proved on the trial that appliances

of the same character as were upon the car in question were in common use, that it cannot be said to be a disputed question. That there were upon the end of the car two hand holds, a brake, and a wheel, was proved by the plaintiff himself. That there was no uniformity in the position of hand holds in common use on the ends of cars was the undisputed testimony on both sides. That there were numerous varieties of the appliances in general use, and that in the great majority of them there were not more than two hand holds, and in many only one, and in some none at all, was also undisputed. The only contention of the plaintiff as to negligence was that there should have been another hand hold somewhere on the end of the car, but there was no proof of any general use requiring such an additional hand hold, and in the absence of such proof the basis of the charge of negligence disappears. Finally, it is manifest that the plaintiff's injury was not due to a want of hand holds, but to his own inexcusable want of care in the use of those that were provided.

It is almost needless to add that the question upon which the case is now decided was not considered or decided at the former hearing in this court. Much more testimony was given at the second trial than at the first, and the question of common use was far more widely developed than on the first trial. The testimony given on the second trial was of such a character as to challenge a critical investigation in order to determine whether it conformed to the standard required by all our decisions, without at all invading the province of the jury. Judgment reversed.

MITCHELL, J., dissents.

CONROY v. CARROLL et al.

(Court of Appeals of Maryland. Dec. 11, 1895.)

JUDICIAL SALES—NOTICE—RIGHTS OF PURCHASER.

The failure of the trustee to advertise the sale as required by the decree, coupled with the fact that the land was sold for much less than its real value, authorizes the court to set aside the sale, as against the purchaser.

Appeal from circuit court, Montgomery county, in equity.

Creditors' bill by Frank J. Dieudonne against Helen M. Carroll and others. From an order setting aside a sale by trustees, the purchaser, Thomas F. Conroy, appeals. Affirmed.

Argued before ROBINSON, C. J., and BRISCOE, BRYAN, BOYD, McSHERRY, and FOWLER, JJ.

H. W. Talbott and Chas. W. Prettyman, for appellant. Thomas Anderson and W. Veirs Bouie, Jr., for appellees.

FOWLER, J. By authority of a decree of the circuit court for Montgomery county, the trustees therein named sold a part of the real estate of the late Samuel Sprigg Carroll. Exceptions were filed to the ratification of this sale, upon the grounds—First, that the sale was not advertised according to the requirements of the decree; second, that the price obtained was grossly inadequate; and, thirdly, that the trustees had failed to file the bond required by the decree. The learned judge below overruled the second and third exceptions, sustained the first, and passed an order setting the sale aside. From this order, the purchaser, Thomas F. Conroy, has appealed.

The trustees were required by the decree to give "at least three weeks' previous notice by advertisement inserted in some newspaper printed, and published in Montgomery county, and such other notice as they should think proper, of the time, place, manner, and terms of sale." This requirement, it is conceded, was not complied with, for the sale which was reported as having been made to the appellant never was advertised, except by a short notice published in the Washington Star five days before the sale. The appellant purchased the property for \$7,500, and a few days thereafter a bona fide cash offer of \$9,000 was made to the trustees, who hold a certified check for that amount as evidence that said offer is a continuing one. Under these circumstances, we are all of opinion that the sale should be set aside. We do not, however, so hold because of any gross inadequacy of price (the evidence not justifying such a conclusion), but because the sale, as reported, was not advertised as directed by the decree, coupled with the fact, which is clearly established by the proof, that the property was purchased by the appellant for much less than its real value. While it is well settled that the right of purchasers at trustees' sales must be recognized and carefully guarded, yet it must not be forgotten that they always purchase subject to the approval of the court, which is the real vendor, and that, therefore, they must take the risk of losing the benefit of the purchase if it should happen that there are valid objections to the confirmation of the sale. *Kauffman v. Walker*, 9 Md. 241; *Reeside v. Peter*, 33 Md. 127; *Bolgiano v. Cooke*, 19 Md. 391. Finding no error in the order passed by the learned judge below, it will be affirmed. Order affirmed, with costs.

CONSOLIDATED GAS CO. OF BALTIMORE CITY v. CROCKER.

(Court of Appeals of Maryland. Dec. 6, 1895.)

NEGLECTANCE—CONTRIBUTORY NEGLIGENCE—GAS EXPLOSION.

1. The act of taking a lighted lamp into a cellar known by the person entering to be filled with escaped gas is not, as a matter of law, such

contributory negligence as will preclude recovery for injuries from an explosion occurring over 10 minutes later.

2. Where a gas company is notified that quantities of gas are escaping into a building, it cannot discharge the duty to use reasonable diligence to discover and stop the leak by acting on the assumption that the leak proceeds from one source, when in fact it proceeds from a totally different source, which could have been discovered by a proper inspection.

Appeal from superior court of Baltimore City.

Action by John J. Crocker against the Consolidated Gas Company of Baltimore City. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before ROBINSON, C. J., and BRISCOE, BRYAN, ROBERTS, FOWLER, and McSHERRY, JJ.

William A. Fisher and J. Alexander Preston, for appellant. John F. Preston and E. B. Slater, for appellee.

McSHERRY, J. The only questions we have before us on this appeal are those which arise in consequence of the rejection by the trial court of the prayers presented by the defendant for instructions to the jury, and those which grow out of the granting by the court of three instructions of its own. The case is one founded in alleged negligence. The fundamental principles which must govern its decision are thoroughly settled and established. To apply those principles correctly is all that is required. The defendant below (the appellant here) is a gas company. It manufactures and supplies gas for illuminating purposes. The gas is transmitted through mains and pipes underneath the surface of streets into houses and elsewhere. The plaintiff below (the appellee here) leased and occupied certain premises in Baltimore city. In those premises he conducted a saloon. He moved into them on or about the 20th of November, 1891. At that time the odor of escaping gas was very perceptible in the cellar of the house. When an employé of the gas company was notified that the gas was escaping and accumulating in the cellar, he stated that another employé of the company would be sent to remove the old meter and to replace it with a new one, as was customary whenever there was a change in the occupants of premises; and, when the attention of the employé who did remove the old meter was called to this odor, he stated that he guessed the new meter would remedy the matter. In fact, however, this did not furnish a remedy, and gas continued to flow into the cellar to such an extent that it was necessary to keep the door closed at the head of the stairway leading from the cellar into the dining room. There was evidence tending to show that the gas escaped from a main which ran under and parallel to the sidewalk, and that, thus escaping, it penetrated the front wall of the premises occupied by the plaintiff. In the cellar there was a gasoline stove, used

for cooking oysters. On the evening of December 3, 1891, Mrs. Staengler, an employé of the appellee, went into the cellar for the purpose of frying some oysters. She closed the door behind her at the head of the cellar stairway. She took with her a lighted coal-oil lamp, and placed it in a bracket near the top of the cellar, and then proceeded to ignite the gasoline in the stove. The cellar had been opened but once in the preceding 24 hours, and then only for a brief period. She struck several matches, but there being, apparently, some water in the cup of the stove, the gasoline did not vaporize and burn. Mrs. Bryant, an acquaintance of Mrs. Staengler, then entered the cellar, but left the door leading to the dining room open. In the dining room, and just opposite the door leading into the cellar, two gas jets were burning. According to the testimony of Mrs. Staengler, she threw a basin of water, containing a few spoonfuls of gasoline, on the coal pile, and in about two minutes after again lighting the gasoline stove, which immediately went out, she happened to look in the direction of the steps leading up to the dining room, and there she saw a sheet of bluish flame, which was instantly followed by an explosion. This explosion occurred in about 10 minutes after Mrs. Staengler had entered the cellar with the lighted coal-oil lamp. This lamp continued to burn during the whole time Mrs. Staengler was in the cellar. The force of the explosion was so great that it threw Mrs. Bryant out of the front cellar door, and did considerable damage to the building. The coal-oil lamp suspended in the cellar was uninjured, but the globes on the gas jets in the dining room were shattered. According to the testimony of Mrs. Bryant, who was called as a witness for the defendant, Mrs. Staengler emptied the gasoline out of the stove into a basin, and then replenished the stove, and threw the basinful of gasoline on the coal pile. She further stated that after this Mrs. Staengler lit several matches to start the fire in the stove, and that shortly after the explosion occurred. It was further shown that after the explosion had taken place several persons entered the cellar, and found a blaze proceeding apparently from burning oil in the coal pile.

By rejecting the defendant's first prayer the court refused to rule that, in law, the act of entering the cellar with the lighted coal-oil lamp, under the circumstances stated, was such a glaring act of contributory negligence contributing to the injury complained of, as to preclude a recovery by the plaintiff. Had it been a concession in the case, or had it even been clear from the evidence, that the lighted coal-oil lamp carried into the cellar caused the explosion, there would have been some foundation for imputing contributory negligence to the plaintiff's employé in carrying it there. Not only does it not appear that the carrying of the lamp into the cellar actually caused the explosion, but the defend

ant, on the contrary, strenuously insists that there was no explosion of gas at all, but that the explosion proceeded from gasoline. When large quantities of gas have escaped into a building, and have commingled with the air therein, and thus formed a highly-explosive compound, and this condition is known to a person entering such building, it is obviously, in law, a grossly-negligent act to enter with a lighted candle or lamp, or to strike a match after entering, because, according to known and unvarying laws, an explosion, or a suddenly liberated mechanical energy, resulting from the instantaneous combustion of the inflammable compound when brought in contact with a flame, will inevitably follow. And when, under these conditions, an explosion does instantly result the moment a flame is brought in contact with such a compound of gas and atmosphere, the fact that the flame caused the combustion and the consequent and simultaneous explosion is beyond reasonable dispute or question. The deliberate or the careless application of a flame to such an explosive compound is clearly an act of negligence so unequivocally contributing to the production of the injury that no recovery can be had by the person guilty of, or chargeable with, that act of concurrent negligence. And this is precisely what was decided in *Langan v. Gaslight Co.*, 71 N. Y. 29; *Gas Co. v. Robinson*, 99 Pa. St. 1. In these cases the explosion instantly followed upon a light being brought in contact with the gas, and there could be no possible dispute that the bringing of the light in contact with the gas caused the explosion. But where there is not such a connection between the act of entering the house with a lighted lamp and the explosion of the gas as to establish with certainty, and to the exclusion of any other reasonable hypothesis, the relation of cause and effect, the question as to what did cause the explosion is for the jury to solve under proper instructions from the court. When, therefore, as here, more than ten minutes intervened between the time the lamp was taken into the cellar and the time that the subsequent explosion occurred, and when, as here, the lamp itself was uninjured, it would be impossible for the court to assume that the lighted lamp caused the explosion, and to rule, as a conclusion of law, that the plaintiff's employé was guilty of contributory negligence in taking the lamp into the cellar. And this is true, also, with respect to the lighting of the matches to ignite the gasoline in the stove. Assuming, as must be done in discussing this prayer, that all the evidence adduced by the plaintiff was true, then at least two minutes intervened between the period of time when the last match was struck, and the stove was lighted and extinguished for the last time, and the period when the explosion took place; and there was obviously, therefore, no evidence to show that the explosion proceeded from these matches or from the stove. If, then, the evidence failed to show affirmative-

ly, and without dispute, that the explosion resulted from the lighted lamp or from the burning matches being brought in contact with the gas, it would have been improper for the court to say, as a legal conclusion, that the taking of the lighted lamp into the cellar, or the striking of the matches there, was an act of contributory negligence, directly contributing to the production of the injury complained of, because, unless the explosion did result from the one or the other causing a combustion, then neither the one nor the other contributed to the explosion. If there is no evidence to show that a particular act of imputed negligence did actually concur in producing an injury, then there is no evidence that the doing of that act was in itself contributory negligence, and it would be clearly erroneous to ascribe to it that character or quality. To justify a court in pronouncing a given act such an act of contributory negligence as to defeat a recovery, it must be a distinct, prominent, and decisive fact, about which ordinary minds would not differ, because, where the nature and attributes of the act relied on to show negligence contributing to the injury can only be correctly determined by considering all the attending and surrounding circumstances of the transaction, it falls within the province of the jury to pass upon and characterize it, and it is not for the court to determine its quality, as matter of law. *Cooke v. Traction Co.*, 80 Md. 558, 31 Atl. 327. Under the conditions we have stated, and in view of the failure of the evidence to show that the lamp or the matches, to the exclusion of every other reasonably probable cause, occasioned the ignition or combustion that produced the explosion, the court was right in declining to rule, as requested in the defendant's first prayer, that the plaintiff had been guilty of such pronounced negligence, directly contributing to the injury, as to preclude a recovery.

The defendant's second prayer was also properly rejected. It asked the court to instruct the jury that the plaintiff had offered no legally sufficient evidence of negligence on the part of the defendant. Assuming the truth of the evidence adduced by the plaintiff, it was clearly negligence on the part of the defendant to allow gas to escape from its pipes after receiving notice that a leak existed. "Whilst no absolute standard of duty in dealing with such dangerous agencies can be prescribed, it is safe to say, in general terms, that every reasonable precaution suggested by experience and the known perils of the subject ought to be taken. This would require, in the case of a gas company, not only that its pipes and fittings should be of such materials and workmanship, and laid in the ground with such skill and care, as to provide against the escape of gas therefrom when new, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of all leaks that might occur

from the deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in the business." *Koelsch v. Philadelphia Co.* (Pa. Sup.) 25 Atl. 552. A neglect or a failure to use such precautions would be clearly negligent. It cannot be doubted, if the evidence adduced by the plaintiff be credited, that the least attention or diligence on the part of the company's employes would have apprised them of the escape of gas into the street and through the walls of the plaintiff's house. The defendant's employé had been notified of the escape of gas. He had promised to remedy it when the new meter should be placed in position, but he failed to search for or to discover whence in fact the leaking gas proceeded. He seems to have assumed that the change in the meter would obviate the trouble, but he made no search, nor did the other employé who put the new meter in position endeavor to locate the leak. It was clearly negligence on the part of these employes not to make some effort to discover the location of the defect which caused the leak. They were aware of the leak, and that was notice to the company. It then became obligatory on the company to use reasonable efforts, in a reasonable time, to ascertain where the leak was, and to stop it. *Mose v. Gas Co.*, 4 Post. & F. 324. If, instead of doing this, the company's employes chose to assume that a change of the meter would remedy the complaint, though confessedly they did not know whether it would or not, they obviously did not discharge the duty incumbent upon them, and their negligence in this particular was the negligence of the company. When a gas company is made aware, as in this case, that large quantities of gas are escaping into a building, it becomes its plain duty to use reasonable diligence to discover and to stop the leak. It cannot discharge that duty by assuming, without knowing, that the leak proceeds from one source, when in fact it proceeds from a totally different source, which could have been discovered by proper inspection. This rule requires nothing unreasonable. It does not require that the company shall keep up a constant inspection all along its lines, without reference to the existence or nonexistence of a probable cause for the occurrence of leaks or escapes of gas; but it does require that, when notice of the existence of a leak has been given to a company, the company shall use reasonable care and appropriate means to discover the cause of the leak, and to remedy it. This doctrine is not in conflict with the principle laid down in *Hutchinson v. Gas-Light Co.*, 122 Mass. 219, and other cases of a kindred character. "There the escape of gas complained of was the result of an overwhelming calamity, that had laid a great part of the city of Boston in ashes, and fractured and severed the company's pipes in so many places that all the force it

could employ was insufficient to guard against all possible consequences of the escape of gas, without at once shutting off the supply from the whole city; and this it was excused from doing, on the ground that more mischief would result therefrom than was likely to result from the neglect so to do." *Koelsch v. Philadelphia Co.*, supra. The escape of gas from the defendant's main was, under the circumstances stated, after it had received notice that gas was escaping into the plaintiff's house, and after it had failed or neglected to use reasonable care or proper inspection to discover the location of the leak and to stop it, some evidence of negligence; and the court would not have been justified in withdrawing the question of negligence from the consideration of the jury. We are not called on to go further, or to lay down a broader rule than this, in the pending case, and we are not to be understood as doing so, though it has been held by courts of high authority that the escape of gas from the mains underneath the surface of a public street, unless explained, is *prima facie* evidence of some neglect on the part of a gas company. The case of *Smith v. Gaslight Co.*, 129 Mass. 318, is an illustration of this doctrine.

The defendant's third and fifth rejected prayers were fully covered by the court's instructions, and the appellant has therefore no reason to complain of the refusal of the court to grant them. We find no errors in the instructions given by the court. There were two opposite theories presented by the evidence. The plaintiff founded his case upon the theory that the gas which escaped into the cellar, and was confined there while the doors leading into the cellar were closed, rose when Mrs. Bryant entered the cellar and omitted to close the door behind her, and in a few moments came in contact with the lights at the head of the cellar steps, and then exploded. It was, according to the testimony of Mrs. Staengler, at the head or top of these steps that she saw the bluish flame spread out at the moment of the explosion. A slat partition across the cellar was partially blown down, towards the street and away from the steps, as though the force had been applied from the side next to the cellar steps—the side nearest the lighted gas jets at the head of the stairway. On the other hand, assuming, first, that the explosion was a gas explosion, it was insisted that the plaintiff was guilty of contributory negligence; and, secondly, denying that it was a gas explosion, it was contended that the explosion was caused by gasoline. The first contention we have already considered. It is not necessary to state the evidence relied on by the appellant to support the second alternative. Suffice it to say that both theories were fairly submitted to the jury by the instructions given by the learned and accomplished trial judge, and that upon both theories the law was

accurately and clearly announced. It became then solely the province of the jury to determine the facts, and if they found, as they were required to find before returning a verdict for the plaintiff, that the gas escaped by reason of the negligence of the defendant, that the explosion was a gas explosion, and that the act of Mrs. Staengler in going into the cellar with a lighted lamp and striking matches there was, under all the circumstances, such conduct as a person of ordinary prudence and care would have pursued, they were warranted in finding a verdict for the plaintiff. If, on the contrary, they found that the explosion was a gasoline explosion, or that, being a gas explosion, Mrs. Staengler had been guilty of negligence in entering the cellar with a lighted lamp, or in striking matches there, and that either of these acts caused the explosion, the plaintiff was not entitled to recover. The second instruction correctly defined where the burden of proof rested. As we find no error in the rulings of the trial court, its judgment must be affirmed. Judgment affirmed, with costs above and below.

CONSUMERS' ICE CO. OF BALTIMORE CITY v. STATE.

(Court of Appeals of Maryland. Dec. 6, 1895.)

TAXATION—ASSESSMENT—UNISSUED STOCK—INCORPORATIONS—COLLATERAL ATTACK.

1. Code Pub. Gen. Laws, art. 81, § 132, requires the tax commissioners to assess "the shares of capital stock" in corporations, and section 141 provides that in fixing the value of the shares the value of the corporate realty shall be deducted from the aggregate value of all the shares of stock, and the residuum divided by the number of shares. The shares are to be valued to the owners in the counties in which they live. *Held*, that unissued shares of stock cannot be assessed.

2. Code Pub. Gen. Laws, art. 81, § 144, providing for appeals from the tax commissioner's "valuation" of corporate stock, and authorizing the treasurer and comptroller to charge the "valuation and assessment," and that, if either shall agree as to the correctness of the "valuation" made by the commissioner, the appeal shall be dismissed, and the "original valuation" remain the "true valuation," requires an appeal only to attack the "valuation," and therefore, without an appeal, the corporation may defend an action for taxes levied against its stock by showing that the stock was unissued, and therefore not assessable.

Appeal from court of common pleas.

Action by the state of Maryland against the Consumers' Ice Company of Baltimore City. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BRISCOE, ROBERTS, and BOYD, JJ.

Edgar H. Gans and B. Howard Haman, for appellant. James A. Preston and R. L. Preston, for appellee.

BOYD, J. The appellee sued the appellant for state taxes levied and assessed on

the latter's capital stock. The tax was laid on 4,000 shares of stock assessed at \$25 per share. At the trial the defendant proved that there were only 3,277 shares of stock issued, and that the state tax commissioner was informed that there were 723 shares unissued. On motion of the plaintiff the court below struck out this evidence, which had been admitted subject to exception, and granted a prayer that the plaintiff was entitled to recover the amount of taxes set forth in the bill of particulars, with 5 per centum additional thereon, and interest. From this action of the court this appeal was taken. We are therefore called on to decide whether the state tax commissioner can lawfully assess unissued stock of a corporation. If he can, that will end the controversy; but if we reach the contrary conclusion we must then determine whether the defendant can set up that defense in a proceeding of this character. Section 132 of article 81 of the Code of Public General Laws requires the tax commissioner to assess for state purposes, on or before the 15th day of May in each year, "the shares of capital stock in all the banks, state or national, banking associations or other incorporated institutions or companies, incorporated under the authority of this state, or located or doing business therein, whose shares of capital stock are liable to assessment and taxation by the laws of this state," and he has broad powers given him to enable him to obtain information concerning the same. Section 138 of that article requires the president or other proper officer of banks or other incorporated institutions to furnish annually on or before the 1st day of March to the county commissioners of each county and the appeal tax court of Baltimore city in which any of its stockholders may reside, a list of the said stockholders, together with the number of shares held by each, and also to make out and deliver to the county commissioners of the county or appeal tax court where said corporation is situate an account of the number of shares of stock in such corporation held by persons not residents of this state, and provides that the same shall be valued at its actual cash value to and in the names of such stockholders respectively. That section further requires the corporation to pay the tax levied on the stock held by nonresidents. Section 141 provides for the assessment of the real estate of corporations by the county commissioners and the appeal tax court of Baltimore city, and for the payment by the company of state, county, or city taxes thereon, in the same manner as the same are levied upon and paid by individual owners of real property. It then prescribes the method of ascertaining the value of the shares of stock of corporations by the tax commissioner, who is to deduct the assessed value of the real property belonging to the company from the aggregate value of all the shares of such company, and di-

vide the residuum by the number of shares of capital stock, "and the quotient shall be the taxable value of such respective shares for state purposes." The tax commissioner is then required to certify to the county commissioners of each county where any of the stockholders reside, and to the appeal tax court of Baltimore city, if any reside there, the assessed taxable value of such respective shares of stock so ascertained; and the taxable value of such shares of stock owned by residents of this state and taxable within this state shall, for county and municipal purposes, be valued to the owners thereof in the counties or cities in which they respectively reside, but the taxes so assessed are to be paid by the company and charged to the respective stockholders. Section 131 determines where the stock shall be deemed to be situate for the purpose of valuing stock held by nonresidents. Taking all these sections together, it would seem to be perfectly clear that the tax commissioner is not authorized to assess unissued shares of stock, and any other construction might very materially affect the taxable value of stock for the purposes of county or municipal taxation. Take, for example, a corporation of an authorized capital of \$100,000,—1,000 shares of the par value of \$100 each. Suppose 500 shares are subscribed for and paid up, thus giving the company \$50,000, with part of which it purchases real estate of the value of and assessed at \$20,000. The tax commissioner would then, under section 141, deduct the assessed value of the real estate (\$20,000) from the aggregate value of all the shares of stock (\$50,000, assuming that to be the aggregate value), and would have a residuum of \$30,000. Then, if the state's contention be correct, he should divide this residuum by the whole number of shares authorized (1,000) and the quotient would be the taxable value of such respective shares, namely \$30 per share. The tax commissioner would then certify to the county commissioners of each county where any stockholder resides (and to the appeal tax court of Baltimore city if any reside there) "the assessed taxable value of such respective shares of stock or shares, so ascertained as aforesaid." A stockholder holding 100 shares, for which he had paid, and which were actually worth, \$10,000, would thus pay (through the company) taxes on only \$3,000 (in addition to his interest in the real estate), while, if the tax commissioner divided the \$30,000 by 500 (the number of shares issued), the assessment on his shares would be \$6,000. The county in which such stockholder resided would thus be deprived of the taxes on the difference. When the statute directs the tax commissioner to "assess for state purposes the shares of capital stock in all incorporated institutions or companies," etc., it evidently means shares of stock that are in existence. If they have no existence, they have no value. Those that

are already issued may possibly have some additional value given them by reason of the fact that others can be issued, but that can be taken into consideration when the former are assessed. The state can lose nothing by this construction. If the capital stock as fixed by the charter be not subscribed and paid for as required by law, and the state suffer thereby, the corporation may possibly subject itself to proceedings for dissolution; but, under existing statutes, it is not required to pay taxes on unissued shares of stock and the tax commissioner had no authority to assess the 723 shares of this company which had not been issued.

But by section 144 of article 81 the state tax commissioner is required, as soon as he has valued and assessed the shares of stock in the corporations in this state, to certify and return the said valuation to the comptroller of the treasury, who must at once notify the president, cashier, or other proper officer of such corporations of the said valuation and assessment of their shares. If no appeal be taken within 30 days, "the said valuation and assessment shall be final," but, if an appeal is taken within that time to the comptroller and treasurer, they are required to consider the same, "and if the comptroller and treasurer shall both be of the opinion that such valuation and assessment so made by the state tax commissioner is erroneous, and ought to be changed, they shall change the same accordingly, and the valuation and assessment so agreed upon by the comptroller and treasurer shall be final; but if either the comptroller or treasurer shall agree with the state tax commissioner as to the correctness of the valuation so made by him, then such appeal shall be dismissed, and the original valuation shall be and remain as the true valuation of such shares." It is therefore contended by the state that, as the assessment and valuation by the tax commissioner are made final unless changed on appeal to the comptroller and treasurer, they cannot be attacked collaterally, and, as no appeal was taken in this case to those officers, the appellant is without remedy. We might, perhaps, rest our decision on the language of the statute itself, as it seems to contemplate a review by the comptroller and treasurer of the valuation alone. It says such corporation may "appeal from such valuation." It is true, it does authorize the comptroller and treasurer to change the "valuation and assessment," if they think they ought to be changed; but it further provides that, "if either the comptroller or treasurer shall agree with the state tax commissioner as to the correctness of the valuation so made by him, then such appeal shall be dismissed, and the original valuation shall be and remain as the true valuation of such shares." It might, therefore, well be questioned whether the comptroller and treasurer have any power to review anything but the valuation of the stock. But the statute could not have in-

tended that, if the assessment was based on an erroneous application of the law by one or more of these three officers of the state, who are not necessarily lawyers, the taxpayer is without remedy in some tribunal organized for the purpose of determining questions of law. If it were simply a question of the valuation of stock liable to assessment and taxation by the tax commissioner, and he and the appellate board had jurisdiction over the subject-matter and the parties, their decision would be final and conclusive. But, as we have already said, the tax commissioner had no power or authority to assess unissued stock, and, that being so, his assessment of that stock was a nullity; just as much so as would have been his assessment of the real estate of this company, or of the shares of stock of some foreign corporation over which he had no control. His assessment of stock which he had no authority to assess could have no more effect than if assessed by the county commissioners of a county where the company had real estate. This is not a question as to whether the tax commissioner, in valuing the stock, took into consideration items of value that were improper, and hence the assessment was irregular, but he had no right or power to value or assess these 723 shares of stock at all. If he had assessed the 3,277 shares at so much per share, so as to amount to \$100,000, it would have been different, but he assessed 4,000 shares at \$25 per share. It could with as much propriety be argued that he could have assessed 5,000 shares at \$25 per share, and that in a suit to recover the tax the defendant could not have defended as to the tax on the 1,000 shares by proving that its authorized capital was only 4,000 shares. If the tax commissioner had been misled by the conduct of the defendant's officers, such as the refusal or neglect to furnish the information required by the statute, a different question might be presented; but such is not shown to be the case. On the contrary, the testimony that was excluded showed that he was informed that the 723 shares were unissued.

The duties of the tax commissioner are well defined, and they are limited to the powers granted to him by statute. He is authorized to assess for state purposes the shares of capital stock on all banks, state or national banking associations, or other incorporated institutions or companies incorporated under the authority of this state," etc., and from the valuation so to be made by him an appeal is allowed, as already stated, to the comptroller and treasurer; but, as he has no authority to assess unissued stock, the comptroller and treasurer have no authority to review his assessment of it, and their action on such an appeal to them would have been nugatory and of no avail. This case is clearly distinguishable from those cited on behalf of the state, such as *Jackson v. Bennett*, 80 Md. 77, 30 Atl. 612; *Smith v. Goldsborough*, 80 Md. 63, 30 Atl. 574; *County Commissioners v. Union*

Mining Co., 61 Md. 545; *Mayor, etc., of Baltimore v. Canton Co.*, 63 Md. 237; and others referred to. So long as tribunals with special and limited statutory powers act within the scope of such powers, their action is ordinarily conclusive and final, unless appeal be given specially to some other tribunal, but they must not exceed the jurisdiction conferred on them, as we hold the tax commissioner did in undertaking to assess this unissued stock. It follows from what we have said that the testimony of the defendant was relevant and material, and the prayer of the plaintiff ought not to have been granted. The judgment must therefore be reversed. Judgment reversed and new trial awarded, with costs to the appellant.

AGRICULTURAL INS. CO. OF WATERTOWN, N. Y., v. HAMILTON.

(Court of Appeals of Maryland. Dec. 6, 1895.)

INSURANCE—CONDITIONS—VACANT AND UNOCCUPIED.

A dwelling house in which insured lived at the time the policy thereon was issued, on the removal of his family therefrom to a house near by, becomes "vacant and unoccupied," within the meaning of such words in the policy, avoiding it in such event, though the house is still slept in occasionally by the employees of insured, and visited by his wife daily, for the purpose of getting therefrom provisions stored therein.

Appeal from circuit court, Harford county.

Action by James K. Hamilton, use of J. Thomas C. Hopkins and another, against the Agricultural Insurance Company of Watertown, N. Y. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before ROBINSON, C. J., and BOYD, FOWLER, McSHERRY, JJ.

Frank C. Gorrell and Thomas H. Robinson, for appellant. J. T. C. Hopkins, Wm. H. Harlan, and S. A. Williams, for appellee.

McSHERRY, J. On the 11th of June, 1889, the appellant, a fire insurance company, wrote a policy of insurance upon the dwelling house, barn, and personal property of the appellee, insuring the same against loss by fire for the term of three years. Upon the expiration of this policy, in 1892, a second one for the same amount, for another term of three years, and covering the same property, was issued by the same company. At the time the first policy bears date, and continuously on from then until the month of December, 1892, the dwelling house covered by the policy was actually occupied by the appellee and his family as a place of abode; but in December, 1892, he and his family moved out of the house, and went into and occupied another dwelling some few hundred yards away, and located on the opposite side of a public highway. He took with him nearly all his furniture, though he left in the house from which he moved a few beds and some trifling household articles, a trunk containing clothing, and

some provisions stored in a pantry. He and his family ceased to live in the house mentioned in the policy. On the 27th of December, 1893, the house from which he moved, and which was insured under the policy issued by the appellant, was totally destroyed by fire. Due proof of loss was filed, but the company refused to pay the loss, and based its refusal upon a ground which will be stated later on. Thereupon suit was brought on the policy. When both policies were issued, the property was subject to a mortgage held by Messrs. Hopkins & Harlan, to whose use the suit was entered just before the trial in the court below, and across the face of both policies there were written in red ink the words "Loss, if any, payable to mortgagees, as interest may appear." Among other terms and conditions contained in the policy sued on, it is expressly provided that "this entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void * * * if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and so remain for ten days." For nearly three months after the appellee removed from the insured dwelling no person occupied the house at all; and on March 6, 1893, permission was granted to the insured to remove the household furniture, family provisions, wearing apparel, and organ, as insured under the policy, into another dwelling, "the insurance to cease at the former, and apply at the latter, location from" the date just named; but there was no agreement, memorandum, or assent indorsed upon or added to the policy that the dwelling house from which the appellee had previously removed should remain vacant or unoccupied at the risk of the insurer. During a portion of the time from March, 1893, down to the fall of the same year, two and sometimes three of the workmen employed by the appellee upon his farm and in his canning business slept in the house described in the insurance policy, but they did not occupy it during the daytime, and did not cook or eat their meals there. Within a week before the destruction of the house by fire, a man in the service of the appellee spent one night in the house; and occasionally, while the hands slept there, one of the sons of the appellee also slept in the house. During the whole period of time intervening between December, 1892, when the appellee moved out of the house, and December 27, 1893, when the house was burned, the appellee's wife went daily to the house to get provisions stored and kept there. For a portion of this time, a large number of cases of canned goods, manufactured by the appellee, were stored in the house; and at the time of the fire, in addition to the trifling articles of household furniture, the clothing, and provisions that were there, some 50 odd bushels of wheat were stored in one of the first-floor rooms. There is no proof as to how the fire originated. When the evidence closed, numerous prayers for instructions were pre-

sented by the defendant, but as the fourth raises the controlling question in the case, and embodies the ultimate ground upon which the company resists payment of the demand made upon it, we need neither examine nor consider any of the others. The fourth prayer is in these words: "That there is no evidence in this case that the dwelling house that was destroyed by fire, as testified to, was occupied as a dwelling, within the proper construction of the policy of insurance offered in evidence in this case, on the 27th day of December, 1893, or that it had been so occupied at any time within ten days preceding said fire, and that no agreement permitting the property to be vacant and unoccupied was indorsed or added to the policy of insurance offered in evidence, and their verdict must be for the defendant." This, together with several other prayers, was rejected. The verdict and judgment were against the insurance company, and it has brought up this appeal.

The distinct inquiry is thus presented for the first time in this court as to what is the meaning of the terms "vacant or unoccupied," as applied to dwelling houses under fire insurance policies embodying a forfeiture clause of the kind we have said the policy sued on contains. In *Kelly's Case*, 32 Md. 421, and in *Weaver's Case*, 70 Md. 539, 17 Atl. 401, and 18 Atl. 1034, this court repudiated the principle of interpretation adopted in some cases that insurance contracts are to be construed most strongly against the underwriter, and adopted the sounder view that the intention of the parties, as gathered from the whole instrument, must prevail. What, then, is the obvious meaning of the terms "vacant or unoccupied" as applied to a dwelling house which, when insured, was inhabited or lived in? A dwelling house means a place of abode; a habitation; a house occupied or intended to be occupied as a residence. Occupation of a dwelling house primarily implies a living in it; and consequently a fair and reasonable interpretation of the words "vacant and unoccupied," when used to describe a dwelling house, would seem to be that the house is without an occupant,—without some person living in it. An actual use of the house as a place of abode or habitation is what the insurer contemplates and what the policy designs to secure. When the occupant of a dwelling house moves out with his family, taking part of his furniture and nearly all his wearing apparel, and makes his place of abode elsewhere, such dwelling house, while thus deserted, must be regarded as unoccupied,—that is, vacated,—if the word be given its natural and ordinary signification. It is the very situation against the hazards of which the company clearly undertook to guard itself, by an express stipulation and condition inserted in the very contract upon which the suit is founded. Obviously, the word "unoccupied," as applied to a dwelling house in a fire insurance policy, signifies "not used as a

residence"; and consequently a designated enement becomes unoccupied when it is no longer used for the accustomed and ordinary purposes of a dwelling or place of abode. Hence, no matter what other use it may be devoted to, so long as it ceases to be a place of actual abode,—a place really occupied as a residence or habitation,—it is vacant or unoccupied, according to the plain import of those words, and according, too, to the sense in which they are manifestly employed in the contract of insurance. It is not a mere casual or occasional sleeping in a house that constitutes an occupancy of it. The element of a fixed abode is an essential ingredient of every concept of occupancy when applied to a dwelling house, and the term "unoccupied" is employed to express the directly opposite condition. A political or a commercial residence does not necessarily involve an actual occupancy of a particular place. Such a residence is largely a question of intention; whereas an occupancy of a particular place as a dwelling is not a matter of intention at all, but purely one of fact, and is absolutely inseparable from an actual, obvious abiding or living there. The insurance policy has a manifest reference to a continuous physical condition of the house as a habitation, and not to the mental purpose or mere intention of the owner with respect to what he considers his residence. The prohibiting clause was designed to be descriptive of the thing insured in a particular that affects the hazard of the risk, and was not intended to have relation to the mere intent of the owner. If, therefore, the house be not used as a dwelling house in which people live and have their abode, it is unoccupied, even though some of the owner's property may be stored there, and even though occasionally some one may sleep there. If used for these last-named purposes, it may be a place of storage or of temporary shelter, but it is obviously no longer occupied as a dwelling house. This view is fully supported by numerous well-considered adjudications, to some of which we will now refer.

Thus, in *Herrman v. Insurance Co.*, 85 N. E. 162, the plaintiff was living in the dwelling house at the time the policy was issued. He left the place in November, leaving the dwelling furnished, and in charge of his farmer, who occupied the farmhouse (a different structure), and members of whose family visited and aired the dwelling once a week. The plaintiff and his wife also visited once a fortnight. Besides the furniture, all the summer clothing of the plaintiff and his family was left in the dwelling. In the following April, the dwelling, with its contents, was destroyed by fire. In an action upon the policy, it was held that the dwelling house was not "occupied" within the meaning of the policy, which provided that if the house should "become vacant or unoccupied, and so remain for more than 30 days, without notice," etc., the policy would

be void; and a recovery was not allowed. In *Moore v. Insurance Co.*, 64 N. H. 140, 6 Atl. 27, it was held that a dwelling house in which no one lived, but in which a former occupant had left some trifling articles of furniture, not of such a character as to be valuable for use elsewhere, was "vacant and unoccupied," within the meaning of those terms as used in the insurance policy. In *Fisbe v. Insurance Co.*, 74 Iowa, 676, 39 N. W. 87, it was held that a policy was avoided where the house, between the time that elapsed from the removal of the tenant several days before the fire, until the day of the fire, was unoccupied, except by the presence of the owner for a short time during each day for the purpose of cleaning it up. In *Bonefant v. Insurance Co.*, 76 Mich. 653, 43 N. W. 682, it was decided that "occupancy" of premises, within the meaning of a condition in a policy of insurance, implies an actual use of the house as a dwelling house; and the mere fact that the occupant may have left some one to look after it when he moved out with his furniture, and vacated it, will not save the furniture. In *Sexton v. Insurance Co.*, 69 Iowa, 90, 28 N. W. 462, it was held that insurers were not liable for loss which occurred at a time when no one lived in the house, though some articles belonging to a recent tenant and some belonging to the insured were in it at the time of the accident, and the land on which the house was situated and which was described in the policy was occupied. In *Halpin v. Insurance Co.*, 120 N. Y. 70, 23 N. E. 988, it was decided that where an insured manufacturing establishment is leased by the insured, and the tenant thereafter ceases business, leaving the building closed, and in charge of one who lives in a house on the premises some distance from the factory, and who is intrusted with the keys, and visited the premises three or four times a week, the premises are unoccupied. In *Insurance Co. v. Kyle*, 124 Ind. 132, 24 N. E. 727 (S. C., 9 Lawy. Rep. Ann. 81, with copious notes, upon which we have drawn largely), it was held that a building is "vacant or unoccupied," within the meaning of an insurance policy which declares that the insurance shall be void in case it becomes vacant or unoccupied, where a tenant has moved out, although for the purpose of letting new tenants come in, and they intended to move in the next day after the fire occurred, and had already made some repairs on the house, but nothing had been left in it but two or three carpenter's planes. In *Keith v. Insurance Co.*, 10 Allen, 228, which case arose under a policy of insurance on a trip-hammer shop, it was held that it was not sufficient to constitute occupancy that the tools remained in the shop, and that the plaintiff's son went though the shop almost every day to look around and see if things were right. So a dwelling house and barn are unoccupied if the former is used by the insured and his servants for

the sole purpose of taking meals there while working upon an adjacent farm, and the barn is a mere storage room. *Ashworth v. Insurance Co.*, 112 Mass. 422; *Reid v. Insurance Co.*, 90 N. Y. 382. In *Cook v. Insurance Co.*, 70 Mo. 610, the court said: "When this policy was issued, the plaintiff kept what witness called a 'ladies' boarding house,' and had eight girls with her. After she left the premises, there was no one living in it. She lived in Kansas City. Southwick was by her instructed to sleep in the house, but he did not sleep in it after Wednesday night next preceding the Saturday night of the fire. His sleeping there at night was not an 'occupation' of the house, within the meaning of the policy. He did not occupy the house during the day. It is true there is more danger from incendiaries at night than in the daytime, but dwelling houses unoccupied during the day are in more danger from that class than when occupied, and the abandonment of the premises by plaintiff diminished the security against the destruction of the house by fire. Occupation of a dwelling house is living in it. A mere supervision over it is not sufficient. It was plaintiff's business, under the policy, to see that the house was occupied." See, also, *Insurance Co. v. Wells*, 42 Ohio St. 519; *Sleeper v. Insurance Co.*, 56 N. H. 401; *Insurance Co. v. Zanger*, 63 Ill. 464; *Fitzgerald v. Insurance Co.*, 64 Wis. 463, 25 N. W. 785; *Stupetski v. Insurance Co.*, 43 Mich. 373, 5 N. W. 401; *Poor v. Insurance Co.*, 125 Mass. 274; *Bennett v. Insurance Co.*, 50 Conn. 420; *Insurance Co. v. Padfield*, 78 Ill. 169.

These adjudged cases, and many more that might be referred to, announce, we think, conclusions entirely in accord with the natural and obvious meaning of the words contained in the restrictive condition to which we have alluded. That the dwelling house described in the policy sued on was "vacant or unoccupied," in the sense in which those terms are employed in the policy, at the time the fire occurred, seems to us to admit of no serious controversy, notwithstanding the fact that some of the employees of the plaintiff occasionally slept there, and notwithstanding the further fact that some of the provisions of the plaintiff were kept in the house, and his wife daily visited the house, for the purpose of getting provisions therefrom.

But it was insisted that the fourth prayer should not have been granted, because at least some of the personal property contained in the house was covered by the policy, and that the forfeiture of the policy as to the risk upon the house did not involve or carry with it a forfeiture as to the personal property. This position is wholly untenable. When the policy became void because of the nonoccupancy of the house, it became void as an entirety. It was an indivisible and entire contract, and when, by its express terms, it became invalid, it became

invalid for all purposes and to all intents. The stipulation in regard to the forfeiture is applicable to the policy as an entirety. This is settled in Maryland beyond contention or controversy. *Bowman v. Insurance Co.*, 40 Md. 632.

Nor can the fact that the loss was, by indorsement, made payable to the mortgagees, as their interest might appear, at all affect the question before us. When a loss has happened that is covered by a valid policy, it is possible that a controversy may arise as to whether a payment has been rightly made to the insured when the policy has prescribed that the loss shall be payable to the mortgagees, as their interest may appear. In such cases it has been held that the insured has no authority, by an accord and satisfaction between himself and the company, to defeat the right of the mortgagees from recovering the amount due under the policy. *Hathaway v. Insurance Co.*, 134 N. Y. 409, 32 N. E. 40. But here the validity of the policy is made to depend upon the insured continuing to occupy the premises, and no matter to whom the loss may be made payable, it cannot be recovered by any one if, by the terms explicitly set forth in the policy, no right of action can accrue at all upon the violation of some specific condition, whose observance by the insured is made necessary to fix the insurer's liability.

As we think the circuit court erred in refusing to grant the appellant's fourth prayer, the judgment in favor of the appellee must be reversed; and, as this view of the case is decisive against the right of the appellee to recover at all, a new trial will not be awarded. Judgment reversed, with costs above and below.

COPP v. DE RONCERAY.

(Court of Appeals of Maryland. Dec. 5, 1895.)

SALE OF LAND—PROVISION FOR REFUNDING MONEY—NOTICE.

Notice is given, within the provisions of a contract for sale of land,—that money paid would be refunded if notice in writing was given the vendor "between the first and fifteenth days of June,"—where the vendee on June 1st sent a letter making the demand, and followed it by a letter of June 5th stating that, in accordance with the contract, she on June 1st delivered to the vendor's clerk, for him, a notice, and asking if he had received it, and he on June 7th sent a letter stating that he had received both letters.

Appeal from circuit court, Montgomery county.

Action by Marie Estelle De Ronceray against Henry N. Copp. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before BRYAN, FOWLER, BRISCOE, and ROBERTS, JJ.

Samuel D. Luckett, H. M. Talbott, and W. H. Talbott, for appellant. Thomas Anderson and W. Veirs Boulc, for appellee.

BRISCOE, J. Miss De Ronceray, the appellee, brought suit in the circuit court for Montgomery county against Henry N. Copp, appellant, and recovered a judgment for \$800.-31. with interest from March 22, 1895. The suit was instituted upon a written contract, under seal, for the conditional sale of certain lots in West End Park, near Rockville, in Montgomery county. There is but a single question raised by the pleadings in the cause, and it arises upon the following clause of the contract: "It is further agreed by said Henry N. Copp to refund the purchase money paid prior to June 1st, 1894, on the following terms and conditions: The lot purchaser must have complied strictly with the terms of sale herein prescribed, up to and including the month of May, eighteen hundred and ninety-four, and paid each and every installment due, to said month, inclusive, personally or by representative. The lot purchaser thereupon must present to said Henry N. Copp or his representatives, in writing, between the first and fifteenth days of June, 1894, a request for the return of the purchase money paid theretofore. This shall not include commission, credits, or sums paid as fines for delay in making payments. No excuse whatever will be accepted for failure to give the written notice aforesaid between the first and fifteenth days of June, 1894, and all who do not give said notice as above specified will be forever barred." The declaration alleges a compliance with the terms of the contract as to the payment of the purchase money, and a written request for a return of the money between the 1st and 15th days of June, 1894. And the only plea interposed on the part of the defendant is that the demand for the return of the money was not made at the time specified in the contract. It is conceded that the appellee complied with the terms of the contract in the payment of all the monthly installments from the date of the contract, and including the installment for the month of May, 1894. And certain letters from the appellee to the appellant, dated the 1st and 5th of June, 1894, respectively, and a reply thereto, dated the 7th of June, 1894, from the appellant, are in proof, as evidence of a demand under the contract. The court below, sitting as a jury, ruled, as a matter of law, that the letter dated June 1, 1894, and the letters dated June 5 and June 7, 1894, were a sufficient compliance, as to notice, with the requirements of the contract, to entitle the plaintiff to have the money refunded to her, and that the plaintiff was entitled to recover. And the contention of the appellant here is that the court erred in granting the plaintiff's prayers, because a demand made on June 1, 1894, was not a compliance with the terms of the contract, requiring a demand between the 1st and 15th of June, 1894. The prayers, however, it seems to us, are free from objection, and contain the law of the case. It is well settled, as a general rule, that, in the sale and purchase of real estate, the fixing a particular day for the completion of the contract is not regarded as of

the essence of the contract. The parties may make it so, in express terms, or it may be implied; having in view the nature and character of the property, and the object with which it is bought. It is, after all, says this court in *Gilman v. Smith*, 71 Md. 174, 17 Atl. 1035, a question of intention. But, under the facts of the case now under consideration, even assuming that time was of the essence of the contract, we are clearly of the opinion that this condition of the contract was complied with. The letter of June 1st, written by the appellee, made a formal demand for the return of the purchase money in accordance with the terms of the contract, and was amply sufficient. This was followed, however, by a letter of June 5th, of the same year, in these words: "In accordance with our agreement of March 6th, 1890, I, on Friday last, June 1st, delivered to one of your clerks, Miss Gilbert, for you, a formal notification of my withdrawal from said agreement. Will you have the kindness to inform me if you have received this." And upon this letter the appellant wrote on June 7th: "I beg leave to reply that your notice of June 1st was received on the day specified. Shortly after the 15th instant I will formally reply, when I know the number who intend to apply for refund." The letter of the 5th of June, 1894, makes the demand of June 1st a part of that letter, and was equivalent to a demand in writing as of the 5th of June, 1894, and a compliance, in respect to time, with the condition of the contract. But, apart from this, the letter of the 7th of June, which acknowledged the receipt of the letters of June 1st and of the 5th of June, 1894, was clearly the recognition of a demand in the possession of the appellant as of the 7th of June, 1894. And whether the demand be considered as of the 5th or of the 7th of June, 1894, it is not necessary for us to consider, for the purposes of this case, because in either event it would be a sufficient notice, and a compliance with the contract, as to time. Being, then, of opinion that the demand, under the facts of this case, for the payment of the money, was sufficient, under the contract, to entitle the plaintiff to recover, the judgment will be affirmed. Judgment affirmed, with costs.

GADD et al. v. COMMISSIONERS OF ANNE ARUNDEL COUNTY.

(Court of Appeals of Maryland. Dec. 6, 1895.)

APPEAL—CIRCUIT COURT—WHEN LIES.

An appeal does not lie to the supreme court from a judgment of the circuit court on appeal from an order of the county commissioners dismissing a petition for the abatement of an assessment.

Appeal from circuit court, Anne Arundel county.

Petition by Luther M. Gadd and George T. Melvin against the county commissioners of Anne Arundel county for abatement of an assessment. From a judgment of the circuit court dismissing plaintiff's appeal from an

order of defendants dismissing the petition, plaintiffs appeal. Dismissed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, and BOYD, JJ.

Daniel R. Magruder and James W. Owens, for appellants. F. Eugene Wathen and Robert Moss, for appellee.

FOWLER, J. The appellants are the owners of the property known as the "Maryland Hotel," located in the city of Annapolis. They applied by petition to the county commissioners of Anne Arundel county for an abatement of the assessment on said property, upon the ground that, while it was assessed at the sum of \$30,000, the petitioners had purchased it for \$16,000, and they prayed to have the assessment reduced to the last-named sum. This petition was dismissed by the county commissioners, whereupon the petitioners appealed to the circuit court for said county. The county commissioners appeared in that court, and moved to dismiss the appeal which had been taken from their order dismissing the said petition. Subsequently the petitioners asked leave of the court below to amend their petition by inserting therein the averment that the said property has diminished largely in value since the last levy, etc., which was refused. Thereupon the court below dismissed the appeal, and the petitioners appealed to this court.

Assuming, without deciding, that the circuit court had jurisdiction to entertain the appeal from the order of the county commissioners refusing to make the abatement prayed, it is very clear that the action of said court is final and conclusive. It has been the long-settled law of this state that where the circuit courts of this state are clothed with a special jurisdiction, and no appeal to this court is provided for by statute, their judgments are final. *Condon's Case*, 8 Gill & J. 443; *Webster v. Cockey*, 9 Gill, 92; *Lammott v. Maule*, 8 Md. 5; *Kinnear v. Lee*, 28 Md. 488; *Worthington v. Herron*, 39 Md. 145; *Margraff v. Cunningham*, 57 Md. 585. Section 81, art. 5, Code, on which the appellants rely to sustain their right to appeal to the circuit court, makes no provision for an appeal to this court, and therefore none exists. *Swann v. Mayor*, etc., 8 Gill, 150. Appeal to this court dismissed.

WHEELER v. STIFLER.

(Court of Appeals of Maryland. Dec. 6, 1895.)

ORPHANS' COURT—APPOINTMENT OF ADMINISTRATOR—JURISDICTION.

Under Code, art. 93, § 44, providing that if a sole executor was present at the probate of the will, and failed to qualify, or was not present, but was in the state, and failed to appear after being summoned, letters may be

granted as in case of intestacy, the orphans' court has no jurisdiction to appoint an administrator with the will annexed in the absence of a showing that the executor was present at the probate, and failed to qualify, or, if not present, was summoned and failed to attend, or was out of the state, or had become disqualified.

Appeal from orphans' court, Harford county.

Henry G. Wheeler appeals from an order of the orphans' court appointing J. Royston Stifler administrator with the will annexed of the estate of William L. Wheeler, deceased. Reversed.

Argued before ROBINSON, C. J., and BOYD, McSHERRY, and FOWLER, JJ.

Thos. H. Robinson, J. H. Streett, and Wm. H. Harlan, for appellant. George Y. Maynard, for appellee.

FOWLER, J. This is an appeal from the orphans' court of Harford county, and the question which it was intended to have us pass upon we cannot entertain, because it is apparent from an examination of the record that the order appealed from was passed without jurisdiction. The appellant and appellee both claimed the right to be appointed administrator with the will annexed of the late William L. Wheeler. It appears, however, that the validity of the will of the testator was established by the decree of this court in the case of *Devoe v. Singleton*, 80 Md. 68, 30 Atl. 614. By this will Martha M. Singleton was appointed sole executrix. By the order appealed from the appellee was appointed administrator c. t. a., without any notice to the executrix named in the will. It is provided by Code, art. 93, §§ 43, 44, that if such executor be present at the probate of the will, and shall not within 30 days thereafter qualify, letters may be granted as in cases of intestacy. But if such executor shall not have been present at the probate, but was in the state, he may be summoned at the instance of any one interested, or, ex officio, by the orphans' court, or, in their recess, by the register of wills, and on failure to attend on being summoned as provided by said sections, or appearing and failing to qualify as therein required, letters may be granted as in cases of intestacy. The will was admitted to probate on the 4th December, 1894, but there is nothing to show that the executrix named in the will was present at the probate, or was summoned, or out of the state, or that she had been duly declared a lunatic. It is true, she is alleged to be lunatic and insane, but there is no evidence to show she has been so declared by any tribunal having jurisdiction so to do. Under these circumstances, it is clear the order appealed from was improvidently passed, and that the court below was without jurisdiction. Order reversed and cause remanded.

NEW et al. v. TAYLOR et al.

(Court of Appeals of Maryland. Dec. 5, 1895.)

APPEAL—DISMISSAL.

An appeal from a judgment for defendant for costs, in an action tried to the court, will be dismissed, in the absence of a bill of exceptions.

Appeal from circuit court, Queen Anne's county.

Action by P. New & Sons against Charles Taylor and others. From a judgment for defendants for costs, plaintiffs appeal. Dismissed.

Argued before BRYAN, McSHERRY, BRISCOE, ROBERTS, and BOYD, JJ.

Ralph Robinson, William Penrose, and J. H. C. Legg, for appellants. P. B. Hopper and B. Palmer Keating, for appellees.

BRISCOE, J. The appellants brought suit in the circuit court for Queen Anne's county against the appellees, and, the judgment being for defendants for costs of suit, the plaintiff has appealed. It appears from the record that, on the 7th of May, 1895, what purports to be an agreed statement of facts was filed in the case, and on the 10th of May of the same year, the issues being made up, it was agreed to submit the case for trial to the court, and, after the hearing of evidence, the court directed a judgment to be entered for the defendants' costs of suit. The docket entries are as follows: "Sums in case; nar. and note; rule plea; pleas; rule repl.; agreed statement of facts; motion for severance, and motion allowed; trial before the court May 10, 1895; verdict for defendants; judgment rendered on verdict for \$8.85, defendants' costs of suit; and on 9th of July, 1895, order for an appeal." There is no bill of exceptions, however, in the case, bringing the court's rulings before us for review. The appeal is simply from the finding of the court, and it is well settled that, where the court hears the case as a jury, its conclusion, like that of a jury, is subject to no appeal. *Sheppard v. Willis*, 28 Md. 631. While it is true that a prayer offered on the part of the plaintiff appears to have been refused by the court, yet there is nothing to show that an exception was reserved to this ruling, nor to any ruling made during the trial of the case. No bill of exceptions has been sent up with the record, nor is there anything in the transcript showing that any exception was taken in the court below; nor does the record set out the evidence taken at the hearing of the case, except the agreed statement of facts, which were filed on the 7th of May, three days before the case appears to have been submitted and heard by the court. "The practice is too well settled, now, to be disturbed," says the court, in *McCullough v. Biedler*, 66 Md. 284, 7 Atl. 454, "that, when cases are tried before the court without a jury, the court may and ought to be asked to decide any legal proposition

which either party may think essential to his case; and, if he desires to appeal, he should make the court's rulings thereon the basis of his exception;" and the questions should be submitted on appeal by bills of exceptions. *Trustees v. Browne*, 39 Md. 160; *Jackson v. Commissioners*, 66 Md. 459, 7 Atl. 563. And as that was not done in this case, and there being no legal questions before us to review, or which we can review, this appeal will be dismissed. Appeal dismissed, with costs.

MAYOR, ETC., OF BALTIMORE v. FRICK et al.

(Court of Appeals of Maryland. Dec. 6, 1895.)

HIGHWAYS—DEDICATION—EXTENT—ACCEPTANCE AND USER—LAPSE OF TIME.

1. A conveyance of lots as bounding on a street, laid out over the grantor's land on a public or private plat but not opened, is, as against the city seeking to take the land occupied by the street for street purposes without compensation, a dedication of only so much of the land occupied by the street, in either direction, as will enable the grantee and his successors to reach some other opened or unopened public way.

2. Where land was clearly dedicated for a street, it was not necessary that it should be accepted by the public, or used for that purpose, within any limited time, in the absence of a condition to that effect, and hence mere lapse of time of 23 years, without acceptance or user, did not constitute an abandonment.

3. The facts that the bed of the street was from time to time dug up for clay, and that a brickkiln was located on a part thereof for 18 years, did not nullify the dedication.

Appeals from Baltimore city court.

Appeals by Achsah C. Frick, the Safe-Deposit & Trust Company of Baltimore, and G. William Thompson, Achsah C. Frick, trustee, James B. Newbold, Robert S. Carswell, and Riley E. Wright, from the action of the commissioners in the opening of a street by the city of Baltimore. The five appeals were consolidated, and tried by the court without a jury, and from the judgment rendered therein, the respondent and all the appellants appeal. Reversed.

Argued before ROBINSON, O. J., and BRISCOE, ROBERTS, BOYD, BRYAN, McSHERRY, and FOWLER, JJ.

Wm. S. Bryan, for appellants. Thomas B. Mackall, S. D. Schmucker, George Whitelock, and Henry Stockbridge, for appellees.

FOWLER, J. The questions here presented arise upon the appeals of certain landowners from the action of the Baltimore city court in awarding damages and benefits in the matter of the opening of Bayard street in that city. No objection has been made to the inquisition by reason of the amounts of damages awarded or benefits ascertained. On the contrary, it is conceded that both are properly estimated and set forth in the inquisition, unless it should be ascertained that the land to be taken had already been dedicated to public use, in which case, of course,

the landowners could claim no damages. In addition to the first prayer of the property owners, which was granted, by which it was held that no part of Bayard street, as condemned, had been dedicated by the lease, which will presently be referred to, they asked the court again to declare, as law, the identical proposition which had already been adopted by granting their first prayer. After the court had declared that no part of Bayard street had been dedicated, it was asked, also, to say that the part of said street between Herkimer street and Columbia avenue had not been dedicated. The first prayer having been granted, it would seem to have been unnecessary to incur the record with the other instructions. And, no doubt, this was the view entertained by the learned trial judge, who, as we have seen, granted the first and refused the other prayers. It is from those rulings that the six appeals now before us were taken; the city appealing from the granting of the first, and the property owners from the refusal to grant the second and third, prayers. It will thus be seen that the only question presented is that raised by the first prayer, namely, whether the lease from Carroll to Porter & Davis, of March 16, 1872, construed with reference to the facts and circumstances surrounding the transaction and given in evidence, establishes an intention on the part of the lessor to dedicate the bed of Bayard street, as proposed to be condemned, or any part thereof, to the public use, and, if any part thereof, how much was so dedicated.

The doctrine of the dedication of land as and for a highway for the use of the public has been so frequently the subject of consideration by this court that we think it needless, now, to enter into any general discussion of the principles applicable to cases of this kind. Indeed, it has been found that it is very difficult to lay down any general rule applicable to all cases. It has been said "that each individual case must be decided by itself, taking into consideration all the attendant circumstances, the condition of the respective parties, and the acts, declarations, and intentions of the landowner, as manifested by his conduct; for it is largely on the ground of estoppel in pais that the principle of dedication rests." It has been held, therefore, in many cases (*Dovaston v. Payne*, 2 Smith, Lead. Cas. 142, where the authorities are collected), as well as in a number of cases in this state, that it is very strong evidence of dedication where lots are sold and conveyed, laid out on a map or plat with a road or street running by them, and designated as a street on such a plat (*White v. Flannigan*, 1 Md. 540; *Moale's Case*, 5 Md. 321; *Hawley's Case*, 33 Md. 280; *Tinges' Case*, 51 Md. 600; *McCormick v. Mayor*, etc., 45 Md. 523; and others not necessary to cite). It does not appear, from any of these cases, that the map or plat on which the street or public way may be laid out must

be made a part of, or referred to by, the deed or lease or other conveyance of the land under which the dedication is claimed to have been made; for the settled rule appears to be that, if the lot is described as fronting or bounding on a street which is designated on a public map or private plat, such description, calling for an unopened street, raises an implied covenant that such right of way exists, and the presumption of dedication becomes conclusive, unless, as in *Pitts' Case*, 73 Md. 326, 21 Atl. 52, and some others, there is language used by the grantor in his conveyance to show that no dedication to public use was intended. Applying this rule to the lease under consideration, let us examine its provisions. We find that the lot thereby conveyed, which includes all the lots owned by the appellant landowners, is described as bounding on Bayard street. It is admitted that, at the time this lease was executed, there was a private plat in existence on which Bayard street was laid out as now proposed to be opened, and as said street was laid out on the plat used in the partition case of *Carroll v. Carroll*. A copy of this last-named plat is also before us as part of the record. We cannot agree that the plat, referred to as existing at the time the lease was made, was not sufficiently brought home to the lessor, James Carroll. Whether he had the plat before him, or not, when the lease was made, does not appear; but it would seem to be reasonably certain that he and all parties interested were well acquainted with the then location of Bayard street. In his lease he locates it precisely as it is located on both plats, and his description calls for it, and gives the exact number of feet and inches between Herkimer and Bayard streets, and would be faulty and imperfect if, as is now claimed, the latter street had never been located and dedicated by him. The lessor at one time owned all the land between Bayard street and Columbia avenue, and his heirs and devisees subsequently adopted, in the partition case above referred to, the location of the former and other streets as they appeared on the plats. It will not do, therefore, to say that, because it is not shown by any affirmative testimony that a plat was before the lessor when his lease was made, therefore the lease was made without regard to it, for it is apparent that the lessor was fully informed as to the location of Bayard street on the plat, and that he drew his lease accordingly. Nor do we find anything in the lease which will prevent the operation of the rule above mentioned,—that the sale and conveyance of a lot or lots bounding on a street which is laid out on a public or private plat raise an implied covenant that such street shall be opened to the public use, and become a public highway.

But, in the second place, it was contended by the city that the whole bed of Bayard street, from Ohio avenue to Columbia ave-

nue, had been dedicated to public use by the said lease and its recitals. We cannot, however, agree to this. It appears to us clear that only so much of Bayard street was dedicated in each direction as would enable the owners of the leased lot and their successors in title to reach some other street or public way; that is, from Ohio avenue to Herkimer street. The ruling in *Hawley's Case*, supra, we consider conclusive upon the question of the extent of the dedication. This court there said that "the doctrine of implied covenants will not be held to create a right of way over all the lands of a vendor in the bed of the street. The lands must be contiguous to the lot sold, and there must be some point of limitation. The true doctrine, as we understand it, is that the purchaser of a lot calling to bound on a street not yet opened by the public authorities is entitled to a right of way over it, if it is on the land of his vendor, to its full extent and dimensions, only until it reaches some other street or public way." And in this case the dedication, under the above rule, would extend from Ohio avenue to Herkimer street, both of which are streets or public ways; the former being open and in use by the public, while the latter has been dedicated to the public, but has never been used by it for a public way. The contention that the street which limits the extent of the dedication must be an open, public street is not supported by the cases heretofore decided by this court. In *Hawley's Case*, supra, the land over which the right of way is given, it is said, must not be remote, but contiguous to the lot sold; but, if the contention of the city—that in all cases we must presume a dedication of a right of way over the grantor's land until the next or nearest open street is reached—be correct, such right of way would in many cases extend over land, not only not contiguous to, but very remote from, the lot sold. No distinction has been made by this court, in any of the cases referred to, in applying the rule just mentioned, between an open and used street, and one not open, but the general rule has been always announced without reference to the limitation suggested now for the first time. We are not disposed to give this rule such a construction that it may work an injustice to the landowner by taking his land for public use without compensation. No one should be thus deprived of his property, on the ground of a dedication, unless there has been some clear and decisive act indicating an intention to dedicate to public use. *McCormick's Case*, 15 Md. 527. And hence the city, which is here claiming exemption from the payment for land taken for a public street, will not be allowed to stand upon a mere presumption or upon a rule of construction that the grantor's deed must be taken most strongly against him. On the contrary, it is incumbent on the city to establish, clearly and beyond doubt, that the dedication has been

made, and that, too, to the extent claimed; and, having failed in this, its contention must fall as to that part of Bayard street which lies below Herkimer street and Columbia avenue.

The remaining question is whether, conceding there was a dedication of any part of the bed of Bayard street, there has been an abandonment by the public. It was urged on the part of the landowners that, inasmuch as there has been neither acceptance nor user by the public, the dedication, if any, never became complete, and that this continued nonuser for 25 years amounts to and constitutes an abandonment. This view, however, is not consistent with what was said by this court in *McCormick's Case*, supra,—Alvey, former chief judge, delivering the opinion: "In the case of a clear act of dedication as for a street, it is not essential to the validity of such act that the space thus dedicated should, at once, be used by the public for that purpose, or that it should be so used within any limited time, in the absence of any condition to that effect." This being so, it follows that the dedication of Bayard street between Ohio avenue and Herkimer street by the lease of 1872 was perfect and complete, without either acceptance or user by the public. And inasmuch as the public is not bound to avail itself of its rights under the dedication within any limited time, it would not be reasonable to hold that such rights have been lost by the mere lapse of time, without any other evidence of abandonment. Nor are we willing to go to the extent of holding, as contended, that because the bed of Bayard street has been from time to time dug up for clay for making bricks, and because a brickkiln was located on part of the bed of said street, until 1890, the effect of the original act of dedication has been nullified. In *Elliott on Roads & Streets* (page 669), the learned author says that the rule best supported by reason and authority is that the common right of highway cannot be lost by the attempted adverse possession of a private individual. But the question of the effect of adverse possession on the rights of the public, obtained under a valid and clear act of dedication, is not directly presented here, for the facts above mentioned were relied on only for the purpose of showing, for which purpose they cannot be relied on, if we are to be guided by what was said in *McCormick's Case* as to the effect of the original act of dedication.

It follows that the first prayer should have been refused, because by it the court below declared that no part of Bayard street was dedicated by said lease, while our conclusion is that, by the true construction of said lease, the bed of said street between Herkimer street and Ohio avenue was so dedicated. The second prayer was covered by the first, and for that reason was, therefore, properly refused. The third prayer announced the

correct rule of law, namely, that the bed of Bayard street, between Herkimer street and Columbia avenue, had not been dedicated by said lease, and said third prayer should have been granted. It follows that there was error in granting the first prayer, and in refusing to grant the third prayer. Hence, the rulings upon the first and third prayers must be reversed. This cause will be remanded, in order that further proceedings may be had in accordance with this opinion. Rulings in all the appeals reversed, and cause remanded.

STATE v. CHIPPEY.

(Court of General Sessions of the Peace and Jail Delivery of Delaware. Sept., 1892.)

CARRYING DEADLY WEAPON—EVIDENCE.

Where a weapon is taken from one person and given to another, to keep temporarily and return to the owner, and is only kept a few moments, such person is not guilty of carrying concealed a deadly weapon.

Watson Chippey was indicted for carrying concealed a deadly weapon. Acquitted.

Branch H. Giles, Dep. Atty. Gen., for the State. William S. Hilles, for defendant.

CULLEN, J. (charging jury). Watson Chippey stands charged in this indictment with the violation of the statute against carrying concealed a deadly weapon. It is necessary, gentlemen, for us to say to you that this indictment is under a special statute, which has been passed by the legislature for a very wise and useful purpose; and, in order that you may understand this case, it becomes necessary for the court to put a construction upon that statute. Every statute has some purpose and meaning. The object of this statute is to prevent the carrying of concealed deadly weapons about the person, because persons becoming suddenly angered, and having such a weapon in their pocket, would be likely to use it, which in their sober moments they would not have done, and which could not have been done had not the weapon been upon their person. In order that a person may be convicted under this statute, the spirit and intent of the statute must be violated. Where a person, for instance, in walking along the road, picks up a pistol and puts it in his pocket, or if a man buys a pistol, puts it in his pocket, and carries it home, the act never contemplated that he would be guilty of carrying concealed a deadly weapon, because this is not so carrying a deadly weapon. The mere fact of the person's putting it in his pocket and carrying it home is not a violation of this statute. You have heard the testimony, and from that testimony you must make up your minds whether or not this person is guilty. In the intent and meaning of the statute, was the person carrying concealed a deadly weapon? Was he doing it as a matter of habit? Was he concealing the weapon which he

would be likely to use, which the statute is intended to prevent? Those are matters for you to determine. There is testimony, if you believe it, that this person was not the owner of the pistol; that it came into his possession under peculiar circumstances; that it was taken from another person and given to him; that he intended to keep this weapon and restore it to its owner. In other words, the weapon was but for a few minutes in the possession of the person,—not with the intent of carrying concealed the deadly weapon, but with the intention of keeping the weapon, which for the time being was necessarily kept in his pocket. If you believe that testimony, then, under the provisions of this statute, he was not carrying concealed a deadly weapon, for the time being. If a man is drunk and is likely to do some violent act, and you take his pistol from him and thrust it in your pocket, and while grappling with him, he having hold of you and you trying to get loose, a man comes up to you and takes it from you, you are not, according to the meaning and spirit of this act, carrying concealed a deadly weapon. If you believe this testimony offered here, then this person cannot be convicted. If, on the other hand, you believe from the testimony adduced on the part of the state that this man had this pistol—It matters not where it came from; if he goes to a store and buys a pistol, not for the purpose of carrying the pistol home, but buys it and puts it in his pocket with the intention of carrying it, and is found there with that pistol upon him, and that with the intention of concealing it, then he is carrying concealed a deadly weapon. But you must take the facts and circumstances into consideration, and, according to its meaning, make an application of this statute to them. This case presents just that state of facts, exactly, and we have given you the interpretation to be placed upon this statute. If there should be any doubt in your minds—any reasonable doubt—as to the person's being guilty of this offense, then he would, of course, be entitled to the benefit of the doubt.

Verdict: "Not guilty."

STATE v. NORTON.

(Court of General Sessions of the Peace and Jail Delivery of Delaware. Sept., 1892.)

GAMING—INDICTMENT.

Under Rev. Code 1874, p. 786, providing for the suppression of gambling, an indictment charging the defendant with "unlawfully keeping and exhibiting a sweat cloth, on which dice were played for money," is sufficient; an allegation that the game was one of chance being unnecessary.

Prosecution by the state against Oscar Norton. The defendant was indicted for "unlawfully keeping and exhibiting a sweat cloth, on which dice were played for money," the indictment being drawn under Rev. Code 1874, p. 786, providing for the suppression of gambling.

sion of gambling; and defendant moved that the indictment be quashed on the grounds (1) that it does not appear therefrom that a game of chance was played; (2) that the detective says defendant was running a game of "sweat"; and (3) that there is no such game as "dice."

Branch H. Giles, Dep. Atty. Gen., for the State. John Biggs, for defendant.

CULLEN, J. In the first place, in order to sustain this indictment, there must be shown a keeping and exhibiting of some one of the articles mentioned in the act of assembly; and, in the next place, the proof that there had been, by and through that particular instrument, either the playing of cards, playing of dice, "or any other game of chance, for money." We think the indictment is sufficient.

Mr. Biggs, for the defendant: I understand your honors to rule that they do not have to allege that it is a game of chance?

CULLEN, J. No; chance is one thing, dice is another, and cards is another.

STATE v. DAVIS.

(Court of General Sessions of the Peace and Jail Delivery of Delaware. May, 1892.)

PROSTITUTION — TAKING AND USING CHILD FOR — INDICTMENT.

The offense made punishable as a misdemeanor by Act March 29, 1889 (18 Del. Laws, p. 951), of taking, receiving, employing, harboring, or using a female under 15 years of age for the purpose of sexual intercourse, is committed by a woman who keeps and uses such a child for the purpose of prostitution.

Indictment against Martha E. Davis, alias Martha E. Blizzard, for taking and using a child under 15 years of age for the purpose of sexual intercourse. Verdict of guilty, with a recommendation to the mercy of the court.

Branch H. Giles, for the State. Mr. Carpenter, for defendant.

CULLEN, J. (charging jury). This is an indictment against Martha E. Davis, alias Martha E. Blizzard, for a violation of the provisions of a statute of this state passed the 29th of March, 1889, entitled "An act for the better protection of female children" (18 Del. Laws, p. 951). The defendant in this indictment is charged in the first count with the using, and in the second count with the taking, a child under 15 years of age, and using, against the provisions of the statute, for the purpose of sexual intercourse. We have been asked to charge you in relation to the provisions as contained in this act with reference to the indictment itself as supporting the allegations upon which the state contends for a conviction. It is contended on the part of the counsel for the defense that the party as charged in

this indictment is not liable under the provisions of this statute. It therefore becomes necessary for us to give you our views as to the construction to be put upon this statute, and as to whether the allegations in this indictment, if proved, are sufficient for you to render a verdict of conviction, under this statute. This statute, you will observe, contains two distinct and separate provisions. The first provision is: "Whoever takes, receives, employs, harbors, or uses, or causes or procures to be taken, received, employed, harbored, or used a female under the age of fifteen years for the purpose of sexual intercourse," etc. And the second provision is: "Or whoever being proprietor or proprietress of any house of prostitution, reputed house of prostitution, or assignation, house of ill-fame, or assignation, harbors or employs any female in any such house, under the age of fifteen years, under any pretext whatever, shall be deemed guilty of a misdemeanor," etc. This indictment is framed under the first provision of this statute, and therefore it is not necessary to speak with regard to the second provision of the same, as it has no reference to this immediate indictment; for the defendant must be convicted of the violation of this statute, if at all, under the first provision; otherwise, she must be acquitted.

There appears never to have been any construction put upon this statute by the courts in our state. It is contended on the part of the defendant's counsel that the meaning of this act is that a party who uses a child under 15 years of age, in order to be found guilty under the provisions of the statute, must use it for his own special purpose of having sexual intercourse with that child, and that, therefore, none but a male can be convicted under this provision of the statute. Gentlemen, the court don't think so. We cannot put that construction upon this statute, and it never was intended that such a construction should be put upon it. In the construction of a statute you may look not only to what is called the "preamble" (in this there is no preamble), but you may look to the title of the act, not with reference to its immediate construction, but as showing what was the object of the legislature in passing it. The title, as we have seen, is "An act for the better protection of female children." We must also construe an act by using the words according to the general usage. If it is a penal act, then it must be construed strictly in accordance with the meaning; and, if the terms are ambiguous, it may become necessary to take the whole statute together for ascertaining the true meaning; but, where the words employed are words relative to the meaning of which there can be no doubt, then there ceases to be any trouble in interpreting a statute. If the act stopped where it says "uses a female child under fifteen years of age for the purpose of sexual intercourse"

(In the first part of the act), then it would admit of the construction that whoever did this did it for his own special purpose; but you cannot strain an act by adding to those words "for the purpose of" the words "his own particular purpose." The act not only embraces that particular class, but "whoever causes or procures to be taken, received, employed, harbored, or used"; implying the case in which the party does not take, harbor, or use himself or herself, but that the female child, for a special purpose, has been used, received, employed (not by the immediate party, under the construction), for the purpose of sexual intercourse. What is the general construction that should be put upon those words "for the purpose of sexual intercourse"? It is nothing more nor less than for the purpose of prostitution. Looking back to the title of the act, we find that it has reference, beyond all question, to preventing the prostitution of children, using the words "for the purpose of sexual intercourse" as synonymous and equivalent with the words "for the purpose of prostitution."

Much stress has been placed here by the counsel for the defense upon the term "use,"—"whoever shall use for the purpose of sexual intercourse," as confining the word "use" so that it cannot be a female, and that it can only be the party who immediately uses the child for that purpose. When we turn to the definition of the word "use," we find it is to make use of: to convert to one's own service; to avail one's self of; to employ; to put to a purpose,—as to use a plow, to use a chair, to use a book, to use time, to use flour for food; to accustom; to habituate, etc. We must use the plain terms which are applicable to that word. It means in this statute that where a party shall take a child or use a child for the purpose of sexual intercourse. It does not have reference to the one that immediately uses her. It may be a male, or it may be a female. In the first case, the female, as a matter of course, could not be convicted as far as a male; but, where a female takes a child and uses it for the purpose of sexual connection (using the word according to the construction the court place upon it), she would be guilty of this offense.

Then, again, you will observe that the statute provides that "whoever takes, receives, employs, harbors or uses." If the evidence be sufficient to prove that the party charged was guilty under any of those instances of taking, harboring, using, employing, etc., either one would be sufficient. It reduces itself down to this: that this indictment is sufficient under which to convict the party charged with this offense if the proof as made in this case is sufficient to satisfy you that the girl was in the possession of the defendant, and that she was under 15 years of age. If the child was under 15 years of age, the defendant was bound to know it. She has no right to prove ignorance of that

fact. As far as the proof is concerned with regard to that matter, if not admitted, there is no contradiction as to her true age. It is true there is some proof as to what she said in relation to her own age,—and, of course, the child knows nothing as to her own age,—but the physician testifies in this case that she was born on the 18th day of August, 1879. Therefore, there can be no question that this child, at the time she went into that house, was under 15 years of age. In order to make complete this offense, the gist of the offense is in the using of this child for immoral purposes; in other words, using the terms of the act, "for sexual intercourse,"—synonymous with immoral purposes or prostitution. If, then, from the proof you are satisfied—under whatever pretense the child went there, whether she went there herself, whether taken there for any purpose—that, after she was there, this defendant converted to her own use the services of this child, by subjecting her and keeping her for the purpose of sexual intercourse (immoral purposes of prostitution, which amount to the same thing, according to the construction we place upon this act), then, under those circumstances, your verdict should be, "Guilty in manner and form as she stands indicted."

Having stated to you the construction of this statute, we would further say that, before there can be a conviction, the facts as stated in the indictment, according to the law, must be proved to your satisfaction beyond a reasonable doubt. As far as the testimony is concerned, it is not the province of the court to say what construction you are to place upon that. There is testimony here which is conflicting. There are witnesses who testify directly contrary the one to the other. That testimony you are to reconcile, if you can. If you cannot reconcile this, and if, after an examination of the testimony on both sides, there arises in your minds a doubt of such a nature and character that as intelligent men, carefully considering it, you cannot safely come to a conclusion as to whether or not the party charged is guilty of the acts which have been stated here in this case, then she should have the benefit of that doubt, and you should acquit her.

Her counsel has asked us to charge you in relation to this matter of the evidence of keeping a house of ill fame. We say to you that, under the proof, a party may be convicted of this offense if he should live in the finest palace that is in this city, provided the child was under 15 years of age, and was kept there in the house for sexual intercourse by anybody whatever, which we say is nothing more nor less than prostitution. But, under this indictment, the proof was admitted, not as being necessary to make complete the offense against this prisoner, but as corroboration; that is, the fact that this party lived in this house,

which was a noted house of ill fame, strengthened the charge made against her of using this child for the purpose of sexual intercourse.

The testimony rests with you entirely. You will consider it in all its bearings, and render your verdict accordingly. If you believe that this party is guilty as indicted,—that this child went to this house, and that the defendant induced her to be too intimate with men, to be guilty of having sexual intercourse with certain men, receiving part of the profits, putting it in her own pocket,—then, under the provisions of this act, the court say to you that your verdict should be one of guilty in manner and form as she stands indicted, because it was using a female child under 15 years of age for sexual intercourse, or prostitution. If, on the other hand, you believe the testimony on the part of the defendant as contradictory of that of the state, and it renders the evidence of such a nature as to make it so exceedingly doubtful and uncertain that fair and intelligent men cannot come to a fair and satisfactory conclusion, then you should give the prisoner the benefit of that doubt, and acquit her.

Verdict: Guilty, with a recommendation to the mercy of the court.

STATE v. SMITH.

(Court of General Sessions of the Peace and Jail Delivery of Delaware. Oct., 1892.)

CRIMINAL LAW — ORAL CONFESSIONS — ASSAULT WITH INTENT TO RAPE—EVIDENCE—GOOD CHARACTER.

1. It is not necessary, before proving an oral confession by the defendant, to show that the confession was not reduced to writing.

2. The statutory offense of felonious assault with intent to commit rape includes every ingredient of rape except a penetravit.

3. It is a conclusive presumption of law that carnal knowledge of a female under the age of consent was had by force and against her will.

4. Since the term "rape," as used in Code, c. 127, § 11, defining the crime of assault with intent to commit rape, embraces all cases of the violation of females, it is not necessary, in an indictment charging such an assault, to allege that the female was under the age of consent, in order to prove that fact.

5. It is no defense to a charge of assault with intent to commit rape that defendant abandoned the intent, either because of inability to effect a penetravit or because of interference.

6. In a criminal case the weight due verbal confessions of the accused is to be determined by the jury.

7. When the facts proved satisfy the jury of the accused's guilt, evidence of his former good character is entitled to but little weight.

Prosecution by the state against James Corbett Smith for assault with intent to commit rape upon a female child $4\frac{1}{2}$ years of age. Verdict of guilty.

At the trial the attorney general asked a witness whether the defendant made a confession in witness' hearing, to which defendant objected, contending that before an oral

confession can be proved the state must show that it was not reduced to writing. The court (GRUBB, J.) overruled the objection on the authority of *State v. Vincent*, Houst. Cr. Cas. 11.

John R. Nicholson, Atty. Gen., for the State.

GRUBB, J. (charging jury). This indictment which you are impaneled to try is founded upon section 11 of chapter 127 of the Revised Statutes, which provides: "That if any person shall with violence assault any female with intent to commit a rape, such person shall be deemed guilty of felony." This indictment charges that James Corbett Smith, the prisoner at the bar, a certain Emma D. Middleton unlawfully, feloniously, and with violence did assault, with intent her, the said Emma D. Middleton, violently and against her will, feloniously to ravish and carnally know, against the form of the statute, etc. Before you can find the prisoner guilty in manner and form as he stands indicted, you must be satisfied beyond a reasonable doubt, from all the evidence produced at the trial of this case—First, that the assault was made upon the said Emma D. Middleton in the manner described in this indictment; second, that said assault was made by the prisoner; and, third, that it was made upon her with intent to commit a rape, and within this county. An assault is an unlawful attempt by force or violence to do an injury to the person of another, and may be proved by evidence of striking at another with or without a weapon or missile, and whether the aim be missed or not, or by evidence of striking, kicking, or pushing at another with the fists, feet, privy member, or any portion of the assailant's body, and the like, in a manner which conveys to the mind a well-grounded apprehension of personal violence; the person so assaulted being within probable reach of the assailant or of the weapon or missile. There may be an assault without resulting personal injury, since any unlawful attempt, coupled with a present ability, to commit a violent injury to the person of another, is an assault, though the assailant failed to commit the injury intended, owing to the interference of others, or otherwise. But the charge in this indictment comprises not only an assault, but it goes further, and alleges that an assault was made with a felonious intent to rape Emma D. Middleton. To constitute our statutory offense of felonious assault with intent to commit a rape, the circumstances must be such as to show that it would have been rape had the assailant carried out his attempt; for every ingredient of rape, except an actual penetravit, must be proved. It is therefore necessary for the jury to be informed as to the definition and nature of the crime of rape. Rape, at common law, in this state, has been held to be the carnal knowledge of a woman above the age of 10

years, against her will; or of a female child under the age of 10 years with or against her will, the law considering her incapable of consent. Formerly, in the prosecution for rape, it was held that both penetration and emission were necessary to constitute carnal knowledge, but now, under our statute, the carnal knowledge is deemed complete under proof of an actual penetravit only. While the slightest penetration is sufficient, yet there must be at least proof of some degree of entrance of the male organ within the labia pudendum of the female. Force, either actual or presumptive, is, in legal contemplation, an essential element of rape, whether it be committed on a female over or under the age of consent. Where the carnal knowledge is of a female of the age of consent, there must be actual proof, by either direct or circumstantial evidence, that it was consummated by force, and against her will. But where she is under the age she is deemed incapable of consenting to sexual intercourse, and therefore the law conclusively presumes that carnal knowledge of a female under either the common-law or any statutory age of consent has been accomplished by force and against her will; and no evidence to the contrary can lawfully be received or considered by the jury for the purpose of rebutting or overthrowing this presumption. So that, in prosecutions for rape, when the fact of carnal penetration of a female under the age of consent is proven, the law conclusively presumes, without further proof, that force was used, and deems the crime complete when properly charged in the indictment. But upon proof of carnal penetration of a female of the age of consent—that is, of seven years or more, in this state—the burden is upon the prosecution to further prove to the satisfaction of the jury, beyond a reasonable doubt, that the penetration was consummated by force and against her will, or by putting her in great fear and terror, before a conviction can be had. In the former case the existence of force is a presumption of law; in the latter, a conclusion of the jury from the actual evidence thereof submitted to them at the trial. The provision of chapter 105, vol. 14, Laws Del., enacted March 28, 1871, in no wise altered the common-law definition and application of rape in this state, except to lower the age of consent of a female child from ten to seven years, and to increase the punishment for carnally knowing and abusing a female child under seven years of age from a noncapital to a capital grade. Our present statutory provisions for the punishment of the crime of rape are contained in section 10 of chapter 127 of the Revised Code, as follows: "Every person who shall commit the crime of rape, or who shall carnally know and abuse any female child under the age of seven years, shall be guilty of felony, and shall suffer death." Both the offense of carnally knowing and abusing a female child under

the age of seven years and that of carnally knowing a female above said age by force and against her will are rape, as they come within the common-law definition of that offense. The distinction between them relates solely, as just explained, to the character and amount of proof required to convict of the offense. Accordingly, under our present statutory provisions, prosecutions for rape may be sustained against any person properly charged in the indictment with carnally knowing any female either above or under the age of seven years; and so also may prosecutions under section 11 of chapter 127 of our Code against any person properly charged with feloniously assaulting, with intent to commit a rape, any female either above or under said age.

This indictment under which the prisoner is tried charges him with a felonious assault with intent to commit a rape, and in the usual and technical mode of alleging that offense. As the term "rape," within the meaning and intent of said section 10 of chapter 127 of our Code, embraces all cases of the violation of females of any age, the said charge in this indictment manifestly includes those under as well as of statutory age of consent. Its formal allegation of the assault upon the person therein named, with intent her, violently and against her will, feloniously to ravish and carnally know, furnishes a description of the offense charged sufficient to plainly and fully inform the prisoner of the nature and cause of the accusation against him, and to apprise him that he is required to be prepared to answer for an assault with intent to rape a female either under or of the age of consent, according as the proof of her age at the trial shall demand. Therefore it is not necessary, in an indictment containing such an allegation, to aver that the female upon whom the said offense was alleged to have been committed was either under or of the age of consent. It is competent for the prosecution to prove that such female was either under or of said age, as the fact may be, although such indictment contains no such averment, for it is sufficient without it.

In the case now before you the prisoner is indicted, not for rape, but for an assault with intent to commit a rape. As already stated to you, every ingredient of rape, except an actual penetration, must be shown to exist, otherwise the prisoner cannot be convicted of said offense. It is the specific, felonious intent to commit a rape which constitutes the offense as charged in this indictment. Therefore, said intent to commit a rape on the body of Emma D. Middleton is a material fact alleged by the state, and is as necessary to be proved by the prosecution, to the satisfaction of the jury beyond a reasonable doubt, as any other essential ingredient of the offense alleged in this indictment, in order to obtain the conviction of the accused in manner and form as he stands indicted. Such specific, felonious intent may be proved by direct evidence, such as the express confession of the accused that

he committed the alleged assault with the intent charged. It may also be established by indirect or circumstantial evidence; that is, it may be inferred by the jury from the proven acts and conduct of the prisoner, and the facts and circumstances attending them, which reasonably indicate the alleged intent to commit a rape. The loathsome and shocking details of this alleged offense are all in evidence before you,—the lascivious assault, the seminal discharge, the place of probable concealment, the child's tender age, her exhibition of terror and fears, the condition of her private parts and of her clothing, and other circumstances,—from which, in connection with all the evidence in this case, you are to draw your conclusion in reaching your verdict. If you shall be satisfied beyond a reasonable doubt, from all the evidence before you, that the prisoner placed his privy member against the person of Emma D. Middleton, she then being under the age of seven years, with intent to commit a rape upon her, you may find him guilty in manner and form as he stands indicted; and it will be no defense, if at the time of said assault he intended to commit a rape upon her, that he afterwards desisted, and abandoned such intent, either because of inability to effect a penetration, or because he was prevented by the interference of the child's mother, or from any other cause. But if you shall not be so satisfied that he made said assault with intent to commit a rape upon her, but shall believe that he made it with some other intent, then you may find him guilty of an assault only.

With respect to verbal confessions of the accused, it is proper here to say that they are to be received with due caution. The degree of credit due to them is to be estimated by the jury, under the circumstances of each case. The whole of what the prisoner said on the subject at the time of making the confession should be taken together. The jury may believe that part which criminales the accused and reject that part which is in his favor, or vice versa, if they see sufficient grounds for doing so; for the jury are at liberty to judge of a confession like other evidence,—that is, in connection with all the circumstances of the case.

In reference to evidence of the prisoner's good character, it may also be observed that it is always admissible. In doubtful cases,—as where there is great conflict of testimony on material and essential points, or where the evidence for and against the accused is pretty nearly balanced,—former good character, if proved, is entitled to due weight, and should incline the scales in favor of the prisoner. But where the facts proved are such as to satisfy the minds of the jury of the guilt of the accused, character, however excellent, is entitled to very little, if any, consideration or weight.

Gentlemen of the jury, you are now to determine, from all the evidence before you, whether or not the assault charged in this indictment was made, and by the prisoner; and also whether or not he made it with intent to

commit a rape on the body of Emma D. Middleton, and in this county. Under this indictment, you may find him guilty in manner and form as he stands indicted, or guilty only of assault, according as, in your judgment, the evidence may warrant; but, if you do not find him guilty of either, your verdict should be, "Not guilty."

In conclusion, it is our duty to remind you that every accused person is presumed to be innocent until proven guilty beyond a reasonable doubt; but by this is meant, not a vague or fanciful doubt, but such a doubt only as sensible and impartial men may conscientiously entertain after a careful consideration of all the evidence.

Verdict: Guilty.

RUMFORD CHEMICAL WORKS v. RAY, Town Treasurer.

(Supreme Court of Rhode Island. Dec. 4, 1895.)

TAXATION—PERSONAL PROPERTY OF CORPORATIONS
—VALIDITY OF ASSESSMENT.

Since a business corporation whose capital is in shares is taxable for such personality only as is referred to in Pub. St. c. 42, § 11, an assessment which, after specifying taxable articles of personality, adds, "and other personal property," is void; it being impossible to know that it does not include property improperly assessed. *Manufacturing Co. v. Newell*, 2 Atl. 766, 15 R. I. 233, followed.

Action by the Rumford Chemical Works against David S. Ray, town treasurer, to recover the amount of a tax paid under protest. Demurrer to the declaration overruled.

Comstock & Gardner, for plaintiff. E. P. Allen and Cooke & Angell, for defendant.

MATTESON, C. J. This is an action to recover the amount of a tax illegally assessed and paid under protest. The case is before us on demurrer to the declaration. The grounds on which the declaration proceeds are that the complainant is a manufacturing and business corporation, whose capital is divided into shares held by shareholders, and that the assessment roll does not show that the assessment was limited to the kinds of personality taxable to the corporation in its corporate capacity. The assessment complained of is set forth in the declaration as follows: "Horses, carriages, wagons, farm tools, stock in trade, and other personal property, valued at \$700,000. Tax, \$8,400." The plaintiff contends that a corporation such as the plaintiff is taxable only for the kinds of personal property mentioned in Pub. St. R. I. c. 42, § 11, viz. fixtures of the kinds enumerated in section 3 of that chapter, machinery and tools, live stock and farming tools on farms; that, inasmuch as the assessment, though specifying certain kinds of personal property, concludes generally, "and other personal property valued at," etc., it is impossible to know from it that it did not include personal property of the kinds not taxable

the corporation as such, but taxable only as represented by the shares of the capital stock held by its shareholders; and hence that the assessment, being entire, and void in part, is void as a whole. In support of its position the plaintiff relies on *Manufacturing Co. v. Newell*, 15 R. I. 233, 2 Atl. 766, in which the provisions of the statutes relating to the matter in question (Pub. St. R. I. c. 42, §§ 10, 11; Id. c. 43, §§ 11, 12) were considered, and in which the conclusions were reached that a business corporation whose capital was in shares is taxable only for its real estate and such personalty as is described in chapter 42, § 11, that when power to assess for taxation is limited to certain kinds of personal property the assessment roll must show that the assessment is made only on such kinds; and that, if the assessment is entire, and is void in part, the whole is void. We think that this case is conclusive of the present, and hence that, as the assessment roll fails to show that the assessment was limited to the kinds of personalty mentioned in chapter 42, § 11, it must be held to be void. Demurrer overruled, and case remitted to the common pleas division for further proceedings.

CAMPBELL v. HANNEY.

(Supreme Court of Rhode Island. Nov. 30, 1895.)

GARNISHMENT—PROPERTY SUBJECT—LIABILITY OF INSURANCE COMPANY—PAYMENT TO DEFENDANT'S AGENT.

Where an insurance company, in consideration of a surrender by defendant of his policy, agreed to send to its agent, for defendant, a cashier's check for a certain sum, payable to defendant's order, the insurance agent became agent for defendant, so that the mailing of the check to him was a delivery to defendant, and the amount thereof could not be reached by a subsequent garnishment against the company.

Action by George Campbell against James K. Hanney in aid of which garnishment was issued. There was an order discharging the garnishee, and plaintiff petitions for a new trial. Dismissed.

William A. Morgan, for plaintiff. C. E. Gorman and James T. Egan, for defendant.

MATTESON, C. J. Assuming that we have jurisdiction, under the judiciary act (chapter 31, § 2), to entertain the plaintiff's petition for a new trial, we do not think that a new trial should be granted. The purpose of the petition is to have us review the decision of the common pleas division discharging the garnishee. The evidence shows that the agreement between the defendant and Gannett was that the latter

should send the policy, with the defendant's release on it, to the home office of the company in Milwaukee, and that the company should return to Gannett, for the defendant, a cashier's check for the agreed surrender value of the policy, \$402.27, payable to the defendant's order. The evidence further shows that in pursuance of this agreement the defendant executed a release to the company on the policy, and that the policy was then sent by Gannett to the home office of the company; that the company purchased a cashier's check, drawn by the National Exchange Bank of Milwaukee on the Importers' & Traders' National Bank of New York for \$402.27, payable to defendant's order, and sent it by mail to the defendant Gannett for the defendant. We think that the effect of the agreement between the defendant and Gannett was that the cashier's check was to be received by the defendant as payment of the sum agreed on as the consideration for the surrender of the policy, and to constitute Gannett the defendant's agent to receive the check for him. When, therefore, the company, in pursuance of this agreement, deposited in the mail in Milwaukee a check of the National Exchange Bank of Milwaukee on the Importers' & Traders' National Bank of New York for \$402.27, payable to the defendant's order, with the intent that it should be transmitted to Gannett, it had performed its part of the agreement with the defendant, the mailing of the check being tantamount to its delivery to the defendant (*Barret v. Dodge*, 16 R. I. 740, 743, 744, 19 Atl. 530); and, consequently, that the company at the time of the garnishment had in its possession none of the personal estate of the defendant. The plaintiff contends that Gannett, being the agent of the insurance company, could not also be the agent of the defendant to receive the check. But there was no conflict between the duty that he owed to the company and his duty to the defendant to receive the check. We therefore see no reason why he might not properly and legally be the agent of the defendant for that purpose. The testimony of Gannett was supplementary to the answer of the garnishee, rather than contradictory of it. It was material to the issue to be determined, and the defendant would have had the right to have it brought to the attention of the court if Gannett had not been summoned before the court of its own motion. We think that the decision of the common pleas division discharging the garnishee was correct, though we think the decision should be rested on different grounds from that assigned by that division. Petition denied and dismissed, and case remitted to the common pleas division, with direction to enter judgment discharging the garnishee.

MILLER v. McCARDELL.

(Supreme Court of Rhode Island. Dec. 5, 1895.)

LANDLORD AND TENANT—LEASE—COVENANTS—CONSTRUCTION.

1. The covenant of a lessor to "keep" the outside of the building in good repair requires him to put it in good repair where, at the execution of the lease, it was out of repair.

2. Where the lessor covenants to keep the outside of the building in repair, and the lessee to keep the inside in repair, the lessor, on failure to do so, is liable to the lessee for expenses incurred in repairing the inside due to his failure to keep the outside in repair.

3. Where the lessor covenants to keep the outside of the building in repair, "provided that he shall not be liable for any loss arising in said house from the weather," an instruction that the lessor is liable for expenses incurred by the lessee in repairing the interior, which was damaged by water leaking through the roof, but not for damages done by the water to the furniture of the lessee, is sufficiently favorable to the lessor.

Action by Thomas Miller against Robert McCardell. There was a verdict for plaintiff, and defendant petitions for a new trial. Denied.

J. M. Brennan and Dennis J. Holland, for plaintiff. Bassett & Mitchell, for defendant.

TILLINGHAUST, J. This action is brought to recover damages alleged to have been sustained by the plaintiff by reason of the breach, on the part of the defendant, of a certain covenant in a lease made by him. The record shows that on the 1st day of April, 1892, the defendant leased to the plaintiff the estate situated at the southeasterly corner of Mathewson and Washington streets, in the city of Providence, with the building thereon, known as the "St. George Hotel," for the term of three years, the defendant on his part covenanting "that he will keep the outside of said premises in good repair: provided, however, that he shall not be liable for any loss arising in said house by damage from the weather"; and the plaintiff covenanting on his part "that he will keep the interior of said building in good repair, reasonable wear and tear alone excepted." At the trial of the case in the common pleas division the plaintiff offered proof that the roof of said building was out of repair to such an extent that it leaked very badly, causing the house to be frequently flooded with water, the plastering in several of the rooms to fall off, and the paper to peel off from the walls, thereby rendering said rooms uninhabitable, and causing serious damage thereto, and also to the furniture therein, and depriving the plaintiff of the use and benefit of quite a large part of said hotel, and also necessitating the frequent repair of the interior thereof by the plaintiff. Proof was also submitted that during the subsistence of said lease the plaintiff repeatedly requested the defendant to repair the roof and outside of said building, so as to prevent it from leaking; that the defendant repeatedly promised to make such re-

pairs, and that he had on several occasions made some slight repairs thereon, but that they were ineffectual to stop the leaks from which the plaintiff was suffering. It further appeared in evidence that the roof and exterior of said building was out of repair at the time of the making of said lease. The court ruled that, in view of the provisions in the lease, the plaintiff could not recover for damages to his furniture contained in said building, caused by the defendant's neglect to keep the exterior thereof in repair, but that he could recover for the loss of the use and rental of such rooms in said building as were rendered untenable on account of said neglect to repair, and also for the expense to which he had been put in repairing the damages caused by the injury to the interior of said building through the defendant's neglect as aforesaid. The jury found in favor of the plaintiff, and awarded him damages in the sum of \$750. The defendant now petitions for a new trial on the grounds that the verdict was against the evidence and the weight thereof, and that the court erred in its rulings aforesaid.

The only contention which is urged at the trial of this petition on the part of the defendant is that the said covenant to repair was fully performed by him if he maintained the premises in the same condition and form as they were when the lease was given; or, in other words, that, as the exterior of the building was in bad repair when the plaintiff hired it, the defendant was under no obligation to put it in good repair during the subsistence of said lease. The covenants to repair in the lease in question were evidently intended to be reciprocal; that is to say, the lessor, in consideration of the covenant to keep the interior of the premises in good repair on the part of the lessee, covenanted on his part to keep the exterior of said premises in good repair. And while the covenant of the lessor may seem at first blush to be self-contradictory, and therefore nugatory, in that it provides that the lessor "shall not be liable for any loss arising in said house by damage from the weather," yet, taking both of said covenants together, as we are bound to do in construing the instrument, it would be absurd to hold that the lessor is not equally bound to the performance of the one as is the lessee to the performance of the other. Indeed, the first duty to repair is evidently on the lessor, as it would be idle and useless to attempt to keep the interior of the premises in good repair so long as the exterior thereof is not in a condition to withstand the ordinary weather incident to our climate. Moreover, it is a well-settled rule, in the construction of covenants and other written instruments, that where there is doubt or ambiguity the construction should be most favorable to the party in whose favor the covenant is made, and most strongly against the party imposing such covenant upon himself. 4 Am. &

Eng. Enc. Law, 470, note, and cases cited. Just what is meant by the proviso to the lessor's covenant aforesaid it is not easy to determine. But we think the common pleas division, in holding that it had the effect to exonerate the lessor from damage to the furniture of the lessee, caused by the leaky condition of the roof and other parts of the house, put quite as favorable a construction thereon as the defendant was entitled to, and hence that he has no reason to complain of said ruling.

That the lessor understood that the duty of keeping the exterior of said building in repair was devolved upon him under his said covenant is clearly apparent from his repeated promises aforesaid, and also from the actual repairs made by him. As to the contention of counsel for the defendant that the covenant to keep said premises in good repair is fully performed by keeping the same in as good condition as when leased, we have to say that if by this he means that a landlord who lets a building for the purposes of a dwelling house or hotel, the building at the time being in whole or in part uninhabitable by reason of its being out of repair, the lessor is under no obligation to put the same in repair, so as to make it inhabitable, we do not agree to such contention. A dwelling house or hotel is primarily made for people to live in, and is intended to protect them from the weather; and, in order to be habitable or tenantable, it must furnish such protection. And where one lets a house for people to live in, and agrees to keep it in good repair, he is bound by the dictates of common reason, as well as by those of common law, to both make it and keep it habitable,—that is, reasonably fit for the occupation of a tenant of the class which occupies it. If we allow the position taken by the defendant, as we understand it, to prevail, the result will practically be this: That, as the said hotel building was in bad repair when the plaintiff hired it, the defendant was bound by his said covenant to keep it in like bad repair during the subsistence of the lease; thus exactly reversing the express terms thereof. In *Payne v. Haine*, 16 Mees. & W. 543, which was a case where the tenant agreed to keep the premises, and at the expiration of the tenancy to deliver up the same, in good repair, Parke, B., in delivering the opinion of the court, said: "If, at the time of the demise, the premises were old, and in bad repair, the lessee was bound to put them in good repair as old premises; for he cannot 'keep' them in good repair without putting them into it. He might have contracted to keep them in the state in which they were at the time of the demise. This is a contract to keep the premises in good repair as old premises, but that cannot justify the keeping them in bad repair because they happened to be in that state when the defendant took them. The cases all show that the

age and class of the premises let, with their general condition as to repair, may be estimated, in order to measure the extent of the repairs to be done. Thus a house in Spitsfields may be repaired with materials inferior to those requisite for repairing a mansion in Grosvenor square, but this lessee cannot say he will do no repairs, or leave the premises in bad repair, because they were old and out of repair when he took them. He was to keep them in good repair; and in that state, with reference to their age and class, he was to deliver them up at the end of the term." To "keep in good repair," says Rolfe, B., in the same case, "presupposes the putting into it, and means that during the whole term the premises shall be in good repair." See, also, *Cooke v. Cholmondeley*, 4 Drew. 326; *Proudfoot v. Hart*, 25 Q. B. Div. 42. In *Myers v. Burns*, 35 N. Y. 269, the landlord covenanted to keep the hotel and premises in good, necessary repair at his own expense, and he was held liable thereunder to do what was necessary to enable the tenant to use the premises, although the defect had existed at the commencement of the lease. See, also, *White v. Railway Co.*, 17 Hun, 98; *Kelsey v. Ward*, 38 N. Y. 83; *Hexter v. Knox*, 63 N. Y. 561; *Stewart v. Lanier House Co.*, 75 Ga. 582. In *Tayl. Landl. & Ten.* (8th Ed.) § 330, the author says: "A general covenant to repair, when made by the lessor, requires him not only to keep the premises in good repair, but to put them in that condition, although the tenant may have entered. And if he neglects to make suitable repairs, after being thereunto required by the tenant, the latter may, after waiting a reasonable time, make such repairs himself, and recover the expense from his landlord; or he may at his option leave the premises unrepaired, and recover any damages he may have sustained from the landlord's default therein." See, also, *Cohen v. Habenicht*, 14 Rich. Eq. 31; *Gutteridge v. Munyard*, 1 Moody & R. 336; *Harris v. Jones*, Id. 173; *Mantz v. Goring*, 4 Bing. N. C. 452; *Stanley v. Towgood*, 3 Bing. N. C. 4; *Wood, Landl. & Ten.* § 370. Petition for new trial denied, and dismissed.

KEENE v. WEEKS et al.

(Supreme Court of Rhode Island. Dec. 7, 1895.)

ALTERATION OF NOTE—REDELIVERY TO PAYEE—FRAUDULENT INTENT—RECOVERY.

1. Where a note was delivered by the payee to the maker to purchase stock, and the maker transferred it, in payment for stock, to one of two owners thereof, who altered the note by reducing the rate of interest and afterwards transferred it to the other owner, who redelivered it to the payee upon an agreement to rescind the purchase of stock, the payee cannot recover on the note, as against the parties not consenting to the alteration.

2. The presumption of a fraudulent intent in altering a note being rebutted, the holder

can recover, under the common counts, the debt for which the note was given, as against the parties who received the consideration.

Action by Albert H. Keene against Weeks & Aldrich and another on a note. Judgment against certain defendants, and in favor of the other.

William R. Tillinghast, for plaintiff.
Cooke & Angell, for defendants.

MATTESON, C. J. This is an action of assumpsit on a promissory note, dated October 26, 1894, payable to the order of the plaintiff, and made by the partnership of Weeks & Aldrich, composed of John M. Weeks and Arthur M. Aldrich. It is indorsed by the copartners, Weeks and Aldrich, individually, and by Samuel W. Aldrich, who has deceased during the pendency of the suit. Jury trial was waived in the common pleas division, and the case was thereupon certified to this division for hearing and determination. The defense to the suit is that a material alteration was made in the note after its delivery, consisting in a change in the rate of interest specified in it from 10 per cent. per annum to 6 per cent. per annum. The note was originally given to the plaintiff by Weeks & Aldrich for a loan to them of \$1,000. November 10, 1894, the plaintiff agreed with Weeks to purchase 200 shares of the capital stock of the National Gas Generator Company, and thereupon indorsed and delivered the note to Weeks to pay for the stock. The note was taken by Weeks & Aldrich to Daggett, treasurer of the gas generator company, for the purpose of having him issue to the plaintiff, in exchange for it, 200 shares of the stock of the company, which had not been issued and was denominated treasury stock. Daggett declined to issue the stock because the by-laws of the company did not allow the issue of treasury stock for notes, but suggested that the 200 shares could be transferred to the plaintiff from stock which had been issued to members of the corporation. In accordance with this suggestion, and with the consent of Weeks & Aldrich, 200 shares of the stock of the company, which had been issued previously to Daggett and Montfort, were transferred by them to the plaintiff in exchange for the note. Daggett, before receiving the note, objected to taking it because it bore so high a rate of interest as 10 per cent., and on receiving it, and, as he testifies, though this is denied by Weeks, while Weeks & Aldrich were standing by, and without objection from them, erased the 10 and substituted a 6 in place of it, so that the rate of interest was changed from 10 per cent. to 6 per cent. The note was afterwards turned over by Daggett to Montfort, and was by him redelivered to the plaintiff, on the voluntary rescission by Montfort and the plaintiff of the contract for the purchase and sale of the stock, when it had been ascertained that

the stock was worthless, the plaintiff alleging that he was induced to make the purchase by the fraudulent representations of Weeks concerning the company and its affairs.

The plaintiff does not dispute the proposition that a material alteration of a note by a holder, without the consent of the parties to it, will avoid the note, but he maintains that if the alteration be made by a stranger it will not have that effect; and he further maintains that, in the present case, Daggett, by whom the alteration was made, is to be regarded, as to the plaintiff, as a stranger. We do not think that this last claim can be sustained. By the indorsement and delivery of the note by the plaintiff to Weeks, and through him to Daggett, in exchange for the stock, the title to the note was vested in Daggett, who became the holder and legal owner of it, though, to the extent to which Montfort was the owner of the stock transferred to the plaintiff, Daggett doubtless held it as a trustee for Montfort. Having thus the legal title to the note, the change by him in the rate of interest, the change being a material alteration, extinguished the liability of all parties to it who did not consent to the alteration. When it subsequently passed to Montfort, he took it subject to the infirmity resulting from the alteration, as the successor in title to Daggett; and the plaintiff, likewise, on its redelivery to him by Montfort, took it subject to the same infirmity, as the successor in title of Montfort. The voluntary rescission of the contract by Montfort and the plaintiff, for the alleged fraudulent representations of Weeks, could not revivify the liability of parties to the note whose liability had been extinguished by its previous alteration; and as there thus existed between Daggett and the plaintiff the relation of privity in title, there is no ground for holding Daggett to be a stranger as to the plaintiff.

The evidence does not show that Daggett had any fraudulent purpose in changing the rate of interest specified in the note, or that there was any other motive for it than his scruples against receiving what might be regarded as an excessive interest. The fact that the change was to a lower rate than that specified, and consequently was against his interest as a holder of the note, and to the advantage of the parties liable on it, in the absence of any other fact, rebuts the presumption of a fraudulent intent, which otherwise, perhaps, would arise from the alteration. *Whitmer v. Frye*, 10 Mo. 349; *Wheelock v. Freeman*, 13 Pick. 185; *Robinson v. Reed*, 46 Iowa, 219. The presumption of a fraudulent intent being rebutted, the plaintiff can recover, under the common counts in the declaration, the debt for which the note was given, as against the parties who received the consideration. *Booth v. Powers*, 56 N. Y. 22, 31; *Clute v.*

Small, 17 Wend. 238; Meyer v. Huncke, 55 N. Y. 412, 417; Hunt v. Gray, 35 N. J. Law, 227, 234; Matteson v. Ellsworth, 33 Wis. 488; Bank v. Shaffer, 9 Neb. 1, 5, 1 N. W. 980; 2 Daniel, Neg. Inst. §§ 1411, 1413. There is no claim that Samuel W. Aldrich ever assented to the change in the note or ratified the change after it was made, nor that he received any part of the consideration for which the note was given; and we think, therefore, that there can be no recovery as against his administratrix. But we think the plaintiff is entitled to recover, under the money counts, from Weeks & Aldrich the money which they received. Judgment may be entered for the administratrix of Samuel W. Aldrich for costs, and judgment for the plaintiff against the defendants Weeks & Aldrich for the amount of the loan to them, with interest and costs.

In re CONDEMNATION OF CERTAIN LAND FOR NEW STATE HOUSE.¹

(Supreme Court of Rhode Island. Nov. 23, 1895.)

EMINENT DOMAIN—PROCEEDINGS BY STATE—CONSTITUTIONAL LAW—JURY TRIAL

1. The legislature has power to give the state a right to jury trial in proceedings to condemn land for state purposes.

2. Pub. Laws, c. 1201, creates a board of commissioners with power to acquire a site for a state house, and "all the powers of condemnation conferred upon towns" by Pub. Laws, c. 285, for the acquisition of a water supply, and, in section 2, provides that, in acquiring the land, "said board" shall "proceed in all matters * * * as provided in said chapter 285 in the case of land taken under its provisions, and owners of land so taken shall have the same rights of appeal from the awards of 'said board,' and rights of jury trial thereon, as are secured to owners of land" taken under chapter 285. The right of jury trial referred to in chapter 285, § 5, is on objection to the award of the board of appraisal commissioners, and an award by such commissioners was necessarily made in the proceedings under chapter 1201. *Held*, that since the board of state house commissioners has no power to make awards to landowners, the words "said board," as last used in chapter 1201, though grammatically referring to the board of state house commissioners, must be construed to refer to the board of appraisal commissioners.

3. Chapter 285, as amended by Pub. Laws, c. 1224, subc. 2, § 4, provides that, on the opening of the report of the appraisal commissioners provided for therein, and who necessarily made report in proceedings under chapter 1201, "any person or party aggrieved by any award of damages by the said commissioners may claim a jury trial upon any item of damage." *Held*, that the mention of the "owners of land," in chapter 1201, was an implied exclusion of any right on the part of the state to a jury trial.

4. Since the statutes relating to condemnation of land in force prior to the adoption of Const. art. 1, § 15, providing that "the right of jury trial shall remain inviolate," did not uniformly give both parties the right to a jury trial, but in many cases gave it to the landowners only, the state cannot claim a jury trial, as a constitutional right in proceedings under Pub. Laws, c. 1201, to condemn land for a state house.

5. Const. U. S. Amend. 7, relating to the right of jury trial, is a limitation on the power of the federal government, and does not apply to state legislation.

Proceeding by the board of state house commissioners to condemn land for a state house. A claim by petitioners for a jury trial was dismissed on motions of Warren R. Perce and others, landowners, and the commissioners' petition for a new trial of said motions. Dismissed and remanded.

Edward C. Dubois, Atty. Gen., and Arnold Green, for the State. Warren R. Perce, pro se, and for Abby F. Sessions and others. James M. Ripley, for Anne B. F. Woods and others. James, William R. & Theodore F. Tillinghast, for Elizabeth Francis and others. Amasa M. Eaton, for Richmond Viall.

ROGERS, J. This is a petition by the board of state house commissioners, for and in behalf of the state, for a new trial of motions to dismiss the state's claims for jury trials upon damages awarded the owners of land by appraisal commissioners in certain condemnation proceedings.

A tract of land in the city of Providence was condemned as a site for the proposed new state house, under the provisions of Pub. Laws R. I. c. 1201, passed May 24, 1893, entitled "An act to provide for the creation of a board of state house commissioners, to define their duties and to provide for the issuance of the bonds of the state to an amount not exceeding \$1,500,000." Section 1 of said chapter provided that certain persons therein named "are," in the language of the act, "hereby constituted a board of state house commissioners, who shall perform the duties specified in this act; they shall hold office for a sufficient time to accomplish the purposes of this act, and shall serve without compensation. Any vacancies in said board shall be filled by the governor, with the consent of the senate. Five members of the commission shall constitute a quorum." Section 2 of said chapter is as follows: "Said board shall at once proceed to select and acquire a site for a new state house, either under the provisions of chapter 913 of the Public Laws or by purchase or by condemnation, as said board may determine, and to erect thereon a new state house substantially in accordance with the plan accompanying the report of the state house commission made to the general assembly at its January session, 1892, and recommended by said commission. The said site shall be acquired in the name of the state of Rhode Island, and for the purpose of acquiring land by condemnation for said site said board is hereby given all the powers of condemnation conferred upon towns in certain cases for the purpose of taking land and property for a water supply by chapter 285 of the Public Laws; and in case said board shall so take any land for the purposes of this act, it shall proceed in all matters in relation to such land

¹ See 33 Atl. 523.

as provided in said chapter 285 in the case of land taken under its provisions; and owners of land so taken shall have the same rights of appeal from the awards of said board, and rights of jury trial thereon, as are secured to owners of land taken under the provisions of said chapter 285 by its provisions." The subsequent provisions of said chapter 1201 authorized the board of state house commissioners to make, on behalf of the state, all contracts for the construction of said state house, and the furnishing thereof, and for grading and putting into suitable condition the grounds surrounding the same, and provided how it should be done, and how the money to meet the expenses incurred under said chapter 1201 should be raised, and how the bills audited by said board of state house commissioners were to be paid. Said chapter 285 provided when and under what circumstances certain towns, persons, or corporations, for the purpose of supplying towns with water, may take, condemn, hold, use, and permanently appropriate any land, water, rights of water and of way, necessary and proper to be used in furnishing or enlarging any such water supply; and it also provided for the methods of procedure therefor, which included the filing, in the clerk's office of the common pleas division of the supreme court in the county where the land to be taken was located, of a certificate of taking the property, estate, or right of property described therein, with a list of the owners thereof, and the appointment by said common pleas division, after due notice, of three suitable persons to be commissioners to appraise the damages sustained by any person whose property, estate, or rights of property shall have been taken, and how said commissioners were to proceed, and for the payment for the land so taken. Section 6 of chapter 285, as amended by section 4, subc. 2, c. 1224, Pub. Laws R. I., reads as follows: "Upon the payment of the fees provided in the preceding section, the clerk of the said common pleas division of the supreme court shall open the report of the said commissioners, and the same may be examined by any person interested therein, and any person or party aggrieved by any award of damages by the said commissioners may claim a jury trial upon any item of damages thereby awarded, and may file his claim for such trial at any time within three months from the opening of such report; and such claim shall stand for trial by jury upon a proper issue based upon such claim, as other cases upon the docket of such court, and shall be tried therein in every respect as other cases are there tried, including the right to except to rulings and to apply for new trials for cause; and execution may be awarded thereon as in other cases; but if the party claiming the jury trial shall not therein obtain an award for damages more favorable to him than that given by the commissioners, he shall pay costs to the adverse party."

Within three months from the opening of the report made by the commissioners of appraisal duly appointed in the proceedings to condemn the state house site, the board of state house commissioners for and in behalf of the state claimed jury trials upon various items of damage thereby awarded, whereupon, upon motion of the persons that at the time of the condemnation had owned the land so taken, and to whom the awards for damages appealed from by the state had been made, the claims of the state for jury trials were dismissed by the common pleas division; and the matter comes before us on the state's petition for a new trial of that motion, the question involved being whether the state, under said acts, is entitled to jury trials as claimed.

The state, through its board of state house commissioners, contends that it is a party aggrieved by the award of the appraisal commissioners, and that said chapter 285, § 6, and every part of said section 6, applies to the proceedings to condemn land for a state house site, and, therefore, that the state by express legislation has the right to claim jury trials. The landowners deny, on various grounds, such right, and, among others, contend that the words "said board," when last used in chapter 1201, § 2, refer to the appraisal commissioners provided for in chapter 285, and not to the board of state house commissioners; and that the right to claim a jury trial is given only to the owners of land taken, and not to the state. We think the words "any person or party aggrieved," contained in chapter 285, § 6, are broad enough to include the state, and that the board of state house commissioners would have power to act for and in behalf of the state in claiming a jury trial if the legislation relating to condemning land for a state house site intended to confer upon the state the right of trial by jury, and that intent can be ascertained by legal construction. We see no inherent difficulty or impropriety in the lawmaking power granting a jury trial to the state in condemnation proceedings if dissatisfied with an award of the appraisal commissioners. A state may sue in its own courts, but it cannot be sued therein unless there is some statute giving the court jurisdiction in express terms. 23 Am. & Eng. Enc. Law, 80, note 1, and cases cited. The state is continually suing in its own courts, and recognizances running to the state are being constantly sued there in the name and for the benefit of the state. The official bonds required of certain officers, such as general treasurer, state auditor, warden of state prison, etc., are made to the state, and would be suable in its name in the state courts. Though persons, to be eligible as jurors, must be taxpayers, and therefore, in a sense, having an interest in the state, yet such interest would not incapacitate jurors from sitting on a case in which the state was a party, even before May 25, 1895, the date of the passage of Pub. Laws R. I. c. 1389. The state is the government. Courts are created by it, and judges and jurors hold

their positions under it, and receive pay from it for their services. A judge or a juror receiving pay for his services from an ordinary party would be unfitted to sit where such party was interested. Not so, however, in the case of the state, for the relations of citizens to it, be they judges or jurors, are fundamental; and, notwithstanding such relations, the state, as we have seen, can sue in its own courts. To hold otherwise would be to paralyze courts, and to disintegrate government. The contention of the landowners that the state could not have been granted the right to claim a jury trial in condemnation proceedings seems to us utterly untenable.

But, while the right to a jury trial might have been granted to the state by the law-making power, the crucial question in this case is: Was such right actually granted in the legislation referred to? Was it the intention of the statute to grant such right? For the great object of the maxims of interpretation is to discover the true intention of the law. The intention of the makers of a statute is sometimes to be collected from the cause or necessity of making a statute, and at other times from the circumstances. Whenever it can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seems contrary to the letter of the statute. The real intention, when accurately ascertained, will always prevail over the literal sense of terms. A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of a statute is not within the statute, unless it is within the intention of the makers. *Bac. Abr. "Statute,"* I., §§ 5, 10; 1 *Kent, Comm.* 461, 468; *People v. Utica Ins. Co.*, 15 *Johns.* 358, 381; *Holmes v. Carley*, 31 *N. Y.* 289, 290. In the words of Chief Justice Duffee in *Dawley v. Probate Court*, 16 *R. I.* 696, 19 *Atl.* 248: "We always like, in construing a statute, to take the words literally, assuming that the general assembly have chosen such as readily express their intent. This cannot always be done, for it sometimes happens that words have been used that, taken literally, are inconsistent with the predominating purpose. The cases are numerous in which the literal meaning of words and phrases has been restrained or extended by construction to suit the legislative intent." See, also, *State v. Perry*, 18 *R. I.* — (*Index MM.* 40), 27 *Atl.* 606. The object or purpose of chapter 1201 was to enable the state to acquire land for a site, and to erect thereon a state house. The land might be acquired in various ways, and one was by condemnation. Chapter 1201, instead of stating at length, in language to be found within its own limits, the manner of proceeding in condemning a state house site, adopted certain provisions of chapter 285 by brief reference thereto, and therein arises the ambiguity which the court is called upon to construe. Such a method of

drafting acts is objectionable, and in regard to the state house legislation the language as well as the method is lacking in precision. The provisions of chapter 285, adopted by chapter 1201 are not clearly defined, for no sections or parts of sections are referred to by their numbers, but only by descriptions of their matter, and we have to look to chapter 1201 for the limitations of adoption of parts of chapter 285. If chapter 1201, § 2, had concluded with these words found therein, viz.: "And in case said board shall so take any land for the purposes of this act, it shall proceed in all matters in relation to such land as provided in said chapter 285 in the case of land taken under its provisions,"—we should have found little, if any, difficulty in saying that the lawmakers intended to give to the state, as well as to the landowners, the right of trial by jury, as provided for in chapter 285, § 6, if aggrieved by the award of the appraisal commissioners. But chapter 1201, § 2, did not conclude with the words just quoted, but continued on as follows, viz.: "And owners of land so taken shall have the same rights of appeal from the awards of said board, and rights of jury trial thereon, as are secured to owners of land taken under the provisions of said chapter 285 by its provisions." If these words last above quoted refer to a jury trial for the landowners on appeal from the award of the appraisal commissioners, then the query arises as to how broad a construction the lawmakers put upon the words of chapter 1201, § 2, referring to chapter 285; for if the provisions of chapter 285, § 6, adopted by chapter 1201, gave both sides to the condemnation proceedings a jury trial, what necessity would there be for chapter 1201, § 2, giving the landowners alone a jury trial in express terms, and why expressly refer to chapter 285 in such a limited gift? The state house commissioners insist that the words of chapter 1201, § 2, last above quoted, refer to awards made by themselves, i. e. by said board of state house commissioners; whereas the landowners contend that they refer to the awards of the appraisal commissioners. Taking the words "said board," when last used in chapter 1201, § 2, according to their strict technical meaning, and the grammatical construction of the sentence containing them, they refer to the board of state house commissioners, for the same words are used five times in said section, and the first four times they were unquestionably intended by the lawmakers to refer to said board of state house commissioners. But if the words "said board," when last used in chapter 1201, § 2, are construed to mean the board of state house commissioners, all conceivable meaning of the words is taken away, for that board has no power to make awards to the landowners; and it is, moreover, representing the state adversely to the landowners. Immediately preceding the words "said board," when last used in chapter 1201, § 2, and subsequent to the use of the same words

when next thereinbefore used in said section, there is a reference to said chapter 285; and another reference to the same chapter also immediately follows the words "said board," when last used in said chapter 1201, § 2, in referring to the kind of appeal and jury trial intended. An examination of chapter 285, § 6, discloses that the appeal therein referred to is an appeal from the award of the appraisal commissioners; and, as appraisal commissioners must necessarily be appointed in the condemnation of said state house site, it seems to us that the legislators intended that the words "said board," when last used in chapter 1201, § 2, should refer to the appraisal commissioners, and not to the state house commissioners. It is true that nowhere in said chapter 285 are the appraisal commissioners called a board, but it is common practice to speak of commissioners collectively as a board, and in this manner we think the legislators spoke of the appraisal commissioners. Having, in the body of chapter 1201, § 2, given to the owners of land the right to appeal from and of jury trial on the award of the appraisal commissioners, we think the lawmakers did not intend to give it to the state also, for "inclusio unius est exclusio alterius," unless, indeed, such gift of jury trial to the state in condemnation proceedings is a constitutional necessity; for it seems to us the paramount purpose of the legislation was to confer an effective method of condemning land for a state house site, and no method not constitutional could be effective.

Is there, then, any constitutional necessity for assuring a jury trial to the state in order to make the power to condemn complete? The constitution of Rhode Island (article 1, § 15) provides as follows, viz.: "The right of trial by jury shall remain inviolate." At the time of the adoption of the constitution of Rhode Island in 1842, did the state possess the right of trial by jury in condemnation proceedings? If it did, then it must remain inviolate. The only general law relating to condemnation of real estate, in force in 1842, was "An act for laying out highways" (Pub. Laws R. I. 1822, p. 286), by sections 2 and 3 of which it was provided how town councils might lay out highways and driftways. Section 4 thereof provided that if any person through whose land such highway or driftway is laid shall be aggrieved by the doings of the committee or town council in laying out such highway or driftway or appraising the damage, as provided for in the act, he shall have liberty to appeal to the next court of general sessions of the peace to be holden for the county; but there was no provision for allowing a jury trial to any other party to the proceedings under said sections 3 and 4.

Turning to private acts conferring power of condemnation, we find that such power was, for a long term of years preceding the adoption of the constitution, conferred largely, if not chiefly, upon two classes of corpora-

tions, viz. railroad corporations and turnpike corporations. In condemnation proceedings under railroad charters, the right of appeal and trial by jury from the award of the appraisal commissioners was usually, if not always, conferred upon either party aggrieved, i. e. upon the corporation and landowners alike, in clear and unmistakable terms. In condemnation proceedings under turnpike charters, however, the right of appeal and trial by jury from the award of the appraisal committee appointed in the charter, they being the equivalent of appraisal commissioners appointed by the court in the later practice, was, in a very large majority of cases, conferred only upon the persons whose land was taken, the ordinary language used in such charters upon that point being as follows, viz.: "That" certain persons, naming them, "be and they hereby are appointed a committee to locate and establish said road, and to agree with the proprietors if they can; and if not, to appraise the damages (if any) that any person or persons may sustain through whose land said road may pass; and the said committee shall make a return of their proceedings in laying out said road and appraising the damages aforesaid, into the clerk's office of the court of common pleas in the county of Providence, as soon as conveniently may be after said appraisement shall have been made; and if any person or persons shall be aggrieved by said appraisement made by said committee, he or they may apply to said court of common pleas at the next term thereof after the appraisement shall have been returned as aforesaid, and may have the damages assessed by a jury in said court, and a verdict of such jury when established by said court shall be final; provided always, that if the report of the committee shall be confirmed, or the amount of damages lessened by the jury, the person or persons applying for such jury trial, shall pay all lawful costs; and if the amount of damages shall be increased, the costs shall be paid by said corporation." Foster Valley Turnpike Co.'s Charter, § 15 (R. I. Acts & Resolves June, 1830, p. 39). See, also, Stone Bridge & Fall River Turnpike Co.'s Charter, § 3 (Acts & Resolves Jan., 1838, p. 74); Worcester Turnpike Co.'s Charter, § 3 (Acts & Resolves Jan., 1836, p. 52); Woonsocket Falls Turnpike Co.'s Charter, § 3 (Acts & Resolves Jan., 1830, p. 23); Providence & Warren Turnpike Co.'s Charter, § 3 (Acts and Resolves Jan., 1827, p. 7); and Pawtucket & Providence East Turnpike Co.'s Charter, § 3 (Acts & Resolves Oct. 25, 1825, p. 55). While the language just quoted seems to us to confer the right of trial by jury unquestionably upon the landowners merely, yet there are various cases where the intent so to do is expressed in still more unmistakable terms. Thus, in an amendment to the Providence & Norwich City Turnpike Company's Charter (R. I. Acts & Resolves June, 1835, p. 27), the language is: "And if any person or persons shall be

aggrieved by said appraisement made by said committee, he, she or they may apply to the court of common pleas in the county in which his, her or their estate lies, at the next term thereof after said appraisement shall have been made as aforesaid, and may have the damages assessed by a jury in said court;" and then proceeding on in the same language as in the last preceding quotation. In an amendment to the charter of the Providence & Douglas Turnpike Corporation, § 2 (R. I. Acts & Resolves May, 1822, p. 41), the provision as to jury trial is that "any proprietor of the said land who has not been agreed with or satisfied as aforesaid may appeal to the next court of common pleas for the said county of Providence, after said report shall have been returned as aforesaid, and have his damages assessed by a jury in said court," with like provisions as to costs as in the other cases hereinbefore referred to. In the act relating to the turnpike road from Wickford to Connecticut, the right of trial by jury is limited to the owners of land who may be aggrieved (R. I. Acts & Resolves Feb., 1807, p. 17); and, in that relating to the Smithfield turnpike road, the right of appeal and trial by jury is reserved alone to "said landholders," those words referring to the individuals through whose land the road may pass (R. I. Acts & Resolves Feb., 1805, p. 29). It is apparent that for 40 years, at least, prior to the adoption of the constitution, the party in whose favor the power of condemnation was exercised was not uniformly granted the right of trial by jury; and this seems to us to be conclusive that there is no constitutional necessity requiring such party to have a jury trial. The state stands in no better position, certainly, as to the right of trial by jury, than would any other party in whose favor condemnation power is exercised. Indeed, it might be questioned if it stood as well, for, being the lawmaking power, it might be urged with more or less force that it might, through its lawmakers, waive the right of jury trial, even if it had it constitutionally; but a consideration and determination of that point in the present inquiry is not necessary.

Of course, the provision in the constitution of the United States (article 7 of the amendments) as to jury trial has no relevancy here; for, even if this case came within the language of that amendment, it is well settled that that amendment, like all the rest of the first 10 amendments, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states. In *re Liquors of Fitzpatrick*, 16 R. I. 60, 63, 11 Atl. 773; *State v. Brown & Sharpe Manuf'g Co.*, 18 R. I. 16, 25 Atl. 246, and cases cited.

Our opinion is that said chapter 1201 confers no right of jury trial upon the state in the condemnation proceedings therein provided for, and that the common pleas division

did not err in dismissing the state's claim for jury trials thereunder.

Petitions for new trial denied and dismissed. Case remanded to the common pleas division, for further proceedings.

MORRISON-JEWELL FILTRATION CO. v. LINGANE.

(Supreme Court of Rhode Island. Dec. 14, 1895.)

LIBEL—WHAT ACTIONABLE—ACTION BY CORPORATION—PLEADING.

1. A declaration in an action for libel alleged that the publication was made when plaintiff was trying to contract with a city for the construction in it of plaintiff's system of filtration, and falsely stated that alum was used in plaintiff's system, and that it was doubtful whether water having passed through plaintiff's process was healthful. *Held*, that it was sufficient on demurrer. *Stiness, J.*, dissenting.

2. A declaration alleged that, while plaintiff was trying to contract with a city for the construction in it of plaintiff's system of filtration, defendant published an article set out therein, and stating, in effect, that defendant had just been informed by the member of the city council who introduced the resolution for the adoption of plaintiff's system that he was led to believe that he would receive \$10,000 if he should get the resolution through the council, and charged by proper innuendo that the meaning intended to be conveyed was that plaintiff had offered a bribe to said member to procure the passage of said resolution, which was alleged to be false. *Held*, that it was sufficient on demurrer.

3. A private corporation may maintain an action for libel for a publication concerning it in the trade or occupation in which it is engaged.

Action by the Morrison-Jewell Filtration Company against David F. Lingane for libel. On demurrer to the declaration. *Overruled*.

Edwards & Angell, for plaintiff. Wilson & Jenckes, for defendant.

MATTESON, C. J. The plaintiff is a corporation engaged in the business of building works and appliances for the filtration and purification of water by a system or process known as the Morrison-Jewell system or process. At the time of the publication by the defendant complained of, it was endeavoring to make a contract with the city of Providence for the construction for the city of its system of tanks and works for the filtration of the water used by the city and its inhabitants. The portions of the article alleged to be libelous, set forth in the first count of the declaration, are as follows: "Possible danger to health in the use of alum in the process of filtering water. * * * Another important consideration in connection with the Morrison-Jewell system, which employs alum in its process, is the healthfulness of the water after having passed through the filtering tanks. Some very high medical and chemical authorities are inclined seriously to question the safety of such water for drinking purposes; and while there may, perhaps, be some doubt on both sides, the fact that any

doubt whatever may exist regarding the healthfulness of the water is sufficient to emphasize the necessity of caution and thorough investigation before the city is finally irrevocably committed to the proposed system." If the statements of facts contained in these extracts are true, we should doubt whether they went beyond the limits of proper newspaper comment. But the declaration avers that they are false; and, as the case is before us on demurrer which admits the facts to be as alleged in the count, we must assume for the present purpose that the statements contained in the article are false. Assuming them to be false, we cannot doubt that they are libelous, since the necessary effect of them would be to injure the plaintiff in its business, and to embarrass it in its negotiations with the city of Providence or others with whom it might wish to contract for the adoption of its process, if not to prevent such negotiations altogether. A corporation, though an artificial person, may maintain an action for libel for language concerning it in the trade or occupation in which it is engaged. *Ohio & M. Ry. Co. v. Press Pub. Co.*, 48 Fed. 206; *Insurance Co. v. Perrine*, 23 N. J. Law, 402; *Mutual Reserve Fund Life Ass'n v. Spectator Co.*, 50 N. Y. Super. Ct. 460; *Bank v. Thompson*, 18 Abb. Prac. 413; *Omnibus Co. v. Hawkins*, 4 Hurl. & N. 146; *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R. 9 Exch. 218.

The article complained of in the second count is as follows: "Within twenty-four hours, a well-known business man, who for many years was a member of the city council, has informed the Telegram that more than a year ago a resolution was framed providing for the introduction of the Morrison-Jewell system of filtration. He was intrusted with the introduction of the resolution, and was requested, in presenting it to the council, to urge its passage. Before doing so, however, he felt it his duty to look into the matter, and acquaint himself with the system and the conditions of the resolution. This gentleman informs the Telegram that during his investigations he was led to believe that he would receive \$10,000 if he should succeed in getting the resolution through the city council." The count, by a proper innuendo, charges that the intention of the article, and the meaning intended to be conveyed by it, was that a member of the city council of Providence was offered ten thousand dollars by the plaintiff to secure the passage through the city council of a resolution for the introduction of the plaintiff's system of filtration of water into the city of Providence. We think the language quoted fairly susceptible of the meaning attributed to it by the innuendo, and that, if such should be found by a jury to have been the construction intended by the defendant, it was clearly defamatory of the plaintiff, and therefore libelous.

We do not think that either of the counts is bad for want of a proper and sufficient prefatory statement or colloquium, or because it seeks to enlarge the meaning of the language complained of beyond its fair and reasonable construction. The publication complained of is not of the class which is absolutely privileged, or, as the defendant terms it, "privileged in law." As suggested by the plaintiff's counsel, the most that can be claimed for it is that it is entitled to the qualified privilege which is extended to publications otherwise libelous when made from the proper motives and in circumstances which afford an excuse or justification. *Kent v. Bongartz*, 15 R. I. 72, 22 Atl. 1023; *Odgers, Sland. & L.* *182-*184. As such qualified privilege is founded on motives and circumstances the existence of which is negatived by the declaration, we cannot consider it on demurrer, but must assume the truths of the allegations of the declaration. Demurrer overruled, and case remitted to the common pleas division for further proceedings.

STINESS, J., dissents as to the libelous character of the language complained of set out in the first count.

In re STATE HOUSE COMMISSION.

(Supreme Court of Rhode Island. Oct. 8, 1895.)

BOARD OF STATE HOUSE COMMISSIONERS—PRESENTATION OF BILLS TO THE STATE AUDITOR —DUTY OF AUDITOR.

1. The word "bills," as used in P. L. c. 1201, § 9, and chapter 1322, § 4, which direct the state auditor to draw his order for the payment of bills audited by the board of state house commissioners, means the itemized bills of the original parties with whom they were contracted, except in the case of incidental expenses for postage, telegrams, etc., which may be embraced in an account by the person paying them, and be audited without the production of vouchers.

2. Pub. St. c. 32, § 10, provides that, whenever appropriations shall be made for the erection or repairs of a public building, the state auditor shall, before drawing his order, require satisfactory proof that the work has been properly done. P. L. c. 1201, § 9, and chapter 1322, § 4, direct the auditor to draw his order for the payment of bills audited by the board of state house commissioners. *Held*, that these provisions do not confer a joint authority upon the commissioners and auditor in regard to the bills referred to in chapters 1201 and 1322, but that when an itemized bill of the party with whom it was contracted has been audited by the commissioners, and presented to the auditor, the latter is bound to draw an order for its payment, unless he has reason to believe that its allowance was procured by fraud, mistake, or other undue means.

Reply to communication from the governor of the state of Rhode Island, requesting an opinion upon the proper construction of certain statutory provisions.

To His Excellency, Charles Warren Lippitt, Governor of the State of Rhode Island and Providence Plantations.

We have received your excellency's com-

munication requesting our opinion on the points set forth in a communication to you from the state auditor, inclosed for our consideration.

The questions at issue turn upon the construction to be given to the following language, contained in P. L. R. I. c. 1201, § 9: "The amount received from the sale of such scrip, less any premium received over and above the principal thereof as provided in section 8, or so much thereof as may be necessary, is hereby appropriated for the payment of bills audited by said board, or by a committee thereof duly authorized for that purpose, and the state auditor is hereby authorized and directed to draw his order upon the general treasurer for the payment of all such bills out of the amount so received;" and upon the construction to be given to similar language contained in P. L. R. I. c. 1322, § 4, as follows: "All moneys received by said board by virtue of the provisions of this act, are hereby appropriated for the payment of bills, audited by said board or by a committee thereof, duly constituted for that purpose, and the state auditor shall draw his order upon the general treasurer for the payment of such bills out of the moneys so received."

The communication from the auditor states that it is contended by the board of state house commissioners that he has no authority except to see that the names of the approving officers of the board are upon the bills presented for payment, and that it has been the practice of the commissioners to send in for payment bills of their secretary for sundry expenses paid to others, without specifying fully what the expenses were, and without submitting vouchers for the payment. The auditor alleges that such a practice is contrary to the usages of the auditor's office, and that, if it is permitted and persisted in, it will prevent his rendering an itemized report of the expenditures of the state to the general assembly. He maintains that the word "bills," used in the statutes in question, for the payment of which he is directed to draw his orders on the general treasurer, refers to the original bills of the parties with whom they are contracted, and not to the bill of a second person who claims to have paid the original contractor, and presents a demand not accompanied by the bill of the original party as voucher. The auditor refers to Pub. St. R. I. c. 32, § 10, which provides that whenever the general assembly shall make any appropriation for the erection or repair of any public building, etc., the auditor shall require satisfactory proof that the work specified has been faithfully performed, according to the terms of such appropriation, before the money appropriated shall be drawn, etc., and maintains that it is within the province and authority of the state auditor to inquire into the several items of expenditure, in order that he may determine whether or not they are provided for by the act, and that a

joint authority is conferred upon the board and the auditor by the provisions of the statutes in question.

As the statutes relate to the auditing and payment of bills, and as an intelligent examination and allowance of such bills require a detailed statement of the several items and charges which go to make them up, we are of the opinion that the word "bills" in these statutes is used in its primary signification of an account for goods sold, services rendered, or work done, with the prices or charges annexed, though it is doubtless applied often in public speech to the statement of a claim in gross as well as by items. Moreover, unless the word be construed to require a statement of items, the auditor, as he suggests, cannot render an itemized report to the general assembly of the expenditures incurred, and the people will have no means of ascertaining for what the moneys have been expended. We do not think that the legislature intended such a result when it conferred authority on the commissioners, or their duly-constituted committee to audit bills. We are of the opinion, also, that these statutes contemplate the presentation of the bills of the original parties with whom they were contracted as the bills to be audited, except in the case of small and comparatively unimportant incidental expenses incurred by the commissioners,—as, for instance, for postage, telegrams, expressage, and the like,—for which vouchers would not ordinarily be taken. Such incidental expenses may properly be embraced in an account by the person paying them, and be audited without the production of vouchers. Unless, then, the bills presented to the auditor, as audited by the commissioners or their duly-constituted committee, are itemized bills of the parties with whom they were contracted, or are accounts for incidental expenses of the character specified, we do not think that the statutes in question impose upon the auditor the duty of drawing his order upon the general treasurer for their payment.

We do not think that the statutes in question are to be construed as conferring a joint authority upon the commissioners and the auditor. Chapters 1201 and 1322 are special statutes. In the matters to which they relate, they exclude the operation of Pub. St. c. 32, § 10. When a bill is presented to the auditor in the form contemplated by the statute, and which has been audited by the commissioners or their duly-constituted committee, he has no discretion. It is his duty to pay it, unless, indeed, he should have reason to believe that its allowance was procured by mistake, fraud, or other undue means.

[Signed]

CHARLES MATTESON.
JOHN STINESS.
P. E. TILLINGHAST.
GEORGE A. WILBUR.
HORATIO ROGERS.
WM. W. DOUGLAS.

STURR v. WEST JERSEY R. CO.

(Court of Errors and Appeals of New Jersey.
June Term, 1894.)

Error to supreme court.

Action between one Sturr and the West Jersey Railroad Company. There was a judgment for the latter, and the former brings error. Affirmed.

John W. Wartman, for plaintiff in error.
Samuel H. Grey, for defendant in error.

PER CURIAM. The judgment in this case is affirmed.

THE CHANCELLOR, THE CHIEF JUSTICE, and DEPUE, DIXON, LIPPINCOTT, REED, VAN SYCKEL, BOGERT, BROWN, and SMITH, JJ., for affirmance. **ABBETT, J.,** for reversal.

BERRY v. STATE (POTTER, Prosecutor).

(Court of Errors and Appeals of New Jersey.
June, 1894.)

Error to supreme court.

Action by the state, at the prosecution of Anna M. Potter, against Arthur E. Berry. There was a judgment for the plaintiff, and defendant brings error. Affirmed.

For opinion of supreme court, see 28 Atl. 668, 56 N. J. Law, 454.

Ephraim Cutter, for plaintiff in error. Alan H. Strong, for defendant in error.

PER CURIAM. The judgment in this case is affirmed, for the reasons given by the court below. Unanimously affirmed.

SUDLER et al. v. LANKFORD.

(Court of Appeals of Maryland. Dec. 12, 1895.)

ELECTION—APPOINTMENT OF BALLOT CLERKS—MANDAMUS—PROCEDURE—PETITION.

1. Under Act 1892, c. 701, and Act 1890, c. 538, § 152, providing, in regard to the appointment of ballot clerks, that, if the supervisors cannot "agree" upon the appointment of any clerk, then the supervisor representing the party entitled to be represented by the clerk to be appointed shall present three names, from which the other supervisors shall select a clerk, a majority of the supervisors have not power, against the will of the supervisor representing the party to be represented by the ballot clerk, to appoint a person belonging to such party, but one of the three whose names are presented by the supervisor representing the party must be selected.

2. Where the statute requires an answer in mandamus to be filed by defendant, setting forth his defenses, and, on his failure to do so, requiring the petitioner to produce proof showing his right to the writ, the court cannot grant the writ, where the petition is heard on demurrer, without proof by petitioner of his right thereto.

3. Where the statute requires ballot clerks to be electors and residents of their respective districts, a petition by one supervisor to compel the others to appoint as clerk, to represent his party, one of certain persons, must allege that they have the statutory qualifications.

Appeal from circuit court, Somerset county.
Petition for writ of mandamus by Benjamin F. Lankford against Albert Sudler and

another. From a judgment for petitioner, defendants appeal. Reversed.

Argued before **ROBINSON, C. J., and BRYAN, McSHERRY, BRISCOE, ROBERTS, and BOYD, JJ.**

I. W. Miles, for appellants. E. H. Gans, for appellee.

ROBINSON, C. J. The board of supervisors of election for Somerset county is composed of two Democrats and one Republican. The Republican supervisor presented the name of a Republican for ballot clerk in each of the election districts of said county, all of whom were rejected by the two Democratic supervisors. The Republican supervisor then submitted the names of three persons for Republican ballot clerk in each district, from whom the Democratic supervisors should select one from each district. The Democratic supervisors refused to select from these names, but appointed a Republican ballot clerk in each election district, of their own selection, and who was not one of the three names submitted to them by the Republican supervisor. This is an application for a mandamus to compel the two Democratic supervisors to select one of the three persons submitted by the Republican supervisor as ballot clerks for each election district of the county. It is contended on behalf of the Democratic supervisors that, inasmuch as they constitute a majority of the board, they have the right, by reason of that majority, to appoint any person as Republican ballot clerk whom they may see proper to appoint, provided the person so appointed is a Republican, and a resident of the election district. The appellee claims that, in the event of all the supervisors not being able to agree as to the appointment of a Republican ballot clerk, he, as Republican supervisor, has the right to submit the names of three eligible Republicans for ballot clerk, and that the Democratic supervisors are obliged, by the terms of the statute, to select one of the three names thus submitted.

The question turns entirely upon the construction of Act 1890, c. 538, § 152, and Act 1892, c. 701. This latter act provides that the governor shall biennially appoint, with the consent of the senate, in each county, three supervisors of election, two of whom shall always be selected from the two leading political parties of the state,—one from each of said parties. Under this act the practice has been to appoint two Democrats and one Republican supervisor. The act then provides that it shall be the duty of these supervisors to appoint three persons for each election district of the county, who are residents and voters of such election districts, as judges of election; and in making these appointments they are to select at least one of said judges for each district from among those of the leading political parties different from themselves or a majority of themselves. In other words, if the majority of the board

of supervisors are Democrats, they must appoint one judge who is a Republican. And this is all the law requires as to the appointment of judges of election. Now, it is well settled that where appointments are to be made by any public board, and the method is specifically pointed out for the exercise of the power, the majority rule governs. And therefore judges of election for the counties may be, under the statute, appointed by a majority vote. When, however, the law comes to provide for the appointment of ballot clerks and other officers of election, a different mode of appointment is prescribed. The act does not say simply that they shall be appointed by the board of supervisors, as it did in the appointment of judges of election, but provides in express terms that the ballot clerks or other officials shall be appointed as provided by section 152, c. 538, Act 1890. Now, this section provides that the board of supervisors shall appoint two ballot clerks for each election district; each one of the supervisors shall have a vote upon the proposed selection or nomination of any election clerk; and if, in any instance, in consequence of such vote, the board cannot agree upon such appointment, then the names of three persons who are eligible shall be submitted for selection for election clerks by the supervisor or supervisors belonging to the leading political party entitled to be represented by such election clerk, and out of each three names the other supervisor or supervisors representing the other leading party of the state shall select the name of such election clerk, who, when so selected, shall be appointed election clerk, if otherwise eligible, and shall serve, unless excused by said board of supervisors of election, so that there shall be two ballot clerks for each voting place. The statute thus gives to each of the two different political parties which polled the largest number of votes at the last preceding election one of the two ballot clerks, and means, and can only mean, that the supervisor or supervisors belonging to each of said parties shall have a voice in the selection of said ballot clerks. And when it says that, if the board cannot agree upon such appointment, then the names of three persons who are eligible shall be submitted, etc., the word "agree," as thus used, means a concurrence or agreement of each supervisor, and does not mean that a mere majority shall have the power to appoint, without regard to the minority supervisor. So in this case, when the two Democratic supervisors refused to agree to the appointment of the ballot clerk selected by the Republican supervisor, then it became the duty of the Republican supervisor to submit to the two Democratic supervisors the names of three persons eligible as ballot clerks, one of whom they were bound to select as ballot clerk. And, if the Republican supervisor refused to agree to the appointment of the person selected by the Democratic supervisors, then it was the duty of the latter to submit to

the Republican supervisor the names of three persons eligible as ballot clerks, one of whom was to be selected by the Republican supervisor. The duty thus imposed upon the supervisors is a mere ministerial duty, and one the performance of which may be enforced by mandamus. And for the willful refusal to discharge such the supervisor would be amenable to the punishment prescribed by section 164 of the act.

In view of its importance, involving as it does the appointment of ballot clerks,—officers necessary to the conduct of an election,—we have deemed it proper to decide the question which this appeal was intended to raise, which was fully argued by counsel on both sides. The proceedings, however, under the petition for a mandamus, have not been conducted in the manner prescribed by the Code, so as to present the question. The Code provides that on an application for a writ of mandamus the defendant shall file an answer to the petition, fully setting forth all the defenses upon which he intended to rely. The answer thus filed stands in the place of the return of the alternative writ under the former practice. And then the Code further provides that if the defendant shall fail to file his answer within the time fixed by the judge, being served with notice thereof, the judge shall proceed to hear the petition *ex parte*, etc. The judge has no right, as we said in *Legg's Case*, 42 Md. 203, to act upon the allegations in the petition as if they had been confessed, or to assume that they were true because the appellants failed to make sufficient answer to them. So, if the defendant fails to answer, the judge hears the case *ex parte*; that is, he allows the petitioner to offer such proof as may be necessary to satisfy the judge that the allegations set forth in the petition are true. The case must be heard, and the judge satisfied both as to the law and facts, before the writ can be ordered. *Legg's Case*, *supra*. Now, in this case the petition was heard on a general demurrer filed by the defendants, and no proof was offered to sustain the averments in the petition; it being assumed that no proof was necessary, provided the facts alleged were admitted by demurrer. This would be so in ordinary pleading, but in an application for a prerogative writ, like mandamus, the legislature has seen fit to say that the defendant must file an answer setting forth specifically all the defenses on which he relies. And, if he fails to do so, proof must be offered to satisfy the judge that the allegations in the petition are founded in truth. The court below had no right, therefore, to order a writ of mandamus without answer or proof of some kind.

✓ The petition is also defective inasmuch as it does not aver that the three names suggested by the Republican supervisor were eligible; that is, residents and voters of the respective election districts, these being the qualifications prescribed by the statute for

ballot clerks. In an application for a mandamus, all the facts necessary to the granting of the writ should be stated. For these reasons the order of the court directing the writ to issue must be reversed, and the petition dismissed. Order reversed and petition dismissed.

RICHARDSON v. SIMPSON.

(Court of Appeals of Maryland. Dec. 6, 1895.)

TAX SALE—DESCRIPTION OF LAND.

The notice of a tax sale of land described the land as a tract owned by H., containing 64 acres, called the "T. B. Tract," described in a certain recorded deed. The deed called for a tract containing 103 acres. H. had conveyed the land, one person at the time owning 50 acres of the tract, another 25 acres, another 38. Held, that the sale was invalid, on account of the indefinite description of the land.

Appeal from circuit court, Prince George's county.

Bill by Robert L. Simpson against George W. Richardson, Jr., to set aside a tax sale. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Argued before ROBINSON, C. J., and BRISCOE, BRYAN, BOYD, FOWLER, and McSHERRY, JJ.

C. C. Magruder and Jos. S. Wilson, for appellant. J. J. Johnson, Marion Duckett, and Elbert Dent, for appellee.

McSHERRY, J. A tract of land called "Three Brothers," and containing 103 acres, lying in Prince George's county, was conveyed by Samuel T. Suit and others to Milton L. Howser, in March, 1879, and four days afterwards was reconveyed by Howser to Suit, by way of mortgage, to secure the payment of \$2,250. Howser caused the tract to be surveyed, and subdivided into six lots, and had the survey and plat recorded in 1880, among the land records of the county. Lots 1, 2, and 3 appear to have been conveyed to Ellen E. Bruce, and were transferred to her on the assessment books of the county. The title to the residue of Three Brothers, by some means not clearly disclosed in the record, was again acquired by Suit, who afterwards died. In March, 1890, 25 acres of this residue were conveyed by Suit's executrix to one Werck, for the sum of \$875; and, in December following, the remainder, comprising about 38½ acres, was conveyed by Suit's executrix to the appellee, Simpson, for the consideration of \$1,330. The whole tract of 103 acres was assessed in the name of Howser, and stood thus, long after he had ceased to own any part of it. In May, 1891, to enforce the payment of the taxes for 1890, which amounted to \$8.73, and which were then due and in arrear, subdivisions 4, 5, and 6, belonging, under the conveyances mentioned above, to Werck and Simpson, and aggregating about 63 acres, were sold by the tax collector, after he had first advertised

the sale for the period of time prescribed by law. In the advertisement the collector described the land as follows: "M. L. Howser, a tract of land called the 'Three Brothers,' containing sixty-four and eighteen one-hundredth acres, more or less. For further description, see deed recorded in Liber A. T. B., No. 1, folio 154. State and county taxes for year 1890, \$8.73." At the tax sale, the 63 or 64 acres were purchased by the appellant, Richardson, for the sum of \$35, or a fraction over 55 cents an acre. Simpson unquestionably never knew of this sale until after the expiration of the time allowed for a redemption of the property, nor until after Richardson had received a deed for the land from the collector. Simpson then offered to redeem the land, and to repay the purchaser all his outlay, with the penalty fixed by the statute added, and whatever after-imposed taxes Richardson had paid; but the latter refused to surrender his claim to the property under the collector's deed, unless upon the payment of a considerable sum of money. Thereupon a bill was filed by Simpson in the circuit court for Prince George's county, against Richardson, alleging that the tax sale was irregular and void, and praying that the tax collector's deed might be canceled and set aside. Richardson answered. Testimony was taken, and the court below passed a decree granting the relief prayed. From that decree, this appeal has been taken. There are several alleged irregularities relied on to defeat the sale attacked in this proceeding; but, as one of these presents a fatal objection, it will not be necessary to consider or to discuss the others.

Under the provisions of section 52, art. 81, of the Code, the final ratification of a tax collector's sale by the circuit court is prima facie evidence of the regularity of the antecedent proceedings, but it has no greater or other efficacy. It seems merely to relieve the purchaser of the onus of proof, and to cast the burden of showing the illegality of the proceedings upon the party resisting the sale. Until such proof is offered by the assailing party, the sale, if ratified and confirmed, stands good and effective, by operation of the statute. *Guisebert v. Etchison*, 51 Md. 478; *Steuart v. Meyer*, 54 Md. 454; *Cooper v. Holmes*, 71 Md. 26, 17 Atl. 711. While the burden of proof is thus shifted, still the validity of the sale depends on there having been a substantial compliance on the part of the collector with all the essential requirements of the statute. This is in no manner dispensed with. With the burden thus cast upon him, the appellee, who is owner of the property which was sold as the property of some one else, insists, and in the court below successfully maintained, that there was no sufficient description of the property given by the collector in the advertisement of sale to gratify the requirements of the law. He claims that the advertisement was vague, misleading, and indefinite; and that it failed

to designate the property intended to be sold with an accuracy or certainty that identified it. If this contention be well founded, then the decree appealed from was right, and must be affirmed.

It cannot be seriously doubted that under a summary proceeding, where a special power has been executed, and the land of one person has been levied upon and sold to pay taxes assessed against another, the failure of the officer to give a proper notice of the sale, or his omission to advertise a sufficient description of the property intended to be sold, will deprive him of authority and jurisdiction to proceed at all, and will invalidate the deed which he subsequently makes, even though the sale may have been ratified by the court; and especially is this true if the insufficient or indefinite description has arisen from, or can be traced to, the neglect of public officials, whose duty it is to properly keep the records of persons chargeable with taxes, and to levy the tax accordingly. The chief, if not the only, objects in giving notice of tax sales by public advertisement, are: First, to apprise the owner of property intended to be sold that a proceeding is pending which, unless arrested by the payment of the tax, will divest him of his property; and, secondly, to apprise persons desirous of purchasing, so they may know the particular property to be sold. If both or if either of these objects be defeated by the form of the advertisement, or by the description which it gives of the property, then, obviously, the designs of the law in requiring public notice to be given have not been subserved; the proceeding is irregular; and the sale, if made, will be void. *Ronkendorff v. Taylor's Lessee*, 4 Pet. 362; *Cooley, Tax'n*, 284. An erroneous published description, which is calculated to mislead, is insufficient to constitute notice. *Knight v. Alexander*, 38 Minn. 384, 37 N. W. 796. The designation of the land will be sufficient if it afford the means of identification, and do not positively mislead the owner (*Woodside v. Wilson*, 32 Pa. St. 52), or be calculated to mislead him (*Curtis v. Board of Sup'rs*, 22 Wis. 167). Where the description is part of a lot, without showing how much, or giving boundaries, it will be insufficient. *Detroit Young Men's Soc. v. Mayor, etc.*, of Detroit, 3 Mich. 172; *Lessee of Massie's Heirs v. Long*, 2 Ohio, 287. See, also, *People v. Cone*, 48 Cal. 427.

Now, we have seen that the advertisement purported to offer for sale a tract of land ostensibly owned by M. L. Howser, and containing 64.18 acres, called "Three Brothers," which, the advertisement stated, was described in a deed recorded in Liber A. T. B., No. 1, folio 154. To this deed, whose contents are by reference distinctly incorporated in the advertisement as containing a correct description of the land proposed to be sold, recourse must be had to ascertain what particular property was intended to be sold. By referring to that deed, the collector incorporated its description

of the land in his published notice. But that deed, when inspected, discloses the fact that Three Brothers is a tract of land containing 103 acres, and not 64.18 acres. Is the tract which was advertised a totally different tract of the same name, but erroneously supposed to be conveyed by the deed referred to? Or is it a part of the 103-acre tract described in the deed alluded to in the advertisement? The advertisement does not disclose. But, if it be conceded that the 64 acres are a part of the 103 acres, still there is a manifest uncertainty as to which 64 acres of the whole 103 were intended to be sold. By the successive exclusion of each one of the 64 acres, and the inclusion, once or oftener, of some one of the remaining 39 acres, it is possible that 64 different locations could be made, though all of them would, of necessity, include some part of each separate division. But this is not all; for, by other methods of subdivision, the whole or fractional parts of the remaining 39 acres might be included in 64 acres, and yet no one division might contain the precise 64 acres intended to be sold. As we have said, Werck owned 25 acres, and Simpson 38, aggregating 63 acres; and it was entirely possible that the 64 acres advertised included the 39 acres, or a part of the 39 acres, owned by Bruce, and no part of the 38 acres owned by Simpson. In other words, taking the whole advertisement together, including the reference to Howser's deed, it was impossible to determine from that advertisement precisely what 64 acres were meant. The published description fitted the 39 acres owned by Bruce plus the 25 acres owned by Werck quite as well as it fitted the 38 acres owned by Simpson plus the 25 owned by Werck. It was impossible for Simpson, the appellee, to know from the description that his 38 acres were included; and it was equally impossible for a purchaser to know what particular 64 acres he was buying. Upon the same ground the following description, "60 acres, part of the north-half section 13," was held to be too vague and uncertain. The court there said: "Which sixty acres? is an inquiry naturally to be made." *Treon's Lessee v. Emerick*, 6 Ohio, 391. And so a description of "two-thirds of block four in Bass' outlots" was held bad for uncertainty; it was not a description of any particular parcel of land. *Bidwell v. Coleman*, 11 Minn. 78 (Gil. 45). See, also, *Hunt v. Warshung*, 48 N. J. Law, 613, 9 Atl. 190; *Murphy v. Hall*, 68 Wis. 202, 31 N. W. 754; *Marin v. Sheriff*, 30 La. Ann. 293; *Whitmore v. Learned*, 70 Me. 276; *Pickering v. Lomax*, 120 Ill. 289, 11 N. E. 175; *Power v. Bowdle* (N. D.) 54 N. W. 404.

There was not only an uncertainty in the description of the land offered for sale, but the uncertainty arose from the tax official's own neglect. In point of fact, Howser had not owned the land, or any part of it, for 10 years prior to the sale. By the eighth section of article 81 of the Code, it is made the duty of the clerks of the several circuit courts to transmit annually to the county commissioners a list of

all alienations of property recorded in their respective offices. From the testimony in the record, we conclude this was regularly done by the clerk of the circuit court for Prince George's county. While, as decided by this court in *Commissioners v. Clagett*, 31 Md. 210, a failure to comply by the clerk with this duty did not relieve an alienor of property from the obligation to make personal application to the county commissioners for a transfer from himself to his alienee, but left the alienor liable to be sued in assumpsit for all taxes levied against him with respect to the property standing in his name, though no longer owned by him, still the list so furnished to the county commissioners of Prince George's county gave to them and to the collector information that Howser was no longer the owner of the Three Brothers, and that the whole tract had been subdivided, and was in fact owned by three different individuals. If, as a result of their failure to note these alienations and changes of ownership, the property was subsequently advertised in such a way as to mislead the real owner, the strongest possible equity against upholding the sale is presented. It seems to us that a court of equity ought not to permit a sale to stand which has been so defectively advertised as this one was, and which, as a consequence of the vague notice, resulted in stripping the appellee of his property at about the one-hundredth of its real value, to satisfy taxes apparently due by some one else. That a sale of property for \$35, when, according to the undisputed evidence, it was worth \$3,500 or more, should be upheld in the face of the objection we have been considering, is too obviously unjust and unconscionable a proposition to be entertained for a moment.

There is nothing in what we have said at all in conflict with the decision by this court of *Cooper v. Holmes*, 71 Md. 20, 17 Atl. 711. There the description was held sufficient because there was nothing on the face of it, as in the case at bar, to render it vague or uncertain.

Agreeing, as we do, with the circuit court, its decree will be affirmed, with costs. Decree affirmed, with costs in this court.

GAINES v. LAMKIN.

(Court of Appeals of Maryland. Dec. 6, 1895.)

APPEAL—TIME OF TAKING.

Code, art. 5, § 6, provides that appeals from a court of law shall be taken within two months from the date of the judgment. Held that, where a verbal order for an appeal is given out of court and after the expiration of the term, the entry of the appeal must be made within the time limited by statute, or the appeal will be dismissed.

Appeal from circuit court, Washington county.

Action by Samuel Lewis Lamkin against John M. Gaines to recover the balance due on a contract for construction of a house. From a judgment for plaintiff, defendant appeals. Appeal dismissed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, and BRISCOE, JJ.

Alex. Armstrong and Alex. Neill, for appellant. William Clarence Kealhofer and J. Clarence Lane, for appellee.

ROBINSON, C. J. The Code provides that all appeals from any judgment of a court of law "shall be taken within two months from the date of such judgment. Article 5, § 6. The judgment in this case was rendered on the 24th November, 1894, and the appeal was entered on the 20th March, 1895, more than two months from the date of the judgment. It is admitted, however, that the defendant's attorney, on the 7th of January, 1895, after the actual session of the court for the November term had ended, gave a verbal order for an appeal; but it was not entered, because the clerk of the court says he had no recollection that any such order was given, and that the entry of March 20, 1895, was made at the request of defendant's attorney, and upon his statement that he had given a verbal order for the appeal on the 7th January. And the question is whether a mere verbal order for an appeal which is not entered of record till after the expiration of two months from the date of the judgment is an appeal properly taken, within the meaning of the Code. In *Miller v. Murray*, 71 Md. 61, 17 Atl. 939, we held that a verbal order for an appeal from an order passed by a court of equity, but which was not entered within two months from the date of the order, was not a compliance with the statute, and the appeal was therefore dismissed. The Code provides, it is true, that appeals from orders or decrees of a court of equity "shall be taken and entered" within two months, etc. But, after referring to the provisions of the Code relating to appeals from judgment of a court of law, we said in that case: "It was not probable that a different rule was intended in the two cases." We did not decide that an order for an appeal must necessarily be in writing, although it is obvious that such an order would be the safer practice, and would avoid all question as to whether an appeal had been prayed, and, if so, whether it was within the time thus limited by the Code. But we did say: "There was but one mode by which the proceedings of a court of record could be proved, and that was by the record itself." And, if so, where the order is by word of mouth, to entitle one to the benefit of an appeal the entry must be made on the records of the court, and made, too, within two months from the date of the judgment. Any other construction of the statute would lead to endless controversies, the decision of which would depend, not upon the records of the court, but upon the uncertain, and in many cases conflicting, recollection of the attorney and the clerk. Every safe and sound principle construction, therefore, requires us to h

that where a mere verbal order for an appeal is given, not in open court, but after the actual session of the court is over, the entry of the appeal must be made within the time limited by the statute. No such entry was made in this case, and it follows, therefore, that the appeal must be dismissed.

As the case was fully argued on its merits, we may say that, after a careful examination of the record, we find no error in the several rulings of the court below, unless, perhaps, there was error in excluding the evidence offered by the defendant to prove the amount paid by him to the witness Bryson for relaying the drain pipes to carry the water to the cistern. The bill of particulars, however, filed by the defendant, shows that the amount thus paid by him was only \$11.70; and, if the question was properly before us, we should have great reluctance in reversing the judgment for so small an amount, and thereby subject the parties to the costs and expenses of another trial. Appeal dismissed.

BALTIMORE BREWERIES CO. v. CALLAHAN.

(Court of Appeals of Maryland. Dec. 5, 1895.)
STATUTE OF FRAUDS—CONTRACT OF EMPLOYMENT
FOR ONE YEAR.

A contract of employment for one year, to commence when the employé secures a release from a former employment, is not within the statute of frauds, where his release on the date of the contract was a possibility, though not in fact secured till a later date.

Appeal from superior court of Baltimore city.

Action by John H. Callahan against the Baltimore Breweries Company for breach of contract of employment. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BRYAN, ROBERTS, McSHERRY, and FOWLER, JJ.

Charles Marshall, W. L. Marbury, and R. J. Bowdoin, for appellant. Henry Stockbridge and Edgar H. Gans, for appellee.

FOWLER, J. The plaintiff sued the defendant corporation to recover damages for the breach of a contract to employ him for one year at a salary of \$1,560, payable in weekly installments of \$30 each. This contract is in writing, and the controlling question is whether it is a contract to be performed within a year, and, if so, whether it sufficiently sets forth a consideration on the part of the plaintiff. But for the ingenious argument of the counsel for defendant, we should have had but little, if any, doubt in regard to the correctness of the rulings of the learned judge below. He held, and we think correctly, that upon its face the contract was one which could have been performed within a year, or rather that it did not appear that it could not be possibly performed within that time, and that, there-

fore, it was not within the fourth section of the statute of frauds. This view is in accordance with the great weight of authority, and is supported by the decisions of this court in the case of *Cole v. SINGERLY*, 60 Md. 354, where it was said that "the statute will not be applied where the contract can, by any possibility, be fulfilled or completed within the space of a year, although the parties may have intended its operation should extend through a much longer period." It appears that the contract sued on in this case was executed on the 5th of September, 1893, and it will appear from an examination of its provisions that it was made between the plaintiff and defendant; that each of them signed; that they both thereby declared that the defendant had employed the plaintiff for the term of one year, beginning on the — day of September, 1893, and ending on the — day of September, 1894, to serve as a solicitor of trade, etc., that the defendant agreed to pay the plaintiff as salary for said term of one year the sum of \$1,560. It appears from the testimony of the plaintiff that at the time of the execution of this contract it was thought there was nothing which could prevent his going into the service of the defendant at once, except the fact that he could not then tell at what moment of time the person he had been theretofore serving would release him, and that the date which was left blank depended upon that uncertain or contingent event. If he had been released by his former employer on the day of the signing of the contract with the defendant, he would have filled out the blank by writing in the 5th of September, and the contract would then have clearly been for a year certain, and not within the statute. In the case of *Cole v. SINGERLY*, supra, it was held that the fourth section of the statute of frauds prohibits only such contracts as are not to be performed within a year, and expressly and specifically so agreed. A contingency is not within the statute, nor any case that depends upon a contingency. Hence this case is not changed by the fact that after the contract was signed the plaintiff ascertained, and so informed the defendant, that he could not begin his service until the 11th of September; for, as we have seen, there was nothing to render it impossible for the service to begin the very hour and day the contract was signed, if the plaintiff had been immediately released by his former employers. But, even if we could adopt the view so earnestly presented by defendant's counsel, and hold that the contract is one which is not to be performed within the space of a year, it seems to us that it complies with the statute, for it is in writing, and sufficiently sets forth a valid consideration. Over their signatures the plaintiff and defendant declare that the latter has employed the former for the term of one year at a stipulated salary. The infer-

ence from this language is certain, namely, that both parties agreed to this employment, and the terms thereof, the time it was to continue, and the compensation to be paid; and nothing else was necessary to make the contract binding upon both of them. If the paper had been drawn in a more formal manner, perhaps it would have been set forth in the contract that the plaintiff agreed to render the stipulated service in consideration of the payment of the salary. But such express statement, moving from the plaintiff, is not required, for it is sufficient if the consideration may be collected or implied with certainty from the instrument itself. In the case of *Black v. Woodrow*, 39 Md. 215, it is said that: "It not infrequently occurs that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it is manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied." We entirely agree with the learned judge below that the written contract before us shows the whole, and not only a part, of the consideration, and, being in other respects valid, there was no error in the rulings excepted to, all of them having been based upon the ground that the contract in question is void. Judgment affirmed.

STERLING, Sheriff, v. McMASTER, County Treasurer.

(Court of Appeals of Maryland. Dec. 11, 1895.)

MANDAMUS—PETITION—SUFFICIENCY.

Acts 1894, c. 578, § 215, requires the county treasurer, as soon as the annual tax levy is made, to give public notice by advertisement, declares the taxes due October 1st of the year in which they are levied, and provides that the treasurer shall sit for two days in each election district for the purpose of receiving taxes. Section 216 provides that the taxes are in arrears January 1st, and draw interest from October 1st; that the treasurer, as soon as practicable after January 1st, shall deliver each delinquent who has not previously received such notice, an account of his taxes, and a warning that, unless payment in full be made within 60 days, the same shall be collected by process of law; and that all tax bills unpaid on April 1st, after service of notice, shall be placed by the treasurer in the hands of the sheriff, for collection. *Held*, that a petition by the sheriff for a writ of mandamus to compel the treasurer to place unpaid tax bills in his hands for collection must allege that the treasurer has unreasonably delayed in delivering the warnings, or that the 60 days after their delivery have expired.

Appeal from circuit court, Somerset county.

Petition by W. Jerome Sterling, sheriff of Somerset county, for a writ of mandamus to compel William S. McMaster, treasurer of

Somerset county, to place in the hands of the sheriff for collection certain bills of unpaid taxes. From a judgment sustaining a demurrer to and dismissing the petition, petitioner appeals. Affirmed.

Argued before BRYAN, McSHERRY, BRISCOE, ROBERTS, and BOYD, JJ.

Thos. S. Hodson, Ed. S. Kines, and T. Sherwood Hodson, for appellant. Miles & Stanford, for appellee.

BRYAN, J. Sterling, the sheriff of Somerset county, filed a petition for a mandamus against McMaster, treasurer and collector of the same county. It was alleged that McMaster, in violation of his duty, refused to place in the hands of the sheriff certain bills for the collection of unpaid taxes, and the petition prayed that he might be compelled by mandamus to perform the alleged duty. A demurrer having been entered by consent, the court dismissed the petition.

The duties of the treasurer and collector were imposed by Act 1894, c. 578. By the 215th section of the act he is required each year, as soon as the annual levy is made, to give public notice thereof by advertisement in at least two newspapers published in Somerset county, and the taxes are declared to be due and payable on the 1st day of October of the year in which they are levied. By the same section it is made the duty of the treasurer and collector to sit for two days for the purpose of receiving taxes at the principal town in each election district in the county, and, if there be no town, then at the principal or some convenient place of resort therein; and he is required to give due notice of each of said sittings by advertisement in two newspapers published in the county. By the 216th section it is declared that, on the 1st day of January in each year, taxes shall be deemed to be in arrears, and interest shall be collected on them from the 1st day of October. The treasurer is required, as soon as practicable after the 1st day of January, to deliver to each delinquent who has not previously received such notice an account of the assessment and the taxes and interest due thereon, with a notice and warning thereto attached that, unless payment in full be made within 60 days from the delivery of such notice, the same shall be collected by process of law. It is also required by the same section that all tax bills unpaid on the 1st day of April after the service of such notice shall be placed by the treasurer in the hands of the sheriff, who is required forthwith to proceed to collect them, according to the provisions of the Public General Laws.

The petition alleges that "on the 1st day of April, 1895, a large proportion of the bills of state and county taxes being unpaid, he demanded of William S. McMaster, the treasurer and collector as aforesaid, that the

taxes remaining unpaid on that date be handed over to him, your petitioner, under the provisions of the said act, and placed in his hands for collection; but the said William S. McMaster, contrary to his duty, neglected and refused, and still neglects and refuses, to place the said bills for taxes remaining unpaid in the hands of the petitioner for collection." The quotations from the statute which we have made show that, as soon as practicable after the 1st day of January, the treasurer shall deliver to each delinquent who has not previously received notice an account of his assessment, accompanied with the notice and warning that the tax will be collected by process of law if not paid within 60 days. He is, of course, entitled to a reasonable time to deliver these notices and warnings. The terms of the act imply a personal delivery to each delinquent. Although it is impossible to determine in advance what length of time might be required to make these deliveries, yet it is very certain that the treasurer ought to act promptly and diligently, as becomes a public officer impressed with the necessity of making a speedy collection of taxes. If the delinquent should fail to make payment within 60 days after the delivery of the notice and warning, he is liable to legal process; and, if this time has expired, the bills must be placed in the hands of the sheriff for collection on the 1st day of April. In passing, we would say that we would not intimate that the bills were to be withheld from the sheriff in case the 60 days did not expire until after the 1st of April. The law manifestly contemplated that the warnings would be given more than 60 days before the 1st day of April; but if, for any reason, there should be a delay in giving them, so that this term of notice would not expire before the 1st day of April, the law is not on that account to be defeated. Its grand leading object is to compel the speedy collection of taxes; and that object must be attained, notwithstanding the proceedings for this purpose should not be carried out at the times designated. The time appointed for placing the tax bills in the hands of the sheriff is not an essential part of the statute; but the speedy collection of taxes is the predominant purpose for which it was enacted. It would be most unwise to sacrifice this end to the matters of administration which were intended to accomplish it. In *State v. County Com'rs*, 29 Md. 523, this court considered a statute which provided that the county commissioners of Baltimore county should within 20 days after its passage order an election for supervisors of roads and bridges. It was held that the election might be ordered after the expiration of the 20 days, and that the county commissioners might be compelled by mandamus to order it. The court quoted a decision of Lord Ellenborough on an act of parliament which required the justices of the quarter

sessions to appoint a surveyor of highways at their first special session after Michaelmas. The appointment was not made at the first session, and the justices declined to make it at the subsequent sessions. His lordship said: "This part of the act is only directory to the magistrates to make the appointment at the time mentioned. * * * And common sense requires that, if the appointment be not made at the first special sessions, it should be made afterwards." *King v. Justices of Denbysire*, 4 East, 144. He therefore compelled the appointment by mandamus.

The petitioner does not allege that the treasurer has unreasonably delayed in delivering the warnings, or that the 60 days after their delivery had expired when this proceeding was instituted. If these facts existed, they would show a breach of public duty on the part of the treasurer; but the allegation in the petition which we have quoted is far short of this charge. In *Pumphrey v. Mayor, etc.*, 47 Md. 145, it was held that any private citizen was entitled to the writ of mandamus to enforce the performance of a public duty which was not due to the government as such. In this case the writ was issued at the suit of Pumphrey, to compel the mayor and city council of Baltimore to take charge and possession of the bridge over Gwynn's Falls, as required by Act 1876, c. 220. In a proper case, therefore, the petitioner, like any other citizen, would be entitled to a mandamus.

We must affirm the judgment in this case; but the appellant is at liberty to file another petition, if he sees fit to do so. Judgment affirmed, without prejudice.

FRICK v. FRICK et al.

(Court of Appeals of Maryland. Dec. 13, 1895.)

WILLS—CONSTRUCTION—CONFLICTING PROVISIONS—EXTRINSIC EVIDENCE.

1. In a suit for construction of a will by which a testator first devised all his personal property to a daughter, and, after providing that she was to have no share in the balance of his estate, devised it to his other children, it appeared that when the will was made the testator owned, and had, by an unrecorded written agreement, contracted to sell, a tract of land, the vendee to pay the purchase price "according to the last will" of testator, to his "heirs"; that before his death the testator deeded the land to the vendee, and took a promissory note for the price. *Held*, that the note did not pass to the daughter, under the bequest to her of all the personal property, but must be distributed, according to the terms of the will, to the remaining eight children.

2. In a suit for construction of a will devising all a testator's personal property to a daughter, and, after excluding her from any share in the balance, devising it to his other children, extrinsic evidence is admissible to show that the balance referred to is the purchase note for land, which a vendee had agreed, by an unrecorded contract of sale previously made, to

pay to "heirs" of the testator "according to" his "last will."

Appeal from circuit court, Carroll county, in equity.

Bill by John Frick, administrator with the will annexed, against Lillian Frick, by her guardian ad litem, and others, for construction of the will. From a pro forma decree dismissing his bill, plaintiff appeals. Reversed.

Argued before ROBINSON, C. J., and MC-SHERRY, FOWLER, BRISCOE, and BOYD, JJ.

James A. C. Bond, for appellant. T. Neal Parke and W. H. Thomas, for appellees.

BOYD, J. The bill was filed in this case for the construction of the will of John Frick, who died in May, 1893. It was executed on the 4th day of February, 1890, and by it, after directing all his just debts and funeral expenses to be paid by his executor out of his estate as soon after his decease as should be found convenient, the testator gave to his wife, Mary Frick, for life, his house and lot in Smallwood, Carroll county, and after her death to his daughter Lillian Frick, for life, and after her death to the Evangelical Lutheran Church, of which he was a member. Then follow the provisions which we are asked to pass upon, viz.: "I also give to my said daughter Lillian Frick all my personal property, to have and hold forever. And, as to the balance of my estate, my wife, Mary Frick, and my daughter Lillian are not to have any share in it, but is to be divided as follows: To my sons John Frick and Rufus Frick, Amelia Hyson, and Caroline Block, in consideration of what they have already received, each the sum of ten dollars; the balance to be equally divided, share and share alike, between and among my other children, Philip Frick, Frank Frick, Louisa Baker, and Sophia Nelson." Testimony was taken as to the surrounding circumstances of the testator, and on some other matters, the legal effect of which we will have occasion to refer to. The record discloses that when the will was executed the testator owned the house and lot in Smallwood; furniture and other goods and chattels, afterwards appraised at \$25.90; two small notes, returned "Desperate"; and a farm containing 47 acres, which he had on December 18, 1889, sold to his son Frank by an unrecorded written agreement. It was herein agreed that Frank was not to pay for the property until after the death of his father, but he was to pay him annually 5 per cent. interest on \$1,000, the consideration mentioned in the agreement, and "after the decease of the said John Frick, Sr., the said Frank A. Frick agrees to pay the heirs according to the last will and testament of said John Frick, Sr." Subsequently the senior Frick executed a deed to his son, and took a note for \$1,200, payable one year after date (November 16, 1891), with 5 per cent. interest from date, signed by Frank and his wife. Mrs. Frick

testified that the note was taken for \$1,200 because Frank had fixed up the property out of his own means. Lillian Frick is the only child by Mary Frick, who was the second wife of John Frick, Sr., and the others named in the will were his children by a former marriage.

We have thus referred to the testimony which shows what property Mr. Frick owned when he made the will, and explains the relationship of the beneficiaries under it to the testator, as it is not only the right but the duty of judges, in construing wills, to put themselves in the place of the testators, as far as possible, for the purpose of ascertaining their intentions. We must discover such intention from the face of the will, but, without knowing how the testator was situated, the meaning and application of his words would oftentimes be incomprehensible. We cannot, however, resort to extrinsic evidence to ascertain from the scrivener what the testator instructed or intended him to say, as was attempted in this case, nor can we accept the declarations of the testator to establish his intention, or to aid in the interpretation of the will, as was settled in *Cesar v. Chew*, 7 Gill & J. 127; *Zimmerman v. Hafer*, 81 Md. 347, 32 Atl. 316; and other cases that might be cited. Having before us, therefore, the facts and circumstances respecting the persons and property to which the will relates, we must seek to discover the meaning of the testator in the language used by him. The bequest to Lillian of "all my personal property" is sufficiently broad to include all personal property which the testator could dispose of at the time of his death, unless there be something elsewhere in the will to qualify or limit it. It has always been the law of this state that a will takes effect as of the death of the testator, so far as it affects personal property, and the statute many years ago adopted a similar rule for real estate. It was accordingly held in *Dalrymple v. Gamble*, 68 Md. 523, 13 Atl. 153, that the terms "all my personal property," as used in that will, passed the testator's distributive share in the estate of his brother, who died intestate 23 days before the death of the testator, which amounted to \$30,000, although when he made his will he only had about \$100 worth of personal property in California, where he lived. That decision rested on the fact that there was nothing in the will to restrict the term used, "all my personal property," and as the will spoke and took effect from the death of the testator, it included all personal property he owned at that time. In *Stannard v. Barnum*, 51 Md. 451, it was said: "It would be a dangerous doctrine to establish, and one without precedent, that where the language of the will is plain, and the residuary clause, in terms, disposes of the whole estate, and there are no qualifying words in any part of the will, you may introduce extrinsic evidence to show that the testator did not know that certain property which he owned actually be-

longed to him, for the purpose of restricting the natural meaning and operation of the will. Such evidence would clearly be inadmissible." In *State v. Robinson*, 57 Md. 486, this court, in construing the will then under consideration, held that where a testator gave to his wife, among other property, the bills receivable of which he should die possessed, absolutely, and two leasehold lots for life, and between the dates of the execution of the will and his death the testator sold the lots, and died without collecting all of the purchase money, the uncollected purchase money passed to the wife absolutely, under the gift, "bills receivable of which I should die possessed." But the court said, in passing on the question, "If there was anything in the will to indicate an intention to restrict the terms within a narrower compass, it might, no doubt, be done, to carry out a manifest purpose of the testator."

We have thus selected a few of the many cases in this state to show that, in deciding this question, we have not overlooked the general principle that such a bequest as that made to appellee is broad enough to include all personal property of which the testator died possessed, if it stood alone, but that we must also be guided by the further well-established doctrine that, if there be anything in any part of the will which restricts or qualifies the general term, the latter must be so restricted and qualified, if it can be done without violating some other principle of law, or the manifest intention of the testator. Let us then see whether this gift to Lillian of all the testator's personal property in the one clause is restricted by any other part of the will. It is perfectly apparent that, if the appellees' contention be correct, the eight children of John Frick by his first wife will take nothing. It is equally manifest from the face of his will that he intended four of them to have \$10 each, and the other four to have something. It is, moreover, perfectly certain that when he made that will he did not intend his wife and daughter Lillian to have all of his estate; for after giving them, for life, the house and lot in Smallwood, and the personal property to Lillian, he distinctly said, "And, as to the balance of my estate, my wife, Mary Frick, and my daughter Lillian are not to have any share in it." If, then, Lillian, by our construction of the will, gets all or any part of what her father called "the balance of my estate," she will receive what he expressly intended she should not have, and his other eight children will be deprived of what he manifestly designed they should have, so far as disclosed by the face of the will. The will is peculiar, because it not only undertakes to give something to one set of his children, thus negating the idea that the other child and her mother are to have that "something," whatever it may be, but he affirmatively said that his wife and daughter Lillian shall not have it. We are convinced from a careful reading and study of the will that the testator did intend, when he made it, not only to give these eight

children some part of his estate, but to exclude Lillian from such part, and that such intention (to use the language of Judge Miller in *Dalrymple v. Gamble*, supra) "remained in the will, speaking from day to day until the testator died." We are then brought face to face with the question, are there any principles or law involved in the construction of this will which compel us (sitting in a court of justice, where we cannot ignore the law to avoid seeming hardships in particular cases) to take from eight children of the testator that which we believe was intended for them, to give to another, who, in our opinion, was intended by the testator to be kept from it, and that, too, when our belief is founded on the terms of the will itself? In *Walston's Lessee v. White*, 5 Md. 304, Le Grand, C. J., speaking for the court, said: "Where the language of the testator is plain and unambiguous, such language must govern, and therefore extrinsic evidence is inadmissible to show that he meant something different from what his language imports; but any evidence is admissible which, in its nature and effect, simply explains what the testator has written. In other words, the question, in expounding a will, is not what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words. And extrinsic evidence, in aid of the exposition of his will, must be admissible or inadmissible with reference to its bearing upon the issue which this question raises." Again, on page 305, he quotes with approval from *Wigram's Rules of Law*, that "for the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of the interest he has given by his will." In *Warner v. Miltenberger's Lessee*, 21 Md. 272, the above was approved, and it was held competent to show by testimony derived from other parts of the will, and by extrinsic evidence explaining the sense in which the testator used the word "lot," that it embraced a larger parcel of ground, and was not intended to refer to the small subdivisions designated as town lots on the plat of Ridgeley's addition to Baltimore. In *Hawman v. Thomas*, 44 Md. 43, in quoting from *Allen's Ex'rs v. Allen*, 18 How. 393, it is said: "That the court may put itself in the place of the testator, by looking into the state of his property and the circumstances by which he was surrounded at the time of making his will, is true; but this is done only to explain ambiguities arising out of extrinsic circumstances, and not to show a different intention from that the will discloses."

We can, therefore, under the authorities,

look to extrinsic evidence to see what the testator meant by the expression, "the balance of my estate." In doing so, we find a farm standing in the name of John Frick, Sr., which he had sold to his son Frank by an agreement dated December 18, 1888,—less than two months before the execution of the will,—and we have already seen the terms of that sale. The agreement was in existence when the will was made, and the conclusion is irresistible that this was the property referred to in the will as "the balance of my estate"; the testator then holding the legal title to the farm, subject to the contract for its sale. The purchaser was in a position to enforce his purchase in a court of equity on paying the purchase money to those entitled to it by law, if the vendor had died intestate, or to "the heirs according to the last will and testament of said John Frick, Sr." if he so provided. He did make such provision. Excluding from consideration for the present the deed subsequently made, and the note given by Frank A. Frick and wife, we find from this extrinsic evidence, which we have the right to consider for the purpose of determining "the subject of disposition,"—to ascertain of what the balance of the estate consisted,—that the testator had an estate not previously disposed of in the will, viz. a legal estate in his farm, subject to the agreement of sale. The term "estate" is sufficient to pass by will the fee, as well as other property. *Chamberlain v. Owings*, 30 Md. 447. If, then, it was the intention of the testator to devise this farm, that clause of the will now under consideration passed at least the legal title. It has generally been held that if a testator devise lands, and then contracts for the sale of them, the devisee takes the legal estate, and only that, in equity, by reason of the revocation of the devise by the alteration of the estate. But if he has previously sold the lands, and then devises them by words comprehensive enough to embrace all his interest in them, including his interest in the purchase money, we can see no valid reason why the latter should not pass to the devisee as well as the legal estate. If A. devises Black Acre to B. after he had previously agreed, by a binding contract, to sell it to C., but neither conveyed it by deed nor collected the purchase money in his lifetime, it would seem difficult to work out of such devise an intention on the part of A. to simply give the naked legal title to B., and exclude him from all the really beneficial interest in the property; and such a construction is not required by the authorities,—certainly, not all of them. See *Wright v. Minshall*, 72 Ill. 584; *Woods v. Moore*, 4 Sandf. 579. Whether or not there was a technical equitable conversion of the land into personalty by the agreement of sale, it is evident that the testator did not regard it as disposed of by the previous clause in his will, and that it was his intention to exclude his daughter Lillian from any share in the

farm or the proceeds of sale thereof. By the clause which follows the bequest of the personal property to her, he gave \$10 to each of four of his children, and the rest of the "balance" of his estate to his other four children. No effect can be given to that part of the will if we adopt the construction contended for by the appellee. It is the duty of the court to so construe wills as to give effect to every part of them, when possible, without conflicting with some established principle of law. That requirement is emphasized in this case by the fact that any other interpretation would disinherit eight out of the nine children of the testator, when the ninth was already well provided for in other parts of the will. We therefore conclude that when this will was made the testator intended to leave to his eight children, in the proportions mentioned, the farm and the proceeds of sale thereof, and to exclude Lillian from them. It only remains to determine whether his subsequent acts of executing a deed and taking the note changed this. Having clearly manifested his intention to exclude Lillian from participating in the purchase money, he did nothing that, under the circumstances of this case, can be deemed a change of purpose on his part, or a revocation of the gift to his other children. Having determined what was meant by "the balance of my estate," and being of the opinion that he excepted it (this farm and the proceeds of sale) from his bequest to her, the mere change of the form of indebtedness for the purchase money from the agreement to a note did not so alter the subject of the gift as to revoke it. His intention to exclude Lillian from it, to repeat the above quotation, "remained in the will, speaking from day to day until the testator died." The will spoke as of the day of his death, in respect to that, as well as to other parts of it; and we cannot decide that this note of \$1,200 went to her, under the general bequest of the personal property, without obliterating from the will this subsequent clause, and refusing to obey the injunction of the testator that his wife and daughter Lillian were not to have any share in this fund, which we believe the testator referred to in the clause above quoted. We are therefore of the opinion that, under a proper construction of the clauses of this will presented to us for interpretation, the note of Frank A. Frick and wife is not included in the bequest to Lillian, and that \$10 must be paid to each of the four children to whom that amount was given, and the balance should be equally divided between the other four children mentioned in the will, after deducting such costs as it may be properly liable to. The rest of the personal property was bequeathed to Lillian. It follows from what we have said that the pro forma decree of the court below must be reversed. Decree reversed and cause remanded; the costs to be paid out of the \$1,200 fund.

GOLDSWORTHY v. COYLE.

(Supreme Court of Rhode Island. Dec. 27, 1895.)

EXECUTION—SALE—NOTICE.

Judiciary Act, c. 37, § 11, provides that, in case of levy on land, notice of such levy shall be given for three months "after" such levy, and "before" the sale. Pub. St. c. 24, § 12, provides that, whenever time is to be reckoned from any day, date, or act done, such day, date, or the day when such act is done shall not be included in such computation. *Held*, that a sale on December 5th of land levied on September 5th is void.

Action by John E. Goldsworthy against John Coyle. There was a judgment for plaintiff, and defendant petitions for a new trial. Judgment ordered to be entered for defendant for costs.

John E. Goldsworthy, pro se. E. W. Blodgett, for defendant.

STINESS, J. A verdict having been rendered for the plaintiff, in an action of trespass and ejectment, for the possession of certain land in Central Falls, bought by the plaintiff at a sheriff's sale under an execution against the defendant, the latter now petitions for a new trial, upon the ground that the verdict is against the evidence. It appears by the sheriff's deed that the execution was levied upon the real estate September 5, 1894, and sold on December 5, 1894. The judiciary act (chapter 37, § 11) provides, in case of a levy upon real estate, that the officer shall set up notification of such levy for the space of three months after such levy, and before the same shall be exposed for sale. Pub. St. c. 24, § 12, provides: "Whenever time is to be reckoned from any day, date or act done, or the time of any act done, such day, date, or the day when such act is done shall not be included in such computation." In this case time is to be reckoned both after the levy and before the sale, and the exclusion of either of these dates would be sufficient to avoid this sale. The purpose of the statute is to provide a notice of three full calendar months (Pub. St. c. 24, § 11) between the levy and the sale. It was put into the revision of the statutes of 1857, as an express rule of law, after the decision of *Millard v. Willard*, 3 R. I. 42, where it had been adopted as a rule of judicial construction. See, also, 26 Am. & Eng. Enc. Law, pp. 3, 7, and note 1, page 8. Under this rule, there was not a notification for the space of three months, as required by statute; and hence, as a statutory authority in cases of a sale in invitum must be strictly followed, the sale was void, and the verdict should have been for the defendant. Other objections to the deed are made, but, as this is decisive of the case, it is not necessary to consider them; and, as it appears that the defect in the plaintiff's title is such that he could in no

event recover, the case is remitted to the common pleas division, with instructions to enter judgment for the defendant for costs.

BROWN et ux. v. SMITH.

(Supreme Court of Rhode Island. Dec. 23, 1895.)

DIVORCE—LIABILITY FOR SUPPORT OF CHILDREN.

Where the supreme court granting a divorce was authorized by Pub. St. c. 167, § 23, to modify, on application, its orders concerning the custody and support of the minor children, a woman who has been granted a divorce and the custody of the children, without any provision for their maintenance, cannot, on the death of the husband, recover from his estate for the board of the children.

Action by Charles F. Brown and wife against William C. Smith, administrator. Judgment for defendant for costs.

Page & Owen, for plaintiffs. B. M. Bosworth, for defendant.

TILLINGHAST, J. The agreed statement of facts in this case shows that Rebecca M. Brown, the real plaintiff, was formerly the wife of Daniel Bosworth, late of Warren, deceased, and by him had three children; that, prior to the death of said Bosworth, Mrs. Brown (then Mrs. Bosworth), upon her petition to the supreme court of this state, was divorced from said Daniel Bosworth, and the custody of the said three children of the marriage (they being minors) was awarded to her; that upon the death of said Daniel Bosworth, which occurred about three years after the divorce, the defendant was appointed administrator on his estate, and that after said appointment Mrs. Brown presented to him a claim for the board of said children, against the estate of Daniel Bosworth; that said administrator represented said estate insolvent, and thereupon, pursuant to law, commissioners were duly appointed to receive and examine the claims against said estate, and that said commissioners allowed the claim of Mrs. Brown for the board of said children; that, upon the filing of the report of said commissioners in the court of probate, the administrator, being dissatisfied with the allowance of said claim by the commissioners, gave notice thereof in the office of the clerk of the court of probate, and also to the plaintiffs, as provided by law, whereupon said claim was stricken out of said report by the court of probate; and that the plaintiffs thereupon, in accordance with the provisions of Pub. St. R. I. c. 186, § 15, brought this suit to determine the validity of the claim of Mrs. Brown against said estate.

The only question presented for our decision, under this state of facts, is: Can a married woman, who has been granted a divorce and the custody of minor children, maintain an action at law against the estate of her deceased husband, for the board of

said children? We think this question must be answered in the negative. At the time when said divorce was granted, the supreme court had the authority, under Pub. St. R. I. c. 167, § 23, as the appellate division now has (Judiciary Act, c. 2, § 4), to regulate the custody, and provide for the education, maintenance, and support, of the children of all persons by them divorced; to make all necessary orders and decrees concerning the same, and the same at any time to alter, amend, or annul, for sufficient cause, after notice to the parties interested therein. *Sammis v. Medbury*, 14 R. I. 214. This statute is presumably based upon the theory that the rights of the parties in a proceeding for divorce, as to the custody and support of the minor children of the marriage, can be best determined in connection with said proceeding, upon a full consideration of the circumstances and situation of the parties, instead of leaving such rights open to further, independent litigation. See *Husband v. Husband*, 67 Ind. 585; *Buckminster v. Buckminster*, 38 Vt. 248; *Chester v. Chester*, 17 Mo. App. 657. Whatever is decreed, therefore, regarding the custody of children, in a divorce proceeding, is conclusive of the rights of the parties until the decree is either modified or annulled. By virtue of the decree in the petition above referred to, said Rebecca M. Brown became entitled to the custody of said minor children, together with the right to their services, and defendant's intestate was thereby deprived of his common-law right thereto; and, being thus deprived of this right, he became absolved from the correspondent common-law obligation which previously rested upon him to support said children. In other words, the award of the children to the mother carried with it a transfer of parental duties as well as of parental rights. *Schouler*, Dom. Rel. (3d Ed.) § 237. As said in 2 Bish. Mar. & Div. § 557: "The true legal principle applicable to cases of this kind seems to be that the right to the services of the children, and the obligation to maintain them, go together; and, if the assignment of the custody to the wife extends to depriving the father of his claim to their services, then he cannot be compelled to maintain them, otherwise than in pursuance of some statutory regulation." In *Burritt v. Burritt*, 29 Barb. 130, the court say: "It would seem almost an oppressive exercise of power, first to withdraw the child wholly from the care, control, and influence of the father; to deprive him entirely of its presence, society, and aid; to put it entirely in the possession and control of the mother, with whom he is at variance; to allow that mother to support, educate, and maintain it in her own way, and agreeably to her own pleasure; and then to require from the husband an absolute and unquestioning compliance with all her demands for the means of its support, education, and maintenance." In short, the right of the father to the serv-

ices and earnings of his minor children is founded upon the obligation which the law imposes upon him to nurture, support, and educate them; and it continues until their maturity, if they remain with him, when the law determines that they are capable of providing for themselves. But when the father is deprived of their custody and services, by a decree which commits them to the custody of the mother, the duty to support them no longer exists, except as the court may direct, in pursuance of statutory authority. See *Gilley v. Gilley*, 79 Me. 292, 9 Atl. 623; *Brow v. Brightman*, 136 Mass. 187; *Johnson v. Onsted*, 74 Mich. 437, 42 N. W. 62; *Finch v. Finch*, 22 Conn. 411; *Harris v. Harris*, 5 Kan. 46; *Hall v. Green* (Me.) 32 Atl. 796. See, also, Pub. St. R. I. c. 71, §§ 5, 6.

Counsel for the plaintiff relies on the case of *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 15 N. E. 476, which, while it fully sustains his position, and was rendered by a court whose decisions are entitled to very high respect and consideration, is nevertheless opposed to the preponderance of American authorities upon the question here presented. And, moreover, all the parental obligations of the father, so vigorously contended for by the court in that case, could have been enforced in connection with the divorce proceedings. In the states of Arkansas and Illinois there is, or at the time of the rendition of the decisions mentioned below there was, no statutory provision authorizing the court granting the divorce to subsequently modify its orders and decrees concerning the custody and support of the minor children of the marriage; and therefore the cases of *Holt v. Holt*, 42 Ark. 495, and *Plaster v. Plaster*, 53 Ill. 445, can hardly be considered authorities in support of the plaintiff's position. Moreover, the fact that, notwithstanding the very numerous cases of divorce granted in this state in which the custody of minor children has been awarded to the mother, no such action as the present has, to our knowledge, ever been instituted, indicates very strongly that the members of the bar never supposed that such an action could be maintained. If said Daniel Bosworth were still living, a change in the said decree of divorce, in so far as it relates to the children, might, for cause shown, upon application of the petitioner therein, be made. But, said Bosworth being dead, no such change can now be made; and the plaintiff having been, presumably upon her own request, awarded the custody of said children, and no provision having been made in the decree for their support, or, so far as appears, even been asked for, she must be presumed to have assumed that duty upon herself, and is now without remedy. *Burritt v. Burritt*, supra. Again, as no express promise to pay for the board of said children is shown to have been made by defendant's intestate, and as the granting of the custody of said children to the mother negatives any

implication of liability therefor on the part of the father, there is no evidence whatever upon which to base a judgment in favor of the plaintiff. *Johnson v. Onsted*, supra. Judgment for the defendant for costs.

STIMIS v. STIMIS et al.

(Court of Chancery of New Jersey. Dec. 17, 1895.)

SATISFACTION OF MORTGAGE—PRESUMPTION—EXPRESS TRUST—LACHES—MORTGAGOR AS EXECUTOR—FAILURE TO ACCOUNT.

1. A lapse of 20 years after a mortgage has become due, within which there has not been either payment or demand of the principal or interest, or part thereof, or entry by the mortgagee into possession of the mortgaged premises, will raise a presumption that the mortgage has been satisfied, though in fact it be not paid.

2. Such presumption may be taken advantage of by demurrer to a bill which alleges the facts raising it without averring circumstances which will rebut it.

3. Lapse of time will not be allowed to defeat an express trust, cognizable in equity alone, which continues to be acknowledged and acted upon by the parties.

4. When the relationship of trustee and cestui que trust is no longer admitted to exist, or gross laches in enforcing a known right, or long acquiescence in the alleged breach of trust, is shown, and lapse of time has obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to a presumption unfavorable to its continuance, a court of equity, even in case of an express trust, will refuse relief, upon the ground of lapse of time and its inability to do certain and complete justice.

5. A mortgagor became the executor of the will of his father, the mortgagee, before his mortgage was paid; the beneficiaries under the father's will being his mother, for her life, and his brothers, sisters, two nephews, and himself, in remainder. After the mortgage became due, and his mother died, he retained possession of the mortgaged premises, and failed to pay interest upon the mortgage, or to pay any part of the principal thereof, for 15 years, within which time he sold a portion of the premises, and then, never having accounted as executor, executed a satisfaction of the mortgage, and thereafter, continuing in possession of the mortgaged premises, sold other portions thereof, and, yet failing to pay either principal or interest, lived four years, and died. Three years after his death, no part of the principal or interest of the mortgage having yet been paid, the administrator de bonis non, etc., of the estate of the father, filed his bill to foreclose the mortgage. Upon demurrer to the bill on the ground that more than 20 years had elapsed since the making of the mortgage, within which neither principal nor interest had been paid, *held*, that the presumption arising from such lapse of time without the payment indicated was rebutted by the implication arising from the executor's failure to account, his execution of the satisfaction, and the near relationship between him and the other beneficiaries of his father's estate.

(Syllabus by the Court.)

Bill by Christopher Stimis, administrator of John Stimis, deceased, against John B. Stimis and others. Demurrer to bill overruled.

The bill, which was filed in February, 1894, alleges: That in 1851 Henry Stimis mortgaged about two acres of land, situate at

Belleville, in Essex county, to his father, John Stimis, to secure the payment of \$500, with interest, one year after date, which mortgage was duly registered. That later in the same year John Stimis died testate, leaving, him surviving, his widow (Anne), three sons (Henry, Christopher, and William), two grandsons (the sons of a deceased son), and four daughters. That by his will he gave his estate to his widow for her life, "but not to commit waste," and at her death to his children and the sons of his deceased son, they taking one share, and appointed his widow the executrix, and his son Henry the executor, of the will. That the will was duly admitted to probate, and both the executor and executrix named in it qualified. That in February, 1852, the executrix and executor filed an inventory, in which, among other properties, they enumerated this: "Henry Stimis, bond and mortgage, \$500." That in 1872 the widow died, and in 1891 Henry, the executor and mortgagor, also died. That the executrix and executor never accounted, nor did either of them ever account. That in 1866 Henry sold a strip of the mortgaged land to the Paterson & Newark Railroad Company for part of its right of way. (That company is not a party to this suit.) That in 1887, as executor, he executed and recorded a satisfaction of the mortgage, as follows: "I, Henry Stimis, do hereby certify that a certain mortgage, bearing date the thirtieth day of June, in the year of our Lord one thousand eight hundred and fifty-one, made and executed by Henry Stimis to John Stimis to secure the sum of five hundred dollars, and registered in the office of the register of the county of Essex, in Book X2 of Mortgages, page 231, &c., on the eighteenth day of February, 1852, at ——— o'clock ——— m., is paid and satisfied, and I do hereby consent that the same may be discharged of record. Dated the eleventh day of July, 1887. Henry Stimis, Executor. [L. S.] Witness: J. E. Howell." That in fact the mortgage had never been paid and satisfied by Henry Stimis, nor by any one in his behalf. That at the time of the execution and record of the satisfaction the whole of the principal of the mortgage, with large arrears of interest, remained due and owing by Henry to himself, as executor of his father's will. That no part of the principal of the mortgage was ever paid, and no interest was paid after the death of Anne Stimis. That the execution and record of the said satisfaction were without consideration, and in fraud of the estate of John Stimis, deceased, and of the legatees under his will. That in 1891, some three months before he died, Henry conveyed two portions of the mortgaged property to his daughter Susan E. Burling, who knew that the mortgage had not in fact been paid. That by his will he gave the residue of his estate to his five children. That the complainant was appointed admin-

istrator de bonis non, cum testamento annexo, of John Stimis, in May, 1892. That the complainant has obtained possession of the mortgage, and that since the execution of the mortgage the mortgagor and his devisees and assigns have retained possession of the mortgaged premises. The bill prays that the satisfaction of the mortgage shall be decreed to be void and of no effect, and that the mortgage shall be decreed to be valid, and that the equity of redemption in the mortgaged premises may be foreclosed. The defendants demur on the ground that more than 20 years have elapsed since the maturity of the mortgage, within which neither principal nor interest has been paid, and that, therefore, they are entitled to the presumption that it has been satisfied.

Herbert Boggs, for complainant. J. E. Howell, for demurrants.

MCGILL, Ch. (after stating the facts). It is settled by the adjudications of this court that a lapse of 20 years after a mortgage has become due, within which there has not been either payment or demand of the principal or interest, or part thereof, or entry by the mortgagee into possession of the mortgaged premises, will raise a presumption that the mortgage has been satisfied, though in fact it be not paid. *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685; *Evans v. Huffman*, 5 N. J. Eq. 354; *Barned v. Barned*, 21 N. J. Eq. 245; *Murphy v. Coates*, 33 N. J. Eq. 424. And this presumption may be taken advantage of by demurrer to a bill which alleges the facts raising it, without averring circumstances which will rebut it. *Olden v. Hubbard*, 34 N. J. Eq. 85. The formal averment in a foreclosure bill that the principal and interest of the mortgage are now due and owing—manifestly a mere conclusion argumentatively insisted upon—is not admitted by demurrer. *Olden v. Hubbard*, supra; *Redmond v. Dickerson*, 9 N. J. Eq. 507, 516. The allegations of the bill considered show that no payment of either principal or interest of the mortgage in question has been made since the year 1872,—that is, for a period of 22 years prior to the filing of the bill,—during which time the mortgagor, his assigns and devisees, have been in possession of all parts of the mortgaged premises; and it fails to show that within that time any demand has been made for the payment of principal or interest, or any part thereof. From these facts the presumption invoked clearly arises, and the principal question of the case becomes whether other circumstances averred are sufficient to rebut the presumption.

It appears that in 1852 the mortgagor became one of the executors of the will of the mortgagee, which will devised and bequeathed all the testator's estate to his widow during her life or widowhood, with this addendum "But not to committ waste," and at her death to his children, of whom the mortgagor was

one. As executor of that will, it became the mortgagor's duty, together with his mother, to collect the assets of the estate, pay the testator's debts, account for the executorship in a year, and transfer the residue of the estate to the life tenant, who thereafter would become accountable for it to those who were to take it in remainder. The estate was not given to the executors in trust for the widow for life, and then to distribute it to those taking in remainder, but was given directly to the life tenant; and hence the trust confided to the mortgagor through the executorship, so far at least as the mortgage in question is concerned, would, in regular course, terminate with the accounting, which became due in the year 1853, and his transfer of it at that time to the life tenant. It appears that there never was in fact an accounting, and because of this circumstance, coupled with the official action of the executor in 1887, when he satisfied the mortgage of record, it is claimed that the trust of the executorship—an express trust—continued until the mortgagor died, in 1891, and, this being so, that lapse of time will not avail to defeat the relief sought by the complainant; or, in other words, that the presumption already referred to is rebutted. It is the rule that lapse of time will not be allowed to defeat an express trust cognizable in equity alone, which continues to be acknowledged and acted upon by the parties. *Kane v. Bloodgood*, 7 Johns, Ch. 111; *Conover v. Conover*, 1 N. J. Eq. 403; *Wanmaker v. Van Buskirk*, supra; *Cook v. Williams*, 2 N. J. Eq. 200; *Stark v. Hunton*, 3 N. J. Eq. 311; *Dean v. Dean*, 9 N. J. Eq. 425; *McClane's Adm'r v. Shepherd's Ex'r*, 21 N. J. Eq. 76; *Morse v. Oliver*, 14 N. J. Eq. 259; *Lindsley v. Dodd* (N. J. Ch.) 30 Atl. 896. The reason is that the possession of the trustee, while the relation of trustee and cestui que trust is admitted to exist, is deemed to be possession for the cestui que trust, and coincident with the title of the cestui que trust. But when the trustee denies the right of the cestui que trust, and his possession of the property becomes adverse, lapse of time from that period may constitute a bar in equity. *Kane v. Bloodgood*, supra; *Dean v. Dean*, supra; *Young v. Young*, 45 N. J. Eq. 40, 16 Atl. 921; *Starkey v. Fox*, 52 N. J. Eq. 758, 29 Atl. 211, affirmed on appeal 53 N. J. Eq. —, 29 Atl. 211. And, even if the proof be satisfactory that possession and the relationship of trustee and cestui que trust were at one time coincident, there may be certain conditions which will prevent the application of the rule that time does not run against an express trust; for when the relationship is no longer admitted to exist, or gross laches in enforcing a known right, or long acquiescence in the alleged breach of trust, are shown, and lapse of time has obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to a presumption unfavorable to its

continuance, a court of equity, even in a case of express trust, will refuse relief upon the ground of lapse of time and its inability to do certain and complete justice. *Starkey v. Fox*, supra. Vice Chancellor Green, who wrote the opinion in the case just cited, which opinion was adopted by the court of errors and appeals, said: "This doctrine is not an exception to the rule, but proceeds on an inference, from facts other than, but in connection with, the lapse of time, that the trust has been executed and in some way extinguished. As is said by the master of the rolls in *Pickering v. Stamford*, 2 Ves. Jr. 583: 'Every presumption that can fairly be made shall be made against a stale demand. It may arise from the acts of the parties, or the very forbearance to make the demand affords a presumption either that the claimant is conscious it was satisfied, or intended to relinquish it.'" In *Starkey v. Fox* an administrator who had prosecuted a suit for the foreclosure of a mortgage belonging to his intestate, to sale, bought the mortgaged premises at the foreclosure sale in his own name, as administrator, and subsequently, in the year 1841, accounted for it as an asset remaining in his name, undisposed of, in trust for the intestate's estate. It was made to appear that a year or two later, through proceedings in ejectment, he secured possession of the mortgaged premises, and that later he exercised acts of ownership over that property, building thereon and clearing, tilling and improving the soil, paying all taxes and taking all income, without accounting, and that thus he lived in the enjoyment of the property until the year 1891, when he died. After his death, persons entitled to shares of the intestate's estate filed a bill to enforce the trust in the property, and it was held, among other things, that a presumption had arisen that the trust was extinguished, which presumption had not been rebutted.

In the case in hand the executors could have been compelled to account in the year 1853, and thus the estate which was to go to the life tenant could have been ascertained, and security for its safe preservation, upon proof that it was in danger in the hands of the life tenant, if need be, might have been exacted; but those who were to take in remainder, who then, for aught that appears to the contrary, and from thence to the present time, save in the case of Henry Stimis himself, were living and sui juris, remained inactive. After 20 years the life tenant died, and then those in remainder became entitled to possession; and yet thereafter, for 19 years, until Henry Stimis died, they stood by, witnessing the possession of the mortgaged lands by him and his grantees, and acquiescing all that time in his failure to pay them interest upon the mortgage. For three years after his death the same conditions continued, and then the present action was begun. Thus, for upwards of 40

years the remainder-men were silent when they might have spoken, and for more than 20 years they acquiesced in the attitude of the mortgagor so far adverse to his holding the mortgage in trust as withholding interest and failure to acknowledge the mortgage as a valid obligation establish. Besides, during such acquiescent inaction and laches, the lapse of time carried with it lives of both life tenant and mortgagor, who could have spoken as witnesses, and we know not what other evidences. Did the complainant's claim of rebuttal rest alone upon the mortgagor's failure to account as executor, I think I would feel constrained, notwithstanding the importance of his due discharge from his trust (*Bank v. Helron*, 5 Exch. Div. 319), to decide that the presumption of the satisfaction of the mortgage has been rebutted. *Phillippi v. Philippe*, 115 U. S. 151, 5 Sup. Ct. 1181. But not only did the mortgagor fail to terminate his trusteeship of the mortgage by accounting as executor, but, on the contrary, he affirmed the continuance thereof in the year 1887,—seven years before the filing of the bill,—when, by deliberate writing executed in virtue of a still existing executorship, and continued dominion over the mortgage in that fiduciary character, he declared it to be satisfied and paid. This declaration does not say when the payment was in fact made, but, standing alone, it will not be assumed to speak of a condition prior to its date. The instrument appears to me to amount to an acknowledgment of the existence of the mortgage and continuance of the executorship in control of that instrument to the date of the satisfaction, in 1887. The satisfaction is consistent with the executor's failure to account, and by that means throw off his fiduciary character, and place himself in the position of a stranger to the beneficiaries; and considered in connection with that fact, and the near family relationship between the executor and the beneficiaries, I deem it sufficient, at least while it remains unexplained, to rebut the presumption invoked by the demurrants. There is absence of laches with reference to the attack upon the satisfaction, if for no other reason, because it does not appear that the existence of that instrument was known to the cestui que trustent. *Lindsley v. Dodd*, supra. I will overrule the demurrer, with costs.

ASPINWALL v. ASPINWALL.

(Court of Errors and Appeals of New Jersey.
Dec. 13, 1895.)

DECREE IN CHANCERY — ENFORCEMENT — COSTS —
COMPELLING PAYMENT.

1. In cases where no special equities exist, sections 56 and 64 of the chancery act (Revision, pp. 113, 115) provide the only methods by which a decree of the court of chancery for the payment of a sum of money due upon a contract between the parties can be enforced, to wit, by the sequestration of the estate of the

defendant, by *feri facias* against his real and personal property, and, in cases of fraud, by *capias* against his person.

2. Where costs are directed to be paid by an interlocutory order, which cannot be enforced by execution, their payment may be compelled by attachment for contempt; but where they are awarded as an incident to the final decree in the cause, their payment can only be enforced by those methods which the law designates for the enforcement of the decree itself.

(Syllabus by the Court.)

Appeal from court of chancery; McGill, Chancellor.

Bill by Florence S. Aspinwall against Sumner D. Aspinwall. Decree for complainant. On failure of defendant to comply therewith complainant applied for a judgment for contempt, and from a denial of the application she appeals. Affirmed.

Cortlandt Parker and Chauncey G. Parker, for appellant. Samuel Kalisch, for respondent.

GUMMERE, J. The appellant and the respondent, who is her husband, entered into articles of agreement providing for a separation between them, in which the respondent agreed, among other things, to pay to his wife a certain sum of money each week for her support. Upon his failure to comply with this provision of the contract, the appellant filed her bill in the court of chancery to compel the performance by her husband of the articles of agreement, and particularly the payment of the weekly allowance stipulated for therein. The chancellor decreed the performance of the contract; and that portion of the decree which directed the payment by the husband to the wife of the moneys which had become due to her, under the stipulation to pay the allowance, was affirmed by this court. Aspinwall v. Aspinwall, 49 N. J. Eq. 302, 24 Atl. 926. The respondent having failed to pay to the appellant the moneys decreed to be due to her under the articles of separation, after service upon him of a certified copy of the decree and a demand for payment, she applied to the chancellor for an attachment for contempt against him to compel the payment thereof. The chancellor, considering that an attachment for contempt was not a proper method for the enforcement of the appellant's decree, denied the application, and from the order of denial this appeal is taken.

In my opinion the application for an attachment was properly refused. It is true, as urged by counsel for the appellant, that in the earlier days of the court of chancery the only method by which a decree for the payment of money due upon a contract could be enforced, as well as all other decrees except those which were for the land itself, was by process of contempt; but that was because such decrees operated only in personam. This defect in the law, however, has been remedied in this state by statute.

Revision, p. 113, § 56; Id. p. 115, § 64. By these provisions the legislature has clothed the court of chancery with power to enforce its decrees by the sequestration of the estate, both real and personal, of the defendant, and by the issuing of writs of *feri facias* and *capias ad satisfaciendum* against him, and has given to the decrees of that court which direct the payment of a sum of money by one person to another the force, operation, and effect of judgments at law in the supreme court. In my opinion the effect of this legislation was to do away with the process of contempt, as a method of enforcing decrees for the payment of moneys due upon contracts between the parties in cases where no special equities exist, and to substitute therefor sequestration of the defendant's estate, the writ of *feri facias* against his real and personal property, and, in cases of fraud, the writ of *capias* against his person. The conclusion that decrees of this kind, in cases where there is no pretense of fraud, can ordinarily be enforced in this state by process of attachment, can only be reached by ignoring that provision of our constitution which forbids the imprisonment of any person for debt in any action, or on any judgment founded on contract, unless in cases of fraud (Const. art. 1, par. 17); for the ultimate result of proceedings for contempt, where they are used as a method of relief *inter partes*, is the imprisonment of the party proceeded against. A similar view has been taken by the courts of England of the effect of the statute of 32 & 33 Vict. c. 62, passed for the abolition of imprisonment for debt, which provides that, with the exception of certain cases mentioned in the act, no person shall be arrested for making default in payment of a sum of money. In the case of *Esdaile v. Visser*, 13 Ch. Div. 421, it was held by the English court of chancery that, since the adoption of that statute, process of contempt could no longer be issued out of that court for the purpose of compelling a person to make payment of a sum of money which he had been directed to pay by the order of that court, but that the method provided by the act for the enforcement of such orders must be followed. It is contended, on behalf of the appellant, that, as a large part of the decree which she seeks to enforce is for costs, such part is collectible by proceedings for contempt, even if the original debt cannot be collected by that process. But this contention cannot be sustained. Whether or not costs can be collected by attachment depends upon the character of the order or decree which has been entered for their payment. If it be an interlocutory or independent order for their payment, where, by law, an execution cannot be awarded for their collection, then the party against whom they are awarded may be proceeded against by attachment; but if the costs which are ordered to be paid are an incident to the final

decree in the cause, their payment can only be enforced by those methods which the law designates for the enforcement of the decree itself. The order appealed from should be affirmed, with costs.

RICHEY v. CARPENTER et al.
HULSIZER'S ADM'RS v. SAME.

(Court of Chancery of New Jersey. Dec. 2, 1895.)

FRAUDULENT CONVEYANCE—HINDERING CREDITORS.

The conveyance by a debtor of all his real and personal estate to a trustee, to be held in trust, with directions to pay a claim which the trustee himself held against the grantor, and also the claims of certain other creditors, out of the rents and profits and out of the proceeds of the sale thereof by the trustee, but which sale cannot be made without the consent in writing of the grantor, will be set aside as fraudulent at the instance of judgment creditors, who have not been provided for in such conveyance, because it hinders and delays them in the collection of their just demands; but such conveyance will be sustained so far as it provides a security for trust moneys in the hands of the grantor, which may be enforced by cross bill.

(Syllabus by the Court.)

Bills by Daniel Richey and by the administrators of William H. Hulsizer against Charles R. Carpenter and others to set aside a conveyance. Judgment for complainants.

Oscar Jeffrey, for complainants. Wm. H. Morrow, for infant defendants. I. W. Schultz, for trustee. Martin Wyckoff, per se.

BIRD, V. C. These bills are filed to set aside a conveyance alleged to have been made for the purpose of defrauding the complainants, who are judgment creditors of Charles R. Carpenter, the grantor. The conveyance was not absolute or unqualified. It was declared therein that the grantee was to hold the property, both real and personal, in trust for the payment of certain debts of the grantor. Certain creditors of the grantor, not all of his creditors, only were provided for. Among these creditors so provided for were the children of the grantor. These children were beneficiaries under the last will of their grandmother. Under that will, her son, the father of said children, enjoyed the income of a large portion (over \$32,000) of the estate for life, which at his death was given and bequeathed to said children. The son, the said grantor, was appointed one of the executors. There was another executor, who had died before the transaction complained of. Before the conveyance the father had wasted a large portion of the principal so given and bequeathed to his children at his death. There is one provision in the deed which I think invites criticism, and renders the transaction obnoxious in the eye of the law, viz. the provision which prohibits the trustee from selling any of the property

conveyed to him without the consent in writing of the grantor. This unquestionably hinders and delays his creditors other than those who are provided for in the conveyance and accept its provisions. A debtor has an undoubted right to prefer one creditor or many over others. He has a right to make disposition of all his assets for that purpose. But if he attempts to do this he must pay them, or secure them in such a legitimate manner as not to embarrass or hinder other creditors in the prosecution of their claims against any of his estate that may not be required to satisfy the demands of those whom he has preferred. The conveyance in question emphatically provides for that delay which is certainly hostile to the interests of every active creditor. It gives to the grantee the right to appropriate the rents and profits of the estate conveyed to the payment of his own claim and the payment of the other persons named. When the value of the estate is considered, and the large amount of indebtedness, it is seen at a glance that it will take many years before the rents and profits will discharge the growing interest and reduce all the principal. This fact shows design, to say nothing about the prohibition upon the conveyance by the grantee without the consent in writing of the grantor. I think it cannot be successfully denied but that these are such substantial embarrassments as are contemplated in the statute when it speaks of conveyances that are designed to hinder and delay creditors. The creditors who are not favored in the conveyance can only reach any interest in the property by first removing these obstacles. It was an attempt to dispose of all the debtor's estate for the benefit of four creditors. None of these can claim the protection of the court except the children of the grantor, they being beneficiaries whose estate this conveyance was designed, among other things, to secure.

I think the conclusion here reached as to all the creditors except the said infant children is fully sustained by the cases of *Owen v. Arvis*, 26 N. J. Law, 22; *Bank v. Sprague*, 21 N. J. Eq. 530, decided in the court of errors and appeals; *Knight v. Packer*, 12 N. J. Eq. 214; *Walker v. Hill's Ex'rs*, 22 N. J. Eq. 513; *De Witt v. Van Sickle*, 29 N. J. Eq. 209; *Bank v. Conklin*, 51 N. J. Eq. 7, 26 Atl. 678. To my mind, if this conveyance can be upheld, then it is only necessary for a debtor to place all his property in the possession of one or more individuals, with directions to manage the estate according to their own skill or judgment, and out of the profits to pay only certain of his creditors, giving them their own time in which to raise the money and to make the payment, in order to render the statute of frauds of no account. The cases above cited show that the courts intend to thwart every such scheme, and to maintain the integrity of the statute. After a careful survey of the case of *Much*

more v. Budd. 53 N. J. Law, 369, 22 Atl. 518, I am perfectly satisfied that the material points in this case upon which I rely for expressing the views which I have are so radically different from the facts in that case as to separate the one very decidedly from the other. Therefore I think that these bills were properly filed as to all of the defendants except the children of the grantor.

It is insisted upon behalf of the infants that, since the grantor was in possession of large funds as trustee for them, and to which they would be entitled at his death, and as the conveyance was expressly made to secure them such funds, the rule above laid down with respect to other creditors does not apply. In support of this view, *Bank v. Cummins*, 38 N. J. Eq. 192, is cited (same case on appeal, 39 N. J. Eq. 577). That case shows that such conveyances may be good in part and bad in part. In that case an executor was directed to invest a sum of money for the benefit of legatees after the death of a tenant for life. Such executor was the owner of a tract of land, which he conveyed to his son in violation of the provisions of the statute of frauds, taking back from his son a mortgage to secure the payment of the amount of such legacies. While the conveyance in that case was declared to be fraudulent as to other creditors, the mortgage given to secure the moneys so held in trust was upheld, and to that extent the conveyance was allowed to stand. This case was affirmed in the court of errors and appeals. The case of *Johns v. Norris*, 27 N. J. Eq. 485, supports the view that a transaction may be good in part and bad in part. There are only two features of the case in hand which are in any respect different from the case of *Bank v. Cummins*, supra. One is the presence of a clause prohibiting a sale without the consent of the grantor, and the other is the absence of a reconveyance by way of mortgage from the grantee to the grantor to secure the trust moneys.

First. Is the absence of such reconveyance by way of mortgage fatal to the claim of these beneficiaries? The giving and acceptance of the mortgage in the case of *Bank v. Cummins* was simply a declaration of the trust, together with the giving of the security for its payment. That act perfected the lien, and fastened the money upon the land. The giving and acceptance of the deed declaring that the amount due these infants shall be paid out of the rents, profits, and proceeds of the sale thereof is not only an acknowledgment of the trust, but a declaration that it was made and received as a security for its payment. It would not have been more complete, nor would the rights of the infants have been a whit more definitely fixed, had a mortgage been given, than they now are. The conveyance was made and accepted for the purposes indicated. Samuel accepted the title, and undertook the performance of the trust, and the

cestuis que trustent can enforce the obligation arising therefrom. To this extent the case is so exactly like that of *Bank v. Cummins*, that the latter must control.

But does the prohibition against the trustees selling without the consent of the grantor render this conveyance ineffectual as to the beneficiaries? In other words, was such a title or interest in the premises given to the trustee for the infants that a court of equity can enforce it in their behalf? It does not admit of debate but that whatever interests in this respect were given to the trustee these infants are entitled to. To that extent the court can unquestionably go. In such case, the interests of the infant cestuis que trustent having been fixed, is the effort of the grantor, who was trustee for such infants, to place a rider upon the conveyance which none could remove but himself, anything more than a mere phantom in contemplation of equitable interests and rights? In other words, in reality has the trustee, who now holds the title, anything tangible or available as an asset, which this court can lay hold of, and convert into money? In my judgment, he has. The trustee, at the instance of these cestuis que trustent, can be required to enforce the trust, and Charles, the grantor, compelled to do that which would be reasonable; that is, to join in a conveyance of the fee of this property in case a sale should be ordered. Every presumption is that he would, in a reasonable time or manner, consent in writing to the conversion of this property into money; and that time is when the interests of all parties would be best subserved by a conversion. But it is the duty of this court, on behalf of and in the interests of these infants, to interfere, and determine this question of reasonableness. Without the least embarrassment, the court can accomplish this. It would be absurd for a court of equity to allow the title to stand in the name of a trustee, who avowedly accepted the trust for the purpose of protecting these infants, because it is claimed that it cannot brush away the limitations so put upon the trust by the debtor. The trustee, the father of these children, having acknowledged the possession of trust funds, and having made a conveyance in which he effectually creates a lien to the extent of such trust funds, a court of equity will have no difficulty in enforcing the trust.

But the fact that the amount due the infants is declared to be a lien under this conveyance does not make it necessary to dismiss the complainants' bill as to said infants. But further and other steps will be necessary to be taken in order to realize the value of this property to the infants. Such steps ought to be taken in their behalf. As the case now stands, they have only a lien, without proper proceedings to enforce it. The judgment creditors who have filed these bills and been sustained in that may proceed to sell, but they can only sell such in-

terests as the judgment debtor has in the property, subject to the liens of these infants. Since their judgments were obtained subsequent to the creation of the lien of the infants, they cannot, by their judgments, make an effectual sale of the entire fee. This can only be accomplished by the filing of a cross bill in behalf of the infants. This will enable them the more effectually to sustain their defense, to enforce their lien, and to convey by the aid of the court an absolute estate in fee simple. That the highest and best interests of all concerned, and especially of the infants, may be wrought in this suit, I feel it my duty to advise this course. I trust that Mr. Davis, recently appointed the trustee for the infants, will take prompt measures to accomplish what has been indicated.

MERCANTILE NAT. BANK OF NEW YORK v. PEQUONNOCK NAT. BANK OF BRIDGEPORT, CONN., et al.

(Supreme Court of New Jersey. Dec. 9, 1895.)

ATTACHMENT—FALSITY OF AFFIDAVIT.

The "Act to regulate the practice of courts of law," approved March 10, 1893 (Laws 1893, p. 181), does not make provision for a contest as to the truth of the affidavits whereon an order awarding an attachment against a debtor has been made. If such affidavits are sufficient to support such an order, it cannot be questioned by counter affidavits tending to show their falsity.

(Syllabus by the Court.)

Rule by the Mercantile National Bank of New York on the Pequonnock National Bank of Bridgeport, Conn., and against the Bridgeport National Bank of Bridgeport, Conn., to show cause why certain attachments should not be vacated. Rule discharged.

The Mercantile National Bank of New York, having entered up a judgment in the Essex circuit court against Edwin O. Quigley, and issued an execution thereon, which was levied on personal and real estate of the defendant, obtained a rule to show cause why an attachment issued out of this court, previously levied upon said personal and real estate of Quigley, in favor of the Pequonnock National Bank of Bridgeport, Conn., should not be vacated. The same judgment creditor also obtained a rule to show cause why another attachment out of this court, previously levied on the same property of Quigley, in favor of the Bridgeport National Bank of Bridgeport, Conn., should not be vacated. Affidavits have been taken, and these rules have been brought to hearing together.

Argued at June term, 1895, before VAN SYCKEL, LIPPINCOTT, and MAGIE, JJ.

Thomas N. McCarter, Jr., for the rule. Gilbert Collins, opposed.

MAGIE, J. (after stating the facts). It is settled in this court that a judgment creditor

of a defendant in an attachment may interpose and set aside the attachment if it was providently issued. *Papeterie Co. v. Kinsey*, N. J. Law, 29, 23 Atl. 275. Each of the attachments which relator seeks to vacate was issued upon the order of a supreme court commissioner, under the provisions of the act entitled "an act to regulate the practice of courts of law," approved March 10, 1893 (Laws 1893, p. 181). By that act it is provided that, in cases in which a *capias ad respondendum* is issued against a defendant in an action on contract, the court, or a judge thereof, or supreme court commissioner, may, by an order made for that purpose, award a writ of attachment against the property of the defendant in this state, whether he be a resident or non-resident. Relator's contention is that the respective debts upon which the orders awarding attachments were made were not joint, but individual debts of Quigley, but the affidavits show that the joint indebtedness of Quigley and one Tuttle. His contention is that the fact of the joint indebtedness sufficiently appears in the affidavits on which the orders were made, or, if not, at least that the affidavits taken upon these rules. If the indebtedness upon which these attachments were issued was in fact joint, it is clear that the attachments were improperly issued; for, on such joint indebtedness, a *capias ad respondendum* alone against one of the debtors could not have issued. By section 1 of the practice act, upon proof of a joint indebtedness and the fraud of one joint debtor, a *capias* may be ordered against him, and summonses may be joined therewith against other debtors. But that practice is not in violation of the provisions of the act authorizing an attachment against a resident debtor. The question is whether the fact so appears in the affidavits upon which the orders of the supreme court commissioner were made are substantially alike, and each shows that the indebtedness to the attaching creditor was that of Quigley and Tuttle, although it was secured by the promissory note of Quigley and Tuttle. It is obvious, therefore, that the orders were properly issued, and cannot be assailed for lack of jurisdiction to make them.

It remains to consider whether we can, in the affidavits taken under the rule which, it is contended, show the truth of the affidavits on which the orders were issued, and that the indebtedness in each case was the joint indebtedness of Quigley and Tuttle. In my judgment, we cannot controvert the affidavits taken under the rule. The act of 1893 expressly authorized an order for a *capias ad respondendum* in all cases where a *capias ad respondendum* could issue. Upon the original affidavits, showing Quigley's liability and his joint indebtedness with Tuttle, such a writ could issue. An order for a *capias ad respondendum* was always open to the court upon the ground of the insufficiency of the affidavits whereon it was granted. In 1853 the court held that counter affidavits tending to show no indebtedness or an absence of

were not admissible, but that the facts sworn to in the original affidavits must be taken to be true. *Painter v. Houston*, 28 N. J. Law, 21. This decision evidently produced the amendment to the practice act which was approved March 13, 1861 (Laws 1861, p. 312), which is now substantially re-enacted in section 64 of the revised practice act (Revision, § 59). By its provisions, counter affidavits may be taken and considered in respect to the truth of the affidavits on which an order to hold to bail has been made. But no such provision is contained in the act of 1893, under which the orders for attachment were made. Nor do I find it possible to apply the provisions of section 64 to the act of 1893. The commissioner acquired jurisdiction to make the orders upon affidavits which the law made sufficient. We may examine them, and determine whether they are sufficient to support the orders. But, in my judgment, we have no authority, unless conferred upon us by the statute, to admit a contest as to the truth of the affidavits. The statute not having conferred on the court that power, we cannot exercise it. The rules must therefore be discharged, with costs.

NEW JERSEY TRUST & SAFE-DEPOSIT CO. v. CAMDEN SAFE-DEPOSIT & TRUST CO.

Court of Errors and Appeals of New Jersey.
Dec. 17, 1895.)

INCOMPETENCY OF WITNESS — TRANSACTIONS WITH DECEDENT — OFFICERS OF CORPORATION.

The testimony of officers or directors of a corporation, called as witnesses in its behalf in an action in which it is a party, is not testimony given by the corporation, and consequently is not rendered incompetent by the proviso of the supplement to the act concerning evidence, approved February 25, 1880 (Supp. Revision, p. 287), which declares that a party to an action, in cases where his adversary sues or is sued in a representative capacity, shall not be permitted to give testimony as to any transaction with or statement by any testator or intestate represented in said action.

(Syllabus by the Court.)

Error to supreme court.

Action by the New Jersey Trust & Safe-deposit Company, executor, against the Camden Safe-Deposit & Trust Company. From the judgment, plaintiff brings error. Affirmed.

E. A. Armstrong and William E. Potter, for plaintiff in error. D. J. Pancoast, for defendant in error.

GUMMERE, J. On the trial of this cause, certain officers and directors of the defendant corporation were offered as witnesses in its behalf; and they were permitted, against objection, to testify concerning transactions with and statements by the testator represented by the plaintiff in error. The ground upon which the objection was rested, when taken at the trial, and which is urged before

this court, is that this testimony was incompetent by force of the proviso of the supplement to the act concerning evidence, approved February 25, 1880 (Supp. Revision, p. 287), which makes it incompetent, in cases where one or other of the litigants appears upon the record as a party suing or being sued in a representative capacity, for the opposite party to give testimony as to any transaction with or statement by the testator or intestate represented in the action; and the contention is that a corporation, being an artificial person, can only testify through its officers and directors, and that, therefore, when such officers or directors are called as witnesses, and testify on behalf of the corporation, it is the corporation itself which is giving testimony, within the meaning of the supplement of 1880. It seems to me that this contention is not well founded. At common law a party to the record was incompetent to testify on his own behalf, and this rule of evidence would have disqualified the officers or directors of a corporation as witnesses for it, in suits in which such corporation was a party, if their testimony was the testimony of the corporation itself; yet numerous cases are to be found in the books, decided while this rule was in force, in which officers and directors were permitted to testify on the behalf of the corporations which they represented, on the ground that they were not parties to the record. *Weller v. Governors of Foundling Hospital*, Peake, p. 153; *Bank v. Bates*, 11 Conn. 519; *Van Wormer v. Albany*, 15 Wend. 262; *Trustees v. Cowen*, 4 Paige, 510; *Pack v. Mayor*, etc., 3 N. Y. 491. In those cases in which officers or directors of a corporation were not permitted to testify on its behalf, it will invariably be found that they were disqualified, not because they were parties to the record, but because they had an interest in the subject-matter of the litigation. The fallacy of the contention advanced on behalf of the plaintiff in error lies in the assumption that, because a corporation is an artificial person, it must testify by its officers and directors, whereas the fact is that a corporation, because it is an artificial person, is incapable of testifying at all. The testimony objected to was not rendered incompetent by the proviso contained in the supplement to the act relating to evidence, above referred to, and the writ of error should be dismissed.

NEWARK & H. R. CO. et al. v. NEW JERSEY TRACTION CO. et al.
(Court of Chancery of New Jersey. Dec. 18, 1895.)

PRELIMINARY INJUNCTION.

A preliminary injunction will not issue where complainant's right thereto rests upon an unsettled question of law.

Bill by the Newark & Hudson Railroad Company and another against the New Jer-

sey Traction Company and another, to enjoin defendants from laying rails upon a bridge constructed and maintained by complainants. An order was made to show cause why a preliminary injunction should not issue. Order discharged.

E. Q. Keasbey, for the motion. Cortlandt Parker and Wayne Parker, contra.

MCGILL, Ch. The object of this suit, primarily, was to enjoin the defendants from laying rails upon a bridge constructed and maintained by the complainants, in conducting Kearney avenue, in Kearney township, in the county of Hudson, over the right of way of the Newark & Hudson Railroad Company, for use by street, horse, or electric cars, and from operating such cars over the bridge until the defendants should suitably strengthen the bridge. The bridge was constructed and is maintained in virtue of the duties imposed by the eleventh section of the "Act to incorporate the Newark & Hudson Railroad Company," approved March 17, 1870 (P. L. p. 1274), which provides "that it shall be the duty of said company to construct and keep in repair, good and sufficient bridges or passages over or under the said railroad, where any public or other road shall cross the same, and to alter or grade the said road, so that the passage of carriages, horses and cattle passing and repassing, shall not be impeded thereby." The insistence of the complainants is that the duty, in construction and maintenance of the bridge, imposed had reference only to a bridge suitable to accommodate the uses to which the highway was then ordinarily devoted, to wit, as indicated in the requirement of the charter concerning the approaches to the bridges or passages, by "carriages, horses, and cattle, passing and repassing," assuming carriages to mean wagons ordinarily in use upon roads at the time when the charter was enacted. The bill claims that the use of the bridge by rails, upon which shall be operated horse cars, or electric cars, much heavier than horse cars, and with capacity to run at greater speed, is not such use as the charter contemplates that the bridge must be sufficient to subserve, and that the shock and strain which such use will subject the bridge to will continually rack and weaken it, and cause additional expense in its maintenance, which, if permitted, will work continuing damage to the complainants. The bill was filed on the 11th of August, 1892, and thereupon an order to show cause why a preliminary injunction should not issue in accordance with the prayer of the bill was made, returnable August 16th, in the same year, which order contained an ad interim restraint, forbidding the operation of electric motors or cars over the bridge. The parties did not respond to the order to show cause upon its return day, but, by arrangement between themselves, suffered the suit to lie dormant until after a lease by

the defendant of its roads and franchises to the Consolidated Traction Company, in January, 1894, and until the latter company obtained permission to intervene as a defendant in the suit. That permission was obtained August, 1895, and in September, 1895, the Consolidated Traction Company, and on the 1st of October of the same year the New Jersey Traction Company, answered the bill, and gave notice of motion to discharge the order to show cause. While the case was dormant the defendants laid rails over the bridge which were suitable for electric cars, and over them they have operated horse cars some time. The Consolidated Traction Company proposes presently to run electric cars over the bridge in the place of the horse cars, and although, by its terms, the record of the order to show cause expired on the 16th of August, 1892, in deference to the agreement of the parties, which is not in the record in the case, it now moves to have that order discharged by the judgment of this court, thereby presenting the question which has been argued, whether the complainants shall have the preliminary injunction they sought in 1892.

The answers insist that the Consolidated Traction Company has been duly authorized by law to operate electric cars through Kearney avenue, including that part of the same which is carried over the complainants' right of way by the bridge which they are to maintain. Their claim is that where the highway may be lawfully subjected to must be accommodated by the bridge maintained by the complainants. This contention contemplates, not only the uses of the highway which were recognized when the charter of the Newark & Hudson Railroad Company imposed the duty of maintaining the bridge upon that company, among which was the horse-car railway, but also the use of electric railway, a new use, equipped with cars fashioned in appearance and size after the horse car, but by reason of their machinery each weighing two or three times as much as a horse car, and through the electric current capable of twice or three times the speed of a horse car, both of which railway uses, in the limits indicated, have been recognized by this court as not imposing an additional servitude upon the land in the highway subject to the public easement. *Halsey v. New Jersey Traction Co.*, 47 N. J. Eq. 380, 20 Atl. 859; *New Jersey R. Co. v. Camden, G. & W. R. Co.*, 52 N. J. Eq. 31, 29 Atl. 423. Pursuing their claim, the answers do not controvert the allegation of the bill that the bridge is sufficiently strong to maintain its use for horse cars, but the answer of the Consolidated Traction Company, accepting the allegation as true, by way of cross bill, asks a judgment that the complainants may be compelled to strengthen the bridge so that it will serve the contemplated use. Whether the relief sought can be had in this court, or whether it should be sought by mandamus, is not now

quiry. The proposition upon which claim to the preliminary injunction sought must rest is that, for use by the defendants' electric cars, the complainants are not bound to maintain the bridge. The solution of that proposition involves, not only the determination of the extent of the duty which the eleventh paragraph of the charter of the Newark & Hudson Railroad Company imposes, but also what duty is due from the defendants, who, by the legislation under which they take their powers, or as an incident to the exercise of their powers which the law imposes, may, as insisted at the argument, be bound to bear the expense of such structural changes in the existing highway, including strength to the bridge, as may be necessary to safely and properly accommodate the use to which they propose to put it. The inquiry is important, and, as yet, is unsettled by adjudication. The right of the complainants to have the bridge protected against use by the defendants' electric cars, until the defendants shall strengthen the bridge, is not clear. Thus the case is within the well-settled rule that where a complainant's right, of which protection is sought in limine by an interlocutory injunction, is in doubt, the preliminary injunction will not be allowed. *Hagerty v. Lee*, 45 N. J. Eq. 255, 17 Atl. 826. It is clear that the duty to make safe and maintain the bridge lies upon one or the other, or both, of the parties, and the responsibility for neglect of that duty must rest also in the same way. I will grant the motion to dismiss the order to show cause.

STATE (BARR, Prosecutor) v. MAYOR,
ETC., OF NEW BRUNSWICK et al.

(Supreme Court of New Jersey. Nov. 29, 1895).

MUNICIPAL CORPORATIONS — ORDINANCES — PUBLICATION — EMINENT DOMAIN — RELOCATION OF RAILROADS.

1. Under Acts 1874, p. 45, and Id. 1893, p. 157, when a railroad company presents to the common council of a city a petition offering certain terms, if authority is given to change and alter streets, and such terms are accepted by the city, a contract is made between the company and the city, within the meaning of the said acts.

2. The taking of land in such a case is the taking of it for a public use.

3. The fact that the company undertakes to pay the entire expense of the proceeding does not invalidate it. The city is authorized to make such an agreement in ease of the public burden.

4. In proceedings under the eightieth section of the city charter a dwelling house may be taken upon making due compensation.

5. In order to give the common council jurisdiction to pass an ordinance, it need not appear in the minutes of their proceedings that the notice required by the city charter was given; it is sufficient if such notice was actually given, and proof aliunde is competent to show compliance with the charter in that respect.

6. The provision in the city charter requiring publication of an ordinance between its second and third readings applies only where the ordinance involves the expenditure of public

moneys, and not to a case where the ordinance permits a railroad company to expend its own money in making a change in streets.

(Syllabus by the Court.)

Certiorari on the prosecution of Henry J. Barr against the mayor and common council of New Brunswick and the Pennsylvania Railroad Company to review an ordinance of the city of New Brunswick. Proceedings affirmed.

Argued at June term, 1895, before VAN SYCKEL, MAGIE, and LIPPINCOTT, JJ.

Voorhees & Booraem, for plaintiff. James B. Vredenburg, for defendants.

VAN SYCKEL, J. The question presented in this case relates to the validity of an ordinance of the city of New Brunswick, entitled "An ordinance to vacate a portion of Somerset street and to open a new street in the place thereof on the petition of the Pennsylvania Railroad Company," passed February 4, 1895. An act passed in 1874 (Pamph. Laws, p. 45) authorizes city authorities to enter into contracts "with railroad companies, whereby said companies may relocate, change or elevate their railroads, and when necessary for that purpose, the city may have authority to change and alter street lines." A supplement, passed in 1893 (Id. p. 157), extends the right of making such contracts for the opening of streets in the place of those vacated by such agreements. The prosecutor contends that in this case there was no contract between the city and the Pennsylvania Railroad Company, and that, therefore, these acts of 1874 and 1893 do not apply. The railroad company presented a petition to the common council of the city offering to donate a portion of the land, and pay all the expenses of the proposed change in the street, and the common council accepted the proposition, and passed the ordinance making the change. This clearly constituted a contract within the meaning of these laws.

The second objection to the proceeding is that it does not appear that the ordinance was passed for the public good, and that it takes private property for private use. That the right of eminent domain cannot be exercised for the purpose of taking private property for private use, is true beyond controversy. The only reason that it can be invoked in behalf of railroad companies is that it is unquestionable that the taking of lands for their purposes is regarded as taking it for a public use. The case shows that there is reasonable ground for holding that the change to be effected by the ordinance in question is beneficial to the public. That question has been passed upon by the common council of the city in the due exercise of its grantee powers, and it will not be reversed by this court. The fact that the railroad company agreed to pay all the expenses of the change in the street constitutes no legal objection to the proceedings. The cases cited in support of this objection have no pertinency. The legislature, by the acts referred to,

expressly authorized railroad companies to contract with city authorities to make changes in streets for the advantage of the railroad as well as the public. The right to contract necessarily implies that the railroads might assume obligations on their part to induce the city authorities to consent to alterations in streets. The two parties could lawfully make such terms as they could agree upon with reference to the expense incident to such changes. Any provision by which members of the city council would derive a benefit personal to themselves would be vicious and fatal, but an agreement in ease of the public burden consequent upon the passage of the ordinance is authorized by the statute. Section 3 of the ordinance provides that it shall go into effect at the expiration of 10 days, provided the company shall file with the city attorney a bond in the sum of \$25,000 for the performance of its promises. In this respect there is no infirmity in the ordinance. The city had a right to make the contract, and it was the duty of the city authorities to take reasonable and proper measures to secure performance on the part of the other contracting party. Mayor, etc., v. Clunet, 23 Md. 468; 1 Dill. Mun. Corp. (4th Ed.) § 309.

There is a dwelling house upon the land of the relator which is taken by the opening of the new street, and it is claimed that there is no power to take a dwelling house. The charter of New Brunswick (Pamph. Laws 1863, p. 379, § 80) gives the common council, whenever, in its opinion, the public good requires it, the power to lay out and open any street or highway in the city, to order any street or highway to be vacated, altered, or widened, and to take and appropriate for such purposes any lands and real estate, upon making compensation to the owner or owners. Sections 101, 105. The city, having been granted these general powers over streets and highways, is not subject to the seventy-ninth section of the act concerning roads (Revision, p. 1010), which prohibits the taking of a dwelling house. There is no restriction upon the power of the city to vacate and lay out streets, and it is manifest that, if a dwelling house was an insurmountable barrier to the opening of streets in cities, the power granted would be very inadequate, indeed, to the public necessities. It is claimed, however, that by implication there is an absence of power in the city to lay out a street which will take a dwelling. Section 101 of the city charter provides that the provision of the charter in relation to laying out, altering, or widening any street shall be construed to extend to and embrace the renewal of any building or part of a building erected within the lines of any street laid out under section 105 of the charter. The 105th section applies wholly to streets whose lines have not been distinctly marked, and cannot be clearly ascertained, and has no relation to the 80th section of the charter, under which the proceedings in the case were taken. It is contended that, as the charter provides for the re-

moval of buildings under section 105, implication excludes the right to remove when proceeding under the eightieth section. Granting this does not aid the petitioner. It relates only to the removal of buildings. Without such a provision in the charter, there would not, in any case, be a power to remove buildings from lands taken for streets. The city would be obliged to compensate the owner for the value of the building as well as the land upon which it is situated. The legislature has deemed it proper to give the right to remove a building under section 101, but that in no wise affects the power of the city to take land and buildings belonging to the owner the just and reasonable compensation he is entitled to when the proceedings are under the eightieth section. The sixth section provides for the assessment of damages to landowners. If the owner of a dwelling can lawfully refuse to permit the commissioners of assessment to enter it in order to make their valuation, they will make an appraisal upon such view as they may take. The statute does not contemplate that the owner will refuse.

The only remaining question is whether the proceedings below must be set aside on the alleged reason that the ordinance was not published, before it was passed, in the manner required by the city charter. The issue was pointed out in this respect is that it was published between its second and third readings, as the twenty-seventh section of the charter directs. Failure to make such publication in *Athletic Ass'n v. City of New Brunswick*, 55 N. J. Law, 279, 28 Atl. 87, was held to be fatal to the proceedings there commenced, but in that case it was conceded that there had been no publication. This case was argued before this court in June, 1895, at which time the counsel of the defendants handed in affidavits to the court showing that the ordinance had been duly published between the second and third readings. These affidavits were taken ex parte, and the court, therefore, declined to decide the case upon its merits, giving a rule permitting the parties to take affidavits to show how publication had been made. Under this rule testimony was taken on behalf of the city, and the case was reargued by the counsel of the respective parties at the November term. The testimony so taken shows a controversy that publication was duly made. It is urged on the part of the prosecution that the publication must not only be made, but it must appear as a jurisdictional fact. Proof of publication was laid before the common council before it could pass the ordinance. This position is not well taken. The fact of publication gives jurisdiction; the absence of publication constitutes the want of jurisdiction. The purpose for which publication is required is to give those interested an opportunity to be heard. That object was accomplished by the actual giving of the ordinance. All the rights which the prosecutor could legally exercise were afforded to him by

tice, and he has no ground of complaint. It is not essential to jurisdiction in the council that it shall appear that it decided that notice was given in due form. In *State v. City Council of Elizabeth*, 30 N. J. Law, 178, the court said that the jurisdictional facts must appear on the face of the proceedings or otherwise; and in *State v. City Council of Elizabeth*, 30 N. J. Law, 365, it was expressly held that, in order to give the city council jurisdiction, it need not appear by its minutes that it had appointed a day to hear persons who objected to an improvement. It was sufficient if such notice of hearing was actually given. This rule governs the case in hand. It need not appear in the minutes of the proceedings of council that publication was made, if it be shown aliunde that publication in fact was made. Every step necessary to be taken for the passage of the ordinance in legal form has been taken. Nothing more could be done if the proceedings were vacated and reinstituted. A work which is designed to promote the safety of travel on the streets of the city as well as in the cars of the railroad company should not be arrested and delayed by an objection purely technical, and by which no injury whatever has been done to the prosecutor. As the case in now presented there appears to have been a strict compliance with the city charter. Aside from this, the city charter requires publication between the second and third readings only where the ordinance involves the expenditure of money. This means the expenditure of the public funds of the city, and its purpose is to give notice to taxpayers, that they may, if so disposed, resist the passage of an ordinance which will cast a burden upon them. In this case no money was to be expended by the city. The ordinance did not contemplate or provide for the expenditure of any money by the city. The entire expenditure of money under the ordinance was required to be made by the Pennsylvania Railroad Company. The ordinance was, in substance and effect, a permit to the Pennsylvania Railroad Company to make, at its own cost and expense, a change in the streets of the city in the manner therein specified. It did not, therefore, involve the expenditure of money by the city, and is not within the meaning and spirit of the twenty-seventh section of the city charter. Upon this question the contention of the prosecutor is without merit. The proceedings certified should be affirmed, with costs.

CAMDEN SAFE-DEPOSIT & TRUST CO.
v. BURLINGTON CARPET CO. et al.
(Court of Chancery of New Jersey. Dec. 6, 1895.)

CORPORATIONS—AUTHORITY TO EXECUTE MORTGAGE—DIRECTORS—QUALIFICATION—CHATEL MORTGAGE—AFFIDAVIT—SUFFICIENCY.

1. P. L. 1893, p. 121, c. 67 (authorizing domestic corporations to merge and consolidate their corporate franchises and other property),

section 2, subsec. 1, requires the agreement of consolidation to prescribe the amount of capital stock of the new corporation, and the manner of converting the capital stock of the old corporations into stock or obligations of the new. Section 4 makes the latter liable for the debts of the old corporations, and vests it with their property. Section 6 gives the new corporation power to issue bonds to an amount sufficient to provide for payments it will be required to make, or obligations it will be required to assume, in order to effect such consolidation. *Held*, that such new corporation has power to execute a mortgage to secure bonds to be used in part in paying off mortgage liens and indebtedness of the old corporations existing at the time of the consolidation, though there is no provision in the consolidation agreement relating to such debts, and their amount does not equal the capital stock of the new company.

2. P. L. 1893, p. 121, c. 67, § 2, subsec. 1, provides, *inter alia*, that the consolidation agreement shall prescribe the number, names, and places of residence of the first directors and officers of the consolidated corporation, who shall hold their offices until their successors shall be chosen or appointed; but the act does not provide that the first directors of the new corporation shall be stockholders either in the new or in the old corporations. *Held*, that General Corporation Act, § 16, providing that the business of every such company shall be managed and conducted by the directors, who shall be shareholders therein, does not apply to the first directors of a new corporation formed by the consolidation of existing corporations.

3. A corporation formed under P. L. 1893, p. 121, c. 67, by the merger of existing corporations, gave a mortgage on its personal and other property to secure bonds such as are dealt with in commercial transactions. The recitals of the mortgage showed that its true consideration was a loan to the company of \$400,000 for the purpose of paying its indebtedness and procuring funds, and that the creditors were to have the first right to the bonds at par, in satisfaction of their liens and debts, but the purpose of the bonds not taken by creditors was not specified. The affidavit accompanying it stated only that the "true consideration of the above mortgage is the issue of \$400,000 in bonds of the mortgagor for the purpose specially set forth in the mortgage." *Held*, that such affidavit was sufficient, under Supp. Revision, p. 491, par. 11, declaring such mortgages void, as against creditors of the mortgagor, unless the mortgage, having annexed thereto an affidavit of the holder stating the consideration of the mortgage, and as nearly as possible the amount due and to grow due thereon, be recorded, etc.

Bill by the Camden Safe-Deposit & Trust Company against the Burlington Carpet Company and others to foreclose a mortgage. Heard on bill, answer, replication, and proofs.

Martin P. Grey, for complainant. Mark R. Sooy, for defendant Gaskell, receiver. R. L. Lawrence, for defendant W. & J. Sloane Co. F. B. Levis, for defendant Tomlinson.

EMERY, V. C. The bill in this case is filed by the complainant, as trustee for the bondholders, to foreclose a mortgage given by the Burlington Carpet Company upon lands, and also upon chattels, to secure an issue of bonds made by the company. This company, by proceedings taken under the insolvent corporation act, subsequent to the filing of the bill to foreclose, has been de-

clared insolvent, and the receiver is a defendant to the bill to foreclose. The property, real and personal, covered by the mortgage, has been sold by the receiver for less than the amount of outstanding bonds, and by his answer, and on the hearing, the receiver now questions the validity of the mortgage, and the right of the bondholders to the proceeds of sale in his hands. The validity of the mortgage, as to both real and personal property, is contested by the receiver upon the grounds: First. That the company had no legal authority to issue the mortgage. This objection is made at the hearing, but not by the answer. Second. That the directors of the company, who authorized and directed the execution of the mortgage, were not at that time stockholders of the company, and therefore were not qualified to act as directors. Third. The validity of the mortgage as a chattel mortgage is further attacked upon the ground of the insufficiency of the affidavit under the act relating to chattel mortgages. Supp. Revision, p. 491, par. 11. My conclusions upon these questions are:

First. The company had authority to execute the mortgage in question. The company was a corporation created by the merger or consolidation of two previously existing corporations, under the authority of the act of 1893 (c. 67, p. 121), entitled, "An act to authorize corporations incorporated under the laws of this state to merge and consolidate their corporate franchises and other property." Under this act (section 2, subsec. 1), the agreement of consolidation is to prescribe, among other things, the amount of the capital stock of the new corporation, and the manner of converting the capital stock of each of the merging or consolidating corporations into the stock or obligations of the new corporation. By section 4, all the debts and liabilities of the former corporations attach to the new corporation, which upon the merger is vested with all the property of the former corporations, saving the rights of their creditors and their liens. Section 6 provides that the new or consolidated corporation shall have power and authority to issue bonds or other obligations, negotiable or otherwise, to an amount sufficient, with its capital stock, to provide for all the payments it will be required to make, or obligations it will be required to assume, in order to effect such merger or consolidation, and to mortgage its franchises and property to secure such bonds. In the present case the consolidation agreement provided that the capital stock of the new corporation should be \$400,000, being equal to the joint issue of both the constituent companies, and that the stock of the new company should be issued, share for share, for the surrendered stock of the old companies. There was no provision in the consolidation agreement for the payment of any cash for any portion of the

old stock of either company, or for suing of any obligations of the new company on such exchange or surrender. Was there any provision in the consolidation agreement relating to the debts of old companies. The mortgage now in question was made to secure an issue of bonds to the amount of \$400,000, which were to be used in part for the purpose of paying off mortgage liens and indebtedness of each of the constituent companies existing at the time of consolidation. The amount of this pre-existing indebtedness was not equal to \$400,000, the sum of the capital stock of the new company. The counsel for the receiver contends that the new company was therefore not entitled under the sixth section to issue any bonds to be used for paying this indebtedness. That this sixth section is the only authority for any issue of bonds by the new company. But it seems clear to me that the bonds specially authorized by the sixth section were the bonds necessary to effect the payments to be made or the obligations to be issued in order to effect the merger or consolidation on the terms agreed upon, i. e. to provide the cash for the conversions which were made necessary by the conversion of the stock, or other property, specially provided for by the agreement, and necessary in order to effect the consolidation according to the terms of the agreement. The payment of the pre-existing debts of the old companies was not an obligation which the new corporation was required to assume in order to effect the merger. It was an obligation imposed upon it as a consequence of the act of merger, and for the payment or securing of such obligations the new corporation has all the powers of any corporation, including the power to mortgage. This objection, therefore, is not well founded.

The second objection to the validity of the mortgage is that the mortgage was not executed by lawful authority, and the reason assigned is that at the date of the execution of the mortgage neither of the four directors who authorized the mortgage was to be given by the new or consolidated company. These four directors were each stockholders of one or the other of the old companies, as such were, under the consolidation agreement, absolutely entitled to their stock in the new company, and this new stock was actually issued to each of them shortly after the date of the mortgage. These four directors were also the four persons named in the consolidation certificate as the first directors of the new company, and the certificate provided that these directors should hold their offices until their successors should be chosen or appointed according to law, or according to the by-laws of said corporation. Their successors were not chosen until after the execution of the mortgage. The act of 1

L. 121, § 2, subsec. 1) provides, *inter alia*, that the consolidation agreement shall prescribe "the number, names, and places of residence of the first directors and officers of such new or consolidated corporation, who shall hold their offices until their successors shall be chosen or appointed either according to law or according to the by-laws of said corporation." There is no express provision in the act that the first directors of the new corporation shall be stockholders, either in the new or in one of the old corporations, and in the absence of legislation a director need not be a stockholder. In *re St. Lawrence Steamboat Co.*, 44 N. J. Law, 529 (Depue, J., page 541). The contention is that the sixteenth section of the general corporation act, providing that "the business of every such company shall be managed and conducted by the directors thereof who shall be shareholders therein * * *" applies to the case, and that these four directors named in the consolidation certificate were not entitled to act as directors until the certificates of stock to which they were entitled were actually issued to them. I am inclined to think that, inasmuch as the act of 1893 terminated the existence of the former companies, so far as their stockholders were concerned, upon the formation of the new company under it the stockholders of the old companies became, *ipso facto*, on the merger, such shareholders in the new company as would entitle them to be considered qualified as directors of the new company, and that for this purpose a certificate of stock of the old company, for which, under the consolidation agreement, a similar certificate in the new company must be issued, was a sufficient qualification. The four directors were certainly equitably entitled to the rights of shareholders; and, as no other person than the directors had any legal or equitable right to the new certificate in exchange for their old ones, I am inclined to think that they are not disqualified, under the language of the sixteenth section of the corporation act, merely because the new certificate had not been actually issued. But my opinion is that this section 16 of the general act does not apply to the first directors under the consolidation act, who receive their appointment by the consolidation agreement under the express provision of the statute of 1893. This act of 1893 changes the general act, so far as the provisions of the latter are inconsistent with it, or restrict the powers of the directors so named to act under the law. In *Davidson v. Light Co.*, 99 N. Y. 558, 565, 2 N. E. 892, a general law requiring directors to be stockholders was held not to apply to the directors required by law to be named in the corporate certificate as the managers for the first year. I am of opinion, therefore, that these directors were authorized to execute the mortgage, and so decide, without reference to the question of the subsequent ratification of the mortgage by the stockholders

of the company, which ratification is claimed to be made out by the evidence.

The third question is one of more difficulty. It relates to the validity of the mortgage in question as a chattel mortgage, and the question is whether it is void under the chattel mortgage act (Supp. Revision, p. 491, par. 11), which expressly declares such mortgages void as against the creditors of the mortgagor, "unless the mortgage, having annexed thereto an affidavit or affirmation made and subscribed by the holder or holders of said mortgage, his, her or their agent or attorney, stating the consideration of the mortgage and as nearly as possible the amount due and to grow due thereon, be recorded," etc. The receiver in insolvency, as representing the creditors of the company, is entitled to enforce this provision against chattel mortgages. *Receiver of Graham Button Co. v. Spielmann* (Van Fleet, V. C.; 1892) 50 N. J. Eq. 120, 24 Atl. 571, affirmed on appeal. See *Martin v. Bowen*, 51 N. J. Eq. 460 (reporter's note), 26 Atl. 823. The objection now made by the receiver is that the affidavit is insufficient under the statute. The mortgage was given by the Burlington Carpet Company to the complainant, the Camden Safe-Deposit & Trust Company, and the affidavit is made by the treasurer of the complainant as follows:

"State of New Jersey, County of Camden—*ss.*: William Stiles, being duly sworn, saith that he is the secretary and treasurer of the Camden Safe-Deposit and Trust Company, the mortgagee above mentioned, and its duly-authorized agent in this behalf; that the true consideration of the above mortgage is the issue of four hundred thousand dollars (\$400,000) in the bonds of the mortgagor, for the purpose specially set forth in the mortgage. Wm. Stiles.

"Sworn and subscribed at Camden aforesaid this second day of December, Anno Domini eighteen hundred and ninety-three (1893). Thomas B. Harned, M. C. C."

The mortgage being thus referred to in the affidavit as showing the purpose of the mortgage, it must, under the rule settled by the court of errors and appeals in *Fletcher v. Bonnet*, 51 N. J. Eq. 615, 618, 28 Atl. 601, be regarded as part of the affidavit, so far as the purpose of the mortgage is concerned; and, if this purpose disclosed by the mortgage shows as nearly as may be the consideration of the mortgage, and the amount due and to grow due thereon, the affidavit is not defective. The mortgage is in the usual form of corporation mortgages made to trustees for the purpose of securing bonds intended to pass current in the market. The total issue of bonds intended to be secured is declared to be \$400,000, being 400 bonds of \$1,000 each; and each bond, a form of which is set out at length in the mortgage, acknowledges the indebtedness of the company to the bearer thereof in the sum of \$1,000, to be paid 10 years after the date of the bond (December 1, 1893), with inter-

est, etc. As to the purpose of the issue of bonds, the mortgage recites the previous incorporation of the two constituent companies, the Burlington Carpet Company and the Stanwick Carpet Company; their consolidation into the Burlington Carpet Company, the mortgagor; that both of the constituent companies before the consolidation were heavily indebted and financially embarrassed, the indebtedness consisting of mortgages due and unpaid on all the real and personal property of both companies, which mortgages were recorded in the clerk's office of Burlington county, and also of a large indebtedness due and unpaid and unsecured, and that for the purpose of saving the companies from insolvency, and of continuing their business, a consolidation was resolved upon and effected, and that the consolidated company should fund a loan of \$400,000, and secure the same by mortgage on all the property, real and personal, and then owned or thereafter to be acquired, and issue bonds secured by said mortgage, 400 in number, for \$1,000 each, payable 10 years after date, and that the said bonds should be issued at par, to such creditors who should be willing to accept the same in payment of their respective indebtedness; and that the balance should be used for the purposes of the company, as its board of directors should direct, said loan not to become operative until all the mortgages, real and personal, recently recorded, should be delivered up and canceled. The mortgage further recites the resolution of the board approving the form of the bond and mortgage, and authorizing the execution for the purpose above stated, and, after conveying the real and personal property and franchises of the company to the trustee, declares the same to be "in trust, nevertheless, for the security, equal use, and benefit of the several persons or bodies politic or corporate to whom said bonds may or shall be issued, and who shall hereafter or thereafter become the lawful holders thereof, their respective executors, administrators, successors, and assigns, according to law." The mortgage also contains a covenant with the trustee to pay the several holders of the bonds and their assigns the principal sums and interest mentioned, and provisions for foreclosure and sale on default. This mortgage, it will be perceived from the above recitals, is one of a class designed to secure bonds of corporations such as are dealt in commercial transactions, and which for this reason constitute, in some respects, a class by themselves. In *Central Trust Co. v. Continental Iron Works* (Err. & App.; 1804) 51 N. J. Eq. 605, 28 Atl. 595, this distinction was recognized; and it was held that, under mortgages issued by corporations to secure the issue of bonds of this character, the mortgages were valid as securing future advances, and operated from the time of recording, and that bonds issued under the

mortgage, received without actual notice of incumbrances subsequent to the mortgages, were prior to such incumbrances, although the bonds were actually issued after incumbrances. The mortgage seems to have been referred to in the case as a real-estate mortgage only; but a chattel mortgage, as well as a real-estate mortgage, may lawfully be given to secure future advances. The provision of the chattel mortgage prescribing the affidavit of consideration was not intended, and cannot be construed to restrict the purposes for which a chattel mortgage may lawfully be given. *Horn v. Weldner* (N. J. Ch.; Pitney, V. C.; 1895) 31 Atl. 771. If, then, the mortgage in this case had simply recited the issue of bonds to the amount of \$400,000, upon the bonds loans of money to the company to that extent were proposed to be obtained, it seems to me that there could be no question as to the validity of the mortgage, which disclosed that fact, would suffice to state the consideration of the mortgage, whether the amount due or to grow due. The consideration would then be the future advances, and the amount due or to grow due would be the amount of those future advances made on the bonds up to the limit of the issue authorized. The contention of the receiver's counsel in this case is that, inasmuch as the bonds were to be delivered to such creditors as were willing to accept them in payment of their respective indebtedness, and the purpose of the balance was specified, the true consideration of the mortgage and the amount due were not stated, and he insists that under the chattel mortgage act the amount of this prior indebtedness, and the true origin and consideration of each debt, should have been stated. If the mortgage been given to a trustee, solely to secure the pre-existing debts which were intended to continue as debts of the company, I think this view would be well founded; but the mortgage being one which was given according to my view, was primarily intended to secure bonds of the corporation intended to pass from hand to hand in the market as negotiable securities, the fact that the mortgage provided that the bonds should be given to the creditors who would accept them in payment of and satisfaction of their prior liens and debts, and that the balance of the \$400,000 bonds should be subject to the control of the directors, does not, in my judgment, constitute the mortgage a mortgage to secure pre-existing debts, and necessitate the proof of the origin and consideration of those debts as preliminary to the validity of any of the bonds issued or to be issued under the mortgage. In other words, the true consideration of this mortgage was a loan to the company, to the extent of \$400,000, for the purpose of paying its indebtedness and procuring funds. The directors were to have the first right to the bonds at bar, in satisfaction of their

ous liens and debts; but, on receiving the bonds in satisfaction or payment, they stood, so far as subsequent creditors of the company are concerned, on the same footing as bondholders who had advanced money to the company for the bonds. The mortgage cannot be considered simply as a mortgage given to and accepted by them for the purpose of securing their debts as existing debts, and it was not necessary, therefore, that the consideration of these debts should be stated in the affidavit; and this objection to the affidavit is not sustained. If this view of the nature of the mortgage is correct, then the further objection of the receiver that the affidavit should have shown that the prior mortgages were canceled must also be held insufficient, upon the same grounds. The proof shows that these mortgages were canceled on the 16th day of December, 1893, 10 days after the mortgage was recorded as a chattel mortgage, and that they were then canceled of record by the prior mortgagees, on the receipt of bonds issued under the consolidated mortgage to the amount of their own mortgages. I consider the affidavit sufficient under the chattel mortgage act, and will advise a decree that, as to bona fide holders of the bonds under the mortgage, the mortgage is valid, both as a real-estate and as a chattel mortgage. Questions in relation to the bona fides of some of the holders of the bonds, the amount for which they should prove, and some other questions, were reserved, and the form of decree will be settled on notice.

GOULD v. MOULAHAN.

(Prerogative Court of New Jersey. Dec. 7, 1895.)

FUNERAL EXPENSES OF MARRIED WOMAN—SEPARATE ESTATE.

Where a married woman dies, leaving an insolvent husband surviving her, a proper third person, who has borne the necessary expense of her suitable burial, may recover from her estate.

(Syllabus by the Court.)

Appeal from orphans' court, Essex county; Kirkpatrick, Ledwith, and Schalk, Judges.

Robert S. Gould, administrator of the estate of Mary E. Connolly, deceased, appeals from an order discharging an order to show cause why lands of the decedent should not be sold to pay her debts. Reversed.

The order appealed from, discharging an order to show cause why sufficient lands of Mary E. Connolly, deceased intestate, shall not be sold for the payment of her debts, which was made upon the petition of Robert S. Gould, the administrator of her estate, to which petition was annexed an account which exhibits that Mrs. Connolly did not have any personal property, and that the only claim against her estate is a bill presented by J. B. Dowling & Son, for the expense of her burial. It does not appear by

whose direction that bill was incurred. Mrs. Connolly left a husband surviving her, but he is without property from which the expense of her interment may be recovered. He renounced his right to administer upon her estate, and, some two months after her death, letters of administration were issued to the appellant, Gould. The stipulation between the counsel in the case contains this paragraph: "It is further agreed that the argument upon appeal be confined to the single question as to whether the lands and real estate of a married woman, who dies leaving a husband her surviving, are liable for her funeral expenses, and can be sold, by an order of the orphans' court, to pay them, under the statute providing for the sale of lands of a decedent, where the husband of the deceased has no property from which the undertaker's bill can be collected, and whether the decree of the orphans' court was erroneous in this respect." The respondent Patrick J. Moulahan is the heir at law of Mrs. Connolly.

Thomas S. Henry, for appellant. James M. Trimble, for respondent.

McGILL, Ordinary (after stating the facts). Every person has the right to have his or her body, after death, decently buried. *Reg. v. Stewart*, 12 Adol. & E. 773; *Chapple v. Cooper*, 13 Mees. & W. 252; *Patterson v. Patterson*, 59 N. Y. 583; *McCue v. Garvey*, 14 Hun, 562. The reasonable and necessary expense of according that right is chargeable to his or her estate. *Patterson v. Patterson*, supra. The duty of securing the right ordinarily rests with the personal representative, and if there be no such representative, or, if existing, the representative fails to act, the exigency of the situation will permit a proper third person to afford the right, in favor of whom the law will imply, from the representative's obligation, a promise upon the part of the latter to reimburse the reasonable expense of the interment, to the extent of the assets of the decedent's estate which may become available for that purpose. The implication of such a promise is a recognized exception to the rule that an action will not lie for a voluntary courtesy. *Force v. Haines*, 17 N. J. Law, 389; *Patterson v. Patterson*, supra; *Lakin v. Ames*, 10 Cush. 221. In case of the death of a married woman, the duty to bury her, and discharge the expense of so doing, devolves upon her husband, if he shall survive her. *Jenkins v. Tucker*, 1 H. Bl. 90; *Bertie v. Lord Chesterfield*, 9 Mod. 31; *Ambrose v. Kerrison*, 10 C. B. 776; *Bradshaw v. Beard*, 12 C. B. (N. S.) 344; *Cunningham v. Reardon*, 98 Mass. 538; *Weld v. Walker*, 130 Mass. 423; 2 Bright, *Husb. & W.* 521; *Macq. Husb. & W.* 191; *Schouler, Husb. & W.* § 412; *Eversley, Dom. Rel.* 305. His liability for the expense of the interment does not arise in virtue of any interest he may have

in the wife's property, but from the personal advantage it is to himself to have those personæ conjunctæ with him, his wife and lawful children, properly maintained during life, and suitably buried at death. The question whether, if the husband shall perform this duty, he may be reimbursed from his wife's separate estate, is not presented in this inquiry. The cases dealing with that subject appear to be somewhat at variance. See, among others, *Gregory v. Lockyer*, 6 Madd. 90; *McCue v. Garvey*, 14 Hun, 582; *Freeman v. Coit*, 27 Hun, 447; *In re M'Myn*, 33 Ch. Div. 575; *Darmody's Estate*, 13 Phila. 207. The point in the present inquiry is whether, where the husband is unable to bear the expense of his wife's burial, her estate may be held liable for it. But for the husband's survival of his wife, the obligation to bury her, and to pay the expense of that burial, would rest upon the representative of her estate. Is the husband's obligation in such case substituted for the representative's, so that its existence discharges the representative's, or is it additional and primary thereto? I am of opinion that the latter clause of this question is entitled to the affirmative answer; that there is a double obligation when a married woman dies leaving a husband,—a primary obligation on the husband, and a secondary obligation upon the representative of her estate; and that the mere existence of the husband's primary obligation does not discharge the estate's secondary obligation, although the husband's performance of his obligation may effect such discharge. The wife is entitled to be suitably buried at the expense either of her husband or of her estate; otherwise the wealthy wife of an insolvent husband might be subjected to the burial of a pauper. And it appears to me to follow that upon the failure of the primary obligation, for any reason, the secondary may be enforced. Common decency and humanity are regarded by the authorities as authorizing a speedy burial of a decedent by any proper person, unobstructed by hesitation in measuring the responsibilities of the husband and representative, and such exigency affords a strong reason why both those responsibilities for reimbursement should remain available.

By the stipulation in the present case, it appears that the husband is insolvent, and therefore any effort to recover from him, as the primary obligee, would be abortive, and hence that immediate demand against the representative is proper. My conclusion is that the order appealed from must be reversed.

SHERIDAN v. FOLEY.

(Supreme Court of New Jersey. Nov. 7, 1895.)

NEGLIGENCE—PRESUMPTIONS.

Where one engaged in laying a sewer in a building is injured by a falling brick, in the

absence of explanation by the contractor of the brick work, it will be presumed that it occurred from want of reasonable care on his part, and he is liable for the injuries received.

Case certified from court of common pleas, Hudson county.

This is an action brought by John Sheridan against Michael Foley to recover for personal injuries received by the plaintiff while working upon a building which was being erected in the city of Hoboken. On the trial appeared, according to the plaintiff's evidence, that the defendant, Foley, had a contract with the owner to do the masonry upon the building, and that the plaintiff, as employer, had the contract to do the plumbing; that while the plaintiff was at work laying a sewer pipe at the foot of one of the walls of the building, which the defendant's employes were then engaged in erecting, he was struck upon the head and seriously injured by a brick which fell, either from the scaffold upon which certain of the defendant's employes were at work engaged in laying the wall, or else from the head of one of the defendant's hod carriers as he was ascending the ladder to the scaffold with a load of bricks. Upon this evidence the trial judge, without consulting the plaintiff, on the ground that as he viewed the case, there was nothing in the law or facts that would justify the court in allowing the case to go to the jury, refused to make a rule to show cause was allowed. The case was certified to this court for its advice and opinion whether said rule should be made absolute and a new trial granted. The court made absolute.

Argued February term, 1895, before Chief Justice LEY, C. J., and Justices REED and GUMMERE.

John I. Weller, for plaintiff. James Minton, for defendant.

GUMMERE, J. It cannot be denied that it was the duty of the defendant to see that the work upon which he was engaged was not to injure other persons who were engaged upon other work upon the same premises; and that, if the plaintiff was injured through the carelessness of the defendant's servants in the performance of their duty, he is entitled to compensation for such injury. It is urged, however, on behalf of the defendant, that the plaintiff was bound to order to entitle him to a verdict, to affirmatively state that the injury which he received was caused by the negligent act of the defendant or of his servants; that the proof that the plaintiff was injured by a brick falling from the head of one of the defendant's hod carriers, or from a scaffold upon which some of the employes of the defendant were engaged in laying a sewer, does not, standing alone, raise any presumption of negligence; and that, as there was no evidence offered to show under what circumstances the brick fell, there was no ground in the case to warrant the jury in inferring that the injury complained of was the

of the carelessness of the defendant or of his employes. While it is true, as a general principle, that mere proof of the occurrence of an accident raises no presumption of negligence, yet there is a class of cases where this principle does not govern,—cases where the accident is such as, in the ordinary course of things, would not have happened if proper care had been used. In such cases the maxim, "*Res ipsa loquitur*," is held to apply, and it is presumed, in the absence of explanation by the defendant, that the accident arose from want of reasonable care. A leading case on this subject is *Kearney v. Railway Co.*, L. R. 5 Q. B. 411; *Id.* (on appeal) L. R. 6 Q. B. 759. The facts were that the plaintiff was passing along a highway under a railway bridge when a brick fell from one of the piers on which the girders of the bridge rested, and injured him. A rain had passed over the bridge shortly before the accident, but the evidence failed to disclose whether it was a train of the defendant company, or of another railway company which also used the bridge. The bridge had been built and in use for three years. The court of queen's bench held that the maxim, "*Res ipsa loquitur*," applied; that, as the defendants were bound to use due care in keeping the bridge in proper repair, so as not to injure persons passing along the highway, so unusual an occurrence as the falling of a brick was *prima facie* evidence from which the jury might infer negligence in the defendants; and the principle was unanimously affirmed by the court of exchequer chamber on the argument of the appeal. Another case, quite similar in its facts to the one now before us, where this principle was applied, is that of *Byrne v. Boadle*, 2 Hurl & C. 722. In that case the plaintiff was injured by the falling of a barrel from the window of the defendant's shop. There was no evidence to show what caused the barrel to fall, nor was there any direct evidence to connect the defendant or his servants with the occurrence. Pollock, C. B., in discussing the question of the defendant's liability, said: "There are certain cases in which it may be said '*res ipsa loquitur*,' and this seems one of them. * * * It is true that there are many accidents from which no presumption of negligence can arise, but this is not so in all cases. Suppose, in this case, the barrel had rolled out of the warehouse and fallen on the plaintiff. How could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out; and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff, who is injured by it, must call witnesses from the warehouse to prove negligence, seems to me preposterous. So, in building or repairing a house, if a person passing along the road is injured

by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence." In our own state, in the case of *Bahr v. Lombard*, 53 N. J. Law, 233, 21 Atl. 190, and 23 Atl. 167, this maxim was fully commented upon and applied. The facts in the present case bring it within the application of this principle. The bricks were in the custody of the defendant's servants at the time when this one fell, and it was their duty to so handle them as not to endanger others, who were engaged in other work upon the same premises. This brick could not have fallen of itself, and the fact that it fell, in the absence of explanation by the defendant, raises a presumption of negligence. If there are any facts inconsistent with negligence, it is for the defendant to prove them. The court of common pleas is advised that the rule to show cause should be made absolute.

THILLMAN v. BENTON.

(Court of Appeals of Maryland. Dec. 11, 1895.)

PARTNERSHIP CONTRACT—WHEAT CONSTITUTES

A contract between V. and G., trading as the S. M. Co., of the first part, and B., of the second part, recited that whereas the first parties were desirous of securing additional capital, and the second party was willing to contribute the amount desired on the terms that V. shall be the general manager at \$15 per week, "and then, after the payment of all expenses in conducting the business of the company, the parties of the first part agree to pay to the party of the second part, for the use of the said \$2,000, an amount equal to one-third of the net profits arising out of the business." *Held*, that such contract did not make B. a partner.

Appeal from Baltimore city court.

Action by Bernard Thillman against F. H. Von Haftten, James W. Galley, and Luther B. Benton, as copartners trading as the Sanitary Milk Company, to recover a balance alleged to be due on an open account for goods sold and delivered and for work done, in which defendant Benton only answered. From a judgment entered on a verdict directed by the court in favor of Benton, plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, and BOYD, JJ.

Hyland P. Stewart, for appellant. J. V. L. Findlay and Thomas Mackenzie, for appellee.

ROBINSON, C. J. The real question we have to decide in this case is whether the articles of agreement between Von Haftten and Galley, trading as the Sanitary Milk Company, and the defendant, made the latter a member of the firm; for, if he was a partner, then he is liable for the trade obligations of the partnership. And before considering the terms of this agreement it may be as well to state what, according to well-

settled principles, is necessary to constitute a partnership. In doing so we shall not attempt to define what is a partnership, for it would be a difficult matter to formulate a definition to meet every case. In his very able treatise on Partnership, Mr. Justice Lindley gives 15 definitions from text writers and judges, and it is not too much to say that no two of them exactly agree. At one time it was held that a mere participation in the profits of a trade or business made one, by operation of law, a partner, and this, too, even though he never meant to assume that relation, and had never held himself out to the public as a partner. This rule was first announced in *Grace v. Smith*, 2 W. Bl. 908, decided in 1775, in which De Grey, C. J., said that every one who shares the profits ought also to bear his share of the loss, and for the reason that, by taking part of the profits, he takes part of that fund on which the creditor relies for the payment of his debt. And this principle was fully approved and adopted in the well-known case of *Waugh v. Carver*, 2 H. Bl. 235, decided in 1793. These cases, although properly decided on the facts, the grounds on which the judgments are based have never been considered as being satisfactory, for, as was said in *Mollwo v. Court of Wards*, L. R. 4 P. C. 419, "the same consequences might follow in a far greater degree from the mortgage of the common property of the firm, which certainly would not of itself make the mortgagee a partner." Finally, in the leading case of *Cox v. Hickman*, 8 H. L. Cas. 268, the Lord Chancellor Campbell, Lord Brougham, Lord Cranworth, and Lord Wensleydale all sitting, the question was fully considered, and the rule laid down in *Grace v. Smith* and *Waugh v. Carver* was in a great measure qualified, if not entirely overruled. In delivering his judgment, Lord Cranworth says: "It has often been said that the test, or one of the tests, whether a person not ostensibly a partner is nevertheless, in contemplation of law, a partner, is whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test, for a right to participate in profits affords cogent—often conclusive—evidence that the trade in which the profits have been made was carried on in part for or in behalf of the person setting up such a claim. But the real ground of liability is that the trade in which the profits have been made was carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that the right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on in his behalf,—i. e. that he stood in relation

of principal towards the persons acting ostensibly as the traders by whom the liabilities have been incurred and under whose management the profits have been made. In the subsequent case of *Mollwo v. Court of Wards*, in the house of lords, Sir Monteagu Smith says: "The judgment in *Cox v. Hickman* had certainly the effect of disavowing the rule of law which had been supposed to exist, and laid down principles of decision on which the determination of cases of this kind is made to depend, not on arbitrary presumptions of law, but on the real facts, contracts and relations of the parties. It appears to be now established that, although a person has a right to participate in the profits of trade, this is not a strong test of partnership, and that there may be cases where, from such participation alone, it may, as a presumption not of fact but of fact, be inferred, yet that whether that relation does or does not exist must depend on the real intention and contracts of the parties." And in the still later case of *Badeley v. Bank*, 38 Ch. Div. 239, decided in 1888, Colton, L. J., after stating that the rule laid down in *Waugh v. Carver* that participation in the profits of a business, by operation of law, constitutes a partnership, cannot now be considered as a rule of law, says: "I take it the law is this: participation in profits is not now conclusive evidence of the existence of a partnership, but it is one of the circumstances,—a very strong one, which are to be taken into consideration for the purpose of ascertaining whether or not a partnership exists,—to say, whether there was a joint business, or, putting it in another way, whether the parties were carrying on the business as principals and as agents for each other, whether it is a joint business, or the business of one only." We take it, then, as well settled that a partnership is a contract of some kind involving mutual consent of the parties, and when such a contract is entered into between two or more persons for the purpose of carrying on a trade or business, with the right to participate in the profits of such trade or business, then a contract constitutes a partnership, unless there be other facts and circumstances which show that some other relation existed. If there be a partnership in fact, the public has the right to assume that each partner has authority from his co-partners to bind the whole firm in contracts according to the ordinary usages of trade. And this principle applies not only to persons acting openly and avowedly as partners, but also to others, who, though not acting, are by a private agreement or arrangement partners with those who are ostensibly to the world as persons carrying on the business. Without extending our opinion by special reference to the case at hand, it is sufficient to say that the current decisions in this country are in full accord with the principles laid down in the English ca-

which we have referred. The American cases are fully considered and reviewed by Mr. Bates in his carefully considered book on Partnership. And, before leaving this part of the case, we deem it proper to say a word about Rowland v. Long, 45 Md. 439, referred to in the argument. The court was dealing with that case as it was presented by the record, and there is nothing said in the decision, when read in connection with the facts, which conflicts in any manner with the rule laid down in *Cox v. Hickman*. What we decided in *Rowland v. Long* was this: that where two or more persons agree to carry on a trade or business for their mutual benefit, one to furnish the money necessary to carry on the business and the other to perform certain labor or tender certain services, and each to share the profits from the business, these facts in themselves constituted a partnership, there being no other facts in that case to rebut the presumption arising from a participation in the profits of the trade or business, or to show that any other relation existed between the parties.

Tested by these principles, we come to the question whether the articles of agreement between Von Hafften and Gailey, trading as the Sanitary Milk Company, and the defendant made the latter a partner in the company. Now, what are the terms of this agreement? In the first place, it is not an agreement inter partes, but an agreement between Von Hafften and Gailey, trading under the style of the Sanitary Milk Company, of the first part, and the defendants of the second part. And then it recites "that whereas, the parties of the first part are desirous of securing additional capital for the purpose of carrying on the said business, and the party of the second part is willing to contribute the amount so desired, namely, two thousand dollars, upon the following terms and conditions." Then follow these terms and conditions, namely: Von Hafften is to be the general manager of the business, and for his services as such he is to be paid fifteen dollars per week; and then, after the payment of all expenses in conducting the business of the company, "the parties of the first part" agree "to pay to the party of the second part, for the use of the said two thousand dollars, an amount equal to one-third of the net profits arising out of the business." There is no reference whatever as to a partnership. Von Hafften and Gailey, who had been engaged in the business of selling milk, needed additional means to carry on the business; and the defendant, Benton, agrees to furnish them \$2,000, in consideration of which he is not entitled to share in the profits, qua profits, but to be paid "for the use" of the money advanced by him "an amount," says the agreement, "equal to one-third of the net profits." And then it provides that this contract is to remain in force for one year from even

date, and at the expiration of said year the said parties of the first part will pay unto the party of the second part his \$2,000, and his share of profits as stated; thereby creating a personal liability on the part of Von Hafften and Gailey to pay to the defendant at the end of one year the entire amount advanced by him to them, and also to pay an amount equal to one-third of the net profits of the business for the year. Now, it may be true that a participation in the profits of a business, standing alone, would, unless explained, lead to the conclusion that the business was carried on for the mutual benefit and the joint authority of all the parties participating in such profits. But when the participation in profits arises from a particular clause in an agreement between the parties, before you can justly say that such participation is *prima facie* evidence of a partnership it will be necessary to look not only to that clause, but all other clauses in the contract, and then determine whether the contract, taken as a whole, justifies the conclusion that there is a partnership; that is, whether there is a joint business carried on in behalf of all the parties, or whether the transaction is one of loan between debtor and creditor, the loan or interest on the loan to be paid by an amount equal to a certain share in the profits. And, looking to this agreement as a whole, it cannot, it seems to us, be considered as a contract of partnership, to be carried on jointly for the benefit of all the parties to the agreement; that is, a business in which all the parties are principals, with authority to bind each other by obligations entered into according to the ordinary usages of trade. On the contrary, by every fair rule of construction it is an agreement by which the defendant was to loan to the company \$2,000 additional, and to be paid for the use of the money an amount equal to a certain proportion of the net profits.

It may not be amiss to add what was so well said in *Mollwo v. Court of Wards*: "If cases should occur where any persons, under the guise of such an arrangement,—that is, the guise of an arrangement as creditor and debtor,—are really trading as principals, and putting forward as ostensible traders others who are really their agents, they must not hope by such devices to escape liability, for the law in cases of this kind will look at the body and substance of the arrangement, and fasten responsibility on the parties according to their true and real character." "It is a question," says Sir George Jessel, "of substance, and not of mere form." *Pooley v. Driver*, 5 Ch. Div. 458. Outside of this agreement, there is no evidence whatever to charge the defendant as partner. He did, it is true, now and then examine the books of the company, and gave his views as to the manner in which the business ought to be conducted, and in conversations with Von Hafften and Gailey, the members

of the firm, spoke of the business as "our business," and, when the company got into difficulties, he refused to advance any more money, preferring, as he said, to bear his share of the losses, rather than put more money in the concern. All these acts were consistent with his relation as a creditor of the company, for upon the successful management of the company depended the payment by it of the \$2,000 loaned, and the payment of part of the net profits for the use of the money. The defendant was a druggist living and doing business in another part of the city. There is not a particle of evidence to show that he ever held himself out to the public as a partner, or was in any sense an ostensible partner. And the court committed no error in instructing the jury that there was no evidence legally sufficient to show that the defendant was a partner, and in refusing to grant the several prayers offered by the plaintiff.

The evidence offered in the first exception was beyond all question inadmissible. There was no evidence, as we have said, to show that the defendant ever held himself out as a partner, and, in the absence of such evidence, the question whether he was in fact a partner depended upon the written agreement between the parties. The admissions and declarations of Von Hafften, one of the parties to the agreement, were not, therefore, admissible to prove that the defendant was a partner. Judgment affirmed.

DEFORD v. MACWATTY.

(Court of Appeals of Maryland. Dec. 11, 1895.)

RECEIVER'S SALE—CONFIRMATION.

1. The ratification of a sale by a receiver, under order of court, of the plant and good will of a company for manufacturing a patented belting, is properly denied where the receiver failed to give any notice as to the rights to be acquired by the purchaser in the patent, and failed to give two intending purchasers information as to the amount of business done by him while the plant was under his management, whereby a sale was made to relations of the receiver for much less than its value.

2. A receiver should not be directed to sell at auction the debts due the company, amounting to over \$35,000, and due from debtors all over the country, but should be directed to collect the same.

Appeal from circuit court of Baltimore city.

Action by Maurice Gandy against John Macwatty for the dissolution of a partnership. From an order refusing to ratify a sale by the receiver appointed in the action, the purchaser, Benjamin F. Deford, appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, ROBERTS, and BOYD, JJ.

J. N. Steele, John E. Semmes, and Frank K. Carey, for appellant. Bernard Carter, Sons and E. C. Carrington, for appellee.

ROBINSON, C. J. The court below perfectly right, we think, in refusing to ratify the sale made by the receiver in case. Courts, for obvious reasons, always interfere reluctantly with sales of this kind or with judicial sales of any kind. A sale made in strict conformity with the terms prescribed by the order or decree the court will not, as a general rule, be set aside, unless it plainly appears that the property was sold for an inadequate price or unless there has been a mistake or surprise of some kind, or an omission of duty or misconduct on the part of the receiver or fraud on the part of the purchaser. A mistake or surprise or omission of duty, or misconduct or fraud, such as will justify the interference of the court in the confirmation of the sale, will depend upon the facts and circumstances of each particular case. In dealing with all such questions it must be borne in mind that sales of this kind are made by the court, through the receiver, as its agent, and made in behalf of the interests of all parties concerned. In some cases it is out of the question, in the very nature of things, for the court to know in advance the terms and conditions best calculated to put the property to most advantageously before the public, to the end that it may sell for its fair market value; and in such cases the court must rely, in a measure, upon its officer, the receiver having charge of the property, for advice and information. And if the court is to be fully satisfied that the terms of sale prescribed by the order or decree are of a character as not to put the property far below on the market, and in consequence thereof it has sold for a depreciated price, thereby affecting injuriously the interests of all parties concerned, the court should not hesitate to set aside the sale, and order a resale upon better and more favorable terms. The receiver, in such a case, has no just ground of complaint, because he knows that he acquires no title in the property until the sale has been ratified; and it is better—farther—that he should lose the benefits of a good bargain, than that the parties interested should suffer loss by reason of the improvident, and, it may be, unfair, terms under which the property was sold. Objections to the terms of sale, it may be said, ought to be made by the parties in interest before the property is sold; but in some cases it may not be an easy matter to determine in advance how far, and to what extent, the terms prescribed may affect the sale of the property. The mere failure to make objections would not, in itself, be a sufficient reason why the court should ratify a sale, when it plainly appears that the sale was not fairly and properly made.

With these general principles to guide us, we come to the facts and circumstances under which this sale was made. Maurice Gandy, a subject of Great Britain, was the patentee of a process for manufacturing a machine belting made of cotton duck, for which he claimed merits superior to leather, rubber, and other belting used for mechanical purposes. In 1883 he formed a partnership with John Macwatty and John H. Phillips for the purpose of manufacturing this belting according to his patented process in the city of Baltimore. This partnership having dissolved, Gandy and Macwatty on the 18th May, 1885, formed a new partnership for the manufacture of the same belting, under the name of the Gandy Belting Company. The articles of copartnership provided for the payment to Gandy of a royalty of 5 per cent. on the gross sales of each year, and in consideration of that royalty the Gandy Belting Company was to have the sole right to the use of the Gandy patents in the manufacture of the belting. In less than a year after the articles were signed, upon a bill filed for the dissolution and winding up of the affairs of the partnership, Mr. Richard Cromwell was appointed receiver of the assets and property of the Gandy Belting Company. He was at the time of his appointment, and is now, the president of the Mt. Vernon Manufacturing Company, to which company the Gandy Company was indebted in a sum exceeding \$50,000, for cotton duck supplied to it, and which was used in the manufacture of the patent belting. The business of the Gandy Company was carried on, and the belting manufactured and sold, by the receiver, from the time of his appointment, in February, 1886, till July, 1894,—a period of more than eight years,—when he reported to the court that the business, since his appointment, had been re-established and put on a good basis, and that the property was then in as favorable condition for sale as it could be expected to be while in the hands of a receiver, and suggested that it be sold as an entirety. Thereupon, on the same day he report was filed, an order was passed by the court, adopting the precise terms suggested by the receiver; directing him to sell at public auction all the assets of the Gandy Belting Company (exclusive of cash on hand), including the good will of the company, and all machines, machinery, and chattels belonging to the partnership, together with all manufactured goods in the hands of the receiver or agents, and all raw materials, and all debts payable to the company or to the receiver, and all other property, as the same should exist at the time of the ratification of the sale.

In pursuance of this order, the receiver sold the assets and property of the Gandy Belting Company, as an entirety, at public auction,—the advertisement following the terms of the order,—to Benjamin Deford, for \$50,000. To

the ratification of the sale thus made, a number of exceptions have been filed by parties in interest, some of which it is quite unnecessary to consider. One of the main, and, in our judgment, fatal, objections to the ratification of the sale, is the fact that neither in the order prescribing the terms of sale, nor in the advertisement, nor in any other way, was any information given to the public as to the right of the purchaser to use the Gandy patents in the manufacture of the belting, and upon the use of which the successful manufacture of the belt absolutely depended. To no one was this better known than to the receiver himself. He had, during the entire eight years of his receivership, used the Gandy patents in the manufacture of the machine belting; and while so using them a bill was filed in the United States circuit court in Maryland, by the Gandy Belting Company, Limited, of England (the then owner of the patents), against him as receiver, to recover royalty claimed to be due by him for the use of the patents, and to prevent the further use by him of said patents. Pending this suit the Mt. Vernon Company purchased the Gandy patents of the English company, paying therefor \$15,000, and the receiver still continued to use them in the manufacture of the belting. They were purchased by the Mt. Vernon Company, he says in his testimony, in order that he might, as receiver, "continue the business," and which "otherwise might have been closed up at any moment." He knew then, it is clear, that the use of these patents by the purchaser was essential to the successful manufacture of the belting. In his answer to the bill filed by the Gandy Belting Company of England against him as receiver, he claimed that the right to use the Gandy patents was part of the assets of the Gandy Company, and subject to the claims of creditors, and would be a subject of sale in connection with the good will of said business, and that it was out of the power of Gandy or his assignees to deprive said creditors of their equity. And further he says he is advised that the right to use said patents will also accompany the factory and good will of the Gandy Company into the hands of any purchaser to whom they may be sold for the payment of the debts of said partnership. And, even if the said patent rights should not wholly and exclusively inure to the benefit of such purchaser, the right at least to use the very patented machines put into the partnership by Gandy, and thus constituting part of its assets, must go with said machines, whenever sold and disposed of in the winding up of the partnership. And then, in his answer to the exception filed by Macwatty to the ratification of the sale on the ground of inadequacy of price, because no information was given to the public as to the right of the purchaser to use the patents, he says, with regard to the patents, "It would seem sufficient to say that the court, in disposing of the partnership assets, can only dis-

pose of what is contained in these assets. But the facts and circumstances of the case made it wholly unnecessary to make any provisions as to the patent rights." The principles of equity applicable under such circumstances show, as the receiver is advised, that the order of sale not only went to the utmost extent of the jurisdiction of the court, but provided for an advantageous disposition of the partnership property. What were the facts and circumstances that made it wholly unnecessary to make any provision in the order of sale as to the right of the purchaser to use the patents? He knew the good will and business of the Gandy Company were utterly valueless unless the patents could be used in the manufacture of the belting; for he says they were purchased by the Mt. Vernon Company to enable him, as receiver, to continue the business, and that without their use the business might be closed at any moment. And it is equally clear from the answers filed by him as receiver that he was uncertain what rights would pass to a purchaser of the good will of the business, and what would pass with the factory and good will. In one answer he says the right to use the patents will go with the good will of the business, whether carried on at the old factory or not, and then he says "the only right which the purchaser would get would be the right to use the very machines now in the ———."¹ Under these circumstances, we entirely agree with the counsel for the appellee that it was vitally necessary for a purchaser to know whether he would be entitled to the use of the patents, and, if so, on what terms, and whether this right was to be exclusive of a similar right in any one else. And we agree, too, that it was the clear duty of the receiver, in view of the uncertainty which he knew existed in regard to this right to use the patents, as shown by his testimony and answers, to have applied to the court by which he was appointed for an order ascertaining definitely just what rights the purchaser would acquire to the use of the Gandy patents. And we cannot believe that the court, if this matter had been properly brought to its attention, would have passed an order of sale without making a provision of some kind in regard to the rights of a purchaser under the sale. We agree, too, that the proper time at which this matter should have been settled was before the order of sale was passed, but the failure to have these rights ascertained at that time is no reason why a party in interest may not avail himself of the objection when the sale comes before the court for ratification.

The failure to have the rights of the purchaser thus definitely ascertained affected most injuriously, as the proof shows, the sale of the plant and good will of the business. As offered for sale by the receiver, without any guaranty that the purchaser would have the right to use the patents. Mr. Phillips,

who was himself a manufacturer of the chine belting, says the plant and machinery were worth nothing more than so much iron, and that he would not himself, would he have advised any one else to, bid any more for it. And yet neither in report of the receiver, suggesting the terms which the entire assets and property of Gandy Company should be sold, nor in the order of sale prescribing the terms and conditions of the sale, nor in the advertisement nor in any other manner, was anything about the right of a purchaser to the use of the patents, and without which, the receiver in his testimony says, the business could be carried for a day.

But this is not the only objection on which the exceptants rely against the confirmation of the sale. Here was a sale of the plant and good will of a business paying annually a profit of over \$10,000, the cost value of the plant amounting to \$36,458.48, together with the stock of merchandise in the possession of the receiver and in the hands of agents, the value of over \$50,000, and of bills receivable and debts due the company aggregating nearly \$35,000. And the proof shows that besides paying commissions of over \$5,000 annually to the receiver, and \$2,500 a year manager and all other expenses, there accumulated in the hands of the receiver during the eight years of his management a cash surplus of \$50,000. And yet neither the advertisement nor otherwise was any information given by the receiver as to the character and value of the property to be sold, nor of the extent of the business, the good will of which was part of the assets of the company. If the competition was to be invited, and the property brought to the hammer under the most favorable terms, such information was absolutely necessary to enable bidders to form some judgment as to the value of the entire property. And accordingly the Providence Belting Company in its first letter, dated 29th August, 1891, requests the receiver to furnish particulars as to the estimated value of the property, the debts on same, if any, and then asks the pertinent question, "What does the property for sale consist of?" And in reply, instead of furnishing the information, and answering directly the inquiry, the receiver contented himself with saying "that the particulars of the sale of this business are really contained in the advertisement," and then says: "The entire property of this company, as it stands on date as advertised, with the exception of cash on hand, will be offered for sale. Just what this will aggregate in amount at the moment, impossible for us to say. Our books will not be closed officially until about the time of sale." And in a second letter, by the same company, it asks the receiver as to the amount of sales, expenses, and net profits for the past year. Now, what was the reply? The receiver says he has never been required by the court to make a s

¹An omission in the original.

ment showing the profit and loss of the business, and he is not in a position at the moment to render officially a public statement such as you request." Then, again, Mr. Walker, who came all the way from Chicago for the purpose of getting information as to the assets and property of the Gandy Company, writes on his return home, October 1st, saying: "What we desire to know is the exact amount of the assets, including plant, machinery, outstanding accounts, and all other assets that will be sold at the receiver's sale, as also the amount of net sales per annum for the last two years, and the amount of profit from the business during that time." Now, the proof shows that the receiver had at his command all the information necessary to have answered these inquiries satisfactorily. While withholding the information from the Providence Belting Company and Mr. Walker, he furnishes, by his letter of September 13th, this information to the Gandy Belting Company, Limited, of England. To this company he says the profits for the past six years have averaged \$10,000 per annum; "the books will show more profit." With this knowledge on his part as to the annual profits, he declines to give this information in response to direct inquiries from the Providence Belting Company and also from Mr. Walker. Now, what was the result of this failure on the part of the receiver to furnish the information thus requested as to the character and value of the property which he had advertised for sale,—information which any prudent owner would have been only too glad to have given in regard to his own property? The proof shows that the only two bidders for this valuable property, paying more than \$10,000 a year clear profits, were the Mt. Vernon Company and Benjamin Deford, the latter becoming the purchaser. And it further appears that besides Mr. Deford, the ostensible purchaser, the other parties interested in the purchase were Mr. Kennedy Cromwell, a son of the receiver, and the manager of the Mt. Vernon Company, of which his father was the president, and the Boone heirs nephews and nieces by marriage of the receiver, all of whom are stockholders in the Mt. Vernon Company, and one of them, Mr. Kennedy Boone, being also a director. But it is unnecessary to further consider the exceptions relied on against the ratification of this sale. The counsel for the exceptants has made out quite an elaborate statement for the purpose of showing that the property sold for an inadequate price. That it sold far below its market value, and that this depreciated price was caused by the failure on the part of the receiver to put it fairly and advantageously on the market, there cannot be any question. We do not, however, rest our judgment on mere inadequacy of price, but on the ground that there has been a plain omission, misconception, or neglect of duty—call it what you please—on the part of the receiver in the sale of this property, and in

consequence of which it sold far below its fair value.

We deem it proper to add that we cannot approve of so much of the order of the court below as directed the receiver to sell at public auction the bills payable, and all other debts due the company. This indebtedness amounted to over \$35,000, scattered all over the country, and no bidder could form even a probable estimate as to the value of these debts. And, besides, the purchaser was to get only such debts as remained uncollected by the receiver at the time of the ratification of the sale. How was it possible for any one to tell what amount would remain uncollected at some uncertain time in the future. The better course was to have directed the receiver to collect the outstanding indebtedness, and to account for the same as part of the assets of the company. Order affirmed, with costs.

BOLTON MINES CO. v. STOKES et al.
(Court of Appeals of Maryland. Dec. 6, 1895.)

ELECTION OF REMEDIES.

On the insolvency of the buyer, the fact that the seller sues out a writ to replevin the goods sold, where he discontinues the proceeding without trial, and pays the trustee of the insolvent the value of the goods replevied, does not estop the seller from claiming from the insolvent's estate payment for such goods.

Appeal from circuit court of Baltimore city.

Appeal by the Bolton Mines Company from an order denying the claim of appellant against the trust estate of the Waring Manufacturing Company, Francis Stokes and Hanson H. Haines, trustees. Reversed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, ROBERTS, FOWLER, and McSHERRY, JJ.

F. C. Slingluff and Wm. T. Donaldson, for appellant. Edgar H. Gans, B. H. Haman, and Vernon Cook, for appellees.

McSHERRY, J. In December, 1889, the Bolton Mines Company contracted to sell to the Waring Manufacturing Company a quantity of fertilizers. The sale was made, the goods were delivered, and the purchaser gave its promissory note to the vendor on March 15, 1890, for the price agreed on, payable in four months after its date. On the 23d day of May, 1890, before the maturity of this note, the Waring Manufacturing Company executed to Hanson H. Haines and Francis Stokes, trustees, a deed of trust for the benefit of its creditors, and the trustees filed their bond in Cecil county on May 31, and in Baltimore city on June 11, 1890. On June 9th of the same year the Bolton Mines Company sued out a writ of replevin, and under it the sheriff seized and took from the possession of the trustees, and turned over to the Bolton Company, the same fertilizers that had been sold by it to the Waring Company under the contract of De-

cember, 1889; and five days afterwards the Bolton Company tendered to the trustees the promissory note given for the purchase price, but the trustees declined to receive it. After the Bolton Mines Company got possession of the fertilizers under the writ of replevin, it discontinued or dismissed the replevin suit without trial, and thereafter, on April 10, 1891, the trustees instituted suit in the superior court of Baltimore city against the surety of the Bolton Mines Company on the replevin bond which had been given by it, and that suit resulted in a judgment in favor of the trustees for the penalty of the replevin bond, to be released on the payment of the sum of \$4,464.72, the value of the replevied fertilizers at the date of their seizure under the writ of replevin, together with interest to the date of the verdict. Part of this judgment has been paid, and the residue is to await the result of this proceeding, but may be treated as actually paid. The Bolton Mines Company then filed in the Waring Company's trust-estate proceeding the note of the Waring Company held by the Bolton Company; and when the auditor made his report, distributing the cash assets in the hands of the trustees among the creditors of the Waring Company, he allowed to the Bolton Mines Company its ratable share or percentage upon the note of March 15th. To this allowance Haines and Stokes, who are creditors, as well as trustees, filed objections. The ground upon which these trustees, in their character as creditors, object to this allowance is that the Bolton Mines Company, having, by replevying the fertilizers for the payment of which the note was given, disaffirmed the sale, and having treated the contract of purchase as rescinded, cannot, after a judgment has been obtained against it on the replevin bond for the value of the identical articles replevied, reaffirm the sale, and claim to participate in a distribution of the proceeds of the debtor's assets. The court below so decided, and hence this appeal.

Does the fact, then, that the Bolton Mines Company sued out a writ of replevin, and seized thereunder the same fertilizers which it had previously sold to the Waring Company, preclude the vendor, the Bolton Company, from asserting a claim to a proportion of the creditor's assets, if the vendor abandoned the replevin suit without trial, and then paid to the vendee's trustees the full value of the replevied articles? This is the single question which the pending appeal presents.

The situation is a peculiar one. The Bolton Mines Company and the trustees are precisely in the position both would have occupied had not the replevin been sued out; for the Bolton Mines Company still has the note of the vendee, the trustees have in money the value of the fertilizers, and the note is unpaid. This being so, the Bolton Company asks a court of equity to allow to it from the assets of the debtor—in which assets are included the value of the creditor's fertilizers—a percentage equal to that distributed to

the debtor's other general creditors; but the court, by its order, refuses this request, and includes the Bolton Company from participating in the distribution of even the very funds which have been realized from the identical property that the Bolton Company sold and delivered to its insolvent debtor, and which the vendor has received no payment whatever. Can that order be maintained? It is not pretended that it can be supported upon any other theory or ground than that the creditor, having, by the replevin suit, elected to treat the original contract of sale as rescinded, cannot afterwards assert the validity of that same contract, and claim to be paid for the goods furnished under it; that, having two alternative remedies, and having selected one of them, and having failed to prosecute it to a final judgment, it cannot resort to the other. Technically, abstractly put, the proposition appears more reasonable and just than when it is practically applied. The actual result of application to the facts of this case is that the Bolton Company loses the full value of the fertilizers which it sold to the insolvent vendee, and is besides entirely cut out from sharing in the vendee's assets. The vendor, the Bolton Company, therefore gets nothing, and the other creditors get the value of the Bolton Company's fertilizers. It must be an exceedingly rigid and stringent rule of law that will constrain a court of equity to work out such a singular and inequitable result. Is there such a rule as that? It cannot be denied that "the law is adverse to multiplying suits; and, if a party has a choice between two actions upon the same demand, and he selects one, which is decided by a competent tribunal either for or against him, as a general rule he will not be permitted to resort to the other." *Beall v. Pearre*, 12 Md. 566; *Walsh v. Canal Co.*, 59 Md. 427. So in *Edes v. Garey*, 46 Md. 24, where Carey was both executor and trustee under a will, and, as executor, transferred certain funds to himself as trustee, and to secure the funds executed a deed to himself, as trustee, conveying certain lots in Baltimore city, failed to place the conveyance on record. After his death a creditors' bill was filed, and these lots were sold. The parties for whose benefit the unrecorded deed was executed claimed the proceeds of the sales of the lots conveyed thereby, and these proceeds were allowed to them. They afterwards filed a bill in equity against the sureties on Carey's bond as executor, but this court held, on common sense and common justice required, that, having claimed and having received the entire proceeds from the sale of the property conveyed by the unrecorded deed upon express ground that it was executed by Carey to secure the complainants on account of the money belonging to them, and which he held as trustee under the will, they should not be permitted to deny those facts and suit brought against the sureties on the

ministration bond." And so in the still more recent case of *Fisher v. Boyce*, 81 Md. 46, 31 Atl. 707, it appeared that the will of James Boyce was duly admitted to probate by the orphans' court of Baltimore county; that thereupon the executors filed a bill in equity against all the parties interested in the estate of the decedent, asking the court to construe the will, and to assume jurisdiction over the administration and settlement of the entire estate. This bill was answered by all parties in interest, including those who subsequently sought to caveat the will. In those answers the defendants (two of whom were the same persons who afterwards assailed the will by caveat) unequivocally admitted the due execution, publication, and probate of the will. Later on, the circuit court, by its decretal order, assumed jurisdiction of the whole estate and of its administration. Afterwards one of the defendants filed a petition in the equity case, claiming that she was entitled, under the will, to certain income, and praying an allowance under the will for her maintenance pending the settlement of the estate. This petition was answered, and both petition and answer were heard upon proof adduced, and finally the petition was dismissed by the court. Two years later two of the defendants in the equity proceeding filed in the orphans' court a caveat to a part of the will, and upon appeal this court held they were estopped to question its validity. They had taken a beneficial interest under the will, whose validity they formally and solemnly asserted, and they were thereafter prohibited from setting up any adverse right, which, if successfully asserted, would have defeated the full operation of the instrument. And so in *Keedy v. Long*, 71 Md. 385, 18 Atl. 704, it was held that, where a person had two alternative remedies open to him, and proceeded upon one to a final judgment, he would be precluded from resorting to the other one afterwards. And to the same effect is *Olmstead v. Bach*, 78 Md. 132, 27 Atl. 501. It will be observed, and must be borne in mind, that in all these, and similar, cases, it was not the mere institution of a suit, which was abandoned before a final judgment had been reached, that operated to estop the prosecution of a subsequent suit between the same parties, and founded on the same cause of action, but that it was the selection by the plaintiff of one of two remedies that were open to him, and a decision thereon by a competent tribunal, that precluded a resort to the other inconsistent remedy. The obvious principle which underlies this class of cases must, therefore, be that, when a party has deliberately selected his form of action, and has pursued it to a final judgment,—and whether that judgment be for or against him is wholly immaterial,—he shall not be at liberty to again vex the same defendant with another suit in a different form of action, for the identical demand involved in,

and passed upon by, the antecedent litigation. Where the remedies are alternative, and not cumulative, his choice of the one, and his pursuit of it to a final judgment, will exclude the other or opposite remedy, and, having thus repudiated the latter, he cannot afterwards ignore the judgment actually rendered, change his position, and adopt the remedy he had repudiated, and repudiate the one he had adopted. Upon the plainest principles of public policy, he would be absolutely estopped to do this, because "a man who obtains or defeats a judgment by pleading or representing an act in one aspect will be precluded from giving it a different and inconsistent character in a subsequent suit upon the same subject." *McQueen's Appeal*, 104 Pa. St. 595. It is an inflexible and invariable rule that, when the cause of action is substantially the same, and is or might be sustained by the same evidence, no change in the form of the suit or of the pleadings shall avail to withdraw a matter, which has once been judicially determined, from the estoppel of the adjudication. Consequently, a judgment in one suit will be conclusive in every other where the cause of action is substantially identical, notwithstanding a change in the form in which the action is brought. But, for this defense to be availing, there must have been a judgment for a discontinuance of the suit, before judgment will create no such estoppel. It has been established, both in this country and in England, that, whenever an act is done, or a statement is made, by a party, which cannot be contravened or controverted without fraud on his part, and injury to others, whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what would otherwise be mere matter of evidence, and it will become binding, even in opposition to proof of a contrary nature. But it is perfectly obvious that the case at bar does not belong to this class of estoppels, for the change in the character of the claim by the appellant has resulted in no fraud or injury. The case of *Farwell v. Myers*, 59 Mich. 179, 26 N. W. 328, and the case of *Washburn v. Insurance Co.*, 114 Mass. 175, both cited by the appellee, sustain our conclusions. In the Michigan case the claimants sold to the defendant goods to the value of \$10,000. The defendant, a few days afterwards, executed a deed of trust for the benefit of his creditors, and the vendors sued out a writ of replevin for the goods so sold to the insolvent. Under the writ a portion of these goods, valued at about \$4,000, was recovered, but the rest could not be found. The vendors thus got possession of, and retained, the part of the goods which they had replevied. They then filed their account against the insolvent estate for \$10,000, less \$4,000, the value of the goods replevied. The court held that, having elected by the replevin suit, which went to trial and to final judgment, to rescind the contract, they were bound by that

election, and could not, in the distribution of the insolvent's estate, treat the contract as in force, after having proceeded in the replevin suit upon the assumption that it had been rescinded. The court say: "By rescinding the sale, and prosecuting to judgment an action of replevin for the goods sold, on the theory that the fraud of the assignor had vitiated the contract, and that they owned said goods, the plaintiffs had elected their remedy, and cannot be allowed to come into court a year afterwards, because of their failure to secure adequate relief in the replevin suit, and base a claim upon the inconsistent idea that the goods were sold to the assignor." It may not be amiss to observe that in *Powers v. Benedict*, 88 N. Y. 605, a case quite similar to the one at bar, a conclusion precisely the reverse of that announced in the Michigan case was reached, and the doctrine was recognized that a partial recovery of goods, under a replevin sued out under circumstances such as we have here, did not bar an action for the remainder, or preclude the vendor from filing a claim in the insolvent vendee's estate for the value of the balance of the goods, which he failed to recover under the writ of replevin. In the Massachusetts case, where a person filed a bill in equity to reform a policy of insurance by striking out a clause of warranty, and afterwards brought an action at law upon the policy as written, alleging compliance with the warranty, and, after a trial on that issue, had judgment rendered against him, it was held that he had elected his remedy, and had waived his right to prosecute his bill for the reformation of the policy. And to the same effect are *Sanger v. Wood*, 3 Johns. Ch. 416, and *Steinbach v. Insurance Co.*, 77 N. Y. 498.

The record now before us discloses the fact that the replevin suit was not pressed to trial, and that a judgment was not entered therein. The suit was voluntarily discontinued. To hold that the vendor, by merely suing out the writ, though it (the vendor) subsequently abandoned the proceeding, and paid to the vendee's trustees the value of the goods replevied, forfeited all right to claim payment for these very same goods, would be to stretch the doctrine of election of remedies, and to widen its consequences, far beyond any limits heretofore recognized in Maryland. It would, in fact, prescribe as a penalty for a mere mistake in bringing a suit, not the usual one of costs, but the far graver one of a forfeiture of a just and meritorious claim; and its adoption would place a court of equity in the anomalous situation of being forced to say to a suitor: "You made a mistake in suing out this writ of replevin, but you recognized your error, and promptly discontinued the action. Your mistake has hurt no one, because the trustees have recovered from you the full value of the goods you took, and the creditors have therefore not been prejudiced. Confessedly, you delivered the insolvent the

goods, and confessedly you have not paid for them. Their value forms part of the insolvent's estate, but, because you advertently supposed you had a right to claim the goods (though when you discovered you had not such right you abandoned your suit), you shall not receive a dollar from your debtor's estate. You shall not get a part of the money realized from the property which you sold and delivered to the insolvent." With equal propriety could a legatee, who, having caveated a will, subsequently dismissed the proceeding without trial, be deprived of his legacy; but it has been distinctly held that he is not estopped to recover his legacy. *State v. Adams*, Mo. 620.

Estoppels must be reciprocal, and bind both parties. They operate only on parties and privies in blood or estate, and cannot be used neither by nor against strangers. A claim that shall not be concluded by the record in another matter of estoppel, shall not conclude another by it." *Alexander v. Walter*, 8 Mich. 239. The trustees of the vendee were bound by the replevin suit, nor by the vendor's election of that remedy. They brought suit upon the replevin bond, and recovered a judgment for the full value of the replevied property, and this they did upon a claim that the title to the fertilizers was vested in the Waring Manufacturing Company, under the contract of sale with the Bolton Company. In other words, the trustees successfully insisted on the contract of sale being a subsisting, unrescinded contract, notwithstanding the attempted repudiation of it by the Bolton Company. Having recovered a judgment, and having collected the money due under that judgment, upon the hypothesis that the contract was not rescinded, but was in fact in force, what standing have they, in their capacity as creditors, to object to the payment of the promissory note held by the vendor of those goods for the price at which the goods were sold? Having recovered the value of the goods on the theory that the contract was not rescinded, they object to the payment of the note on the opposite ground, that the contract had been rescinded. This is certainly, as the Scotch law says, "to approbate and reprobate." In *re Crampton*, 31 Ch. Div. 466.

If the doctrine sanctioned in *Thompson v. Howard*, 31 Mich. 309, to the effect that it is immaterial whether the plaintiff obtained judgment in the first action or not, were adopted, and it were held that the mere fact of bringing a suit in one form of action, and then abandoning it, without trial or without judgment, forever precluded a resort to any other form of action respecting the same subject-matter, it would, when logically followed out, prevent an amendment from one form of action to another, although the right to make such amendments is expressly given by section 34, art. 75, of the Code.

would prevent such amendments, because, if the mere naked selection of one remedy is such an exclusion of another inconsistent one as to estop the party who has selected the first from ever afterwards resorting to the second, the bare bringing of a suit in one form of action would necessarily preclude a resort, even by way of amendment, to the opposite, or inconsistent, form of action. If the doctrine of *Thompson v. Howard* were generalized, it would amount to this: That a litigant elects his remedy in every case, in the first instance, at his peril. If he finds that he has made a mistake, whether in consequence of erroneous views of law or fact, he has nevertheless estopped himself from retracing his steps. He cannot dismiss his suit, and institute a new proceeding, of a different nature, against the same party. But no one supposes that this is the law. *Milling Co. v. Walsh* (Mo.) 2 West. Rep. 422.

We hold, then, that the mere fact that the Bolton Mines Company sued out a writ of replevin to recover possession of these goods, and then discontinued the proceeding without trial and before judgment, and without realizing anything by its suit (for it paid the value of the goods to the trustees of the vendee), does not estop it to claim, out of the vendee's assets, payment of the note given by the purchaser for the price of the fertilizers sold. The appellant is consequently entitled to participate with the other creditors of the Waring Manufacturing Company in the funds which the trustees hold for distribution. We therefore reverse the order appealed from. Order reversed, with costs above and below, and cause remanded for further proceedings.

MATTHAI et al. v. CAPEN.

(Supreme Court of Errors of Connecticut.
Feb. 8, 1895.)

REPLEVIN—SERVICE—AFFIDAVIT.

In replevin the fact that in the copy of plaintiff's affidavit, left in service, his signature at the end was omitted, the jurat stating that the affidavit was subscribed and sworn to by plaintiff, is not ground for abatement.

Appeal from superior court, Windham county; Ralph Wheeler, Judge.

Replevin by John C. Matthai and others against Charles A. Capen. From a judgment for defendant, on plaintiffs' failure to answer over on their demurrer to defendant's plea in abatement being overruled, they appeal. Error.

Howard H. Knapp, for appellants. Elliot B. Sumner, for appellee.

FENN, J. The sole question in this case is whether the superior court erred in sustaining the defendant's plea in abatement for alleged defective service. The original writ of replevin, with the affidavit and recogni-

zance, complied in all respects with the form given in section 1327 of the General Statutes. The copy served on the defendant gave the name of the affiant, Howard H. Knapp, in the body of the affidavit, and the word "deponent" at the end; also, the jurat of the magistrate, "Subscribed and sworn to before me," but omitted the name of the affiant at the foot of the affidavit, just before the word "deponent." The rules of law which ordinarily apply to a variance between the writ and copy left in service, independently of any aid from section 1000 of the General Statutes, would seem, if equally applicable here, to justify the conclusion that the variance stated was not a fatal one. 1 Swift Dig. side p. 611; *Tucker v. Potter*, 35 Conn. 43; *Gallup v. Manning*, 48 Conn. 25, 30. But it is true, as claimed by the defendant in support of the judgment of the court below, that "the action of replevin is a special one, in which the requirements of the statute must be strictly complied with, before the plaintiff can avail himself of its aid." *Spencer v. Bidwell*, 40 Conn. 62. It is also true that "the statute especially requires the attachment of a particularly defined affidavit to the writ, and the leaving of a copy of the same with the defendant, in addition to the general statute relative to process. This being so, it follows that the failure to subscribe the affidavit would be an irregularity in procuring the replevin process, which, while it would not render the proceeding void, might make it voidable at the election of the defendant." *Nichols v. Standish*, 48 Conn. 321, 323. So, also, the omission to comply with the requirement that the copy left in service shall contain said affidavit might be ground for abatement, at the option of the defendant, notwithstanding that "the person and cause may be rightly understood and intended by the court." But, assuming the name, in the place where it appeared in the original, at the end of the affidavit, to have been essential to the validity of such original, we do not regard it as equally material in the copy. The requirements of the statute in reference to the former are not identical with those in regard to the latter. Nor are the grounds upon which the requirements rest, and their purpose, the same. The object of the provision for an affidavit of certain facts is patent. The required subscription adds deliberation, caution, and solemnity to the deed. The reason for the requirement that the copy left in service shall contain the affidavit is to apprise the defendant that oath to the essential fact upon which the action depends—namely, that the plaintiff is entitled to the immediate possession of the goods or chattels which it is desired to replevy, together with what is stated to be the true and just value of such property—has been made, and to give the name of the affiant. These are matters regarding which the legislature, in its wisdom, has deemed it proper that the defendant should be informed. Hence the re-

quirement. The omission at the end of the affidavit of the name of the deponent appearing at the beginning of such affidavit deprives the defendant of no part of this information. Indeed, he is also further informed by the magistrate's jurat that the affidavit was "subscribed" before him. On the other hand, all that can be claimed by the defendant, if his contention is correct, is that the copy served upon him indicates that this statement of the magistrate may be erroneous, and that a ground for a plea in abatement for a defect in the original process in fact exists. Although an inspection of the original process shows no defect therein, yet the defendant asserts that, because he has thus been misled, a cause for abatement exists for defective service of such process. There does not appear to us to be sufficient merit in this claim to warrant its adoption, and the establishment thereby of a rule which would subject plaintiffs, who had themselves complied with all statutory requirements, to serious loss for clerical inaccuracies of officers of the law, resulting in no possible injury to the opposite party. There is error in the judgment complained of. In this opinion the other judges concurred.

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MOREY et ux. v. HOYT et al.

(Supreme Court of Errors of Connecticut.
Feb. 8, 1895.)

EXECUTION SALE—TIME OF MAKING—TITLE OF PURCHASER—RIGHT TO POSSESSION—TROVER BY PURCHASER—DEFENSES—SUPERIOR TITLE IN THIRD PERSON.

1. The provision in the statute regulating sales on execution which existed prior to the adoption of Gen. St. § 1158, and was similar to the provision in such section, that sale should be made at the end of 21 days from the posting of notice of sale, was mandatory; and a sale made after the expiration of such time conveyed no title or right to possession, as against the execution debtor.

2. In trover by a purchaser at execution sale, where it appeared that, as against defendant, plaintiff acquired title and right to possession by the sale, but had not obtained actual possession, which was in defendant, defendant may defeat recovery by showing that the execution debtor had an outstanding title to the property superior to plaintiff's, because of an irregularity in the sale.

Appeal from superior court, Fairfield county; Thayer, Judge.

Action of trover by George V. Morey and wife against Jeannie P. Hoyt and others. From a judgment of nonsuit, plaintiffs appeal. No error.

Goodwin Stoddard and William D. Bishop, Jr., for appellants. James H. Olmstead and Daniel Davenport, for appellees.

TORRANCE, J. At a former term of this court, upon an appeal by the defendants in this case, a new trial was granted. Morey v. Hoyt, 62 Conn. 542, 26 Atl. 127. Before the case came on again for trial in the court be-

low, the complaint was amended by adding a third count, alleging, in substance, that in June, 1882, the plaintiffs were the owners and possessors of the property described in the complaint, and that, on or about the 22d of that month, Hoyt, the original defendant in the case, unlawfully took said property from the plaintiffs, and without their authority converted the same to his own use. The answer to this was a general denial, and the case was tried to the jury. After the plaintiffs rested their case, the court, on the defendant's motion, ordered a nonsuit, which it subsequently refused to set aside; and the question on the present appeal is whether the court below erred in so doing.

From the uncontradicted and undisputed evidence in the case, the following facts among others, appear: In January, 1882, a New York corporation, called the Hollingshead Electro Depositing & Manufacturing Company, leased from Hoyt certain real estate in Stamford, by a written lease, for the term of five years. Said company went into the possession of said property under the lease on the 1st day of February, 1882, and put in and upon it the property described in the complaint. Subsequently in March, 1882, this property of the corporation in and about the leased premises was attached by William B. Hollingshead, a creditor of the company, to a suit brought against it by him, returned to the superior court for Fairfield county on the second Tuesday of February, 1882. On May, 1882, a judgment was rendered in said suit against the company for upward of \$10,000, on which judgment an execution was issued, and levied upon the property described in the complaint; and on the 16th day of June, 1882, the property levied upon was sold at public auction to the plaintiffs, who were the plaintiffs in this suit, for the sum of \$1,900.

The plaintiffs claimed title to the property in question under the execution sale, and whether said sale conferred upon them a title to the property in controversy, or any interest in its possession, was thus the important question in the case. Before considering the question, however, it may be well first to dispose of a claim made by the plaintiffs in the lower court and here, to the effect that, if the execution sale, as such, conferred title to the property or right of possession on the plaintiffs, still there was evidence to the contrary, that, in making it, the sheriff acted as an agent of the owners and of all others having an interest in the property; that he sold the property, by their direction, and with their assent; and that the evidence upon this point entitled the plaintiffs to go to the jury. We think this claim has no foundation. The disputed evidence in the case shows clearly that whatever the officer did in making the sale he did wholly and solely as an officer of the law under the execution, and that Hollingshead all the way through was acting adversely to the corporation whose property was sold, and to all others having interests therein. There is, we think, no evidence showing

tending to show that the officer was acting as the agent of the owner of the property, or that he sold it by its direction or with its consent; and, on the contrary, the undisputed evidence shows that the entire proceedings were, as against the corporation, in invitum. In short, after a careful consideration of all the evidence bearing upon this point, we think it does not sustain the claim made by the plaintiffs in this behalf. It follows that the plaintiffs in this case must stand upon the title to and rights in this property, if any, which they acquired under and by virtue of the execution sale; for the title and rights of possession obtained at that time and under that sale are the title and rights which were invaded by the claimed conversion, and upon which the plaintiffs must recover if at all.

The defendants claim that the plaintiffs acquired no title or right of possession under the execution sale for two reasons: First, because the sale was not made at the end of 21 days after the notice of sale was posted, as required by the then existing statute, which was substantially the same as section 1158 of the present General Statutes; and, second, because, at the time of the levy and sale, the property was subject to certain liens by way of attachment. We will here consider the first of these reasons.

The officer's return upon the execution, aid in evidence by the plaintiffs, shows that the levy was made on the 25th day of May, 1882, and that the sale was made on the 10th day of June following. After stating the preliminary demand, the return proceeds as follows: "And afterwards, on the 25th day of May, 1882, I levied this execution on [here follows a description of the property], and took the same into my possession and keeping; and thereupon I posted on the signpost * * * a particular description of said property, with a notice that the same would be sold at the factory in said Stamford * * * at the end of 21 days, at public auction." In addition to this, which night, perhaps, be regarded as leaving the precise date when the notice of sale was posted open to doubt, there is the positive uncontradicted testimony of the officer that he posted such notice on the 25th day of May, the day he made the levy. It thus clearly appears beyond dispute, upon the evidence, that the sale was made at the end of 22 days from the day of posting, instead of at the end of 21 days, as the statute required. The important question now is what effect this failure of the officer to sell at the end of 21 days had upon the sale of the property actually made by him.

It certainly is true, as a general rule, that personal property cannot be taken and appropriated by a creditor in payment of his debt, by levy and sale on execution, unless at every step the course prescribed by law is strictly pursued. We are here concerned with only one of those steps, but certainly a very important one,—a step that has been

regulated by positive statutory enactment in this state for more than 200 years. Revision 1808, p. 281, note 1. The statute, in express terms, directs the property to be sold at the end of 21 days, and it carefully points out how the day of sale shall be ascertained. This, by clear implication, forbids the sale at any other time, and so we think this requirement is mandatory, and not merely directory. It is undoubtedly true that some statutory requirements, intended merely for the guidance of officers in the conduct of business, are directory merely. Such are regulations designed to secure order, system, and dispatch in proceedings. Provisions of this character are, as a general rule, not mandatory, unless accompanied by negative words importing that the acts shall not be done in any other manner or at any other time than that designated. But when the requirement, as here, is intended for the protection of parties whose property rights are to be taken in invitum, and to prevent those rights from being sacrificed, it should, as a rule, be held to be mandatory, and not merely directory. In such cases, certainly as against all parties whose rights are or may be affected by the proceedings, the power of the officer is limited by the requirements prescribed for its exercise. As against the execution debtor, then, we think, the officer in this case had no power to sell the property at the end of 22 days. He had no more power to do it then than he would have had to sell it at the end of 1 day or 50 days, or without giving any notice of the sale at all. The sale as to the execution debtor was clearly invalid; did not divest it of its title to the property; and did not, of course, transfer to or confer upon the plaintiffs any title to the property. *Webster v. Peck*, 31 Conn. 495. That they may have bought in good faith and for full value can make no difference so far as the judgment debtor is concerned. They are taking his property in invitum, and caveat emptor applies at such a sale. If the plaintiffs, as against the execution debtor, did not acquire title to the property by the sale, neither did they, as against it, obtain any right to the possession of the property; for the officer then had no such right, and could not, of course, confer any. In short, as to the execution debtor, the levy and sale was "an unwarrantable trespass." *Dutton v. Tracy*, 4 Conn. 370.

As the plaintiffs did not by the execution get any title to the property, or right to the possession of it as against the execution debtor, it may be pertinent to inquire whether the evidence shows that they then obtained the actual possession of it, which would be a legal possession as against every one save the true owner. If, at the time of the sale, the officers delivered the property to the plaintiffs, and they went into the actual possession of it, this would be a legal possession of it as against every one save the owner and those claiming through or un-

der him. If, in this condition of things, Hoyt, as a mere stranger and wrongdoer, took the property out of their possession, and converted it to his own use, the plaintiffs could successfully maintain a suit against him for its value. Any possession is a legal possession as against a mere wrongdoer. *Graham v. Peat*, 1 East, 244-246. In such a case the wrongdoer cannot defend himself by showing a better title than the plaintiffs, in some third person, through or under whom he does not himself claim or justify. *Jeffries v. Railway Co.*, 5 El. & Bl. 802. But the evidence in the case shows no such condition of things as we have supposed. The uncontradicted evidence in the case shows clearly that, up to the time when it is claimed the conversion took place, the plaintiffs never had the possession of the property, nor any of it, but that Hoyt did have such possession. There is no evidence to show that Hoyt ever took any of the property out of the actual possession of the plaintiffs, for it was all in his possession until he chose to surrender some of it. Before the day of the sale, and on that day, he was in the actual and exclusive possession of the leased premises, and of the property of the execution debtor which was therein contained. He had removed the old locks from the doors, and put on new locks of his own, and kept everybody out of possession. In short, without reciting the evidence here upon this point, we think it clearly shows that from the moment of the sale, and before and up to the time of the claimed conversion, the plaintiffs never had the actual possession (meaning by this the legal possession, as distinguished from a right of possession), and that Hoyt never took the property out of their possession; because before, on, and after the day of sale, and up to the time of the claimed conversion, the actual possession was in him. If we concede that this possession on the part of Hoyt was wrongful as against his tenant, both as to the leased property and as to the other property, and that the evidence clearly shows this, it would still be a legal possession as against every one save the tenant, or those who claimed under some valid transfer or conveyance from the tenant, or under a valid levy. It thus, we think, clearly appears that, as against the execution debtor, the plaintiffs, under and by virtue of the execution sale, obtained neither the title to the property, nor a right of possession to it, or any of it; nor did they obtain actual possession of it or any of it.

But the plaintiffs strenuously insist that, if this be so as against the execution debtor, it is not so as against Hoyt. They claim that he was a mere wrongdoer, who will not be permitted to take advantage in this action of the outstanding title and rights of possession of the execution debtor. They claim that, as against him, they obtained, by the sale, a title to the property, which drew to

itself the right of possession, and that this right of possession is sufficient, without actual possession, to enable them to maintain this action. It undoubtedly is true that the plaintiffs obtained the title to this property as against Hoyt, and the property was in the possession of another, this title drew to itself the legal possession. *Boyd v. Dolbeare*, 7 Conn. 232. And it must be conceded that if the plaintiffs, at the time of the claimed conversion, had the immediate right of possession, this alone, without actual possession, would enable them to maintain this suit, as against a mere wrongdoer. *Meach v. Kellogg*, 23 Conn. 70. But Hoyt was in possession of the property at the time of the sale, and if he remained in possession of it till after the time of the conversion, cannot be regarded as a mere wrongdoer, quoad these plaintiffs. In obtaining possession of it prior to the sale, he never wronged he did was done, not to the plaintiffs, but to others. His possession was and continued to be wrongful as against the execution debtor, was rightful as against everybody else who could not show a title and right superior to that of such debtor, or derived from him. Now, the plaintiffs can claim upon the evidence that, as against Hoyt, they obtained a title to the property and a right of possession, and not the legal possession. Suppose the purposes of the argument, we concede this to be true, it does not help the plaintiffs in such case the law is so that Hoyt cannot take advantage of the fact that the plaintiffs' title and right are inferior to that of the debtor, even though Hoyt does not claim to be the owner. In short, in such case the plaintiffs must recover upon the merits of their own right of possession; in other words, upon the "strength of their own title," and not upon the weakness of the defendants'.

As we have already seen, if the plaintiffs had obtained possession of the property, and Hoyt had, without right, invaded that possession, he would have been a mere wrongdoer, and would not be permitted to set up a defect in the plaintiffs' title, unless he could in some way claimed under the execution sale; or but where the plaintiffs must recover on all, upon their right of possession, and not too, as against one rightfully in possession, as to them, the case is different. The law upon this point is thus stated in *Pollard v. Wright on Possession* (page 91): "Every right of possession, however acquired, is protected against any interference by a mere wrongdoer; and the wrongdoer cannot defend himself by showing a better title than the plaintiffs' in some third person through or under whom he does not himself claim or justify." * * * On the other hand, a plaintiff who seeks redress solely for a wrong done to him, his right to possess is not favored to the extent. If his actual possession has not been disturbed by the act complained of, he cannot be defeated by showing that some one

who need not be the defendant, or any one through whom the defendant claims, had a better right to possess." See, also, the case of *Leake v. Loveday*, 4 Man. & G. 972.

In the case at bar, then, if we concede that, as against Hoyt alone, the plaintiffs, by the execution sale, obtained title to the property and a right of possession merely, still, as the evidence shows that the plaintiffs never had possession, and Hoyt did have possession, he may show the superior title and right of possession outstanding in the execution debtor (and which, as against such debtor, the plaintiffs never acquired), to defeat the plaintiffs' right to recover in this action; and this chiefly on the ground that he (Hoyt) would be answerable over to the execution debtor for his wrongs committed against it. As, therefore, we think the evidence clearly shows the existence of such a superior title and right outstanding in another, it follows that, whatever may be said as to the other points in the case, the nonsuit was rightfully granted, and should not be set aside. In view of the conclusion reached, it is unnecessary to consider any of the other points in the case which were argued before this court. There is no error. The other judges concurred.

KETCHUM et al. v. PACKER.

(Supreme Court of Errors of Connecticut.
Feb. 8, 1896.)

APPEAL—REVIEW—PARTIES—BONA FIDE PURCHASERS.

1. A finding as to the "knowledge" of defendant as to the character of bonds transferred by a guardian is a finding of fact, and cannot be disturbed on appeal.

2. *Cestuis que trustent* may jointly sue for the conversion of the trust property, though each is entitled to a different portion of the fund.

3. Defendant loaned to T. bonds to be used as collateral security, which were pledged by him to a bank as security for a note, together with bonds belonging to wards, of the character of the latter of which defendant had notice. Subsequently, on T. being notified by the bank that payment would be demanded on maturity of the note, defendant gave his note to the bank therefor, under an agreement with T. by which T. was to give to defendant his note for a like amount, and leave as security therefor the bonds pledged to the bank. Defendant paid his note to the bank and received the bonds, which he sold, and applied the proceeds on the note of T. Held, in an action by the wards for a conversion of the bonds, that defendant was not a bona fide purchaser thereof, on the ground that he was a purchaser from the bank, who had no notice of the character of the bonds.

Appeal from superior court, New London county; Hall, Judge.

Action by Rollin T. Ketchum, Jr., and others, against Thomas E. Packer. There was a judgment for plaintiffs, and defendant appeals. No error.

Hadlai A. Hull and Wm. F. M. Rogers, for appellant. Walter C. Noyes, for appellees.

FENN, J. This action was brought by Rollin T. Ketchum, Jr., and William T. Ketchum, and in behalf of Annie R., Frederick M., Mary D., and Beulah T. Ketchum, minors, by their guardian. The cause of action, as stated in the amended complaint, is the alleged conversion by the defendant of certain trust bonds and securities belonging to the plaintiffs. They claimed, by way of equitable relief, a discovery, an injunction, and a judgment for retransfer of the property; and by way of alternate relief, in case said property had been so disposed of that it or its avails could not be transferred by the defendant to the plaintiffs, \$7,000 damages. The defendant, to the defense of denial, joined as a special answer that the bonds and securities alleged in said complaint to have been received by the defendant were transferable by delivery, and were held by the banks, from which it was alleged in the complaint he had received them, as securities for loans made to one Charles R. Tinker by said banks, upon notes indorsed by the defendant; that when said notes became due, said Tinker was unable to pay the same, and the defendant, as such indorser, was compelled by said banks to pay said notes, and took from said banks said securities and bonds so held by said banks as security, and sold the same, and applied the proceeds and avails of said sale towards the payment of said notes, by the permission and authority of said Tinker, which proceeds and avails were not sufficient to reimburse the defendant; that the knowledge and notice of the defendant, as to the ownership of said bonds and securities, was the possession by said banks of the same. This answer was denied by the plaintiffs. The court found that Rollin T. Ketchum, father of the plaintiffs, was duly appointed their guardian; that as such guardian he received certain personal property, consisting of bonds, stocks, and savings-bank deposits, which had been bequeathed to his wards by their grandmother; that in 1885 he had reinvested all of this property though the agency of the defendant, who resided in the same town and was a dealer in investment securities, and received in exchange certain other bonds and securities at various times subsequent thereto, and prior to February, 1890; that certain of these bonds and securities were again exchanged for other securities, all through the agency of the defendant; that between June, 1888, and August, 1892, the said Ketchum, guardian, loaned one Charles R. Tinker, his son-in-law, all the bonds and securities of the wards so purchased from the defendant and held in trust, to enable the said Tinker to use the same as collateral for loans procured by said Tinker in his business as a merchant in New London; that in August, 1892, Tinker made an assignment in insolvency; that none of said bonds were ever returned or accounted for by said Tinker; that when Tinker received said securities from said Ketchum, he had actual knowledge that they belonged to

so framed that it can be found "p as a whole, and precisely as stated, it be marked "Not proven." No qualification, or reference is required over. The defendant filed 17 numbered tions to the finding of facts made court, and to the refusal to find facts requested. These exceptions constitute basis of several, but it is very difficult to determine precisely how many, of the defendant's 61 reasons of appeal. The principal grievance complained of is that the court found that, at and prior to the time the trust securities came into the hands of the defendant, he knew that said bonds and securities were held by Ketchum, as guardian, belonged to his wards, had been loaned to him by Tinker to be used as collateral, and that such use of said bonds by said Ketchum and said Tinker was improper. The defendant asserts that such finding was not warranted by the evidence. By far the greater part of the brief of his counsel, and the time occupied in oral argument in this case, was devoted to the effort to procure correction by this court of the finding of fact below, in respect to this particular point.

The views of this court concerning the statute of 1893 have been so recently and fully stated in other cases, especially in *Styles v. Tyler*, 64 Conn. 432, 30 Atl. 225, that no occasion exists to enlarge upon them here. But the defendant relies upon the language used in *Styles v. Tyler*, at page 432, 64 Conn., and page 165, 30 Atl., namely: "It is the province of this court to determine 'questions of legal conclusion, where fact and law are so intermingled that the fact is not a pure question of fact, but a question of the legal conclusion to be drawn from subordinate facts'; and it is his duty to find that the facts upon which the finding of the defendant knew, was based, shown by the evidence, and the conclusion drawn from them can be reviewed upon the evidence received." This claim is not tenable. The parties to the pleadings and throughout the trial regarded the inquiry as to knowledge as a question of fact. The amended complaint contained the allegation of such knowledge. There was a material averment, and was denied by the defendant. Upon the argument in this case in the court below, counsel for the defendant claimed, as a matter of fact, that he asked the court to find, that the defendant at the time he received said securities did not have actual knowledge that said bonds belonged to the children of Rollin T. Ketchum and were guardian bonds. The court below ruled the claim, and found otherwise. It has been stated. The view then taken by the court below was correct. The question as to actual knowledge is purely one of fact, and never the rule may be as to notice, acquiescence, constructive, between which and knowledge a clear distinction exists. 2 Pom. & E. § 592. We cannot disturb the finding of fact. We are asked to disregard the evidence reported.

do not wish to be understood as intimating any regret because of such inability.

Taking the finding as it stands, the numerous remaining reasons of appeal present, in substance, three claims of error only for our determination. We will consider these in the order in which they are treated in the defendant's brief. It appears in the record that, during the trial, counsel for the plaintiffs asked of Rollin T. Ketchum, as a witness, the following question: "Have you ever had any communication with Mr. Packer [the defendant] in which he stated to you, or you stated to him, that Tinker had these bonds [the bonds in question]?" To this inquiry counsel for the defendant objected, upon the ground that the conversation referred to occurred subsequent to the time when it was alleged that the defendant received the bonds in question. The court overruled the defendant's objection, and admitted the inquiry, and the defendant excepted. The witness answered: "He came to me and said, 'Roll, how many of the bonds did you let Charlie have?' I said, 'I let him have all of them.' He said, 'Did you let him have the children's bonds?' I said, 'Yes.' He said, 'I am sorry you let him have those, because I am afraid they are going to be jeopardized.'" It was found that the bonds in question were all received by the defendant from Tinker, prior to said conversation, excepting one, No. 23 San Miguel county bond, which was received by the defendant from Tinker after the conversation. We think the action of the court in permitting the inquiry was correct. It is true that it further appears in the finding that during the argument which ensued upon the matter, counsel for the plaintiff claimed that the defendant would be liable, even if he learned that said bonds were trust funds after having received them. We consider this claim incorrect. But in fact one of the bonds was received after the conversation. So the only ground of the objection taken failed. Besides, as to the other bonds, it could not be known, until the answer was given, that such answer would not show that the defendant had knowledge previous to his receiving them. This was the ground on which, as the record states, the court permitted the question. Had the ruling been otherwise, and judgment been rendered for the defendant, this court, upon appeal by the plaintiffs, in ignorance of what the answer might have been, must have found error, and granted a new trial.

The defendant further claims that the judgment rendered is defective, because, as he asserts, there is included in such judgment, "given to the six plaintiffs, \$700, in which five of the plaintiffs had no right or title." In the first place, this assertion is not supported by the finding. In explanation, the defendant says that bond No. 23 Dolores county, for \$500, and bond No. 23 San Miguel, for \$200, were sold to Mary D.

Ketchum, and that the other plaintiffs have no ownership in either of these two bonds. But this was precisely what was stated in paragraphs 15, 16, and 17 of the defendant's requests for incorporation of facts in the finding, and upon the margin of each of these paragraphs the court has written "Not found"; while, in the finding made, the entire statement upon this matter is: "The ward Mary D. Ketchum had received a somewhat larger bequest from her grandmother than the other children. The property of all the wards was held, managed, and disposed of by the guardian, as a single trust fund." There was no objection to evidence as to these bonds made at the trial, nor was it claimed that the amount thereof should not be included in the judgment. The only claim upon the matter made in behalf of the defendant in the court below was that, "as the evidence showed a greater interest on the part of Mary D. Ketchum in said trust property than of the other plaintiffs, a separate judgment could not be rendered in her favor." Exactly what was intended by this language may be doubtful. But it is unnecessary to consider, for counsel for plaintiffs thereupon, in behalf of all said plaintiffs, asked that a joint judgment be rendered in their favor, stating that the plaintiffs would adjust their separate interests among themselves, without the intervention of the court. Counsel for defendant made no objection to such form of judgment then, and should certainly not do so now. Even if it had appeared—as it did not—that Mary D. Ketchum, in addition to her joint interest with the other plaintiffs in all the property in which they were interested, had a separate and distinct interest in some of the property converted, in which they were not interested, even then the matters in dispute would not have been distinct and unconnected; and such a judgment as that rendered, disposing of all the controversy in a single suit, might well be regarded as beneficial rather than injurious to the defendant, and his waiver of all objection would have appeared reasonable upon that ground. But, upon the facts found, nothing was embraced in the judgment which was not in the strictest sense a proper subject to be included therein. There was but a single trust fund, which was the subject of the action, in which all the plaintiffs had an interest. That being so, the proportion in which such interest belonged to each was a question in which the defendant had no concern. It was enough for him that in some proportion it belonged to all,—that, in the language of Gen. St. § 883, they were "all persons having an interest in the subject of the action, and in obtaining the judgment demanded."

Finally, the defendant claims that the court below erred in its judgment, because, upon the facts found, the good faith and want of knowledge of the banks of the trust character of

the bonds protect the defendant, as matter of law. He invokes the rule that, "if the first purchaser from the trustee takes the property bona fide and for value, and without notice, all purchasers from him will take the property discharged of the equitable claims, although they had notice of them at the time they purchased from the first purchaser, and such notice from them cannot convert them into trustees." 1 Perry, Trusts (4th Ed.) § 222. We have no occasion to question the rule, which is confessedly founded on public policy, to "prevent a stagnation of property," and for the relief of the bona fide purchaser, who "otherwise might be deprived of the benefit of selling his property for full value." We only desire to say that consideration for the subsequent purchaser with knowledge was not a reason why the rule was adopted, nor is it a ground for its extension. If the defendant comes plainly within it, he is protected by it, as a matter of law. If he does not, there are no equities growing out of it and inuring to his benefit. The inquiry, then, is whether the defendant was in fact a purchaser from the banks. The bonds—other than No. 27 Dolores county and No. 23 San Miguel county—were deposited by Tinker, together with other bonds, with the two banks as security respectively for his two notes in said banks. Four of these guardian bonds, amounting to \$3,000, with other bonds belonging to Tinker himself, amounting to \$2,000, in all \$5,000, were deposited with the Bank of Commerce as collateral to his note for \$2,900. Two of the guardian's bonds amounting to \$600, with other bonds belonging to the defendant and loaned by him to Tinker to be used as collateral, amounting to \$4,000, and one bond belonging to Tinker of \$500, in all \$5,100, were deposited by Tinker in the City Bank, as collateral to his note for \$3,500. Both of these notes contained powers of sale of said securities, and were renewals of similar notes previously given to said banks by said Tinker, and secured in the same manner. Some time before either of said notes fell due, both of said banks informed Tinker that they would require payment of said notes when they fell due, or further security for the payment thereof. Tinker thereupon made an arrangement with the defendant, to whom he was then largely indebted, by which he gave to the defendant his note for \$6,400, and pledged to the defendant, as collateral security therefor, all the securities pledged for the payment of the notes at the banks, together with another guardian bond of the value of \$500. Thereupon, before said notes at the banks fell due, the defendant whom, it is to be borne in mind, the court has found then knew the character of the trust bonds, under said arrangement with Tinker, and with the consent of said banks, who had knowledge of said arrangement between Tinker and the defendant, gave to said banks, respectively, his notes for the same amount as the former notes, pledging to said banks, as collateral security therefor,

the same securities so pledged to him by Tinker for the payment of said \$6,400. Banks accepted said notes, and thereupon stamped said notes of Tinker as paid, and surrendered the same to said Tinker, thereupon held said securities—which were not taken from the possession of said Tinker in carrying out said arrangement—as collateral for the payment of said notes. These securities, and also the \$6,400 note given by said Tinker, were renewed from time to time. After the last \$6,400 note to the defendant, but before the last renewal notes to the banks, became due, the defendant paid said notes to the banks and received from them all said securities and sold them—including the No. 23 San Miguel county bond belonging to said Tinker, which had been delivered to the defendant by Tinker as collateral for defendant's endorsements of Tinker's note, and which the defendant was compelled to pay, excepting securities belonging to the defendant—at its face value, and indorsed the avails of the sale as a part payment upon Tinker's \$6,400 note. Now, analyzing this transaction, it will be seen that the banks were not purchasers of these bonds from Tinker, nor the defendant as purchaser of them from the banks. The title of the banks never became complete. All the notes for which they were deposited as collateral security, both those of Tinker and of the defendant, were paid before maturity. The banks, therefore, never exercised, nor ever had the right to exercise the power of sale. The defendant must show his title to Tinker, the wrongdoer; not to the banks, who were innocent. But the defendant asks: "What difference is there, in principle, between his paying the notes before maturity and taking the securities by agreement with the parties concerned, and purchasing the securities from the banks as a commercial transaction and receiving the securities from the banks as collateral?" If the latter had in fact been done by an outside party, he would have had \$10,100 as collateral for \$6,400 of notes. By converting the collateral at its face value, it became necessary to convert it, he would have had to account for \$3,700. The funds in this \$10,100, leaving out the \$500 of the \$200 afterwards received by the defendant, with knowledge, amounted to \$9,600. Tinker's own bonds to \$2,500, and the defendant's to \$4,000. Thus, the collateral, other than guardian bonds, amounted to \$100 more than the loan. The defendant, it is true, is far from being an outside party. But can he operate to his advantage? Ought he to be allowed to protect his own collateral from being converted what he knows to be trust property? We think not. The defendant's position on this point closes with the assertion: "The equities which might be helped by making of assets to have the defendant's or Tinker's bonds first applied for the payment of Tinker notes can be invoked here, because the defendant's notes to the banks were paid and the securities sold and applied, long before

any demand was ever made for the securities by the guardian." It would seem that the necessity of resorting to the claim that the quitclaims in favor of the plaintiffs arising from the transaction were barred would have indicated to the defendant that he stood in no position to invoke any principle of equity in his own behalf. Accounting for these bonds, he is in no worse position than if he had done what equity required he should have done in the first instance,—see that Tinker's collateral claims were applied in part payment, and then bear the loss to the extent of his own. To hold that by his own unauthorized act he can place himself in a better position would be to allow him to take advantage of his own wrong. There is no error in the judgment complained of. The other judges concurred.

JOHNSON et al. v. EDMOND et al.
Supreme Court of Errors of Connecticut. Feb. 8, 1895.)

WILLS—CONSTRUCTION—PERPETUITIES—DESCRIPTION OF DEVISEES.

1. Testator bequeathed one-half of his residuary estate to his daughter M. for life, to go to her decease to her children, "and the legal representatives of any of them who may then have deceased," and their heirs. The other half he bequeathed to his daughter J. for life; to go, at her death, to her children and the "descendants" of any deceased child, but, in case J. left no descendants, then such portion to go to the children of M., and the "legal representative" of any one of them then deceased, and their heirs, subject only to a life estate in one-third hereof to J.'s husband, if he survived her. At testator's death he had but two grandchildren, daughters of M. *Held*, that the bequests over, after the life estates to testator's daughters, were not void as against the statute of perpetuities; and hence the whole residuary estate, on testator's death, vested (so far as to constitute a transmissible estate) in M.'s daughters, subject only to the life estates, and to the contingency of J.'s leaving descendants surviving.

2. The term "legal representatives," as applied to the succession of M.'s life estate, means executors and administrators.

Hamersley, J., dissenting.

Case reserved from superior court, New London county; F. B. Hall, Judge.

Action by John M. Johnson and Gardiner Greene, Jr., trustees, against John D. Edmond, Jr., and others, for the construction of a will. Reserved upon the facts stated in the complaint, for the advice of the supreme court.

W. A. Briscoe, for plaintiffs. Jeremiah Halsey and Frank T. Brown, for John D. Edmond, Jr., and Mary H. and Louis Dugal. William B. Anderson, for Helen H. White and Juliet B. Appleton. W. S. Allis, for Andrew S. Webster. George A. Blaney, for Aaron D. Webber. John T. Walt, for Hugh H. Osgood and others.

TORRANCE, J. This suit is brought to obtain a judicial construction of the will of Russell Hubbard, and comes to this court by way of reservation. The questions in

the case arise upon the eighth clause of the will, which reads as follows: "All the rest and residue of my estate, of all kinds, which I shall own at the time of my decease, I give and bequeath and devise as follows, viz.: To my daughter Mrs. Mary H. Bull one-half thereof for and during her natural life, the net income, rents, and profits thereof, after deducting the current charges and expenses, to be paid over to her as collected by my executors; and, upon her decease, I give and bequeath and devise the estate so given to her for life to her children, and the legal representatives of any of them who may then have deceased, and to their heirs, forever. And I give and bequeath and devise the other half of said residuum of my estate to my daughter Mrs. Juliet H. Spalding, for and during her natural life, the net income, rents, and profits thereof, after deducting charges and expenses, to be paid to her as collected; and, upon the decease of my said daughter Juliet, I give, bequeath, and devise the estate so given to her for life to her children, and the descendants of any child of hers who may then have deceased, and to their heirs, forever; but, if she have no child or other descendant of hers surviving her, then one-third the estate so given to her for life shall go to her husband, Charles Spalding, for life, the net income, rents, and profits thereof to be paid to him by my executors, and the other two-thirds parts thereof to the children of my said daughter Mary, and the legal representatives of such of them as may then be dead, and their heirs, forever; and, upon the decease of the said Charles Spalding, the portion of my estate so given to him for life I give, bequeath, and devise to said children of my daughter Mary, and the legal representatives of such of them as may then be deceased, and to their heirs, forever." These questions are thus stated in the complaint: "Whether the limitation over, upon the decease of the testator's daughters, to the children of Mary H. Bull, and the legal representatives of any of them who may then have deceased, and their heirs, forever, is void, as offending against the statute against perpetuities and the estate therein attempted to be disposed of is intestate estate. If said provision be valid, what is the meaning of the expression 'legal representatives,' wherever the same is used in said section?"

The will was made in 1854, and the testator died in 1857. At the time the will was made, he had a wife, and only two children, the daughters Mary and Juliet, named in the will,—the former, a widow, and the latter, the wife of Mr. Spalding,—and two unmarried granddaughters, named Juliet and Helen, children of his daughter Mary; and this condition of the testator's family remained the same up to the time of his death. His wife died in 1863. After his death, his daughter Mary married Mr. Webber, but had no children by this second marriage, and

she died in January, 1894, leaving her husband, who is a party to this suit. Mrs. Spalding, the other daughter, never had any children. She died in 1865, and her husband died in 1885. The granddaughter Juliet ultimately married Mr. Edmond, and she died in 1878, leaving her husband and three children surviving her. The husband has died since the commencement of this proceeding, and the children, together with their children, are all parties in the case. The other granddaughter, Helen, married Mr. Webster, and died in 1864, leaving her husband, who is a party to this suit, and a daughter, who, with her husband and children, are also parties. The daughters of the testator, Mary and Juliet, left wills, which have been duly admitted to probate, in which the bulk of their property is given to their husbands; and the executor of Mary and the executor of Charles Spalding, claiming under the wills of Mary and Juliet, respectively, are also parties to this proceeding. These executors claim that the devisees over, in the eighth clause of the will, after the life estates to the daughters of the testators, are void, and that consequently the daughters took the entire residue of their father's estate, as his heirs at law; while the children and grandchildren of Mrs. Edmond and of Mrs. Webster claim that these dispositions over are valid. Which, if either, of these claims is correct, will depend upon the construction of this eighth clause of the will.

The intention of the testator is to govern if it can be ascertained, and is conformable to law; and, of course, it is the intention expressed and made manifest in the words used, which words may, if necessary, be read in the light of the facts and circumstances relating to the condition of the testator's family, and the like, under which they were written. The only immediate objects of the testator's bounty, when the will was made, were his wife, his two daughters, and his two living fatherless granddaughters. He would naturally be more solicitous to provide for his grandchildren than for more remote descendants, because the former were nearer to him in blood, and two of them were then living and known to him; and it is evident from the sixth clause of the will that he had these two living grandchildren chiefly in mind when he made the will, for, though the legacies therein given are in form perhaps to his grandchildren as a class, the language used shows he was mainly thinking of the two who then constituted the entire class. It is not at all difficult to discover the main general purpose of the testator in this will. He first makes ample provision for his wife; then he gives such legacies as he deemed it proper to give; and, lastly, he disposes of the residue in the eighth clause. His general plan and purpose in that clause is also clear. He intends to dispose of the entire residuum, so as to

avoid intestacy as to any of it; to treat two daughters exactly alike, for substantially the same provision is made for each; to give the daughters the life use of one of the residuum, and to give them no more than that; and, lastly, to give the entire residuum to his grandchildren, dividing it into two equal parts, one for the issue of each of his daughters, who might survive her.

At the date of his will, one daughter, Mrs. Bull, had issue. She was a widow, and her two unmarried daughters must necessarily have occupied a prominent place in the testator's mind while shaping the provisions of his will. After giving, in the eighth article of that instrument, to Mrs. Bull, half his residuary estate for her life, the net income to be paid over to her, and collected by his executors, he proceeds to say: "Upon her decease I give and bequeath the estate so given to her for life to her children, and the legal representatives of any of them who may then have deceased, and to their heirs, forever." He then makes a similar disposition of the other half of the residuum and its net income in favor of Mrs. Spalding, and adds: "Upon the decease of my said daughter Juliet, I give, bequeath, and devise the estate so given to her for life to her children, and the descendants of any child of hers who may then have deceased, and to their heirs, forever; but if she have no child or other descendant surviving her, then one-third the estate so given to her for life shall go to her husband, Charles Spalding, for life, the net income, rents, and profits thereof to be paid to him by my executors, and the other two-thirds parts thereof to the children of my said daughter Mary, and the legal representatives of such of them as may then be dead, and their heirs, forever; and, upon the decease of the said Charles Spalding, the portion of my estate so given to him for life I give, bequeath, and devise to the children of my daughter Mary, and the legal representatives of such of them as may then have deceased, and to their heirs, forever." The twelfth article of the will is thus: "Should my said son-in-law Charles Spalding not survive his said wife, Juliet, then, upon the decease of the said Juliet, the estate so given to her for life (provided she leave no child or descendant of her surviving her) I give, bequeath, and devise to the children of my said daughter Mary, and the legal representatives of such of them as may then have deceased, and to their heirs, forever." It will be remarked that both in the eighth and twelfth articles the reference to the issue of his daughters is differently phrased, with respect to Mrs. Bull's children, it is "and the legal representatives of any of them who may then have deceased, and to their heirs, forever." In providing for Mrs. Spalding's children,

children (should any thereafter be born to her), the gift is to them, "and the descendants of any child of hers who may then have deceased, and to their heirs, for ever." The term "legal representatives" is used in these two articles four times to prescribe the succession to the estate given to Mrs. Bull for life; and the terms "descendants," "child or other descendant," and "child or descendant" are with equal care used to prescribe the succession to the estate given to Mrs. Spalding. It is natural to conclude that the testator employed this differing phraseology in the case of each daughter because he intended the succession in the line of each to be regulated in a different way. This effect can be given to his words only by regarding the term "legal representatives," as used, to denote the executors or administrators of the estates of the children of Mrs. Bull. It is one of those ambiguous terms the meaning of which can often be determined only by the context, and the situation of the testator with reference to the natural objects of this bounty. In the present case it is not unnatural that the testator may have had such confidence in the good judgment and discretion of his two granddaughters, with whose personal qualities he must have been somewhat familiar, that he was willing to allow their shares to pass out of the family, if they should choose to alienate or bequeath them. No other reason occurs to us, or has been suggested at the bar, for the careful and repeated reference to their executors and administrators, when compared with the equal care shown to keep the half of his estate destined for Mrs. Spalding's children, should she have any, strictly in the line of her descendants.

This conclusion is strengthened by the fact that, while he provides for his living son-in-law, Mr. Spalding, in case Mrs. Spalding should die before him without issue, he makes no provision for the benefit of any future husband of either daughter, although he contemplates the possibility of second marriages, by declaring at the close of his will that they shall take the estates left to them for their sole and separate use, "free from the debts, obligations, and control of any present or future husband." This also serves to show that the testator was more solicitous to provide for those who were in actual existence than for those who might thereafter come, by birth or marriage, into the circle of his family. We therefore think that the term "legal representatives," in each of the places where it is used, with reference to the shares of Mrs. Bull's children, means "executors and administrators," and is one, not of purchase, but of limitation. *Tarrant v. Backus*, 63 Conn. 277, 28 Atl. 46.

Under this construction of the will, it gave half the residuary estate, upon the death of the testator, to the children of Mrs. Bull, as a class, by an absolute title, subject only

to her life estate. The phrase, "upon her decease, I give, bequeath, and devise the estate so given to her for life to her children," has the same legal meaning as if it had read, "I give, bequeath, and devise the estate so given to her for life to her children, to come into their possession upon her decease." It was a vested remainder in fee.

As respects the other half of the residuum, the children of Mrs. Bull, for the same reasons, took as a class, upon the testator's decease, vested interests by way of a contingent remainder with a double aspect. *Gray, Perp. § 113a; Fearn, Rem. 444, 445.* The term "vested," as applied to remainders, has unfortunately been used in English and American law with two meanings. It may signify simply a remainder so far vested as to be capable of alienation, and the subject of succession by inheritance. It may also signify a remainder so absolutely vested that the remainder-man is certain to come into possession immediately upon the determination of the precedent estate. In applying the common-law rule against perpetuities, no interest is ordinarily deemed vested which is not of the description last given. *Gray, Perp. §§ 101, 118.* In applying the statute of perpetuities of this state (*Gen. St. § 2952*), the word may be properly used with either signification. That statute was enacted in furtherance of the ancient policy of this commonwealth, both as a colony and as a state, to promote the equal inheritance and free transmission of landed property, unhampered by complicated trusts or entailments enduring from generation to generation. 1 *Wilt, Syst. Laws Conn. 242, 247; Daggett, J., in Allyn v. Mather, 9 Conn. 132.*

Our statute against perpetuities, as it stood at the date of this will, forbade grants by deed or will to any persons except such, "or the immediate issue or descendants of such, as are in being at the time of making such deed or will." *Comp. St. 1854, p. 630, § 4.* The amendment passed in 1884 (*Gen. St. § 2952*), by which the phrase "at the time of the delivery of such deed or death of the testator" was substituted for the words "at the time of making such deed or will," we regard as merely declaratory of their legal meaning. The class of the children of Mrs. Bull was therefore formed at the death of the testator.

It is unnecessary to consider whether, had Mrs. Spalding left surviving descendants, the provision in their favor would have been fully operative. 2 *Redf. Wills, 578.* If one of the contingencies affecting the remainder interests of the children of Mrs. Bull could be held to be obnoxious to the statute of perpetuities, as to which we express no opinion, the other was certainly one that was clearly stated and open to no legal objection. Upon the death of Mrs. Spalding, in 1865, leaving no surviving descendants, the remainder became a "vested" one, in the fullest sense of the term, in the children of

Mrs. Bull, and their heirs, executors, and administrators, subject only to the life estates created by the will.

To avoid unnecessary complication of statement, we have treated the remainder interests which were vested in the children of Mrs. Bull as if no trusts had been interposed. The trustees, of course, received the legal title, and the remainder interests were subject to their legal estate. The superior court is advised that the entire residuary estate of the testator was vested upon his decease (so far as to constitute a transmissible estate) in the two daughters of Mrs. Bull, subject only to the life estates created by the will, and to the contingency of Mrs. Spalding's death, leaving surviving descendants. The other judges concurred, except HAMERSLEY, J., who dissented.

JOHNSON et al. v. WEBBER et al.
(Supreme Court of Errors of Connecticut. Feb. 8, 1895.)

WILLS—CONSTRUCTION—VALIDITY.

1. Testatrix devised to her two daughters and their heirs a portion of her estate; directing the executors to retain therefrom a fund, from the income of which certain annuities should be paid, the balance of the income to go to the daughters equally, and that the executors should hold the same until the death of the last annuitant, or, if either daughter should die before the last annuitant, then her proportionate share of said income should be paid according to her last will, or, in case of intestacy, to her heirs. *Held* that, both daughters and annuitants being dead, the fund, with its accumulations, should be paid to the estates of the daughters, in equal proportions.

2. Testatrix, in one clause of her will, made certain bequests to her married granddaughters, and in a subsequent clause, which she expressly declared to be an alteration of the former, provided that if either of said granddaughters (naming them) should die, "leaving a husband surviving," such husband should receive a certain life income. *Held*, that the beneficiaries intended were the then husbands of the granddaughters.

3. Testatrix provided in her will that a fund should remain in the hands of her executors during the lives of two granddaughters and the life of the survivor of them; that from the income thereof certain annuities should be paid, and the balance distributed equally between the granddaughters; that on the death of both granddaughters the principal should be divided into two parts, the first part to be distributed to the children of the granddaughters, and the second part, at the death of the last annuitant, to go to the then lineal descendants of testatrix. By a subsequent clause, expressly declared to be an alteration of the above provision, testatrix provided that if either or both the granddaughters should die, leaving a husband, such husband should receive from the income of the above fund one-half what the wife, if living, would have received. *Held*, that the latter provision so modified the former that, after both granddaughters and annuitants were dead, no actual distribution of the fund could be had while the husband of either granddaughter lived, but on the death of the last surviving husband the distribution should be made as of the dates originally provided in the will.

4. A provision in a will that, on the termination of certain trusts created thereby, the trust fund should go to the "then" lineal descend-

ants, is void, under Gen. St. § 2952, which declares that no estate shall be given by will to any persons but such as are, at testator's death, in being, or to their immediate descendants.

5. Where a testatrix devised property otherwise disposed of, at the termination of certain trusts created by the will, to her "heirs," the devisees are those who are her heirs at the time of her decease, and not those who may be her heirs at the termination of the trust.

6. Where testatrix gave a certain fund to her two granddaughters for life, and provided that on their decease the same should be divided and distributed equally to their children "per capita," two of whom were then in being, such devise is a gift to the great grandchildren as a class; vesting, in point of right, at the death of testatrix, in the then two members constituting the class, and in those after as soon as born.

Hammersley, J., dissenting.

Case reserved from superior court, New London county; F. B. Hall, Judge.

Action by John M. Johnson and George Greene, Jr., trustees, against Aaron D. Webber, executor, and others, to determine the validity and construction of a will. Resolved.

Gen. St. Conn. § 2952, provides that no estate in fee simple, fee tail, or any less estate shall be given by deed or will to any persons but such as are, at the delivery of the deed or death of the testator, in being, or to their immediate issue or descendants.

W. A. Briscoe, for plaintiffs. Jeremiah H. Seymour and Frank T. Brown, for John D. Edmond, 2d, and Mary H. and Louis I. William B. Anderson, for Juliet B. Appleton and Helen H. White. John T. Wait, for Aaron D. Webster and the estate of Charles Spalding.

TORRANCE, J. This is a proceeding to obtain a judicial construction of the will of Abby W. Hubbard, reserved by the superior court, upon the facts found, for the advice of this court. The will was made in May, 1863, and the testatrix died in July of that year. At the time the will was made, and at her death, her immediate family and descendants consisted solely of two daughters, Mrs. H. Bull, a widow, and Mrs. Juliette H. Spalding, the wife of Charles Spalding; two granddaughters, children of Mrs. Bull, named Mary and Juliette, the former the wife of Aaron S. Webster, and the latter the wife of Frank V. Edmond; and two great-grandchildren, one being the son of Mrs. Edmond, and the other the daughter of Mrs. Webster. At the death of the testatrix, Mrs. Bull married Aaron D. Webber, and died in January, 1865, leaving her husband, who, as executor under her will, is a party to this proceeding. Spalding, who never had any children, died in 1865, leaving her husband surviving, and a will in which she gave to him all her estate. He died in 1883, and his executors and trustees are parties here, claiming under Spalding's will. One of the granddaughters, Mrs. Webster, died in January, 1864, leaving left, surviving her, her husband, Mr. Webster, and a daughter, now Mrs. Louis H. D.

The husband and daughter, together with her husband and minor children, are made parties to this proceeding. The other granddaughter, Mrs. Edmond, died in 1878; leaving her husband, Mr. Edmond, and three children, surviving her. Mr. Edmond has died since this suit was brought. The three children, together with their children, are made parties to the suit.

The will consists of 14 articles, but as the questions in the case arise mainly, if not entirely, upon the eleventh and thirteenth articles, it will be unnecessary to consider the others, except incidentally; and for such purpose it will be sufficient to state the substance of most of them, other than the eleventh and thirteenth. The first merely directs that the debts and funeral charges be paid. The second gives absolutely to the daughters, Mrs. Bull and Mrs. Spalding, certain property therein mentioned. The third and fourth give certain small legacies to the corporations named therein. The fifth, sixth, seventh, eighth, and ninth provide that certain sums shall be paid yearly to certain relatives therein named, during their lives. These annuities, as we shall for convenience hereafter call them, amount in the whole to \$500. The annuitants named were her brother, Joseph Williams: his two daughters, Abby and Rebecca; Mrs. Huntington, a sister of the testatrix; Mrs. Nancy Whiting and her daughter Mary; and Mrs. Betsey Williams. The tenth article reads as follows: "And all the annual sums of one hundred dollars each given as aforesaid shall be paid to the several legatees aforesaid in the semiannual sums of fifty dollars each to the persons entitled to receive them, by the executors hereof, from the income to be received from the portion of my estate to be left in the hands of said executors as herein provided, and said annual sums shall commence running from the time of my decease. One-half said annual sums shall be paid from the income to be received by said executors and their successors from the portion of my estate to be left as hereinafter provided in the hands of the executors for the benefit of my granddaughters, Mrs. Helen Webster and Mrs. Juliette Edmond, during their lives, and the other half from the income to be received by said executors from the portion of my estate, to the value of eight thousand dollars, to remain in their hands for that purpose, as hereinafter provided." The twelfth and fourteenth articles are of no importance here. The eleventh and thirteenth articles read as follows: "Eleventh. After paying the expense of settling my estate, and within one year after my decease, and earlier if convenient, the estate then in the hands of the executors, both real and personal, including my homestead, shall be appraised, except what is hereinbefore specifically given, by one or more disinterested persons, to be agreed upon by my said daughters, or, if they cannot agree, to be appointed by the court of probate, from the district of Norwich, at its fair cash value,

which appraisal shall be entered of record in said court, and, after paying the legacies herein given, one-half the residue of said appraised estate, which half shall be entirely of the personal estate at said appraised value, shall be and remain in the hands of the executors and their successors during the lives of my granddaughters, Mrs. Helen Webster and Mrs. Juliette Edmond, and the life of the survivor of them; and from the current income thereof said executors, after paying current expenses and charges, shall first pay to the persons entitled to receive it one-half of the aforesaid annual sums of one hundred dollars each, and the balance of the income equally to my said granddaughters; and if either of my said granddaughters shall decease, whether before or after me, from the other surviving, the portion of said income which said deceased one would have received, if living, shall be paid to the lineal descendant or descendants of such deceased one, if she shall leave any, and, if not, then to said surviving granddaughter during her life. And upon the decease of both of said granddaughters the executors and their successors shall retain in their hands a portion of the best part of said estate, so held in their hands for my granddaughters, as in their judgment will be amply sufficient to yield an income of double the amount then required to pay the one-half of said annual sums of \$100 each, and after paying said half the executors shall pay the balance of said income to the lineal descendants of my said granddaughters, per capita, if any such descendant shall then live, if not, to my heirs at law; and the residue of the estate so held for the benefit of my granddaughters shall be divided and distributed equally to their children, per capita: provided that if any such great-grandchild of mine shall have deceased previous to the time of such distribution, leaving a child or children, such child or children shall receive such portion as the parent would receive, if living; but, if there be then living no child or children or lineal descendant of my said granddaughters, then the residue of said estate shall be distributed among my heirs at law. And as to the other half of the residue of said appraised estate, including my homestead, I give, bequeath, and devise the same, subject, however, to the provisions hereinafter made concerning the aforesaid annual sums of \$100 each, to my beloved daughters, the said Mrs. Bull and Mrs. Spalding, and to their heirs; that is to say, said executors and their successors shall hold, properly invested, of the personal estate (if sufficient therefor, and, if not, as a charge upon the real estate), an amount thereof, according to said appraisal, equal to eight thousand dollars, out of the net income of which they shall pay the one-half of said annual sums of \$100 dollars each, and the balance of said net income to my said daughters equally; and said executors shall hold the same with their successors until the decease of the last survivor of the persons aforesaid entitled to \$100 per annum each: pro-

vided, that if my said daughters, or either of them, shall die before said last survivor, her proportion of said income shall be paid according to her last will and testament, or, if she leave none, to her heirs at law. And the portion of my estate to be held by my executors, called above the 'best part,' for the benefit of the persons entitled by this will to \$100 per annum, shall, upon the decease of the last survivor of said persons, be distributed, per capita, equally among my then lineal descendants forever." "Thirteenth. Should any questions arise as to the proper construction of this will, or any doubt exist as to the persons or corporations intended as legatees under its provisions, the executors and the survivor of them will fully understand my intent, and are endowed with full power and authority to determine such questions and doubts, and their determination shall be absolute and final. And should there, upon the ending of all the trusts herein, remain anything not by the preceding provisions finally and fully disposed of, I give, bequeath, and devise the same to my heirs at law. (The provisions of the eleventh section are altered thus: If either or both of my said granddaughters, Mrs. Webster or Mrs. Edmond, die, leaving a husband surviving, such husband shall receive, of the income of my estate, during his life, one-half, as his said wife would receive, if living, under the provisions hereof; and the same of both husbands,—the husbands half what the wife would receive.)"

It is clear, even from a cursory reading of the eleventh article of the will, that the testatrix intended, after the payment of the debts, charges, and specific legacies other than the annuities, to divide the residue of her estate into two equal parts, and to give one of those parts to her daughters, in equal shares, and that this intent is so expressed that it can be carried out. Whatever else in the will may be doubtful, this much is certain: that the eleventh article clearly and legally disposes of this half of the estate. It was given, however, subject to the right of the executors to retain in their hands, for the payment of one-half of the annuities, the sum of \$8,000. This sum was so retained, and the balance distributed to the daughters soon after the death of the testatrix. This fund of \$8,000 is now in the hands of the plaintiffs, with its accumulations since the death of the last annuitant; and one of the questions in the case, and the only one relating to this part of the estate, is, what is the duty of the present trustees regarding the disposition of the \$8,000 fund? Under the will, the balance of the income of this fund, not required to pay annuities, is to be paid to the daughters equally, or, if they die before the last annuitant, then according to their last wills, or, in default of a will, to their heirs at law. It appears from the finding that the last annuitant died in December, 1893, and that up to that time the income of said fund had been paid in accord-

ance with the provisions of Mrs. Hubbard's will. The only question, then, respecting the fund, is, to whom does it, with its accumulations, if any, since the death of the last annuitant, now belong? We answer, to the tates of the daughters, in equal proportions. During their lives the fund was theirs, subject only to the payment of one-half of the annuities; and that charge upon it ceased December, 1893. The fund, with its accumulations, if any, should now be paid, half to the executor of Mrs. Webster, and half to the executor of Charles Spalding.

The remaining questions relate to the position of the other half of the estate, with regard to this disposition of the interest. The testatrix is by no means clear and certain. Before considering those questions, however, it may be well to state what has been done with the principal and income of this half since the death of the testatrix. Of the annuitants named in the will, John Williams, Mrs. Huntington, Mary Williams, and Betsey Williams died before the death of Mrs. Edmond, which occurred in 1878; Nancy Whiting died in March, 1880; John Williams died in January, 1888; and Rebecca Williams, the last of the annuitants, died December, 1893. All the annuities were as directed in the will. Until the death of Mrs. Webster, in January, 1864, the balance of the income, after paying annuities, was paid, one-half to Mrs. Webster, and one-half to Mrs. Edmond. Upon the death of Mrs. Webster, and until the death of Mrs. Edmond, the income of said half of the residue, after paying one-half the annuities, was as follows: One-half to Mrs. Edmond, one-quarter to Mr. Webster, and the remainder to the child of Mrs. Webster, now Mrs. Dugal. Upon the death of Mrs. Edmond, the executors made no division of said trust estate, but held, and the plaintiffs still hold, the principal thereof, and, until the death of the last annuitant, paid the income as follows: They first paid the annuities. Of the residue of the income, they paid one-quarter to Mrs. Edmond, one-quarter to Mr. Webster, one-eighth to the child of Mrs. Webster, now Mrs. Dugal, and one-eighth each to the three children of Mrs. Edmond, who are parties to the suit. The income from said trust fund accruing since the death of the last annuitant the plaintiffs have not paid over. It is stated on the argument before us that whether these past payments of income, made from December, 1893, to parties other than the annuitants, were valid or not, all the parties interested now had agreed to treat them as valid; and, in considering this part of the case, we will assume the existence of such agreement. This renders it unnecessary to consider some of the questions stated in the complaint. The main questions of legal importance now in the case are whether this half of the residuum of Mrs. Hubbard's estate, with its accumulations since the death of the last annuitant, belongs to those

legally represent the two daughters, Mrs. Webber and Mrs. Spalding, or whether it belongs to the great-grandchildren of the testatrix, under the will. The former is the claim of the executor of Mrs. Webber and the executor and trustees of Mr. Spalding, while the latter is the claim of the great-grandchildren.

One of the subordinate questions in the case relates to the rights of the husbands of the granddaughters in this fund during life, and, as the decision of this question affects the discussion of the others, it will be well to dispose of it first. It is said by the great-grandchildren that the provision for the husbands of the granddaughters in the thirteenth article of the will is void, under our statute, because the words used to describe the beneficiaries include, or may include, husbands to be born of persons unborn at the death of the testatrix. It is true, such a construction may be put upon those words; but the supposition that the testatrix, under the circumstances, intended to use them in this sense, is a very violent one, and ought not to be adopted, if a more reasonable one may fairly be given to them. When she wrote the will the husbands had been married to her granddaughters for some years, and were doubtless well known to her, and regarded by her with affection. In the eleventh article of her will she had made provision for her granddaughters, and would most naturally have immediately followed that by a provision for their husbands; but either through mistake or inadvertence, apparently, she failed to do this, and before the will is completed she is made aware of this failure, and at once proceeds to make provision for them by an addition to the thirteenth article, which is expressly declared to be an alteration of the provisions of the eleventh article. This provision is drawn with a good degree of brevity, and the words used are mostly words of a very general nature; but, when the testatrix speaks of "Mrs. Webster" and "Mrs. Edmond" dying leaving "a husband," the words "a husband" may be fairly said to mean the then husband of each granddaughter. In short, we think, if this provision for the husbands is read, as it should be, in the light of the circumstances under which it was made, the beneficiaries intended were the then husbands of the granddaughters. Upon this point the present case is quite similar to that of *Beers v. Narramore*, 61 Conn. 13, 22 Atl. 1061. There, as here, the language descriptive of the beneficiary was quite general and indefinite, but the court held that it meant a certain and definite person answering the description when the will was made. The reasoning in that case upon this point is equally applicable here, and we adopt it without repeating it. The provision for the husbands, then, is a valid one, and they are each entitled during life to the income of one-fourth of this half of the estate of the testatrix. The gift to them is

made a charge upon the entire fund, as was the gift to the granddaughters. This construction makes it necessary to consider the effect, if any, of this provision in favor of the husbands upon the eleventh article of the will, directing a division of this half of the estate into two unequal parts, and a distribution of one of those parts, at the death of both granddaughters, to the children of both, and of the other part, at the death of the last annuitant, to the then lineal descendants of the testatrix.

And first as to its effect, if any, upon the provision for a separation or division of this half of the estate into two unequal parts at the death of both granddaughters. The eleventh article expressly provides for such a division at that time, and disposes of one part in one way, and of the other in an entirely different way. We do not think this direction to divide this half of the estate into two unequal parts is at all affected by the added provision in favor of the husbands, and it should be carried out, if it can now be done. A rule is given by which the division can be made, with reasonable certainty, as of the time of the death of Mrs. Edmond, in 1878; and we see no difficulty, legal or otherwise, in now making such a division as of that date, and in regarding it as if it had been made as of that date. It is true, one of the chief reasons for making such a division at the time specified, namely, to provide for the payment of one-half of the annuities, has now ceased to be operative, all the annuitants being dead. Still, the manifest intent of the testatrix to make a different disposition of each part remains, and should be carried out, if legal. On the whole, we think, this half of Mrs. Hubbard's estate should be regarded and treated, so far forth as may be necessary to carry out her intent to dispose of the parts in different ways, as if the division which she directed to be made on the death of both granddaughters had been made at that time, under the rule given in the will.

The next question is what effect, if any, this added provision for the husbands had upon the distribution of each of these parts directed to be made in the eleventh article of the will. That article expressly directs one part to be divided and distributed, on the death of both granddaughters, to the children of both; and the other, on the death of the last annuitant, to be distributed to the then lineal descendants of the testatrix. This provision for the actual distribution of each part at the time specified is manifestly inconsistent with the later provision made for the husbands; for one or both of them might be alive at the death of the surviving granddaughter, and also at the death of the last annuitant, and the fund, upon the whole of which the provision in their favor was a charge, could not be actually distributed unless both husbands were dead at the times specified for distribution. As a mat-

ter of fact, both husbands outlived the granddaughters and all of the annuitants. One of them, Mr. Edmond, died since this suit was commenced, and the other, Mr. Webster, is yet alive. The provision for the husbands was made later than the provision for actual distribution. It was made, apparently, with deliberation, and with full knowledge that it would change or modify the earlier provision as to the time of actual distribution; and, in legal effect, we think it provides that no actual distribution of one part shall be made at the death of both granddaughters, unless both husbands are then dead, nor of the other, at the death of the last annuitant, unless both husbands are dead at that time. On this construction, both of the parts into which we have regarded the principal of this half of Mrs. Hubbard's estate as divided must be held intact till the death of Mr. Webster.

This brings us to the important practical question in the case, namely, to whom does the principal of each of these parts of the fund go on the death of Mr. Webster? The part which the executors were directed to retain in their hands on the death of Mrs. Edmond, to provide for the payment of one-half the annuities, we will, for brevity, hereafter call the "first part," and the other the "second part," respectively. By the terms of the eleventh article of the will, as we have construed it, in the light of the subsequent provision made for the husbands, this first part is to go, on the death of Mr. Webster, to the "then" lineal descendants of the testatrix. This is, in effect, a gift to her "then" lineal descendants, and is, we think, void, under section 2952 of the General Statutes of this state. This would make the first part intestate estate, but for the provision made in the thirteenth article of the will, which reads as follows: "And should there, upon the ending of all the trusts herein, remain anything not by the preceding provisions finally and fully disposed of, I give, bequeath, and devise the same to my heirs at law." These are words of present gift to a class of persons who came into being immediately upon the decease of the testatrix. In the eleventh article she desires to make a residuary provision in favor of those of her descendants who might survive at a remote period, and describes them as "my then lineal descendants." Had she desired, in the thirteenth article, her property otherwise undisposed of to go to such persons as might be her heirs at law at the final termination of the trusts, she would naturally have used, in describing them, language somewhat similar in character to that used in the eleventh article. We think the heirs at law of the testatrix, upon her decease, took an interest in her estate, otherwise undisposed of, if any, by virtue of the thirteenth article, and that under that article this first part, on the death of Mr. Webster, goes to them; that is, to those who now le-

gally represent the two daughters of the testatrix, or who claim by succession from them, or either of them. By the terms of the eleventh article of the will, the income of this first part, if any remain, is to be paid to the lineal descendants of the testatrix, per capita, if any then living, and, if not, to the heirs at law of the testatrix. Whether this disposition of the plus income is a valid one or not, we have no occasion to consider; for the question is one of no practical importance now. It is much as all parties in interest have agreed to treat all the payments of income as made heretofore as rightfully made.

The next question is, to whom does the second part go on the death of Mr. Webster? Under the eleventh article of the will, originally drawn, this second part, on the death of both granddaughters, was to be divided and distributed equally to their children, per capita." These words, as used, are, we think, equivalent to words of conveyance, and import a gift to the grandchildren as a class, for they are the only words made use of in limiting the second part to them. *Belfield v. Boscawen*, 10 Conn. 299, 27 Atl. 585. The material question is whether they import a present taking effect in point of right at the death of the testatrix, or one taking effect in point of right at the death of both granddaughters, and we think the former is the true construction. That the general purpose and intent of the testatrix in disposing of the second part was chiefly to benefit the children and great-grandchildren, two of whom were living when the will was made and who took effect, cannot be doubted. The members of that class, born and to be born, naturally be the preferred objects of her bounty after she had made what she deemed sufficient provision for their parents and her own two children. The gift to this class, neither in terms, nor by any necessary implication, contingent; nor is the vesting of the estate in its members, in point of time, at her decease, in terms, or by any necessary implication, postponed to some future time. We think there is, in the eleventh article of the will, a gift of this second part—first, to the great-grandchildren as a class, in shares, by way of remainder; second, to the children, by way of executory devise, contingent upon the death of any member of the class before the period of enjoyment, to the children or descendants of such deceased member, and, third, in default of such issue, to the heirs at law of the testatrix. We think the gift to the great-grandchildren as a class is vested, in point of right, at the death of the testatrix, in the then two members composing the class, and in those after born as soon as born; subject, if the limitations were valid, to be defeated, as to the children, by death before the period of enjoyment. *Austin v. Bristol*, 40 Conn. 120.

v. White, 33 Conn. 294; Farnam v. Farnam, 53 Conn. 261, 2 Atl. 325, and 5 Atl. 682; Belfield v. Booth, 63 Conn. 299, 27 Atl. 585. What, then, is the period fixed for enjoyment? We think it was the death of the surviving granddaughter. It is quite manifest from the eleventh article, as originally drawn, that the entire beneficial interest in this second part was to go, on the death of both granddaughters, to their children, in equal shares. The only difference which the added provision for the husbands made was to charge this second part with what might become an additional burden during the lives of the husbands after the death of both granddaughters, and, as a consequence, to postpone its actual distribution till both husbands, as well as both granddaughters, were dead. It is clearly the intent of the testatrix, in the will as finally written, that the great-grandchildren shall, at the death of both granddaughters, take the entire beneficial use and enjoyment of this second part, subject only to the charge upon it made in favor of the husbands. As all the great-grandchildren were alive at the time of the death of Mrs. Edmond, in 1878, we think this second part then became fully and completely vested in them, both in point of right and enjoyment, subject only to the rights of the husbands of the granddaughters; and this renders it unnecessary to consider either the effect or the validity of the limitations over in case of the death of any of them before the period of enjoyment, for if such limitations, or any of them, were obnoxious to the statute of perpetuities, their invalidity would not disturb the prior estate vested in the great-grandchildren, and if, on the other hand, they were all good, yet the event never happened on which they were to take effect. It follows that since the death of Mrs. Edmond this second part has been the property of the great-grandchildren, in equal shares, and that consequently, on the death of Mr. Webster, it should go to them, in equal shares.

The superior court is advised as follows: First. The fund of \$8,000, with its accumulations, if any, should be at once paid over, one-half to the executor of Mrs. Webber, and one-half to the executor of Mr. Spalding. Second. The other half of Mrs. Hubbard's estate should be kept intact until the death of Mr. Webster, and the income thereof from the death of the last annuitant up to the death of Mr. Edmond be disposed of as follows: One-fourth to Mr. Edmond, or to his executor or administrator; one-fourth to Mr. Webster; and the balance to the four great-grandchildren, in equal shares. Since the death of Mr. Edmond said income should go, one-fourth to Mr. Webster, and the balance to the four great-grandchildren, in equal shares. Third. This entire half of Mrs. Hubbard's estate should be divided, on the death of Mr. Webster, into two unequal parts, as of the date of Mrs. Edmond's death, under

the rule given in the eleventh article of the will, and the part hereinbefore designated as the first part should then be divided equally between the executor of Mrs. Webber and the executor of Mr. Spalding, while the second part, so called, should then be divided and distributed among the four great-grandchildren in equal shares. The other judges concurred, except HAMERSLEY, J., who dissented.

LEONARD v. CHARTER OAK LIFE INS. CO.

(Supreme Court of Errors of Connecticut. Feb. 8, 1896.)

LIFE INSURANCE—PROVISIONS IN POLICY—AMOUNT PAYABLE—SCALING AGREEMENT—ASSIGNMENT OF POLICY—ACTION BY ASSIGNEE—STIPULATIONS—SET-OFF—OBJECTIONS TO EVIDENCE.

1. A provision in a life policy that all deferred premiums and unpaid premium notes should be deducted from the amount named in the policy is an extinguishment pro tanto of such amount.

2. An agreement between an insurance company and the insured and the beneficiary in a life policy for a scaling down of the amount named in the policy is binding on an assignee of the policy.

3. An agreement between an insurance company, the insured, and the beneficiary in a life policy that the amount thereof should be scaled down two-fifths is an extinguishment pro tanto of such amount.

4. In an action on a life policy, containing a provision for a deduction from the sum named in the policy of all deferred premiums and unpaid premium notes, where it appeared that, by a subsequent agreement between the company, the insured, and the beneficiary, the sum so named should be further scaled down two-fifths, and the company defended on the grounds that proper proofs of death were not made, and that plaintiff had no insurable interest, a stipulation was made abandoning all "defense to the merits of the claim," but providing that the claim should be "subject to any offsets." Held that, if the amount of outstanding premium notes and the scaling agreement were not intended as limitations on the amount named in the policy, they were "offsets," within the meaning of the stipulation.

5. Objections to evidence not raised in the court below will not be considered.

6. In proceedings by the holder of a life policy to establish a claim against receivers of the company, an objection to the admission of an agreement for a scaling down of the amount named in the policy, on the ground that such agreement provided that it was to be void if receivers were appointed, was without merit, where such provision was to take effect only in case receivers were appointed because of the failure of the scaling plan adopted by the company to keep it from insolvency, and such plan was successful, and that the receivers were not appointed until several years after the making of the agreement.

Appeal from superior court, Hartford county; Shumway, Judge.

On appointment of receivers for the Charter Oak Life Insurance Company, the superior court of Hartford county ordered all claims against the company to be presented to a special committee. From an order overruling a remonstrance by Ellie Leonard to

the report of such committee on a claim presented by her, she appeals. No error.

William F. Henney and J. Aspinwall Hodge, Jr., for appellant. Henry O. Robinson and Charles E. Gross, for appellee.

ANDREWS, O. J. The Charter Oak Life Insurance Company was put into the hands of receivers on the 22d day of September, 1886; and at a later date an order was duly passed, requiring the creditors of said corporation to present their claims to the receivers. On the 4th day of August, 1887, a committee was appointed to hear and decide upon all claims which had been or might thereafter be presented to the said receivers. Within the time limited, the present appellant presented to the receivers and to the said committee a claim against the said company predicated upon policy No. 36,775, dated December 7, 1868, on the life of Alexander Austin, for the sum of \$10,000, payable to Margaret Austin, wife of the said Alexander. On the 16th day of February, 1891, the said committee reported to the superior court for Hartford county (in which court all the said proceedings were then pending) that they had allowed the said claim in favor of the appellant to recover the amount of \$3,854.24, computed in this way: Original amount of policy, \$10,000; scaled by agreement in 1877 to \$6,000; less amount of premium notes, \$3,348; leaving due \$2,652; interest on this sum from September 21, 1886, \$1,202.24, to be added, amounting in all to \$3,854.24. The appellant appeared in the superior court, and remonstrated against the acceptance of such report. A full hearing was had. The court made a finding of facts, accepted the report, and rendered judgment accordingly. From that judgment this appeal is taken.

There are in effect but two reasons of appeal: That the court erred in sustaining the action of the committee in holding that the amount of the appellant's claim was only the sum due after deducting (1) the amount of the scaling agreement, and (2) the amount of the outstanding premium notes.

In respect to the premium notes, we are very clear that there is no error. The policy of insurance under which the plaintiff claims contains no promise to pay the sum of \$10,000, which is the sum insured, but only the sum insured, "deducting therefrom the amount of all unpaid notes given for premiums or loans by them on this policy, and all deferred premiums, if any, then existing." It certainly was not error for the committee or for the court to hold that the plaintiff could not recover a greater sum than the insurance company had, in any event, promised to pay. The amount of the premium notes was a limitation on the sum named in the policy. That amount was one of the elements from which the sum due on the policy was to be ascertained. While these notes were outstanding, the sum of \$10,000 was

not, and could not become, due. The sum of these notes was not properly an offset for an offset involves the idea of two dependent amounts, one of which is to be set over against the other. But the amount of these notes operated by the terms of the policy itself as an extinguishment of a part of the amount named in the policy. In the year 1877, Alexander Austin and Margaret Austin, both then in full life, entered into an agreement, called a "scaling agreement" with the said insurance company, by which, upon sufficient consideration, they agreed "that the amount originally payable under the terms of policy No. 36,775 . . . be the same is hereby, reduced two-fifths of the sum of ten thousand dollars to the amount of six thousand dollars, and the said policy, when it matures, shall represent a claim only for said sum of six thousand dollars, together with such interest as may be hereafter made to said policy; and the remainder of the sum originally payable in and by said policy, and all of the insured in relation to the policy, when released, are hereby fully and absolutely released, surrendered, and discharged. And it is further agreed that said scaling agreement, policy and this agreement shall be treated as one instrument, but that said original policy shall remain in full force in every respect, as varied by this agreement, and said sum is to be considered and taken, in all respects, as if it had been originally issued for the sum of six thousand dollars." Margaret Austin, to whom said policy was made payable, died in January, 1878, and by her will devised to said Alexander Austin all her interest in the same. Alexander Austin died on the 10th day of September, 1878. The present plaintiff claimed title to said policy by an assignment thereof to her from Alexander, dated April 1, 1878. Obviously she cannot possibly have any greater interest under that policy than the said Margaret Austin had. As they would have been bound by the scaling agreement, it is difficult to see why she is not also bound by it, and why the considerations applicable to the premium notes do not have equal force as applied to this agreement; that, as the amount scaled is not an offset, but an extinguishment pro tanto of the sum named in the original policy.

The plaintiff's counsel have, however, urged another view with a good deal of force and with great apparent confidence. They say, perhaps, just to them that their claims should be considered.

As already stated, the insurance company was put into the hands of receivers on the 22d day of September, 1886. Ancillary receivers were appointed in the state of New York on the next day (October 1 of September, 1886), and in various other states within a very few days. The plaintiff, who resided in New York City, brought a suit there in 1879 on said

That suit had been suffered by her to remain pending in court until 1885, when an amended complaint was filed in it, to which an answer had been duly made. On the 27th day of September, 1886, four days after the appointment of such receiver in New York, she obtained an order of attachment on the property of the company in that state, and such order was served. Shortly prior to the 30th day of July, 1886, the receivers were endeavoring to have all the assets of said company transferred from other states to the state of Connecticut for a common distribution to its creditors and policy holders. Their attorney, being in New York, sought to have all the property in that state freed from the attachment of the plaintiff and from sundry other creditors, and had certain negotiations with the counsel of the plaintiff, the result of which was that a stipulation was entered into as follows: "Ellie Leonard vs. Charter Oak Life Ins. Co. In consideration of the discontinuance of the above-entitled case, now pending in the supreme court, county and state of New York, without costs, said entry to be made on the 30th or 31st day of July, 1888, it is hereby stipulated and agreed that all defense to the merits of the claim shall be abandoned. Said claim may be proved in Connecticut, and is to be allowed subject to any offsets and claims of conflicting claimants. New York, July 30th, 1888." This stipulation was signed by the receivers by their attorney. That case was discontinued that day, and the claim was presented to the receivers in Connecticut, as has been mentioned.

The plaintiff insists that because the receivers agreed by the stipulation to abandon all defense to the merits of her claim, and that the same was to be allowed subject to any offset and claims of conflicting claimants, they are precluded from any attempt to lessen her claim from the full sum named in the policy, by reason of the premium notes or the scaling agreement. Her argument deals mainly with the word "claim," the expression "defense to the merits," and the term "offset." She urges that the claim referred to in the stipulation was the one mentioned in the complaint in the action which was discontinued. It is not material to debate this point. We assume it to be true. The claim which the plaintiff made against the insurance company may very fairly be ascertained by reading the complaint in the light of the rules of pleading in the state of New York. These rules require a plaintiff to state correctly in the complaint the nature of the claim he makes, and the circumstances out of which it arises. But, as a claim is or may be something very different from the amount of the claim, a plaintiff is not required to state that partial payments have been made (Van Demark v. Van Demark, 13 How. Prac. 372), nor that offsets exist (Giles v. Betz, 15 Abb. Prac. 283), even though such payments have been made or such offsets lawfully exist, and are perfectly

well known to the plaintiff. The statement of these is left to the defendant. While, therefore, the plaintiff's complaint may be said to state the nature of her claim, it cannot be said to state any amount as being the amount of her claim. The amount of her claim, as therein set forth, was the sum for which the policy was issued, less any lawful abatements which the defendant should set up in its answer and show to exist. Her "claim" and the "merits of her claim" mean the same thing. Each expression includes all that she could of right recover in the action. *Blakely v. Frazier*, 11 S. C. 134; *Dill v. Moon*, 14 S. C. 339. See, also, *St. John v. West*, 4 How. Prac. 331; *Rahn v. Gunnison*, 12 Wis. 528; *Oatman v. Bond*, 15 Wis. 25. By the terms of the stipulation, the receivers abandoned all defenses to the merits of the plaintiff's claim. But they retained the right to insist on all offsets to it which might lawfully exist. It is very plain, then, that the parties understood that an offset was something different from, and not included in, a defense to the merits. A defense to the merits of an action is one which denies that the plaintiff has any cause of action at all,—one which, if sustained, bars the entire action. It is a defense to the action. 1 Chit. Pl. 469; *Rahn v. Gunnison*, 12 Wis. 528; *Gould, Pl. c. 6*. Of this kind there were three, perhaps four, set up in the answer to the plaintiff's action in New York: That the said Austin committed suicide; that proper proofs of death had never been made; that the plaintiff had no insurable interest in the life of the said Austin; and that the administrators of the said Austin owned the policy. These defenses were undoubtedly abandoned by the stipulation. An offset does not deny the existence or the merits of a claim. It is a contrary sum or claim, by which a given claim may be lessened or canceled. *Century Dictionary*. If the premium notes and the scaling agreement were not limitations upon the amount named in the policy, then they were claims of this kind. They were offsets. These were not abandoned, but were retained.

The plaintiff claims that the superior court erred in admitting the scaling agreement in evidence, and also in giving it the effect of reducing the amount due by the face of the policy, because of the proviso in that agreement that it was to be void in case a receiver was appointed. It is found by the superior court, by its acceptance of the report of the committee appointed to pass upon the claims against the company, that this proviso was added "simply and only to provide for the possibility of a failure of the scaling plan then on hand, and had reference only to the immediate contingency of a receivership, and not to the possibility of new insolvency proceedings" instituted years afterwards, and when the condition of the company might have been essentially changed. It is also found that "the plan of restoring the company to its standard of solvency by means of the

scaling agreements became successful in 1878, and thereafter the company continued to do business as a mutual company for about eight years." So far as concerns the objection to the admission of the scaling agreement in evidence, on account of this proviso, it is sufficient to say it was not made in the court below. The only ground of objection there taken was that the agreement was irrelevant and inadmissible, in view of the stipulation which resulted in the discontinuance of the New York action. So far as the objection now taken relates to the effect given to the scaling agreement by the superior court in ascertaining the amount of the plaintiff's claim, it is disposed of by the finding of the committee, as above quoted. There was no appointment of a receiver until eight or nine years after the agreement was executed, and the proviso in question was without effect as respects the rights of the parties to it. Those of the plaintiff, as has been already said, were no greater than those of the parties in whose favor the policy was drawn. There is no error. The other judges concurred.

HARLEM CO-OPERATIVE BUILDING & LOAN ASS'N v. FREEBURN.

(Court of Chancery of New Jersey. Dec. 28, 1895.)

FORECLOSURE OF MORTGAGES — PARTIES — ACTION AGAINST EXECUTOR.

1. The personal representative of a deceased mortgagor, because by law the mortgage debt is primarily charged on the personal assets, need not be made a party to the foreclosure of the mortgage.

2. Where the allegations of and ends sought by the bill show ground for a defendant executor, named as an individual in the prayer for process, being in court in a representative capacity, he or she will be regarded as being there in that capacity, but not otherwise.

(Announced by the Court.)

Bill by the Harlem Co-operative Building & Loan Association against Emily F. Freeburn. Demurrer to bill overruled.

The complainant's bill alleges that on the 2d of May, 1890, Archibald D. Freeburn, being indebted to the complainant in the sum of \$5,500, together with his wife, Sarah, mortgaged to the complainant the fee of certain premises, situate in the city of Bayonne, in this state, to secure to it the payment of that money in manner specified in the bill; that on the 11th of August, 1892, Sarah, the wife of Freeburn, died; that on the 15th of April, 1895, Freeburn died, having remarried, and leaving a widow, named Emily F., and a son, named William B., Freeburn; that on the 27th of May, in the same year, his will was proved before the surrogate of Hudson county, by which, after directing the payment of his just debts and funeral expenses and legacies to his son, he gave and devised the residue of his estate, real and personal, including the mortgaged premises,

to his widow, Emily, and constituted her one Alfred Haynes executors of the last will and testament of the said Archibald D. Haynes; that Haynes renounced the executorship; that letters testamentary were issued to Freeburn alone. Emily F. Freeburn was the only defendant to the bill which was filed August 8, 1895. In the prayer for process the bill is styled Emily F. Freeburn, and is not designated as the executrix of the estate of her husband. The bill prays for relief from "said defendants," and that "the same of them," may be decreed to pay the principal sum due on the bond and mortgage with interest, and complainant's costs and charges, and, in default thereof, that "said defendants" may be foreclosed from equity of redemption in the mortgaged premises, and may deliver possession of, etc., and that complainant may have relief as may be just. To this bill Emily F. Freeburn demurs upon the ground "that the said complainants have not in said bill prayed for any decree against said defendant"; (2) "neither doth said bill pray for any answer from or relief against said defendant"; and (3) "that Emily F. Freeburn, executrix of Archibald B. Freeburn, deceased," should be made a party defendant.

Samuel C. Mount, for complainant.
Traphagen, for defendant.

McGILL, Ch. (after stating the facts) is clear that the first two grounds of demurrer are not well taken. By careless drafting the draftsman of the bill has used a phrase blank covering the prayers of the bill in the plural, with defendants to be made and has neglected to make the necessary alterations in it to make the prayers refer to a single defendant. It may be possible that hereafter appearing, that he considered Mrs. Freeburn a defendant in a representative capacity, and therefore to be treated in the plural. However this may be, it is obvious upon inspection of the bill, that the use of defendants in the plural was a mistake, which, including the single defendant, would not lead to any confusion. Within the bill, the defendants, the bill does pray a decree against the demurrant and that she answer. The third ground of demurrer, that Mrs. Freeburn should be made a party as executrix of her husband's will—this I think is not well taken. The personal representative of a deceased mortgagor, because by law the mortgage debt is primarily charged on the personal assets, need not be made a party to the foreclosure of the mortgage. If the heir desires the benefit of having the personal estate applied in exoneration of the real, he must enforce the right by bill. *Story, Eq. Pl. §§ 175, 196; 1 Dantzler v. Prace, 283; Duncombe v. Hansley, 3 P. 333, note; Bradshaw v. Outram, 13 V. 333.* But the mortgagee need not look to the personal assets of the estate. He may proceed to foreclose the equity of redemption.

the mortgaged premises in which the heir alone is concerned. But it is urged that the executor, as the representative of the creditors of the mortgagor, should be made a party. The argument is that for a year after the death of the mortgagor his equity of redemption in the mortgaged premises is subject to the lien of his debts, in virtue of the statute (*Den v. Hunt*, 11 N. J. Law, 1; *Bockover v. Ayres*, 22 N. J. Eq. 1; *Haston v. Castner*, 31 N. J. Eq. 697; *Trimmer v. Todd*, 32 N. J. Eq. 426, 28 Atl. 583), and, in this case, that the real estate is charged with the payment of debts by the will, because of its provision for their payment and the subsequent disposition of the residue of the estate as blended realty and personality (*Stevens v. Flower*, 46 N. J. Eq. 340, 19 Atl. 777), and that this court will not proceed with the foreclosure suit until all existing incumbrancers, subsequent to the mortgage foreclosed, shall be made parties to the suit (*Gould v. Wheeler*, 28 N. J. Eq. 541; *Vanderker v. Holcomb*, 17 N. J. Eq. 87). The primary difficulty with this position, and a difficulty which precludes the necessity of discussing the propositions presented, is that upon demurrer we are confined to the allegations of the bill, which are to be taken as true, and that it does not appear among the allegations of the present bill that there will be a deficiency of personal assets to pay debts, or, in fact, that there are any debts to pay. It is true that the will contemplates debts, but it does not follow from that contemplation that there are in fact debts.

The complainant argues that the executrix is a party, because Emily F. Freeburn, against whom process is prayed, appears by the allegations of the bill to be both executrix and devisee, and, that appearing, she need not be styled in those several capacities in the prayer for process. Being brought in court in her proper name, she is there for all the purposes of the bill. It is true that she is in court for all the ends obviously sought by the bill. That is, she is in court as devisee, because, as such, she is the owner of the equity of redemption, but she is not there as executrix, because no allegation of the bill discloses a necessity for her being there in that character. As I have said, there is no charge of the existence of debts which the personality will not satisfy, or of the existence of debts at all. The bill does not intimate a purpose to foreclose redemption by creditors or by the executrix in their half. Where the allegations of and ends sought by the bill show ground for a defendant, named as an individual in the prayer for process, being in court in a representative capacity, he or she will be regarded as being there in that capacity; but not otherwise. *Ans v. Evans*, 23 N. J. Eq. 71; *Ransom v. Er*, 30 N. J. Eq. 249; *Plaut v. Plaut*, 44 N. J. Eq. 18, 13 Atl. 849; *White v. Davis*, 48 N. J. Eq. 22, 21 Atl. 187. I will overrule the demurrer, with costs.

ESTES et al. v. HOME MANUFACTURERS' & TRADERS' MUT. INS. CO. SAME v. AMERICAN MANUFACTURERS' MUT. INS. CO. SAME v. AETNA MUT. FIRE INS. CO.

(Supreme Court of New Hampshire. Merrimack. July 28, 1893.)

INSURANCE—CONDITIONS—WAIVER.

1. An insurance broker solicited applications for insurance, which were sent by him to the agents of the insurance companies, by whom policies were sent to the broker. The premiums were charged to the broker, but the companies had no claim against him unless the premiums were collected. *Held*, that a finding by the jury that the broker was the "duly-authorized" agent of the companies, within the meaning of a provision in the policies requiring payments of premiums to the company, or its duly-authorized agents, within a certain time, would not be disturbed.

2. Where it appears that the companies had frequently accepted premiums on policies sent to the broker after the expiration of the time within which the premiums were required by the policies to be paid, a finding by the jury that the companies waived their right to avoid policies sent such broker for nonpayment of premiums within the required time will not be disturbed.

Case reserved from Merrimack county.

Assumpsit by E. B. Estes & Son against the Home Manufacturers' & Traders' Mutual Insurance Company, and against the American Manufacturers' Mutual Insurance Company, and against the Aetna Mutual Fire Insurance Company. Reserved for consideration of this court. Case discharged.

Assumpsit on insurance policies upon the plaintiffs' stock of goods in their store in New York City. Facts agreed: The plaintiffs applied to Abraham Barker, an insurance broker in New York City, for the insurance, and he sent the application to Morrill & Danforth, of Concord, N. H. Morrill, of this firm, was the secretary of the defendant corporations, Danforth was the treasurer, and the firm were their agents. They wrote the policies under date of May 16, 1890, and sent them to Barker, and charged the premiums to him on their books. They had previously issued policies upon similar applications from Barker, and charged them to him, but they had no claim against him unless he collected the premiums from the insured. The policies were not in the New Hampshire standard form, but were such as were issued by the defendants upon property located outside the state. They contained the following provisions: "If the premium hereon is not paid to this company within thirty days from date of this policy, it shall be null and void. * * * If any broker or other person than the assured have procured this policy, or any renewal thereof, or any indorsement thereon, he shall be deemed to be the agent of the assured, and not of the company, in any transaction relating to the insurance; and the payment of the premium to any person or persons other than to the company or its duly-authorized agent shall be at the risk of the assured." The plaintiffs paid the pre-

ers, on the overruling of their motions for dismissal of the proceedings, filed petitions for new trials of their motions. Petitions dismissed.

Edmund S. Hopkins and Irving Champlin, for Abby A. and Mary C. Billings. John W. Hogan, Stephen O. Edwards, and Walter F. Angell, for Tobias Burke. Francis Colwell, City Sol., and Albert A. Baker, Asst. City Sol., for city of Providence.

MATTESON, C. J. This is a proceeding under the act of February 22, 1854, entitled "An act in relation to laying out, enlarging, straightening or otherwise altering streets in the city of Providence," commonly called the "Betterment Act," and the several acts in amendment thereof. The purpose of the proceeding is the layout and widening of Washington street, in Providence, between Eddy and Walker streets. Commissioners were appointed, as provided in the act, by a decree of this court entered October 22, 1892. They made their report to the court May 3, 1894. In this report, among the estimates of the loss and damage over and above the benefit and advantage accruing to the owners and parties interested in the lands taken for the widening of the street, was the following: "To Abby A. Billings, Mary C. Billings, Tobias Burke, assignees of the lessees, on lot 355, plat 25, three thousand nine hundred and sixty-two dollars (\$3,962.00)." On June 25, 1894, the city council of Providence elected to make the improvement. The act provides that the commissioners shall set forth in their report, not only the names of the respective owners, lessees, parties, and persons interested in the lands, tenements, hereditaments, and premises, and an apt and sufficient designation or description of the respective lots or parcels of lands and tenements, hereditaments, and premises required for the improvement, but also the loss and damage, benefit and advantage, to each. It further provides that on the coming in of the report the court shall, after giving notice to the parties interested, and after hearing any matter alleged against the same, either confirm the same or refer it, in whole or in part, to the commissioners for revisal and correction, or to new commissioners, as the court may think fit, who shall return the same to the court without unnecessary delay, which shall be confirmed or again referred as aforesaid, as right and justice shall require, until a report shall be made which the court shall confirm. Portions of the report, including that relating to Abby A. and Mary C. Billings and Tobias Burke, quoted above, not being in conformity to the requirement of the statute, in that they did not set forth the loss and damage to the respective owners, lessees, and parties interested, separately to each, but awarded one entire sum to the owners, lessees, and parties interested in the lands required, though their interests were

distinct, were committed by the court, in accordance with this provision of the statute, to the commissioners for revisal and correction. On February 8, 1895, the commissioners filed their amended report, by which they apportioned the sum awarded to Abby A. Billings, Mary C. Billings, and Tobias Burke as aforesaid, as follows: "To Abby A. Billings & Mary C. Billings, \$3,702.00; to Tobias Burke, assignee of the lessees on lot 355, plat 25, \$260.00; total, \$3,962.00." On March 30, 1895, Tobias Burke moved to dismiss the proceeding, and on April 1, 1895, a like motion was filed by Abby A. and Mary C. Billings. These motions were, on June 1, 1895, overruled by the common pleas division, in which the proceeding has been pending since the judiciary act took effect. Thereupon, the moving parties filed their petitions for new trials of their motions. P. L. R. I. c. 991, § 3, of April 26, 1872, amending the act of February 22, 1854, provides that notice be given by the city clerk upon the filing in court of the report to all persons named in it, to the effect that all persons aggrieved by the report must file with the clerk of the court a notice in writing of intention to claim a jury trial. Section 2 of the same chapter provides that any person so aggrieved shall, within 30 days from the reception by him of such notice, file with the clerk of the court a notice of his intention to claim a jury trial; and that, in case of a failure so to do, he shall not be entitled to a jury trial. Section 1 of the same chapter provides that the city council of Providence, within 60 days after the commissioners have filed their first report in court, shall elect whether they will make the improvement described in the report or not; and the original act provides that after such election the city of Providence shall become seised of all the lands, tenements, hereditaments, and premises mentioned in the report required for the improvement.

It is argued in support of the petitions that in proceedings of the nature of the one under consideration there must be a strict compliance with the terms of the statute which are made for the benefit and protection of the individual whose property is taken against his will; that in the present instance there was no strict compliance with the statute with reference to the property of the petitioners, since the commissioners disregarded the plain and unequivocal command of the statute to set forth in their report the names of the respective owners, lessees, parties, and persons interested in the lands, tenements, and premises proposed to be taken, and an apt and sufficient designation or description of the respective lots or parcels of lands, tenements, hereditaments, and premises so proposed to be taken, with the loss and damage, benefit and advantage, to each of such owners, lessees, parties, and persons interested, but instead of so doing made a joint award to the said Abby A. and Mary C. Billings and To-

bias Burke, the interest of Burke being a leasehold interest, distinct from that of Abby A. and Mary C. Billings as the owners of the lot; that such an award was no award, both because contrary to the statute and also because contrary to the general rule of law that where there are distinct estates or interests in the same tract, such as leaseholds, life estates, mortgage interests, and the like, there should be a separate award to the owner of each estate or interest (Lewis, Em. Dom. § 575; Rentz v. Detroit, 48 Mich. 544, 12 N. W. 694, 911); that there is no provision of the statute whereby the city can acquire any seisin of the lands except on the election of the city council to make the improvement within 60 days after the commissioners shall have made their first report, which election was made by a vote of the city council passed June 25, 1894, and hence, that all the land that the city acquired for the improvement it acquired by the proceedings prior to and on June 25, 1894; that, if these proceedings were regular as to the land in question, it was taken; otherwise not. The argument is plausible, rather than convincing. The fallacy of it is that it regards the recommitment of the report and its amendment as a distinct and independent step in the proceedings, and as having no effect on the prior proceedings because subsequent in time. The errors of the commissioners in not apportioning the awards in the several instances among the several persons interested in lands required to be taken according to their respective interests as owners, or as holders of leasehold or mortgage interests, did not affect their jurisdiction, but was a mere irregularity, which was cured by the recommitment of the report in accordance with the statute and its amendment by the commissioners. When the amended report was filed, it related back to the filing of the original report. The amended awards contained in it became in legal effect the same as if in the original report. The proceedings were thereby not only made to conform to the statute, but to conform to it as of the date of the filing of the original report, and so to constitute a sufficient basis for the election of the city council to make the improvement and the seisin of the city of the land required consequent on that election. This was apparently the view of the effect of a recommitment of the report and its amendment entertained by the court in Tingley v. City of Providence, 9 R. I. 388. But, were this otherwise, the petitioners are in no position to take advantage of the defect. The order recommitting the report recites that it was made "upon motion of parties interested to recommit and refer portions of said report affecting the respective interests of said several parties to said commissioners for revisal and correction as to such portions," etc. There was a dispute at the hearing as to the correctness of this recital, the petitioners contending that the recommitment was on the motion of the city solicitor, and not of themselves. We

think that the recital of the record must be regarded as conclusive of the matter, but we do not deem it material, for it does not appear that any exception was taken by the petitioners to the recommitment of the report, even such action was taken on motion of the solicitor. The recommitment must be considered, therefore, as made with their acquiescence or consent, if not on their motion. They ought not to be permitted, now that the commissioners have proceeded to act on the recommitment, and have returned an amended report, to urge the objection. Where an irregularity has been committed by a party knowing of it, who consents to a proceeding which he might have prevented by insisting it on that account, waives thereby his exception to such irregularity. Tingley v. City of Providence, 9 R. I. 388, 389; Patten v. Manufacturing Co., 11 R. I. 188, 189; R. I. v. Cruger, 7 Johns. 611. And it matters not that the irregularity is the failure to observe or perform a statutory requirement, for a statutory, or even a constitutional, provision may be waived by one entitled to the benefit of its observance or performance. Lewis, Em. Dom. § 531; Cooley, Const. Lim. 214; Tress v. Effingham, 17 N. H. 585; Stevens v. Goffstown, 21 N. H. 454; Embury v. Coffey, 3 N. Y. 511; Lee v. Tillotson, 24 Wend. 387. In re Cooper, 93 N. Y. 507.

The petitioners filed notice of their intention to claim jury trials within the 30 days prescribed by P. L. R. I. c. 991, § 2, of April 1872, and their demands for a jury trial in accordance with such notice, so that it is unnecessary to consider the question whether the absence of such a notice of intention to claim seasonably filed after notice of the filing of the original report, the court has power to grant a jury trial to a party aggrieved by the amended report on the filing of such report. Petition for new trial denied and dismissed, and proceeding remitted to the common law division.

In re BLAKELY et al.
(Supreme Court of Rhode Island. Jan. 3, 1895.)
TESTAMENTARY TRUSTEE — DISCRETIONARY POWERS.

Discretionary powers conferred on a trustee by a testator should be held as annexed to the office, and not personal to the original trustee, where the will does not show that they were conferred because of any personal confidence reposed in such trustee, and withholding their exercise by a successor would defeat the object of the trust.

Petition of William Blakely and others for the construction of a will.

Walter H. Barney, for petitioners. See also Norris, Jr., for guardian ad litem.

PER CURIAM. We are of the opinion that the discretionary powers conferred on the testator on the original trustee were intended by the testator to be annexed to

office of trustee, rather than to be personal to the original trustee, and hence that they can be exercised by the new trustee. Our reasons for this opinion are (1) that there is nothing in the language to show that the powers conferred were because of any peculiar confidence reposed by the testator in the person originally named as trustee; and (2) to withhold the exercise of the discretionary powers by the new trustee would have the effect to defeat the object of the trust. *Burdick v. Goddard*, 11 R. I. 516, 518.

TAYLOR, Tax Collector, v. NARRAGANSETT PIER CO.

(Supreme Court of Rhode Island. June 8, 1895.)

TAXATION — ASSESSMENT — DESCRIPTION OF LAND.

1. Under Pub. St. c. 42, § 4, providing that, in assessing taxes, "separate tracts or parcels shall be separately described and valued as far as practicable," the assessment of several separate and distinct parcels of land under a common description will be invalid, when it is not shown that it was not practicable to describe and value them separately.

2. An assessment which includes several tracts of land under the common description of "beach" is invalid, where it appears that such description does not identify the land with certainty, and the owner cannot tell from it whether other lands than his own are not included therein.

Action of assumpsit by Ezbon S. Taylor, collector of taxes, against the Narragansett Pier Company, for taxes. Certified from the common pleas division on agreed statement of facts. Judgment to be for defendant.

Frederick C. Olney, for plaintiff. Benjamin W. Case, for defendant.

PER CURIAM. At the time of the assessment, the defendant owned six separate and distinct parcels of land, shown on the plat put in evidence on the trial, and particularly described in the account of the ratable estate of the defendant, a copy of which account is annexed to the agreed statement of facts. In the assessment, these various parcels, instead of being separately described and valued, as required by Pub. St. R. I. c. 42, § 4, are all included under the designation "beach." No circumstances appear to show that it was not practicable separately to describe and value the several parcels. As the assessment was not in conformity with the requirement of the statute, it must be held to be invalid. *Young v. Joslin*, 13 R. I. 675; *Evans v. Newell*, 18 R. I. 38, 25 Atl. 347.

The assessment must also be held to be invalid because it is so vague and uncertain that it does not identify the lands assessed. The owner could not know from it what lands were assessed, nor whether the lands of other persons might not be included in it. *Evans v. Newell*, supra, and cases cited.

The case is remitted to the common pleas division, with direction to enter judgment for the defendant for its costs.

STATE v. CONLON.

(Supreme Court of Errors of Connecticut. Jan. 24, 1895.)

LICENSES—TRANSIENT BUSINESS—TRANSIENT AND TEMPORARY BUSINESS—CONSTITUTIONAL LAW.

Pub. Acts 1893, p. 271, c. 121, entitled "An act concerning sales of merchandise by itinerant peddlers," providing that city and town authorities may issue licenses to such persons as they find proper to engage in a temporary or transient business, for the sale of goods, wares, and merchandise, for a term not exceeding a year, on applicant paying a fee not less than \$1, nor more than \$100, as the authorities may direct, and making it a misdemeanor to engage in any such business, except in the sale of farm and sea products, without a license, being a trade regulation of harmless business, authorizing the granting of exclusive privileges at the discretion of the authorities, violates Bill of Rights, § 1, declaring all men equal in rights, and that no man or set of men are entitled to exclusive privileges from the community.

Appeal from superior court, Tolland county; Prentice, Judge.

William Conlon was convicted of selling without a license, in violation of Pub. Acts 1893, c. 121, and appeals. Reversed.

Charles E. Perkins and Jeremiah J. Desmond, for appellant. Joel H. Reed, State's Atty., for the State.

HAMERSLEY, J. "An act concerning sales of merchandise by itinerant peddlers" contains the following provisions:

"Section 1. The mayor of any city, the warden of any borough, and the selectmen of any town, may issue a license to such persons as they find proper persons to engage in a temporary or transient business, in one locality, either in a building, tent, or other premises, for the sale of goods, wares and merchandise, * * * in their respective cities, boroughs, or towns, for a term not exceeding one year, upon the applicant paying to such municipal corporation a fee not less than one dollar nor more than one hundred dollars, as the authority issuing such license may direct. * * *

"Sec. 2. Any person engaging in any business mentioned in section one of this act, except in the sale of articles that are the product of a farm or of the sea, without obtaining a license therefor, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than seven dollars nor more than two hundred dollars, or imprisoned not less than thirty days nor more than six months, or both."

Pub. Acts 1893, p. 271.

The state's attorney for Tolland county filed an information charging the defendant with a misdemeanor under this act in the sale of boots and shoes at a store in the city of Rockville. The defendant demurred to

the information, because the statute is void, as being contrary to the provisions of the constitution of Connecticut and of the constitution of the United States, and to the principles of natural justice. The demurrer was overruled; and the defendant was tried, convicted, and sentenced. This is an appeal from the judgment of conviction; and the only error assigned by the defendant is the action of the superior court in overruling the demurrer.

The legislature has power to require a license for the transaction of any business, either for the purpose of raising a revenue, or for the purpose of regulating the conduct of such business, as public interests may demand. This power, however, is, in the manner of its exercise, subject to the limitations embodied in the constitution, including in that term the constitution of the United States as well as that of Connecticut. The former, so far as it relates to such question, is in reality a part of the latter, and must be so regarded by this court in determining the validity of any legislative act. The question whether or not a particular law is obnoxious to any such limitation does not depend upon the wisdom of the law. We therefore dismiss as immaterial all considerations urged in argument as to the propriety of this legislation, and consider only the legal effect of the act, and the power of the legislature to enact such a law.

1. What is the legal effect of the act? The validity of the law in this case depends upon its real legal effect, and not merely upon its phraseology. In determining whether any law invades a right secured by constitutional enactment, the court looks at the essence as well as the form. In *re Clark*, 65 Conn. 17, 31 Atl. 522. The act is not an exercise of the power of taxation. This is too plain for argument. It is purely a trade regulation; and the crime of which the defendant was convicted consists solely of the violation of such regulation. The power, first, to regulate the conduct of all business, or of any particular business, harmless in its nature, and which every citizen has the right to carry on; and, second, to regulate, even to the extent of prohibition, any business in its nature injurious to the public,—is vested in the legislature in the broadest terms; but the exercise of that power in the two cases is governed by different principles. In the latter case the controlling object is giving to the public that protection from danger which the state is bound to give, and ordinarily the legislature must be the judge of the degree of danger and of the required protection. It may restrict the business by requiring large license fees, or by other protective regulations; and it may restrict the conduct of the business to a limited number of persons, or to persons possessing certain qualifications, to be determined by public officers to whom the administration of the law is given, or, in certain cases, to such persons

as these public officers may select; treating the persons intrusted with the business as quasi public officers, and authorizing their selection on grounds of special fitness, similar to those applicable to the appointment of any state officer or agent. Illustrations of such regulations of a business dangerous to the public are found in the cases maintaining the power of the legislature to establish them are too numerous to cite.

But the law in question is not a regulation of a business dangerous to the public; it does not come within the special principle applicable to such regulations. It relates to all business "for the sale of goods, wares and merchandise," to the bread and meat essential to the support of life, and to every commodity a human being has need of. The only distinction made by the law is between a business that is temporary and transient and all other business. It does not define a "temporary or transient" business. Such phrase has no technical legal meaning. The natural meaning of the words as generally understood does not furnish a definite guide to what the statute permits and prohibits. Its validity might perhaps be questioned on the ground that the language used is too vague to constitute and define a crime, but that question was not discussed in argument. The defendant is punished for selling boots and shoes in the conduct of a temporary and transient business. There is nothing in the nature of such business dangerous to the public when called "temporary" than if called "permanent." There is no distinction as to public danger between a boot and shoe business conducted by a person for an indefinite time, and the same business conducted after his death, by his executor, or the settlement of his estate, for a short definite time. The statute does not distinguish between any temporary business involving danger to the public and one peculiar to itself. It draws no line of distinction except between a business that is temporary and one that is not temporary. One is no more dangerous to the public than the other. One is no more essential to the conduct of human affairs than the other. Indeed, it would be impracticable to carry on the necessary transactions of life without the "temporary and transient business for the sale of goods, wares and merchandise." It may be that future conditions will produce a general conviction that any temporary business is as dangerous to public morals and good order as lotteries, disorderly house-keeping shops, or those suspicious vagrants more than 200 years ago were called "rascals and petty chapmen," and whose business was absolutely prohibited. 3 Col. 435. It is unnecessary to consider how the legislature may anticipate common perilence in declaring a business generally regarded as harmless and lawful to be dangerous to public morals and order. It is enough that the legislature has made no

tion as to the business under discussion. The act therefore must be held to deal with temporary or transient business for the purpose of regulating an ordinary and lawful business essential to the conduct of human affairs in which all citizens have an equal right to engage. The legislature has full power to regulate such a business, but its power must be governed by very different principles from those which may govern regulations of a business in its nature peculiar to the public. In the one business every citizen has an absolute right to engage; in the other all citizens have the right, and no citizen has the right, to engage. The difference is

that in the regulation prescribed by this act there is simply a prohibition of the business unless a license is obtained from the municipality where the business is to be conducted. If the terms on which such license should be granted were different, a different question would be presented.

If the legislature believes that fraud in the conduct of any kind of business is a public evil, it may undoubtedly prevent it by way of security against such fraud. If the persons engaging in such business are increasingly liable to be detected in the conduct of any kind of business, it may undoubtedly prevent it by way of security against such fraud.

In Massachusetts, "An act to prevent and punish fraud in sales of goods, wares and merchandise at public or private sale by peddlers, and to regulate such sales," recently passed. The act attempted to regulate "itinerant vendors" so as to include transient business, provided security for customers by requiring a deposit of money to be made with the state, and by other regulations, and required the amount of license fee charged to be ascertained according to law, and a license to be issued to those who complied with the law. This act did not violate the Massachusetts Constitution by a majority of the supreme court.

Com. v. Crowell, 156 Mass. 215, 30 N.E. 1015. However such an act might be held under our constitution, it is wholly different from the act under discussion, which forbids the transaction of the business without a license, but permits the local authority to grant a license to one, and to refuse to another, in pursuance of a discretion guided and unrestrained by law. It provides "The mayor may license such persons as he finds to be proper persons to engage in temporary business for the sale of goods, wares and merchandise," and "any person engaging in such business without obtaining a license therefor shall be guilty of a misdemeanor." The unrestrained power of selecting the favored recipients of a license is left to the mayor. All persons who cannot obtain this special privilege are forbidden to engage in the business under a penalty that extends to a fine of \$200 and imprisonment in the common jail for six months. If

the word "may," as here used, could be given the effect of "shall," the question would be presented in a little different form. It would be our duty to construe "may" as "shall," if necessary to give effect to an act, and the context would permit such construction. But here the context plainly forbids that construction. The conditions of the act do not support a mandate to issue a license upon compliance with rules established by law. On the contrary, they clearly provide for the exercise of a discretion unrestrained by law. The phrase "such persons as he finds proper persons to engage in a temporary business" is too vague to support any definite judicial or quasi-judicial action. There is not a regulation established which the licensees are bound by law to observe, and there is absolutely no legal test and no indication of who may be a "proper person." Without some test fixed by law, every person must be presumed to be a proper person to conduct an ordinary and lawful business. The mayor is authorized to select from those legally presumed to be proper persons such as he finds proper. The necessary legal effect of this phrase is "such persons as he pleases." So that, if "may" were construed as "shall," the act would then say: "The mayor shall license such persons as he pleases." Again, the provision giving the mayor absolute power to fix the license fee at \$1 for one year, or \$100 for one day,—i. e. to fix the license fee so that it shall be, at his pleasure, either nominal or prohibitive,—in connection with the other provisions, renders it certain that the purpose of the statute, as well as its legal effect, is to authorize the mayor to permit or forbid the transaction of an ordinary lawful business at his pleasure. This purpose of the act to secure to favored persons special privileges in the conduct of a lawful business, open of right to all citizens, is further indicated by the provision that exempts from the operation of the act "articles that are the product of a farm or of the sea."

We can find no escape from the conclusion that the legal effect of the act is to authorize the local officers of each municipality to grant exclusive privileges to such persons as they please in the transaction of a lawful business essential to the conduct of human affairs, and in which each citizen has an equal right to engage for the support of life.

2. Has the legislature power to enact such a law? The constitution of Connecticut is somewhat peculiar in its limitation of legislative power. The "legislative power of this state" is, in the broadest terms, vested in the "general assembly." This power is, in a certain way, defined and limited by the provisions dividing the powers of government into distinct departments, and by those relating to the operation of the state government and duties of particular officers. But, unlike the constitutions of many states, it contains no specific limitations on the exercise of legislative power, except some slight restrictions in one or two recent amendments. The limitations, however,

are no less real, and perhaps more effective, than if phrased in specific terms. Our bill of rights constitutes the fundamental condition on which all powers of government can be exercised. Its more definite declarations are chiefly concerned with the administration of justice, especially of the criminal law, the preservation of the trial by jury, the protection of private property from confiscation for public use, the right of the citizen to bear arms, and the subordination of the military to the civil power; but the protection of the citizen in the equal enjoyment of those essential rights belonging to citizens of a free government is guaranteed, not in narrow phrases of detailed statement, but in terms as broad as those which vest the legislative power in the general assembly or the judicial power in the courts. The bill of rights begins as follows: "That the great and essential principles of liberty and free government may be recognized and established, we declare, that all men when they form a social compact, are equal in rights; and that no man or set of men are entitled to exclusive public emoluments or privileges from the community." No legislative act is law that clearly and certainly is obnoxious to the principle of equality in rights thus solemnly made the condition of all exercise of legislative power. It is patent that not everything that can be called a "right" is included in this guaranty. The protected rights are those that inhere in "the great and essential principles of liberty and free government" recognized in the course of events that resulted in our independence, and established by the adoption of our constitution. The language used is purposely broad, as the language in reference to the absolute power of legislation is broad; and the relation of limitation to power can, in the nature of things, be settled only through specific applications as emergencies arise. Among the principles thus established were those universally accepted as so essential to free government as to justify the resort to armed rebellion in our war of independence; and, of these, equality under the law, in the rights to "life, liberty, and the pursuit of happiness," was clearly recognized.

Upon the first establishment of government in Connecticut, reliance for the security of civil rights and liberties was placed on the fact that the legislature, in which was concentrated all powers of government, depended on the free and annual election of the people; but as early as 1650 the free enjoyment of certain "liberties, immunities and privileges" was recognized as essential to the stability of commonwealths, and the denial thereof as threatening their ruin. The enjoyment of such rights, however, was then recognized as due only to "every man in his place and proportion." Code 1650, p. 1. The full recognition of the principle of equality in rights, as well as of the necessity of protection by a fundamental law, was of later growth. In 1672 the right of every man to "enjoy the same justice and law within this colony" was recognized. Revision of 1672. These principles were embodied in a statutory

declaration of rights, which remained substantially unchanged until the adoption of our constitution. During the period preceding and following the Revolution, the conviction became general that equality under the law in the enjoyment of certain rights was so essential to free government that it must be defended against invasion even from the lawful power. In a proclamation issued June 1776, Gov. Jonathan Trumbull expressed the conviction of the colony of Connecticut, maintaining that the people "form themselves into society, and to set up and establish a government for the protection and securing their lives and properties" from invasion by those "appointed by the people the guardians of their lives and liberties," and that the king of Great Britain in "depriving of our natural, lawful, and most important rights, and subjecting us to the absolute and controul of himself, and the British legislature," justified a rebellion. 15 Col. Rec. And the declaration by congress that equality under the law, in the right to life, liberty, and the pursuit of happiness, is a self-evident truth, was formally approved by this assembly November 7, 1776 (1 Rec. Conn. pp. 3, 4) and in August, 1777, was ordered to be recorded at length in the state records, "that the memory thereof may be preserved to posterity" (1 Rec. Conn. 367). It was an express avowal of our constitution "effectually to secure and perpetuate the liberties, rights and privileges" derived from our ancestors. It is clear that our bill of rights in its principle of equality among those principles essential to liberty and free government to establish which it declares that all members of our political society are equal in rights, and that "no man or set of men are entitled to exclusive public emoluments or privileges from the community." Our legislation affecting the important interest has been so generally confined within the clear lines of legislative power that there has been no occasion to question the limitations of the first section of the bill of rights. The nearest approach to a justification on this subject is in *Norwich City Gas Co. v. Gaslight Co.*, 18 Conn. 38, where the court holds that, if the law then under consideration can be viewed as intended to operate as a discriminating restriction upon carrying on an ordinary business in respect to which the government has no exclusive prerogative, it comes directly within the definition of a monopoly, and may be obnoxious to the first section of the bill of rights. The application of the bill of rights, approved in that case, is plainly satisfactory to the decision of this. We entertain no doubt of its correctness, and feel bound to hold distinctly that an act of the legislature having the only legal effect of which is to grant exclusive privileges in the conduct of an ordinary lawful business, in respect to which the government has no exclusive prerogative, is obnoxious to the first section of the bill of rights and void. There is, in respect to its va-

action between such a law and one giving such privileges to be granted by state officers in the exercise of a mere discretion, wholly uncontrolled by

upon which the information against defendant is based, so far as its provisions give the right to engage in any lawful "transient" business, cannot operate as to make engaging in such business a misdemeanor, and therefore the information does not show any legal offense.

It is unnecessary to consider the other grounds upon which the defendant demurred to the information. There is error in the judgment of the superior court, and it is reversed. The judges concurred.

CONDEMNATION OF CERTAIN LAND FOR NEW STATEHOUSE.

Supreme Court of Rhode Island. Jan. 8, 1896.)

DOMAIN—TAKING LAND FOR STATEHOUSE OF TAKING—FIXING VALUE—WHAT ORDERED—LOCATION OF IMPROVEMENT.

Pub. Laws, c. 1201, creates a board of commissioners with power to acquire a site for a new statehouse, and all the powers of condemnation conferred upon towns by Pub. Laws, c. 285, § 5, enacts that at the time mentioned in the notices given by the clerk of the board in accordance with the preceding section, the board shall adjudge whether the taking of the land is a public necessity; and, if that be affirmatively, the property shall "from that time" be deemed to have been taken. *Held*, that the commissioners must regard the time when the court adjudicates a public necessity for the land as the time of taking, in determining the value of the land when taken.

In the proceedings to condemn certain land for a new statehouse, as provided by Pub. Laws, c. 1201, it appeared that the state had previously acquired by purchase a large tract of land to be condemned as a site for the new statehouse. *Held*, that the commissioners considered the enhancement in value of the land condemned, due to the proposed improvement.

In condemning lots for a site for a statehouse under Pub. Laws, c. 1201, the commissioners, in making the award to the owners, should not add, to the area of the lots on the streets condemned, one-half the width of the streets.

The proceeding by the board of statehouse commissioners to condemn land for a statehouse, and the motion by such board to set aside the award and to quash the proceeding was denied. The board moved for a new trial of the case. *Denial*.

For report, see 33 Atl. 448.

C. Dubois, Atty. Gen., and Arnold for the State. Warren R. Pree, pro for Abby F. Sessions et al. James M. for Anne B. F. Woods et al. James H. for Elizabeth Francis et al. Amasa for Richmond Viall.

MATTESON, C. J. Pub. Laws R. I. c. 1201, of May 24, 1893, created a board of statehouse commissioners to select and acquire a site for a new statehouse, either under the provisions of Pub. Laws R. I. c. 913, or by purchase, or by condemnation, and to locate thereon a new statehouse. The chapter directed that the site should be acquired in the name of the state, and, for the purpose of acquiring land by condemnation for the site, gave to the board the powers of condemnation conferred on towns for the purpose of taking land and property for a water supply by Pub. Laws R. I. c. 285; and provided that, in case the board should so take any land, it should proceed in all matters in relation to such land as directed in Pub. Laws R. I. c. 285. The board so created, on May 26, 1894, in accordance with Pub. Laws R. I. c. 285, § 4, filed in the clerk's office of the common pleas division a certificate that it had taken all that land bounded by Smith, Gaspee, and Francis streets in Providence, which had not been purchased already by the state, including that part of Brownell street lying between Francis and Smith streets. Accompanying this certificate was a plat on which was delineated a location and description of the land taken, and which contained also a list of owners and persons interested in the land. Thereupon the clerk of the common pleas division gave the notices prescribed by Pub. Laws R. I. c. 285, § 4, to the owners and persons interested in the land, to appear and be heard in reference to the necessity for the taking and the appointment of commissioners to appraise the damages accruing to them by means of the taking of their property, estates, or rights of property. On July 9, 1894, the common pleas division, in pursuance of the notices so given, after hearing the parties in interest, adjudged the taking to be a public necessity, and appointed three commissioners to appraise the damages sustained by the persons whose property, estates, or rights of property had been taken. The commissioners so appointed heard the parties interested and the evidence adduced, made their awards for the damages sustained, and filed their report in the common pleas division, which was opened March 1, 1895. On November 25, 1895, the board of statehouse commissioners filed their motion to set aside the awards and to quash the proceeding: "(a) Because the commissioners, in making the awards, allowed the owners of the lands condemned an increased value to their lands, created by the location of said statehouse, said location being the purpose for which said lands were condemned; (b) because the commissioners have allowed said owners for the streets in front of their lots, as if said streets were a part of said lots, and held by the same title as said lots." This motion was heard and denied by the common pleas division. Thereupon the board of statehouse commissioners excepted to the ruling denying the motion, and filed their petition for a new trial of the motion, which is now before us for consideration.

The board of statehouse commissioners base their first objection on the following passages from the report of the commissioners of appraisal: "We have taken fully into account, in our award, such enhancement of value as, in our judgment, properly attached to the property condemned at the time of condemnation by reason of any and all improvements decided on previous to the 9th day of July, 1894. * * * We have earnestly endeavored to so make our award that all persons whose lands have been taken shall be no worse off than their neighbors whose lands have not been taken. Our award in each and every case is made as of July 9, A. D. 1894." The board of statehouse commissioners urge that it thus appears on the face of the report: (a) That in the judgment of the commissioners of appraisal the land taken was enhanced in value by the improvement decided on; (b) that they have appraised the value as of July 9, 1894; (c) that, as the board of statehouse commissioners had authority to condemn land for a statehouse only, and instituted proceedings for such condemnation by filing their certificate on May 24, 1894, and thereby publicly announced the location of the proposed statehouse, the report shows that the commissioners added to the value of the land the enhancement which had accrued to it between May 26th and July 9th; and (d) thus condemned the state to pay the land value plus the enhancement. They contend that the rule of appraisal is that the owner is not entitled to the increased value of the land occasioned by the proposed improvement, and hence that the appraisal should have been for the value at the time of the taking, which they insist was the date of the filing of the certificate, to wit, May 26th, and consequently that the appraisal as of July 9th was illegal, and the awards are void. We do not think that the objection can avail. Pub. Laws R. I. c. 245, § 5, enacts that at the time mentioned in the notices given by the clerk of the court in accordance with the requirement of the preceding section of the chapter, or at such adjournment, from time to time, as it shall order, the court shall, after hearing the parties, adjudge whether the taking of the property is a public necessity; and, if that be adjudged affirmatively, the property shall from that time—i. e. the time of the adjudication—be deemed to have been taken. The statute thus fixes the date of the adjudication, not the date of the filing of the certificate, as the time of taking. In view of this statutory determination of the time, the commissioners could not do otherwise than to regard the land as taken on July 9, 1894, the date when the court adjudged the taking to be a public necessity, and to appraise the value of it as of that date. But, whether the award had been made as of July 9, 1894, or as of May 26, 1894, when the certificate of taking was filed, seems to us, so far as the objection is

concerned, immaterial. The objection proceeds on the theory that the enhancement of value between the dates named was due to the fact of the public announcement, the filing of the certificate, that the lands proposed to be taken had been chosen as a site for the proposed statehouse. It appears, however, from reference to the certificate and plat accompanying it, that the state had acquired by purchase, prior to the filing of the certificate, a tract containing 454.838 square feet adjacent to the land condemned, as a site for the proposed statehouse. The fact of the location of the new statehouse had thus become public knowledge, by the purchase by the state of the tract, prior to the filing of the certificate by the statehouse commissioners; and the consequent enhancement in value, due to the proposed improvement, had already accrued to the adjacent land before the certificate was filed. This is strictly analogous to *Stafford v. City of Providence*, 10 R. I. 567, in which the commissioners of the city of Providence condemned certain land for the purpose of a reservoir. The land taken did not include that of the petitioners. Subsequently, after the improvement had been located, and actually commenced, or nearly so, the water commissioners condemned the land of the petitioners. The court held that the value of the petitioners' land was to be estimated as it was at the time it was condemned, and not at the time of the location of the improvement, thus giving to the petitioners such increase in value as had accrued to their land by reason of the original condemnation of the reservoir before their land was taken.

The second ground on which the motion to quash is based is that, in making their award to the owners of the lots abutting on the streets condemned, the commissioners of appraisal added to the area of the lots on each side the width of the streets in front of such lots. We think the commissioners erred in so doing. The market value of the lots abutting on a street is increased by reason of the proximity of the owner to the use of the street in connection with the lots. Hence, when the commissioners have awarded the full market value of the lot as a lot abutting on a street, they have awarded also the value of the lot as a lot on the street, because the street has helped to make up the market value of the lot. *Anderson v. City of Providence*, Index, PP. 7, 20, 706. This, however, is not such an error as makes it necessary to quash the report; it can be corrected by recommitting the report to the commissioners, with instruction to deduct from the awards the amounts allowable for lands embraced within the streets.

Petition for a new trial of the motion to quash denied, and cause remitted to the common pleas division, with direction to recede from the report to the commissioners for correction as stated.

GIUSTI v. DEL PAPA.

Supreme Court of Rhode Island. July 1, 1896.)

MALICIOUS PROSECUTION—PLEADING—PROBABLE CAUSE.

by a declaration for malicious prosecution, alleging that plaintiff was bound over by the grand jury on the basis of prima facie evidence of probable cause, and that the declaration was not only negated by the averment of additional facts showing that the binding over and indictment were procured by undue means; a general allegation that the prosecution was without probable cause being included.

by Achille Giusti against George Del Papa for malicious prosecution. On hearing of the case by the appellate division of the supreme court, the case was remitted with directions to the trial court to dismiss, and enter judgment for defendant.

by B. Tanner, for plaintiff. Joseph J. Jr., for defendant.

OPINION. The declaration alleges that the defendant maliciously prosecuted the plaintiff, and without probable cause. It then alleges that the defendant caused the plaintiff to be arrested and brought before the district court of the Tenth judicial district, and to be bound over by that court to await the action of the grand jury, and to be indicted and tried. No cause of action is set forth, and no conclusive evidence of probable cause is alleged at the plaintiff was bound over, and, in fact, indicted, there being no allegation that the binding over and indictment were procured by fraud, perjury, or other undue means. *Welch v. Railroad Corp.*, 14 R. I. 609; *Crescent City Live-Stock Co. v. Butchers' Union Slaughterhouse Co.*, 120 U. S. 141, 7 Sup. Ct. 472. Case remitted to the common law division with direction to dismiss, and judgment for the defendant for costs.

On Reargument.

(Jan. 13, 1896.)

OPINION. C. J. In our former rescript we held that the declaration set forth no cause of action, because, though it alleged that the defendant maliciously prosecuted the plaintiff, and without probable cause, it did not state that the defendant caused the plaintiff to be arrested and brought before the district court of the Tenth judicial district, and to be bound over by that court to await the action of the grand jury, and to be indicted, etc. We were of the opinion that though the declaration averred that the plaintiff was without probable cause, that the plaintiff was overborne by the averment that the plaintiff was bound over by the district court to await the action of the grand jury, and was indicted by the grand jury, and that no allegation that the binding over and indictment were procured by undue means. We stated that the fact that the plaintiff was bound over, and, a fortiori, in-

dicted, was conclusive evidence of probable cause; referring in support of the statement to *Welch v. Railroad Corp.*, 14 R. I. 609; *Crescent City Live-Stock Co. v. Butchers' Union Slaughterhouse Co.*, 120 U. S. 141, 7 Sup. Ct. 472. Counsel for the plaintiff has reargued the question. He criticises our use of the word "conclusive," contending that the binding over and indictment are not conclusive, but only prima facie, evidence of probable cause; that the only conclusive evidence of probable cause is the judgment of a court having power to convict, which judgment is conclusive of the question, even though subsequently set aside on appeal. He further contends that, as the binding over and indictment are only prima facie evidence of probable cause, it is not necessary to do more in the declaration than to allege that the prosecution was malicious and without probable cause. We think we shall be obliged to concede that the word "conclusive" was not well chosen, for since the decision in *Burt v. Place*, 4 Wend. 501, even a judgment has not been regarded as absolutely conclusive, since the presumption which would otherwise arise from it may be overcome by averment and proof that it was obtained by undue means. *Marcy, J.*, in this case, states: "That if it appears by the plaintiff's own declaration that the prosecution which he charges to have been malicious was before a tribunal having jurisdiction, and was decided in favor of the plaintiff in that court, nothing appearing to fix on him any unfair means in conducting the suit, the court will regard the judgment in favor of the prosecution satisfactory evidence of probable cause." The judgment relied on by the defendant, though by a court having jurisdiction to convict, was held not conclusive, because, as the opinion goes on to state, "though the plaintiff admits in his declaration that the suits instituted before the magistrate by the defendant were decided against him, he sufficiently countervails the effect of that admission by alleging that the defendant, well knowing that he had no cause of action, and that the plaintiff had a full defense, prevented the plaintiff from procuring the necessary evidence to make out that defense, by causing him to be detained a prisoner until the judgments were obtained, and by alleging that the imprisonment was for the purpose of preventing a defense to the actions." And see *Spring v. Besore*, 12 B. Mon. 551; *Crescent City Live-Stock Co. v. Butchers' Union Slaughterhouse Co.*, 120 U. S. 141, 7 Sup. Ct. 472. Doubtless we should have used the term "prima facie" in describing the effect to be given to the action of the court in binding over and of the grand jury in indicting the plaintiff, since, strictly speaking, there is no conclusive effect to be given to a judgment even, which is evidence of a higher nature than a binding over and indictment; but such judgment is only conclusive or, as Judge Marcy terms it, "satisfactory evidence," when not rebutted by aver-

ment and proof that it was unfairly obtained. But we do not see that our decision itself was on that account erroneous. The question is one of pleading, and the allegation of facts which are *prima facie* evidence of probable cause necessarily stands as conclusive until something further is alleged to rebut the presumption arising from that allegation. An allegation that the plaintiff was bound over by a court having jurisdiction for that purpose, and that the plaintiff was indicted by the grand jury, is an allegation of facts which are as sufficient or satisfactory evidence of probable cause, unless some further facts are averred which countervail the effect to be given them, as the judgment of a court from which an appeal would lie. To rebut the presumption of probable cause in either case, as it seems to us, requires the averment of some additional fact or facts showing fraud, perjury, or other undue means.

As to the contention of the plaintiff's counsel that the *prima facie* effect of the binding over and indictment is taken away by the averment that the prosecution was without probable cause, it seems only necessary to say that the averment of a want of probable cause by itself is not a statement of fact, but only of a conclusion of law; that this conclusion is not only unsupported by any allegations of fact in the declaration, but, in the absence of allegations of fact supporting it, is negatived by the allegations of the facts of the binding over and indictment. The only case cited by plaintiff's counsel in support of his contention, in which the question as to whether it is necessary for the plaintiff to allege undue means in procuring the binding over in order to rebut the presumption of probable cause arising from it, is considered, is *Ross v. Hixon*, 46 Kan. 550, 26 Pac. 935. In this case the trial court, after the plaintiff had rested, and while the defendant was putting in his testimony, stopped the trial, and directed a verdict for the defendant, and subsequently overruled a motion for a new trial. The record in the appellate court disclosed no reason for the ruling of the trial court; but counsel agreed that the reason assigned by that court for its ruling was that the examining magistrate had made a finding of probable cause, and that such finding was conclusive of the question. It was also claimed by the counsel for the defendant in error that the trial court made a further statement "that, as the petition does not charge fraud or undue means in obtaining the finding of probable cause by the magistrate, the same cannot be attacked." The sole question discussed in the oral argument of counsel for defendant in error and in the briefs of both counsel in the appellate court, was whether the finding of the magistrate was conclusive or only *prima facie* evidence of probable cause. The court reached the conclusion that it was to be regarded as *prima facie* evidence only. It recognized the rule as to the

conclusive effect of a judgment unless come by a showing that it was procured by fraud, undue means, or the false testimony of the prosecution, and that in such case the petition in the action for malicious prosecution must directly attack the judgment of conviction, or that it would be suicidal to proceed to say: "It follows that the suggestion of counsel that the finding of the magistrate must be directly attacked by the petition for fraud or undue means is unnecessary, because, as that finding is only *prima facie*, all that is necessary for the plaintiff to do to win is to overthrow it by the preponderance of evidence." With all due respect, we feel constrained, for the reasons that we have given, to dissent from this conclusion. We do not think that it is necessary to attack the finding of the magistrate, because the binding over is only *prima facie* evidence of probable cause, it is unnecessary to attack it in the petition for fraud or undue means; or, in other words, to aver such fraud or undue means to overcome its effect. The pleader must aver the cause of action, and he fails to do so if he overthrows the *prima facie* effect of the finding of probable cause arising from the binding over.

Plaintiff's counsel also refers to 2 C. 7th Eng. Ed., corrected and enlarged by Henry Greening; 16th Am. Ed., with references to English and American decisions by J. C. Perkins) 555; Oliver (5th Ed., revised and enlarged by B. Hall) 523; and to the declaration in *B. Towne*, 4 Cush. 217. In the precedents given in Chitty and Oliver the cases from which they were drawn are not given. In Chitty reference is made to *Dunlop v. Keats*, 11 Adol. & E. 329. But it does not appear in that case, nor in *Bacon v. Towne*, 4 Cush. 217, that the question we have considered was suggested; and therefore we do not think that these authorities, highly worthy of respect, are controlling.

WALL v. YOUNG et al.
(Court of Chancery of New Jersey.
1895.)

CLAIMS AGAINST RECEIVER—PRESENTATION DELAY.

Where it was made to appear that in the time limited for the presentation of claims to receivers of an insolvent corporation the claimant made known her demand to the receivers by the commencement of a suit against them, and thereafter, while the suit was pending, undetermined, entered into negotiations with a committee of creditors having charge of the reorganization of the business of the insolvent company and adjustment of its affairs, with which committee the receivers maintained constant communication and co-operation in the settlement of the claim, and, by reason of her confidence in an outcome of those negotiations which would satisfy her claim, refrained from making formal presentation of it to the receivers within the time limited as aforesaid, application being made to the court to set aside the presentation of the claim before distribution was made of the assets in the receivership, and it being made to appear that no em-

ment in the administration of the trust, which the receivers could not and should not have provided against, in view of their knowledge of the intention to urge the claim had occurred, the claimant was permitted to present the claim beyond the time limited. But circumstances appearing which indicate that the claim may not, in whole or in part, be a just and equitable one, though possibly in form legal, the presentation was allowed merely for the purpose of having the merit of the claim investigated; the right being reserved to hereafter admit it wholly or partially to a dividend, as justice and equity may require.

(Syllabus by the Court.)

Petition by Eliza Wall against Edward F. C. Young and G. W. Loper, receivers of the National Cordage Company, for leave to present claim. Petition granted.

R. V. Lindabury, for claimant. William H. Corbin and John L. Cadwalader, for receivers.

MCGILL, Ch. The National Cordage Company, incorporated under the laws of this state, was adjudged by this court to be insolvent on the 4th of May, 1893; and Edward F. C. Young and G. Weaver Loper were appointed receivers, to administer its assets according to law. Later, by order of this court, the creditors of the company were required to present their claims and demands to the receivers on or before the 31st day of August, 1893. In other states the same gentlemen were appointed ancillary receivers, such ancillary appointment in New York being made by the United States circuit court for the Southern district of that state. The assets and liabilities of the company were very large. Within a few days after the adjudication of insolvency, certain of the creditors and stockholders of the company agreed upon a committee of three gentlemen, who should look after their interests, and endeavor to bring about a reorganization of the business of the insolvent company, so that its value as a going, active concern, which activity gave principal value to its material assets, might be preserved to those who were peculiarly interested in the company. That committee thoroughly familiarized itself with the affairs of the company by daily conferences with the receivers, and an examination of the books, papers, and property of the concern. They made industrious efforts to ascertain all the creditors and stockholders, and to invite them to participate in a scheme to acquire and reorganize the business for the mutual benefit of all who should thus come in. After the expiration of the time limited by the court within which the claims of creditors should be presented, they were able, as they supposed, to know what creditors entitled to participation in the assets had joined in the scheme of reorganization, and, finding that the great majority had united in it, they offered the receivers \$5,000,000—about enough to pay the creditors one-third of their claims

—for the entire assets and good will of the insolvent company, which sum was to be paid partly in the bonds of a new company to be formed to continue the business acquired, and partly in cash, under an arrangement with the creditors who had joined in the reorganization that the dividends paid by the receivers should go to the reorganization committee, and that that committee would make settlements with them, as previously agreed upon, which should be favorable to the future of the new company. Thus only a small portion of the \$5,000,000 bid, necessary to pay the expenses of the receivership, and dividends to a few creditors who refused to join in the new company, would be taken permanently from the reorganization committee. By this means a much larger price was had for the assets of the insolvent company than could be had by any other scheme of disposal, because it was impossible to find another bidder for the entirety; and abandonment of the going business, called "good will," so that the material assets might be sold in small parcels, predicated a much smaller realization. Besides, whatever profit was had in that purchase inured to the benefit of those creditors and stockholders who concluded to venture in the scheme of reorganization. The receivers reported the offer to the court, and, after all parties interested were heard, they were authorized to accept it, and sale was accordingly made. After this sale, and before distribution of the assets, the petitioner, Eliza Wall, made her present application, which is that she may be allowed to present to the receivers a claim for \$554,900, with interest from the year 1890. The receivers resist the application because they urge that it disturbs the calculations of the reorganization bidders, which were based upon the definite ascertainment of the creditors of the insolvent company through the instrumentality of the court's limitation of the presentation of claims, and because they claim that the petitioner, though well aware of the limitation upon the presentation of claims, for the purpose of securing the retirement of commercial paper upon which William Wall's Sons were liable, purposely refrained from presenting her claim until such retirement was had through the influence of the reorganization, regardless of the inconvenience and injury that a prosecution of her claim at the present time will create.

The origin of the claim of Eliza Wall appears, upon examination of the voluminous record, testimony, and exhibits which have been taken and produced, as follows:

Four parties, who theretofore had engaged in the manufacture of cordage and binder twine, by their officers and agents, caused the incorporation of the National Cordage Company, with purpose to effect a consolidation, and practically a monopoly, of the cordage and binder-twine business throughout

the United States. These four parties were: the firm L. Waterbury & Co., which consisted of James A. Waterbury and Chauncey Marshall; the firm William Wall's Sons, which then consisted of Frank T. Wall, Eliza Wall, and Michael W. Wall, but after April 3, 1888, of Eliza Wall, Frank T. Wall, and Frank T. Wall and Edwin R. Brinkerhoff, trustees; the corporations Tucker & Carter Cordage Company, of which John A. Tucker was president, Edwin A. Johnson was secretary, and William A. Tucker was treasurer, and the Elizabethport Cordage Company, of which Eliza M. Fulton was president, Francis Gilbert was secretary, and Willard P. Whitlock was treasurer. At the organization of the National Cordage Company, its capital stock consisted of 15,000 shares, of the par value of \$100 each; making the entire capital \$1,500,000, which in 1890 appears to have been held as follows: James A. Waterbury and others, trustees for the several parties interested in the National Syndicate, 14,955 shares; James M. Waterbury, C. P. Marsh, Frank T. Wall, Edwin R. Brinkerhoff, Eliza M. Fulton, Chauncey Marshall, John A. Tucker, Willard P. Whitlock, and William Marshall, 5 shares each. The individuals named, or some of them, were the directors of the company. The scheme of procedure, so far as it is material to the matter now in question, involved the lease of the manufacturing plants of each of the parties, and the lease of other cordage manufactories, to the National Cordage Company, for a term of years, and the operation of those plants by the lessors under subleases back from the National Cordage Company to them, for the benefit of both the National Cordage Company and themselves; the latter company supplying the raw material, and selling the product, or fixing the prices at which it should be sold by the sublessees. Thus, the parties to the combination, through the instrumentality of the corporation, of which, by means of the leases and subleases, they became dependents, bound themselves and others together so that they could not enter into competition as rivals, and they would largely control the business in which they were engaged. To give that corporation strength and credit, each of the four firms or corporations thus interested, from time to time, loaned its liability in some form upon the commercial paper of the National Cordage Company, and thereby became the more firmly identified in interest with it. Extending the scope of the company, still other cordage factories were secured, by profit-sharing contracts.

In August, 1890, the management determined to increase the capital stock of the National Cordage Company, and to that end had its assets examined, and valued in such a way that the valuation would appear to justify an increase of \$13,500,000 in the capital stock. Entering into this valuation was the

acquisition of fees of the leased plants, place of the leases, and covenants from vendors which would restrain them from engaging in rival manufacturing. The object of the scheme was that, pursuing the law, they increased the capital stock of the National Cordage Company to \$1,000,000,—\$5,000,000 of preferred stock, with cumulative 8 per cent. annual dividend, and \$10,000,000 of common stock. The plan was that the preferred stock should be devoted to securing the fees of the leased manufacturing plants, and the new \$8,500,000 of common stock should be distributed, by dividend, to the then existing stockholders; that is, the four manufacturing companies mentioned, William Wall's Sons having the less than one-seventh interest there was then that the company agreed to purchase of the plant of William Wall's Sons for \$954,900, payable on delivery of instruments of conveyance, and the plan was that the other parties at corresponding prices. Shortly after the agreement of sale, 4,000 shares of the preferred stock, of the par value of \$400,000, were transferred to William Wall's Sons, in part payment of the \$954,900 which, under the agreement, was paid to them. The remaining \$554,900 was not paid, and, although the 4,000 shares of preferred stock were passed over to William Wall's Sons, no formal conveyance of the plant to the National Cordage Company were delivered. While the machinery and other personal property of the National Cordage Company was owned by the National Cordage Company, the real estate used by it was the property of Frank T. Wall and the estate of Michael W. Wall, deceased, for which Frank T. Wall, Edwin R. Brinkerhoff were trustees. The present claimant, Eliza Wall, does not appear to have had any interest in the real estate. By the partnership articles of William Wall's Sons, it was agreed that Frank T. Wall should have general charge of the business of the concern, and the exclusive right to sign the name of the firm, and under that power he appears to have agreed to the sale of the plant. Mrs. Wall did not participate in the management of the business, but from time to time required payments of it to be rendered to her, and appointed agents to examine into the conduct of the business. It appears that those agents had difficulty in getting the satisfaction wished, and were obstructed in their inquiries by the imperfect way in which the books of the firm were kept; but, nevertheless, enough appears to satisfy me that she was apprised of the fact that the firm of which she was a member was in the cordage business, and that because of it had a considerable advantage and, and, I think, that the plant of William Wall's Sons had been bargained to her, although she may not have known the particulars and full extent of the entanglements.

her firm. Exactly how far the profits reconciled her to companionship with the syndicate, presently defined, does not appear with certainty. The statements rendered to Mrs. Wall show that in 1890 the machinery and personal property agreed to be sold to the National Cordage Company were valued by the firm at less than \$200,000, and that her interest in the partnership equaled about $\frac{15}{16}$ of its assets, which assets appeared to be made up of cash, merchandise, bills receivable, machinery, book accounts, interest in National Cordage Company stock, and National Cordage Company indebtedness to the firm. Early in October, 1891, the four parties (firms and corporations) organized a voluntary association, which they called the National Syndicate, but which operated under the name of L. Waterbury & Co., which is said to have been formed principally for the purpose of dealing in the stocks of the National Cordage Company; and, on the 31st of that month (Frank T. Wall acting for William Wall's Sons, and assenting) the syndicate agreed that the National Cordage Company was indebted for unpaid purchase price of their several plants as follows: To L. Waterbury & Co., \$570,579.90; to William Wall's Sons, \$587,084.20; to the Tucker & Carter Cordage Company, \$590,621.07; and to the Elizabethport Cordage Company, \$390,947.07. And they also agreed that as they were members of a syndicate of stockholders of the National Cordage Company, and it was to the interest of all of them to transfer their claims against that company to the National Syndicate, and take therefor obligations of the syndicate, they would do so. Thereupon this entry, among other entries, was made in the ledger of the National Cordage Company:

Wm. Wall's Sons—Mill Account.

Dr.

1891.			
Janv. 31.	To cash paid.....	\$406,900 00	
Oct. 31.	" balance transferred to National Syndicate.....	587,084 20	\$987,084 20

Cr.

1891.			
Janv. 31.	By value of fees, leases, contracts, &c.....	\$654,900 00	
Oct. 31.	" interest to date.....	32,184 20	\$687,084 20

A few days after the National Cordage Company became insolvent, the firm of William Wall's Sons was dissolved, and went into liquidation. Mrs. Wall assumed to be the liquidating partner, and acted under the advice of Martin & Smith, a firm of lawyers in New York City, of which Mr. Pennington Whitehead was a member. William Wall's Sons appears to have been involved by liability on paper of the National Cordage Company to the extent of more than \$500,000; and Mrs. Wall and her lawyers deemed it to be wise, in the liquidation of its affairs, to act harmoniously with the other parties to the National Syndicate, and the

receivers and reorganization committee of the National Cordage Company, so that the paper on which this liability existed would be retired by the settlements and compromises brought about by those interests. To further this determination, and ascertain the extent of the responsibility of William Wall's Sons, and the ability of the National Cordage Company, and the purpose of the reorganization committee, and the remaining members of the syndicate, Mr. Whitehead was an almost daily visitor at the office of the receivers of the National Cordage Company, and in communication with the counsel of the receivers and the reorganization committee. One of the counsel of the receivers testifies that at one of these visits, early in June, 1893, he handed Mr. Whitehead a notice of the order to limit the presentation of claims of creditors, which notice made known to Mr. Whitehead the time within which his clients might present claims to the receivers. Mr. Whitehead testifies, on the other hand, that he is quite certain that the counsel referred to did not hand him a copy of the order limiting the presentation of claims; evidently meaning the paper to which counsel referred, which was not a copy of the order, but a notice of the order. It is evident, if the recollection of the receivers' counsel be correct, that the fact of the receipt of the notice escaped Mr. Whitehead's attention or recollection. Mr. Whitehead is a member of the bar of this state, and as such was aware of the practice of this court, in cases of insolvent corporations, to make an order to limit the time within which the claims of creditors may be presented to receivers, in order, if allowed, to share in the moneys to be distributed. The likelihood of his expecting and watching for such an order, especially as it appears that he was acting for several other creditors of the insolvent company, is so conspicuous that it is difficult to understand how he failed to take notice of it. He explains his failure by the fact that, through the commencement of a suit, he brought about negotiations with reference to a general settlement of the affairs of William Wall's Sons, which included an adjustment of the claim in question. The proofs demonstrate that he was intent, primarily, upon protecting William Wall's Sons—his client, Mrs. Eliza Wall, being the person most largely interested in that concern—from loss by reason of its liability upon some \$512,000 of the National Cordage Company paper; and, secondly, upon securing her, from either syndicate or cordage company, whatever he could of the unpaid \$554,900. Looking to the accomplishment of these ends, on the 22d of July, 1893, he commenced suit in the supreme court of New York, in behalf of Eliza Wall, against the parties composing the National Syndicate, corporations and individuals, and, as well,

the National Cordage Company and the receivers of that company. The cause of action was based upon allegations of the sale of William Wall's Sons' plant to the National Cordage Company; of the formation of the National Syndicate, one purpose of which, it is alleged, was the appropriation to its own uses of the \$954,900 to be paid for the William Wall's Sons plant. That 4,000 shares of preferred stock of the National Cordage Company was never lawfully delivered to William Wall's Sons, but was diverted to the syndicate, but that the \$554,900, with interest, remains due. That an attempt was made to shift that indebtedness from the cordage company to the syndicate, but the proceeding in that respect was unlawful. That the syndicate had some stock-gambling claims against it, which are unlawful, but which it nevertheless intended to pay from its assets, and thereby deplete them, and endanger Mrs. Wall's recovery for the 4,000 shares of preferred stock which were appropriated by the syndicate to its own uses. The complaint prayed, among other things, for an injunction to prevent any disposition of the assets of the syndicate; for a receiver of those assets; that the agreement of sale of William Wall's Sons' plant to the National Cordage Company may be decreed to be void, but, if it should be decreed to be valid, that the receivers of the National Cordage Company may be decreed to pay her the amount to be paid therefor, \$954,900, with interest, or a proper dividend on that sum. The complaint in that suit, a summons, and a rule to show cause why a receiver of the assets of the syndicate should not be appointed, together with a notice that application would be made to the United States circuit court for the Southern district of New York for leave to maintain such suit against the receivers, were served upon Mr. Loper, one of the receivers, on the 22d of July, 1893.

Immediately after the commencement of that suit the reorganization committee of the National Cordage Company, and two or three individuals concerned in the National Syndicate, opened negotiations with Mr. Whitehead for a settlement of the suit, which shortly resulted in an agreement to the effect that the assets of the syndicate should be transferred to trustees, who should use them in paying and compromising the debts of that association due to those who were not members of the syndicate, and then the syndicate's indebtedness to the four manufacturing concerns which participated in it, of which indebtedness the balance due for William Wall's Sons' plant, \$554,900, and interest, should be first paid, and go to Mrs. Wall, and with the remaining indebtedness to the four concerns, \$400,000, the par value of the 4,000 shares of preferred stock which was appropriated by the syndicate from William Wall's Sons, should share pro rata. If there should remain a surplus, it was to be divided so that William

Wall's Sons would get a proportionate of it. On the execution of such trust, other things, the suit was to be discontinued and Mrs. Wall was to release the receivers of the National Cordage Company from all claims except those growing out of the company paper referred to, and was to confirm to the title to the William Wall's Sons' plant. Among others, the receivers of the National Cordage Company and the reorganization committee were to be parties to a formal agreement of settlement which was to be presented to the court. A minute of the agreement thus arrived at was made, but the counsel for the reorganization committee disagreed, and thereafter unable to come together. The last conference between them was on the 17th of August, following September and October, Mr. Whitehead was in Europe. Upon his return, in November, his attention was called to a printed statement by the receivers which represented the liabilities of the National Cordage Company on this item, "Wm. Wall's Sons, \$512,000," thereupon he called upon one of the receivers, and asked whether that represented the claim of William Wall's Sons, or only their accommodation indorsement. He was told that it represented the latter. He then said that there was some further effort at compromise with members of the reorganization committee, but it was unsuccessful. Pending these negotiations for settlement, Mr. Whitehead refrained from pressing his motion before the United States circuit court for leave to sue the receivers; but in January, 1894, after the negotiation failed, upon notice, he applied to that court, and the receivers defaulting in appearance, obtained the desired permission. A few days later he moved that this court had limited the time in which creditors' claims should be presented to the receivers, and obtained a copy of the court's order, and, finding that the time limited had expired four months or more, he made the present application.

The testimony clearly shows that from the time the suit in the supreme court of New York was commenced, until after the sale of the assets of the National Cordage Company, the reorganization committee had continued before it, in the shape of the unsettled claim of Mrs. Wall, notice of her purpose to assert her claim for the \$554,900, with interest, against the National Cordage Company. The receivers did not know of this purpose, and was because of negligence attributable to them. The complaint in the New York suit was served upon Mr. Loper, and by him handed to the counsel employed by the receivers, who cannot account for a failure to read and understand it upon any other hypothesis than negligence. Mr. Whitehead's fault was not concealment of his purpose, but failure to present a formal claim, upon which the court might adjudicate, within the time limited for the presentation of such claims. It does not appear that this is a case of deliberate fraud or disregard of the chancellor's order, in subser-

terior purpose detrimental to the trust entered, as was Leo v. Green, 52 N. J. 28 Atl. 904. Nor does it appear that the failure to present the claim was the result of indifference. While it does appear that the delay the bulk of the commercial upon which William Wall's Sons' claim was taken up by the reorganization committee, and that thereby an achievement desired by Mrs. Wall was accomplished, it does not appear that her claim now urged was withheld so that she might secure that. On the contrary, her complaint in the New York suit made it clear that it was her intention to urge this claim. Indeed, by that suit she did urge it. The neglect to take the claim now sought appears to me rather to be the outcome of confidence in the result of the negotiations which followed the commencement of the suit in New York to the ends wished for. The application was made before any dividend was paid by the receivers, and consequently they retained the right to accord it the same dividend that they have received, if it shall be allowed. The reorganization committee is not in position to claim that the allowance of the claim would disturb its calculations, for its members are aware of the existence of the claim, notwithstanding their entire workings; and that I should not deny the application, but that I should at present admit the claim, as done in *Watjen v. Green*, 48 N. J. Eq. 1028, merely for the purpose of inquiring into its merit, not only as an existing obligation of the National Cordage Company, but also, if it be found to be a legal obligation, as a just charge for the plant transferred, reserving the right to hereafter admit the claim in whole or partially to a dividend, as justice and equity may require.

The receivers' inventory exhibits that the value of the real estate is \$157,950, and that the present value of the personal property is \$242,575, making the whole \$400,525, and this valuation of the personal property exceeds the rating of it in the various reports from time to time rendered by Mrs. De Ladson to her, one of which was in the year of the sale. These indications of the real value of the property, together with the circumstances under which the agreement was made, which, to some extent, I have adverted to, impress me that the price paid, for the fee property, which the company already had secured by lease for 99 years, may have been so greatly and fraudulently in excess of the true value that it will be equitable, as against other creditors and the corporation itself, to permit the unpaid balance of \$554,900, in whole or in part, to participate in the receivers' dividends. In the report which shall be presented for investigation of the sale of the plant to the National Cordage Company must be ratified by the claimants, because the attitude assumed in the New York suit is one of hostility to its validity.

STATE v. DE LADSON.

(Supreme Court of Errors of Connecticut. Feb. 8, 1895.)

INDICTMENT—DUPLICITY—DISORDERLY HOUSE.

An indictment alleging that defendant did keep and maintain a disorderly house, and a house where lewd persons did resort, does not state two offenses.

Case reserved from court of common pleas, New Haven county; Studley, Judge.

Edward S. De Ladson was convicted of keeping a disorderly house, and appealed to the court of common pleas, when the question raised by demurrer to the indictment was reserved for this court. Demurrer overruled.

George M. Gunn, Pros. Atty., for the State.

ANDREWS, C. J. The defendant was arrested, tried, and found guilty, in the city court of New Haven, upon a complaint charging "that on the 7th day of February, A. D. 1894, at said city and town of New Haven, Edward S. De Ladson, * * * with force and arms, did then and there keep and maintain, and for a long time previous thereto did there keep and maintain, and still does there keep and maintain, a disorderly house, and a house where lewd, dissolute, and drunken persons did then and there, and for a long time previous thereto did, and still do, resort, which said house is known as '53 Orange Street,' against the peace," etc. From that judgment he appealed to the criminal side of the common pleas court in New Haven county. In the latter court he demurred to the complaint, "because he alleges that the state's complaint contains in one count, and alleges therein two separate and distinct crimes and offenses, to wit: First, the keeping a disorderly house; second, the keeping of a house where lewd, dissolute, and drunken people resort,—each of which is punishable by a fine and imprisonment." The common pleas court reserved the questions thus presented for the advice of this court.

This is a complaint for keeping a disorderly house, in violation of section 1529 of the General Statutes. A complaint under this section alleging only that the defendant "did keep and maintain a disorderly house" does not properly charge the statutory offense. But, if the allegation that the house described in the complaint was kept by the defendant as a "disorderly house" can be treated as sufficiently stating the offense, it is not true that the further allegations specifying the kind of disorder in keeping the house constitute duplicity. Several such specifications made in one count charge but one offense. The rule of pleading which must be observed in complaints upon statutory offenses has been passed upon by the court so many times, and so recently, that we have now no occasion to go over it again. We refer to the cases as expressing our present

view: *State v. Costello*, 62 Conn. 128, 25 Atl. 477; *State v. Keena*, 63 Conn. 329, 28 Atl. 522; *State v. Bosworth*, 54 Conn. 2, 4 Atl. 248; *State v. Teahan*, 50 Conn. 99; *State v. Hartwick*, 49 Conn. 101; *State v. Burns*, 44 Conn. 149; *State v. Maxwell*, 33 Conn. 259; *Barnes v. State*, 20 Conn. 232. See, also, *Com. v. Ballou*, 124 Mass. 26; 2 Whart. Cr. Law (9th Ed.) § 1450; Whart. Cr. Pl. § 251. The court of common pleas is advised to overrule the demurrer. The other judges concurred.

ROBERTS v. NORTON.

(Supreme Court of Errors of Connecticut. Feb. 8, 1895.)

CHATTEL MORTGAGES—WHAT CONSTITUTE—OPTION CONTRACTS—TIME AS ESSENCE OF CONTRACT.

1. The vendee in a contract of conditional sale of a stallion, after having paid two-thirds of the price, was unable to make the remaining payments. Defendant purchased the horse at the vendee's request, for the balance due, on condition that he should become the owner, took possession thereof, and gave the vendee, who joined in the bill of sale to him, an option to purchase the horse within a certain time, the vendee being under no obligation though to do so. Held that the transaction was not a mortgage or pledge, so as to entitle the vendee to equitable relief after failure to purchase within the agreed time.

2. In contracts giving a person an option to purchase a chattel for a given price within a limited time, time is of the essence of the contract, so as to prevent specific performance on failure without excuse to purchase within the specified time.

Appeal from superior court, New Haven county; Prentice, Judge.

Suit by James Roberts against Philo B. Norton to redeem a certain stallion, and for other equitable relief. There was a judgment for defendant, and complainant appeals. Affirmed.

Henry C. Baldwin, for appellant. William H. Williams, for appellee.

FENN, J. The amended complaint states, as the ground of the plaintiff's action: That in April, 1891, he received a certain stallion, "Harkaway," from one Hayden, under a written agreement of conditional sale, to remain the property of said Hayden until the sum of \$2,000, with interest, was fully paid; then the title to vest in the plaintiff. That in pursuance of this agreement he paid Hayden \$1,500. That afterwards one Lilley purchased of said Hayden his interest in said stallion, and on February 10, 1893, surrendered to the plaintiff said agreement of conditional sale, the plaintiff still being in possession of said stallion, and the balance due from the plaintiff thereon being \$675. That the defendant, at the plaintiff's request, advanced said sum to said Lilley, upon the express condition that the plaintiff and said Lilley should give him a bill of sale of said stallion, of which he was at the same time to

take and retain possession, upon and subject to the conditions set forth in a certain agreement then executed, which provided that, whereas, the defendant was the owner of said stallion, which the plaintiff was desirous of purchasing, the defendant agreed to sell and deliver said horse to the plaintiff any time within three months from said date, on payment to him within said period of the sum of \$675, with interest thereon from said date to time of payment, and on payment of an additional specified sum for the keeping of said horse; but if the defendant failed to pay said sum or any part thereof within said period of three months, the plaintiff should forfeit any and all sum advanced under said agreement, and said agreement should be null and void. That it was understood between the plaintiff and defendant that said sum advanced said Lilley was intended as a loan to the plaintiff, and that said stallion was to be held simply as security for said sum, the interest thereon, and the expense of keeping said horse. That in pursuance of said agreement, the plaintiff delivered to the defendant said stallion, with a full understanding between the parties that the same was in the nature of a pledge mortgage, the plaintiff being the owner of said stallion. That the defendant retained it as such security until May 9, 1893. On said day the plaintiff solicited and obtained from the defendant an extension of time to redeem said stallion. That on May 18, 1893, he went to the defendant's place of business, with sufficient money for, and to the purpose of, such redemption, but was unable to find the defendant. That on May 19, 1893, he went again, made tender, and demanded that the defendant should deliver to him said stallion and take the money. That the defendant declined to do; and that the value of the stallion is \$2,000. The plaintiff demanded equitable relief in the nature of a bill of redemption; also, damages for detention after tender.

The facts found by the court differ materially from those alleged. It was found that the entire sum paid by the plaintiff to the defendant was \$1,400, and that this was not in the amounts or at the time stipulated. After Lilley became the owner of the stallion and claims of the said Hayden, he demanded payment of the balance long due, on penalty of immediate taking possession by him of the stallion as his property. Nothing was paid. Lilley afterwards agreed to sell to the plaintiff his interest in said stallion for the sum of \$675, and the plaintiff thereupon made known his wishes. As a result of the agreement, the defendant should become the owner of the horse, paying for said sum of \$675, demanded by the plaintiff if the plaintiff could arrange so that the defendant could have good and absolute

and that the defendant should then give the plaintiff an option to purchase said horse from the defendant at any time within three months, upon the payment of \$675, together with interest on said sum, and the keeping. This agreement was, on February 10, 1893, effectuated. Lilley and the plaintiff joined in a bill of sale to the defendant, Lilley surrendering to the plaintiff the contract with Hayden. The defendant paid Lilley the \$675. This being done, the defendant executed and delivered to the plaintiff the contract recited in the plaintiff's complaint. At the time of these transactions it was fully understood and intended, by both the plaintiff and defendant, that the defendant, by virtue of the bill of sale and the payment to said Lilley, then and there should, and did, become the absolute owner of said horse. It was not understood or intended between them that by reason of any of said acts the plaintiff should, or did, in any way become indebted to the defendant, and he did not so become indebted. The plaintiff, pursuant to the sale aforesaid, delivered the horse to the defendant, in whose possession it has since remained. No subsequent agreement, written or verbal, was ever made between the parties, varying in any way the terms of the agreement mentioned, or extending the time in which the plaintiff might purchase said horse, as therein provided. The only time the plaintiff ever offered to pay the defendant anything was on May 18, 1893, when he made a tender of \$753, which the defendant refused, stating that the plaintiff had failed to comply with the terms of the contract. The horse, on February 10, 1893, was of uncertain value. Its fair market value, which depended largely on circumstances, was about \$675. The court rendered judgment for the defendant.

The plaintiff states a case which is indeed one of hardship, the proof of which would entitle him to relief from a court of equitable jurisdiction. His misfortune is that he has entirely failed to establish such a case as he alleges to the satisfaction of the trial court. If the court below, upon the facts found, had rendered judgment in his favor, such judgment would not have corresponded with, or been supported by, the allegations of the complaint. The transaction relied upon was a mortgage or pledge, and the claim for a judgment permitting redemption on payment of the indebtedness secured. The court found there was never any mortgage or pledge, and no indebtedness. Hence there could be no such judgment as demanded. This finding we cannot disturb. Indeed, the further fact found, that the plaintiff never owned the stallion, having failed to acquire title under the original sale, precludes the possibility of a mortgage or pledge. The case of *Phipps v. Munson*, 50 Conn. 267, seems, on all questions involved, directly in point, and decisive of the present case. The statement there made (page 270), that the

very purpose of the agreement to reconvey was to give to the plaintiff, instead of an equity of redemption, a right to purchase for a given price within a limited time, is equally applicable here. Such being the object of the parties, it was not in the power of the court below, and surely it is not our province, to place an artificial or technical construction upon their act, for the purpose of defeating their intent. Regarding the transaction as a purchase by the defendant, with an option to the plaintiff to purchase from him "for a given price within a limited time," it is clear that, independently of the difficulty of granting a decree for specific performance upon the complaint as it stands, the plaintiff is not, on the facts found, entitled to such relief. Time has, by this court, been held to be of the essence of such a contract. *Phipps v. Munson*, supra. This should be so, at least to the extent of preventing a plaintiff from successfully inviting a court to ignore his laches, for which he shows no excuse or palliation, and regarding which no blame attaches to the opposite party. The plaintiff doubtless recognized this, for he stated in his complaint that he requested an extension of time, and that the defendant granted it; but the court has expressly found otherwise. There is no error in the judgment complained of. The other judges concurred.

BUNNELL v. BERLIN IRON BRIDGE CO. et al.

(Supreme Court of Errors of Connecticut.
Feb. 8, 1895.)

NEGLIGENCE—COMPLAINT—CONTRIBUTORY NEGLIGENCE—APPEAL—WHEN LIES—REVIEW.

1. In an action, tried to the court, against a contractor for injuries caused by the falling of a derrick, the question whether such contractor was guilty of negligence in failing to have the derrick examined after a heavy girder, while being hoisted, had fallen, is a question of fact, to be determined from the particular circumstances of the case.

2. A complaint alleging that injuries were caused by the falling of a derrick, due to the negligence of defendant's servants in managing derricks while "engaged in hoisting trusses" with them, is sufficient to support a recovery, on proof that the fall of the derrick was caused by a heavy truss which was being hoisted falling against it, and that the fall occurred while the servants were relieving the derrick from the weight of the truss.

3. A complaint for personal injuries, which alleges that the injuries were caused by the "careless and negligent manner" in which defendant's servants managed certain appliances, is sufficient, without alleging the particular acts of such servants which constituted carelessness and negligence.

4. A person does not, by going on a street little used and largely occupied with building material for a building which is being constructed abutting on the street, assume the risk of building material falling on him, due to negligence of the contractor's servants in constructing it.

5. The finding of a trial court that on the evidence plaintiff was not guilty of contributory negligence is conclusive.

6. The practice act, by authorizing one action against defendants with adverse interests, and authorizing the court in such cases to order separate trials, authorizes a final judgment as to one defendant, although the action is continued as to the other parties, so that where one of two defendants suffers judgment by default, and moves for a hearing in damages, a judgment for damages against him is a final judgment, from which an appeal will lie, though the action is still pending against the other defendant.

7. An inference of negligence by the trial court from facts in evidence will not be reviewed where the inference is not palpably wrong.

Appeal from superior court, New Haven county; George W. Wheeler, Judge.

Action by Frank H. Bunnell against the Berlin Iron Bridge Company for personal injuries due to negligence of defendant in constructing a building. W. A. Taylor, as an independent contractor in charge of the work, cited as a codefendant, suffered a default, and moved for a hearing in damages, and from a judgment assessing the damages at \$550 he appeals. Affirmed.

Charles J. Cole and Seymour C. Loomis, for appellant. Samuel A. York and Isaac Wolfe, for appellee.

HAMERSLEY, J. The only reasons of appeal assigned in this case are the alleged errors of the court in overruling the claims set forth in the finding as made by the defendant upon the facts found. The main grievance of the defendant is the action of the court in overruling his general claim that upon the facts found "the injuries to the plaintiff did not result from his negligence, and that the negligence of the plaintiff contributed to said injuries." The defendant was engaged in erecting the iron framework and roof trusses (weighing six tons each) used in a building at the corner of two highways, River street and Ferry street. The apparatus used for raising the trusses consisted of two gin poles or derricks, 8x12 inches thick and 56 feet in length, with their appropriate appliances. A truss, which had been raised some 20 feet or more, fell to the ground. The gin poles parted. The one standing next to Ferry street fell towards the highway, carrying with it the iron framework of the side of the building facing Ferry street. The plaintiff, being in the highway, was struck by the framework and injured.

The court below found that the falling of the gin pole and iron framework was caused by the negligence of the defendant's servants, and that the plaintiff was in the exercise of due care and contributed in no wise to his injuries. This finding of negligence is a conclusion of fact from the evidential facts found, as well as from all the evidence. The question of negligence, shown by the record to have been presented to the court below, clearly depends upon the conduct of the parties under the special circumstances of the case. Did the parties act as men of ordinary prudence would act under like circumstances? "In cases involving the ques-

tion of negligence, where the general rule of conduct is alone applicable, when facts found are of such a nature that they must, as it were, put himself in the shoes of the parties, and must exercise a discretion, based upon his experience, only upon the question, what did the party do or omit under the circumstances? but on the further question, what would a prudent, reasonable man have done under the circumstances? and especially where the facts and circumstances are of such a nature that honest, fair-minded, capable men may come to different conclusions upon the question, the inference or conclusion of negligence is one to be drawn by the trier of fact, not by the court as matter of law." *Frederick v. Railroad Co.*, 60 Conn. 257, 21 Atl. 677, 22 Atl. 544.

The defendant, however, claims that the trial judge, in reaching his conclusion, required of the defendant something which the law does not require of him. The defendant finds that the defendant was guilty of negligence in not making an examination of the apparatus after the falling of the truss, before the falling of the gin pole. The defendant claims it was not his duty to make such examination, and therefore his failure to do so cannot support negligence. The only duty involved is the duty to take such precautions in the special emergencies of the case as a man of ordinary prudence would take. The standard of such duty is not the same under all circumstances, so that the duty to be applied as a matter of law by the court to the facts found. There is no statutory rule of law defining the duty of a builder under the circumstances found by the court. The duty imposed upon the defendant whose measure must vary according to the circumstances presented in each case. The standard then is that of a reasonable man. What would a reasonable man of ordinary prudence have done under the circumstances as they existed in this case? In the circumstances, both the measure of duty and the extent of performance must be ascertained as facts." *O'Neil v. Town of East Windsor*, 63 Conn. 154, 27 Atl. 237. The case under discussion involves the duty of the defendant to take a precaution, the necessity of which depends on conditions peculiar to the exceptional emergency, in its nature not susceptible of reproduction, i. e. on the special circumstances existing in this case, and therefore clearly distinguishable from other cases where the precaution which the defendant fails to take is one required at all times under circumstances not peculiar to a single emergency, but continuing or constantly recurring in the same form. The question is far the duty of taking the precaution in such cases may be a conclusion of fact, not now involved. The principle applied in the cases above cited is supported by many decisions of this court, and must control the present case. The conclusion

negligence on the part of the defendant, and of contributory negligence on the part of the plaintiff, was one to be drawn by the trier as a matter of fact, and not by the court as a matter of law.

The other claims, made by the defendant, and overruled by the court, as set forth in the finding, purport to raise questions of law, but they are largely repetitions in detail of the general claim, and are substantially disposed of by the finding of facts. The first claim is that the "accident resulting from the fall of the gin pole, as proved, was not set up in the complaint, and therefore the plaintiff could recover only nominal damages." It seems to us very clear that the allegations of the complaint are broad enough to cover the transaction as proved. In brief, it alleges that the defendant was engaged in hoisting sundry iron trusses and placing them on the building, using for that purpose sundry derricks and other hoisting apparatus; that by reason of the careless and negligent manner in which the servants of the defendant performed that work, the apparatus broke while one of said trusses was being hoisted, and one of said derricks fell against said building, thereby causing a large body of iron to fall into the highway where the plaintiff was, so as to strike and injure the plaintiff. The proof is within these allegations. The work of caring for the apparatus, when endangered by the fall of a truss to the ground, was as much a part of the work of hoisting sundry iron trusses, as the work of caring for the apparatus when strained by the weight of a truss hanging in the air. The negligence of the defendant consisted in the negligent manner in which its servants performed that work. The charge of negligence in the complaint covers the conduct of the defendant's servants in the use of their appliances during the whole transaction, from the first lifting of the truss mentioned to the falling of the gin pole and framework which caused the injury to the plaintiff. Nor is there any ground for the defendant's claim, made in argument, that because the particular acts of the defendant's workmen which constituted the "careless and negligent manner" in which they performed the work mentioned were not specified in the complaint, the allegation of negligence must be held to be merely an allegation of a conclusion of law. Such particularity is not ordinarily necessary,—especially when the want of particularity is not objected to by appropriate pleading,—and is rarely employed. The complaint substantially alleges that the defendant so carelessly and negligently managed the apparatus described, in the performance of the work described, that the derrick fell against the iron framework, causing that to fall and injure the plaintiff. This is, in substance, the sufficient and well-established form for all such cases. Any want of clearness that may be claimed in its statement is a defect of form,

and not of substance, and is cured by the judgment on default.

The second claim, "that since the apparatus was proper and the employes of Taylor competent, negligence could not be presumed from the mere falling of the gin poles," states a proposition of law not applicable to the facts as found. The court did not presume negligence from the mere falling of the gin pole; and the judge, in overruling, in general, the claims of the defendant containing this proposition, which he had no occasion to apply, did not rule as a matter of law that negligence could be so presumed. The finding of negligence is based on facts proved by the evidence, from which the court inferred actual negligence on the part of the defendant's servants. The defendant criticises the process of reasoning used in the opinion of the court, and especially the inference of the judge by which he finds facts proved as to which no direct evidence was offered; but there was direct evidence from which such inference might be drawn. It is the right, and sometimes the duty, of the trier to infer what a man has actually done, from his conduct, beyond the positive testimony in a case. *Bank v. Middlebrook*, 33 Conn. 100; *Dubuque v. Coman*, 64 Conn. 479, 30 Atl. 777. Such inference is one of fact, and cannot present a question of law; at least where, as in this case, the inference is one which cannot be said to be palpably wrong.

The third and fourth claims relate to the question of contributory negligence, and are fully disposed of by the finding of the court that the plaintiff, in fact, was in the exercise of due care at the time of the injury to him, except the claim of law that, because Ferry street was a highway little used, and at the time of the accident largely occupied by building material to be used in the construction of the adjoining building, the defendant, in going upon the street, assumed the risk of the accident; and this claim is not well founded. Every one has a right to use a public highway, however little it may be used by others. The defendant had a right to be in Ferry street, either for the purpose of traveling, or of satisfying his curiosity. But it is true that, being there lawfully, he might so act, in view of the condition of the street and all the circumstances, as to contribute to his injury by his own actual want of ordinary care. Whether he did so contribute or not is a question of fact, settled both by the general and particular findings of the court.

The fifth claim, that the falling of the truss did not cause the accident, and that none of the acts of negligence claimed by the plaintiff caused the injuries, is disposed of by the finding and the discussion of the other claims.

This action, so far as the original defendant is concerned, is undisposed of by the judgment against Taylor, and is still pend-

ing in the superior court. The question was mooted during argument whether the separate judgment against Taylor, under such circumstances, is a "final judgment," from which an appeal can be taken. In *Finch v. Ives*, 24 Conn. 387, and 28 Conn. 112, it was held that a judgment for costs upon a motion in error is such "final judgment," although not disposing of the merits of the cause, and the action is entered on the court docket for further proceedings. That case seems to establish the principle that a "final judgment," within the meaning of our statute of appeal, may include any judgment in its nature final and separable from any other judgment that may be rendered in the action, although not finally disposing of the action. Independently, however, of such authority, we think the provisions of the practice act for including in one action parties defendant having separate and even antagonistic interests, and for authorizing the court, by orders for separate trials and otherwise, to protect their differing interests, clearly implies the possibility of a "final judgment" as to one party, although the action continues in court for the disposition of the rights of other parties. There can be no question, therefore, of our jurisdiction of such an appeal as this. Whether any defects exist in the manner of taking the appeal is a question not before us. If such defects exist, they must be considered as waived by the parties. The operation of these separate judgments in one action may raise questions of difficulty, and we call attention to the matter in order that this case may not be deemed an authority on such questions beyond the one question considered, viz. a separate judgment against one of several defendants may be a "final judgment," from which an appeal may be taken in the proper manner, before final judgment is rendered as to all parties to the action. There is no error in the judgment of the superior court. The other judges concurred.

CANFIELD v. GREGORY.

(Supreme Court of Errors of Connecticut. Feb. 8, 1895.)

CORPORATIONS—JOINT-STOCK COMPANY—SUBSCRIPTION TO STOCK—ACTION TO ENFORCE—ESTOPPEL TO DENY CORPORATE EXISTENCE.

1. In an action by a trustee in insolvency against a stockholder who was also a corporate officer, to enforce an unpaid subscription, where it appears that defendant attended meetings of the company and took part in its management after having signed under oath and published a certificate (as required by Gen. St. § 1843, before business could be done) that 20 per cent. of all subscribed stock had been paid in, defendant is estopped to deny corporate existence because of the failure of an original subscriber to pay 20 per cent. of his subscription, though defendant acted in good faith, and signed the certificate in the belief that it had been paid.

2. Creditors dealing with a joint-stock company after it has published the certificate of

incorporation required by Gen. St. § 1843, that 20 per cent. of the subscribed stock had been paid in, will be presumed to have received such certificate.

Appeal from superior court, Fairfield county; Thayer, Judge.

Action by Charles S. Canfield, as trustee in insolvency of the Bridgeport Vitrified Brick Company, against James B. Gregory, to enforce a subscription to stock. From the judgment overruling a demurrer to a reply, defendant appeals. Affirmed.

Robert E. De Forest, for appellant.
Judson, Jr., for appellee.

BALDWIN, J. The demurrer to the reply was properly overruled. The plaintiff sues, as trustee in insolvency of a joint-stock corporation, upon an assessment which was called in upon the defendant's stock, and the only answer is nul tiel corporation. The plaintiff's second reply is that, however this may be, the defendant is estopped from making such a defense, because the debts, whose existence he has made the company insolvent, are due to creditors who trusted it, as a corporation, because they were led to believe that it was such, by the acts of the defendant, in promoting its organization, publishing its articles of association, acting as a director and president, and contracting in its name on behalf these very liabilities. It is contended that these averments were not sufficient to cause no bad faith, wilful wrong, or carelessness is charged. No such conduct was necessary. The plaintiff represents the rights of the creditors of an insolvent company, who contracted with it as being a corporation. Whatever rights they formerly had against those who were its members, it has. They were led to believe in the existence of such a corporation by the acts of the defendant, as a promoter, stockholder, director, and president of the company, and are set out in reply. It was natural that such acts should induce that belief. It was by means of knowledge as to the manner in which the company was organized that the public in general were not possessed by the public in general. Had he in fact known that its organization was so defective that the corporation was a mere name, whose name he was contracting, had he known that the company was incapable of transacting business, his acts would have been no more different from the other contracting parties. It is not his intent, so much as the result of his conduct, which determines his liability. The modern estoppel in pais is of equitable origin, and is based upon the principle of equal application in courts of law. It is much more than a rule of evidence; it establishes rights. It determines remedies. An equitable estoppel does not so much set out the truth as set in the truth, and it is a whole truth. Its office is, not to show a whole strict rule of law, but to show a whole truth and good conscience require. The particular circumstances of the case

respective of what might otherwise be the legal rights of the parties. The key to its application is not infrequently to be found in the rule that in matters of trust and confidence, when one of two innocent persons must suffer, in consequence of the acts of one of them, the loss must generally be borne by him who thus occasioned it. *Horn v. Cole*, 51 N. H. 287; *Stevens v. Dennett*, Id. 324, 330; 2 Pom. Eq. Jur. § 802. This rule clearly governs the case at bar. It is true that it does not extend to acts or representations not naturally calculated to mislead, and on which others had no right to rely. *Danforth v. Adams*, 29 Conn. 107. But those of the defendant were addressed to the public and to the parties injured. They came from one who was in a position to know what he affirmed. They gained credit to an organization in which he was interested. The company was a de facto corporation. Its creditors, who contracted with it as a corporation, could not hold the individuals who had associated to form it personally liable as co-partners, for with them no contract had been made. 2 Mor. Priv. Corp. § 748. The defendant was thus shielded from partnership liability by his representations as to its corporate character, and on these representations those with whom he dealt as one of its officers had a right to rely. *Northrop v. Bushnell*, 38 Conn. 498, 511; *Bank v. Ford*, 27 Conn. 282, 289. The publication in a newspaper, which the statute requires, of the articles of association under which a joint-stock corporation is to be organized, is designed to inform the public, among other things, of the amount of the capital stock which has been subscribed, and of the names of those who have agreed to contribute it. Had the Bridgeport Vitriol Pipe Company been a corporation de jure, the subscriptions to its stock which the defendant caused to be published upon its organization would, so far as they remained unpaid, have constituted, when it was adjudged to be an insolvent debtor by the court of probate a trust fund, to be carefully secured and administered, so far as might be necessary, for the benefit of its creditors. *Brandell v. Lincoln*, 52 Conn. 73, 95; *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127. That, through the failure of one of the subscribers to pay in the 20 per cent. in cash, the company remained only a corporation de facto, as respects its capacity to transact business, did not vary the equitable obligation of other subscribers, who, whether in good faith or bad faith, proceeded to treat it as a legal corporation, assumed its management as such, and dealt with third parties on that footing.

Upon the trial to the jury on the issues of fact closed, after the demurrer was overruled, the plaintiff offered evidence tending to prove the principal averments of the reply, and also that the defendant, as one of a majority of the directors, made a certificate under oath, as required by Gen. St. § 1948,

and had it duly filed in the proper offices for record, which stated, among other things, that the amount of capital stock actually paid for in cash was \$12,000, being 20 per cent. thereof, and that he was one of the stockholders who voted to make the assignment in insolvency under which the plaintiff received his appointment. The defendant offered evidence to show that, while he had voted as a director to have certain stock, on which the 20 per cent. had never been in fact paid, except by a worthless check, transferred to the company, on account of the failure or inability of the subscriber to make such payment, and while no payment was ever made on this stock, yet he acted in that, and in all other matters affecting the business of the company, in entire good faith, and in the honest belief that it was a duly-organized corporation and competent to transact business. At the defendant's request, the court instructed the jury that they must return a verdict in his favor, unless he was estopped from denying that the corporation had been legally organized. The following instructions were asked by the defendant, and refused: "Third. That to constitute such an estoppel, the plaintiff must clearly prove by a preponderance of evidence, and the jury must find, that the defendant, by his words or conduct, willfully caused other persons to believe that the said corporation had been in fact legally organized, and that said other persons, by reason of such conduct of the defendant, and by reason of such belief, subscribed for stock of said company, or gave credit to said company by reason of which said company became and still is indebted to them, and, further, that said persons will suffer pecuniary loss, in case the present action is decided in favor of the defendant. Fourth. There is no estoppel in this case, and the jury must find for the defendant on that point, unless all the said facts so requisite to constitute an estoppel are clearly established. It is necessary that the jury should find, not only that the defendant in fact represented that said corporation had been legally established, but that he did so knowingly and willfully. If he was himself deceived and mistaken in that respect, and made such representations in the mistaken belief that the corporation had been legally organized, in good faith, and with no intent to deceive or defraud, then there is no estoppel, nor is there any estoppel unless the defendant's representations, if they were made at all, are shown to have been made to the very persons who it is claimed would now be losers by a verdict for the defendant in this case. The claim is that these representations were made to the other stockholders, and to the creditors of the company. To sustain this claim, it must appear that the defendant represented that the company had been legally organized to such other stockholders and creditors; that this representation actually came to the knowledge of such

stockholders and creditors. Nor would that be sufficient unless it further appeared that such stockholders and creditors, in their dealings with the company, relied upon and were influenced by such representations of the defendant, and not upon other grounds, and that they would not in fact have taken stock in the company, or allowed the company to become indebted to them, had it not been for such representations made by the defendant. And if all the said points should be clearly established, still there would be no estoppel, unless it further appears that such other persons would be losers by a verdict for the defendant in this case." The court, as to the points thus presented, charged the jury that it was not necessary, to found an estoppel, that they should find that the defendant willfully held the company out as a corporation, but, on the contrary, that the course of conduct which the plaintiff claimed to have proved would be sufficient to support his action, although the defendant acted in entire good faith, supposing that the corporation was legally organized, whether with or without actual knowledge of the law as to the effect of a failure to pay in 20 per cent. in cash upon the capital stock; and that, this being a proceeding for the benefit of creditors, to collect unpaid installments of stock, if they should find that the company in fact had held itself out to be a legal corporation, and began and carried on the business for which it was organized, and contracted debts with third parties as a corporation, and also find that the defendant, as a stockholder, attended the meetings of the company during this time, and accepted the office of director and president of the company, and acted as such officer, and attended all the directors' meetings while he held these offices, and took part in the direction and management of the corporation while it was conducting that business, then by law he is estopped to deny that the corporation was a legal corporation, and your verdict should be for the plaintiff."

The defendant complains that the charge, thus given, treated as immaterial the question whether his acts and representations were ever known to or relied on by the creditors represented by the plaintiff. It is true that a trustee in insolvency represents no creditors but those who are such when the proceedings in insolvency are commenced. But all the creditors of the Bridgeport Vitrified Pipe Company who contracted with it as a corporation presumably did so because it was publicly held out as such by its officers and stockholders. The defendant, as one of these, caused its articles of association, containing his subscription to its stock, to be published in a newspaper, and subsequently executed its organization certificate, and had it recorded in the offices of the secretary of the state and town clerk. A copy of such an organization certificate, by Gen. St. § 1090, when certified by the secretary of the state, under its seal, is prima facie evidence of the

due formation, existence, and capacity of the corporation which it describes. This seal was designed to relieve the corporation from all having dealings with it from the necessity of proving, in every case to which it might be a party, by the testimony of witnesses in court, that the conditions of incorporation had been complied with. The certificate, when recorded by the recording officer of the state, under its seal, excuses the production of the original document, and makes what would otherwise be hearsay legal evidence as to all the facts. The formalities of attestation serve only to verify the correctness of the copy as a fact of record. They lend no new weight to the statements in the original certificate made by the directors. These remain the only evidence of the fulfillment of the statutory conditions to which they refer, and are simply given, as evidence, a wider effect. When the defendant joined in filing the organization certificate for record, he furnished public evidence under oath that the Bridgeport Vitrified Pipe Company was a corporation, capable of transacting business and contracting debts. *Wood v. Construction*, 56 Conn. 87, 97, 13 Atl. 137. This certificate served the purpose of a special charter. Thereafter afterwards dealt with the company as a corporation was affected with notice of the contents of this certificate, as the state declaration, and, in effect, the legislature, by its grant, of its corporate powers. It was recorded in a public office for the information of the public, and every person contracting with the company as a corporation is conclusively presumed to do so in view of the statements it contains. One of these statements was that the required cash payments on the stock had been duly made, and the defendant cannot now be heard to deny against any creditor, although he be one who became such without actual knowledge that such a statement had been made. The defendant gave notice that it must have been made by some one, if there was a corporation in existence to which credit could be given; and every creditor could safely rely, without inquiry, on the security afforded by any subscriptions mentioned in the certificate, which were made or had been assumed by one of the directors by whom it was executed. In a case like this, where a trustee in insolvency is the sole plaintiff, he must recover if at all, for the benefit of the estate as a whole. He does not represent the special equities of any particular creditors, but the general equities of all. So far as this defendant is concerned, his responsibility rests upon the same ground. If any particular creditor were shown to have become a creditor solely by reason of his knowledge of the defendant had stated in the organization certificate, and of his reliance upon its truth, he would occupy no better position than creditors who had only constructive notice of the equity and good conscience, the signature on that certificate owe an equal obligation

every one who dealt with what they certified to be a legal corporation, with a capital so far paid in as to enable it to transact business on the footing of its title to that name and character.

Our statute provides (Gen. St. § 1944) that the signers of the articles of association for a joint-stock corporation shall "become and remain" such a corporation when the organization certificate is filed with the secretary of the state. The "first meeting" of the corporation, for effecting an organization, at which directors are to be elected and by-laws may be adopted, is necessarily (section 1946) held before the organization certificate can be prepared or filed. It is evident, therefore, that for some purposes the corporation is deemed to be in existence before (under section 1947) it is competent to "commence business." It was not in dispute between the parties to this cause that the articles of association and organization certificate were sufficient in form, and that they were duly published and filed for record. The only issue tendered by the answer was upon the allegation that there was not, and never had been, any such corporation as that of which the plaintiff claimed to be trustee; but the stoppel set up in the reply had a broader reach, and was invoked to preclude the defendant from denying that the corporation ever existed, and that it was capable of contracting debts and making calls on stock subscriptions. As the case was tried in the court below in this broader aspect, and as if turning on the right of the defendant to rely on the falsity of material statements in the organization certificate, we have treated it from the same point of view; although it may be that, in strictness, the answer was disproved by the admitted facts, which went to show that a corporation was organized, although it never became legally competent to commence business. If this be so, the plaintiff would no less have been entitled to a verdict on the issues closed. There is no error in the judgment appealed from. The other judges concurred.

MEYER v. SAUL.

(Court of Appeals of Maryland. Jan. 9, 1896.)

DEMURRER—GROUNDS OF—SUFFICIENCY—BILL FOR ACCOUNTING—SUFFICIENCY—EQUITY JURISDICTION.

1. The defense of limitations may be raised by a general demurrer to a bill in equity, where the bill shows that limitations apply, and does not state facts to defeat their operation.

2. If any one of several grounds on which a demurrer is based is good, the demurrer must be sustained.

3. A contract for the right to manufacture certain patent medicines, which reserved a royalty to the vendor, provided that if the vendor's son failed within a year from the date of the contract to enter into the same covenants as the vendor, or proof of his death was not made, the obligation to pay the royalty should cease. *Held*, that a bill by the vendor for an account-

ing must show that within a year the son executed the covenants agreed on, or that proof of his death was made.

4. Where equity has assumed jurisdiction of a cause of which it has concurrent jurisdiction with a court of law, it will retain it, though full and adequate remedy may be recovered at law.

Appeal from circuit court, Baltimore city.

Bill by Joseph W. Saul against Adolph C. Meyer, for an accounting under a contract of sale of the right to manufacture and sell certain patented medicines. From an order overruling a demurrer to the bill, defendant appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, ROBERTS, and BOYD, JJ.

Thos. R. Clendinen, for appellant. J. V. L. Findlay and Thomas Mackenzie, for appellee.

ROBERTS, J. On the 22d of November, 1889, the appellant, his wife, and another entered into an agreement with the appellee for the purchase by him of the right to manufacture and sell the preparations known as "Old Saul's Catarrh Cure," and "Old Saul's Pile Ointment," together with all the material on hand, including all the receipts and fixtures used in their manufacture, and all other matters and things connected with the business of manufacturing and selling said remedies. In consideration of said sale to the appellant he agrees to pay the appellee \$125 for the stock on hand, materials, receipts, fixtures, etc., and a royalty of \$5 for each gross of said preparation sold by the appellee, until the sum of \$3,500 had been paid to him,—the appellant reserving the privilege of paying to the appellee at any time the difference between the amount of royalty paid and the sum of \$3,500, which last-mentioned sum, when paid, was to be in full discharge of all royalty; that the appellant should advertise said preparation as far as he deemed best, with the distinct understanding that he was to follow his own judgment entirely as to how, where, or to what extent said advertising should be done; that the appellant was to employ the appellee as selling agent for said preparation for the period of one year from the date of the said agreement, and he, in virtue of such employment, was to give his time and best endeavors in effecting sales of said remedies, and in so doing he was to act under the control, and conform in all respects to the directions, of the appellant; and that in consideration of said employment he was to receive as compensation the sum of \$100 per month, and also his railroad fares while engaged in traveling under the direction of the appellant, and an allowance of \$2 for his other expenses while out of the city in the employ of the appellant. Further, that if the appellee should die within one year of the date of said agreement, the salary of \$100 per month for the balance of the year was to

be paid to the personal representatives of the appellee; and, further, that if the appellee should sell within the territory of Maryland, Pennsylvania, New York, and the New England states, 100 gross of said preparation, within one year from the date of said agreement, that then his employment should continue for another year after the expiration of the first year's employment under said agreement. And the appellee further agreed with the appellant that unless Albert J. Saul, the son of the appellee, should within one year from the date of said agreement, without expense to the appellant, enter into a written contract with the appellant containing the same covenants as are expressed in the said agreement of date November 22, 1889, then the appellant should be relieved from all obligation to pay the appellee any further royalty upon said preparations, until said Albert J. Saul executed such contract, or satisfactory proof of his death be furnished the appellant. On July 1, 1890, the parties to the original contract added a clause to the said agreement, which on the same day was amended and changed; but as the added clause has no bearing on this appeal, it will not be considered. On the 6th of May, 1895, the appellee filed in the court below his bill in equity against the appellant, setting forth substantially the provisions of said agreement, the material facts of which have been incorporated in the statement already made. The original of said agreement is filed with said bill as an exhibit and part thereof. The bill contains the further statement that at the expiration of the first year the parties to this appeal entered into a verbal contract, which is wholly disconnected from the agreement exhibited with the bill, and is to this effect: That the appellee, having failed to sell 100 gross of said preparation within the first year of his employment under said agreement, as stated, he continued in the employ of the appellant and sold said remedies on commission during the second year and thereafter, and that, while he continued to sell on commission, the sales gradually fell off, and in consequence the amount paid to the appellee on account of royalty diminished, until finally little or nothing was received from this source. A word of comment here in passing. After the appellee failed to sell the stipulated amount of said remedies, within the first year of his employment, by which he was to become entitled to employment for another year, he enters into a new contract to sell upon commission, and according to his own showing he was not entitled to receive a royalty on the sales of the second year. The bill prays that the appellant be required to account under oath for all sales made by him of the aforesaid preparation during the year, beginning the 22d of November, 1889, and ending on the 21st of November, 1890, and also calls for the statement of all sales made since the said last-mentioned date, and the quantity of said

preparation he has at present on hand and further prays that if it should be to appear that the appellant did not make the true amount of sales made by him during the first year, and that the quantity sold exceeded 100 gross of said preparation, the appellant be required to pay to the appellee the same salary for the second year as he agreed to be paid for the first. As the demurrer which the appellant has interposed to this bill goes to the whole bill, we thought it proper to state at length the facts material to the proper consideration of the questions at issue. On May 20, 1895, the appellant filed in support of his demurrer the following reasons: (1) Because more than three years have elapsed since the matter was complained of in the years 1889, 1890, and 1892. (2) Because the agreement is not as "Plaintiff's Exhibit No. 1," claimed to be the basis of plaintiff's right of action, but that plaintiff has now no claim against the defendant. (3) Because no facts are alleged to sustain or justify the allegations of plaintiff of irreparable injury; and as the bill of complaint itself shows that the defendant is solvent, plaintiff had full, complete, and adequate remedy at law.

The first reason assigned substantially is that the statute of limitations is a bar to the maintenance of this action. The principle as established by this court in a number of cases, respecting demurrers to bills in equity, leaves very little to be said on this subject. The late Judge Miller, delivering the opinion of this court in *Blays v. Roberts*, 6 Md. 511, 13 Atl. 366, said: "This appeal is from a decree sustaining a demurrer to a bill in equity and dismissing the same on the grounds relied on in support of the decree is limitations, and this court has recently decided that this defense may be availed of under a general demurrer, even from the face of the bill, it can be seen that the bar applies, and where no facts are alleged sufficient to relieve it from the operation of the statute." *Belt v. Bowie*, 65 Md. 4 Atl. 295; *Noble v. Turner*, 69 Md. 5 Atl. 124. The appellee, in his brief, says: "Conceding that limitations would apply to a claim for salary, but not to other property, claim, demurrer ought to be overruled on its first ground." We think this proposition is not sustained by any authority; certainly none to which our attention has been called. We have examined with patient care the "other part of claim" to which limitations is alleged, did not apply, but have failed to discover it. It is the universally common practice in courts of equity that such causes may be assigned for demurrer, whether one be good, and the other bad, that the demurrer will be sustained, since the defendant may at the argument, on terms, assign new causes of demurrer. *Story, Eq. P. 4th Ed.* § 443; *Coop. Eq. Pl.* 112; *Johnson v. Frost*, Jac. 466. In so far as we have been able to ascertain from the provisions

bill of complaint, there is no allegation of any claim, or statement of any facts, sufficient to relieve it of the bar of the statute, and, this being so, it comes within the ruling of this court in *Blays v. Roberts*, supra.

While from the view we have taken of the first ground assigned in support of the demurrer, it will not be necessary to give extended consideration to the second and third reasons, we will yet briefly consider them together in their bearing upon this controversy. The second assignment must prevail, because the appellant has not agreed as to the particular time when he would proceed with the manufacturing and sale of said preparation, and there is no allegation contained in the bill that he has unfairly or unreasonably delayed the performance of any duty devolving upon him in the due and proper execution of said agreement. Yet, further, by the terms of the sixth clause of said agreement, which relates to the execution by Albert J. Saul, the son of the appellee, of an agreement containing like covenants with the original agreement filed as an exhibit with the bill in this case, under the condition hereinbefore stated, there is no averment that said Albert has complied with said condition, or that satisfactory proof of his death has been furnished to the appellant. The appellee disposes of this difficulty by simply saying that this provision as to Albert J. Saul is waived by conduct of the appellant. The circumstances of the waiver are not explained, and we fail to recognize, in the statement of the bill, any facts pertinently bearing upon the subject, or as directly tending to show how the appellant by his conduct has established a waiver. The demurrer unquestionably admits the truth of the facts stated in the bill, so far as they are relevant and well pleaded, but not conclusions of law or theories of construction drawn therefrom. We find nothing in the record sustaining the appellee's contention on the question of waiver, and, giving proper construction to the sixth clause of said agreement, there is no ground for the assertion that the condition in the sixth clause of said agreement has been waived by the appellant. It is, then, very clear that the appellant could not be required, after the expiration of one year from the date of said agreement, to pay any further royalty to the appellee.

As to the third assignment, little need be said. If the appellee has a remedy under said agreement, it is, as to jurisdiction, concurrent, and may be maintained either in a court of equity or in a court of law. It is stated in this bill, and admitted by the demurrer, that the appellant is a man of means, and abundantly able to carry on the business contemplated by the agreement of the parties. There is, therefore, nothing in the charge of irreparable injury, and if the appellee had sued at law instead of in equity, the appellant would have been, according

to the allegations of the appellee, able to respond to such a verdict as might have been recovered against him. A court of equity has, however, first assumed jurisdiction of the cause. It will therefore be permitted to retain it. The motion to dismiss must be overruled. *Chappell v. Funk*, 57 Md. 471, 475; *Hecht v. Colquhoun*, Id. 563. For the reasons assigned, the order of the court below overruling the demurrer must be reversed. Order reversed, and cause remanded for further proceedings.

DAUGHERTY v. DAUGHERTY et al.
(Court of Appeals of Maryland. Jan. 8, 1896.)

ORPHANS' COURT—JURISDICTION.

The orphans' court has not jurisdiction of a contest by one heir as to the validity of a transfer of personalty by deceased during his lifetime to other heirs; the issue involving title to property, and not concealment, of which Code, art. 93, § 238, gives such court jurisdiction.

Appeal from orphans' court, Harford county.

Petition of William S. Daugherty against Thomas Benton Daugherty and others. Petition denied, and petitioner appeals. Affirmed.

Argued before BRYAN, McSHERRY, BRISCOE, BOYD, and ROBERTS, JJ.

S. A. Williams, James J. Archer, and George L. Van Bibber, for appellant. Thomas H. Robinson, John S. Young, and J. Martin McNabb, for appellees.

ROBERTS, J. The appeal in this case is taken from an order of the orphans' court of Harford county refusing letters of administration on the personal estate of John Daugherty, deceased, to the appellant, who is a son of the deceased. The petition of the appellant alleges that his father, John Daugherty, died, intestate, about April 1, 1895, leaving three sons surviving him, the appellant and his two brothers, Thomas B. and John C. Daugherty, who are both older than the appellant; that no application for letters of administration had been made by any one, and no letters ever granted. The appellant, by his petition, alleges that his two brothers and his sisters, some time before the death of their father, the intestate, and while he was of unsound mind, possessed themselves of all his personal estate, and appropriated the same to their own use; that for the purpose of contesting the validity of such transfer, and to compel his said brothers and sisters to account for the money and securities obtained by them from their father when he was of unsound mind, incompetent to execute a valid deed, the appellant filed his petition and application in the orphans' court of Harford county, asking the grant of letters of administration to him. Citation was accordingly issued by the orphans' court for the appellees to show cause why letters

of administration should not be granted. The appellees filed separate answers, under oath, to said petition, in which they both admit that no administration on their father's estate has ever been granted to any one, and by their answers deny that John Daugherty, their father, at the time of his death, and for many years prior thereto, was possessed of personal estate of any kind or character whatsoever. The case was submitted to the court on petition and answers, without replication, and no testimony was taken by either party in support of the allegations of the petition or answers. The petition and answers were both sworn to. The hearing was had before two of the judges of the orphans' court, and, the court not being able to agree, an order was passed refusing letters of administration to the appellant, and from this order the appeal in this case is taken.

There is practically but one question arising on this appeal which it is necessary for us to consider. The appellant seeks to contest the validity of the transfer by his father in his lifetime of his personal property to his two older sons, the appellees, and his daughters, at a time when his father was incompetent to execute a valid deed or contract. In a proceeding of this character we do not think the orphans' court possessed of jurisdiction requisite to the determination of the question involved. It would undoubtedly, in a proper case, have full power and authority to hear and determine a question of concealment of property belonging to the intestate, if the application be made as required by law; but this is clearly not a question of concealment, but is a contest as to the validity of the transfer of certain personal property by the father to certain of his children, and the issue is one involving the title to such property. Has the orphans' court jurisdiction to try this question? We think not. A court of equity alone has jurisdiction to deal with such a controversy. Even when the orphans' court has power to admit to probate a will involving title to personal property mentioned in the will, it is possessed of no jurisdiction authorizing it to pass upon and determine a controversy over the validity of the title. While in *Waring v. Edmonds*, 11 Md. 433, this court had doubts as to whether the orphans' court had jurisdiction of this question, *Le Grand, C. J.*, said: "To guard against all misapprehension hereafter, we add that we have very serious doubts whether the case be one over which the orphans' court had jurisdiction, being a question of title, and not of concealment." It was not, however, a question material to the issues in the case then to be decided, and for that reason was not passed upon. It was by Act 1831, c. 315, § 12 (Code, art. 93, § 238), that the orphans' courts of this state were authorized to pass on questions of concealment only, not of title. *Spencer v. Ragan*, 9 Gill, 480. The orphans' courts of the state exercise only a special limited ju-

risdiction, which they cannot transcend; within a just and reasonable construction of its statutory powers, we do not find where that it is clothed with jurisdiction to try questions of title to personality. *Loring v. Levering*, 64 Md. 410, 2 Atl. 1; *mental v. Moltz*, 76 Md. 586, 25 Atl. 1. We think such has been the well-recognized practice in this state for many years, and one we think entitled to our sanction.

But, independently of the views expressed, we think the pleadings in the cause properly dispose of the questions arising on appeal. While the court below did not let this case pass an order directing plenary proceedings, yet it has been repeatedly held when a petition is filed, and the respondents are cited to appear, and do appear, and their answers under oath, the proceeding is plenary, and must be treated as such. *non v. Crook*, 32 Md. 484; *Pegg v. Waring*, 4 Md. 396; *Barroll v. Peters*, 20 Md. 4. In this case the appellant filed the petition under affidavit, and the respondents have answered under oath, denying every material allegation contained in the petition. The case was submitted to the court for its order without replication, and without testimony taken to sustain the respective contentions of either party to the controversy in this state of case, the allegations contained in the answers must be assumed to be true, and are, in our opinion, sufficient to warrant the judgment of the court below. *Barr v. Peters*, supra. For the reasons assigned, the order of the court below must be affirmed. Order affirmed, with costs.

CHAPPELL v. STEWART.

(Court of Appeals of Maryland. Jan. 8, 1884.)

EQUITY—JURISDICTION—HARMLESS ERROR.

1. Sustaining a demurrer to a bill in equity after amendment of defendant's pleading, when no demurrer in the case is harmless, the matters alleged in the bill not being cognizable in equity.

2. Equity has no jurisdiction to protect a person from surveillance by detectives.

Appeal from circuit court of Baltimore city.

Suit by Thomas C. Chappell against David Stewart. Decree for defendant. Plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and AN, McSHERRY, FOWLER, BRISCOE and ROBERTS, JJ.

Julian J. Alexander and Thomas C. Chappell, for appellant. Red. C. Stewart, for appellee.

BRYAN, J. Thomas C. Chappell filed a bill in equity against David Stewart. Without entering minutely into the details of the bill of complaint, it may be stated that he charged that the defendant had employed detectives to follow him, and watch

wherever he should go; and that this conduct caused him great inconvenience and annoyance, interfered with his social intercourse and his business, and caused grave suspicions to be entertained about him, so as greatly to damage his financial credit. It is also alleged that the defendant intended to continue the same course of conduct towards the complainant. The bill prayed for an injunction to restrain and prohibit the defendant from the aforesaid conduct, and for a decree for damages, and for general relief. He also filed a special motion or a preliminary injunction. The defendant filed a demurrer and answer combined together. It was maintained that the bill of complaint did not entitle the complainant to any relief in equity, because it did not set forth any legal or equitable right which the defendant was injuring, because it did not set forth any danger of irreparable damage, and for other reasons; and the answer denied the charges of the bill. The court refused to grant the preliminary injunction. The defendant, by leave of the court, amended his pleading by changing its form so as to make it simply an answer, and nothing more. Afterwards the court passed an order sustaining the demurrer and dismissing the bill, with costs. The court acted inadvertently in passing an order on the demurrer, when, in consequence of an amendment of the defendant's pleading, there was no longer a demurrer in the case. We shall see whether this oversight inflicted any injury on the plaintiff. As the answer denied the allegations of the bill, and the motion for a preliminary injunction was heard on a bill and answer, it was of necessity that the motion should be denied; and as the bill, assuming that all its allegations were true, did not contain any matter cognizable in equity, it ought then and there to have been dismissed. Courts of equity exercise a very extensive jurisdiction in cases involving property rights. The occasion does not require us to state its precise limits. It is usually said in general terms that it does not exist where a plain, adequate, and complete remedy can be obtained at law. In this case it is alleged that rights affecting the complainant's person have been violated, and that there is a purpose to persist in violating them. The ordinary processes of the law are fully competent to redress all injuries of this character. They have always been considered beyond the scope of the powers of a court of equity. In *Gee v. Bitchard*, 2 Swanst. 402, Lord Eldon said: "The question will be whether the bill has stated facts of which the court can take notice, as a case of civil property, which it is bound to protect." In *Bisp. Eq.* (5th Ed.) § 584, note 2, it is said: "But it is the rights of property, or, rather, rights in property, that equity interferes to protect. A party is not entitled to a writ of injunction or a matter affecting his person." In *Kerr*,

Inj. pp. 1, 2, it is said: "A court of equity is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which its jurisdiction rests. A court of equity has no jurisdiction in matters merely criminal or merely immoral which do not affect any right to property. If a charge be of a criminal nature, or an offense against the public peace, and does not touch the enjoyment of property, jurisdiction cannot be entertained. The court has no jurisdiction to restrain or prevent crime, or to enforce the performance of a moral duty, except so far as the same is concerned with rights to property; nor can it interfere on the ground of any criminal offense committed, or for the purpose of giving a better remedy in the case of a criminal offense, or for putting a stop to acts which, if permitted, would lead to a breach of the public peace." We, of course, do not intend to express an opinion on the merits of any action at law which the complainant may see fit to bring. Decree affirmed, with costs.

IN RE SWEETING.

Appeal of BILLINGTON.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

FRAUDULENT CONVEYANCE — HUSBAND TO WIFE — EVIDENCE.

On an issue as to the bona fides of a judgment confessed by an insolvent in favor of his wife, she claimed that it represented an indebtedness for the proceeds of the sale of certain stock which he had given her at the time of their marriage, 12 years before, and which she had returned to him a few months later, when he sold it, using the proceeds in his business, without ever accounting for them. The husband was secretary of the corporation, and had custody of all its books and papers, but these had disappeared at the time of the trial, and the corporation was defunct. *Held*, that as the alleged sale of the stock and the receipt of value for it was the crucial part of the claim, and the insolvent's testimony was entirely uncorroborated in this regard, the auditor, having found that he was entirely unworthy of credit, should have rejected the claim.

Appeal from court of common pleas, Philadelphia county.

Proceedings for the distribution of the proceeds of the sale of goods of T. H. Sweeting. From the decree rendered, James H. Billington appeals. Modified.

Amos Briggs, for appellant. Ormond Rambo, for appellee.

WILLIAMS, J. The contention of the appellant in the court below was that the judgment under which the wife of the defendant claimed the bulk of the fund in court was fraudulent. The facts shown by the report of the learned auditor are that Sweeting was conducting a large business in bicycles in the city of Philadelphia for some years prior

to the 28th of July, 1892. Finding himself, as he says, unable to pay his debts, he disclosed his situation to his wife and her mother, who lived with them, and, after a day or two of consideration, an attorney was consulted. The result was that judgment notes, payable one day after date, were executed by Sweeting, in the following order: To his wife for about \$12,000; to her mother for about \$11,000; to Ann Slover for \$4,000; to James H. Billington, the appellant, for \$4,250, for money borrowed some three years before. On the next day, judgment was entered upon all these notes at the instance of Sweeting, and writs of fieri facias were issued, and placed in the hands of the sheriff, so as to secure priority in the order above named. Upon these writs the stock and personal goods of the defendant were sold, and the proceeds are insufficient to pay all the writs. Billington cannot be reached if the previous writs are entitled to be paid in full. He accordingly attacked the judgments of Mrs. Sweeting and her mother, Mrs. Munson, before the auditor, who found that only \$4,700 was due to Mrs. Munson, but sustained the judgment of Mrs. Sweeting for the amount named in the note. Whether his conclusion upon this question is supported by the facts found by the auditor is the question now raised.

Mrs. Sweeting alleges that her judgment represents two items of indebtedness. One is for money loaned to her husband out of her separate estate, amounting to \$2,400. The other is for the sum of \$8,650, claimed to be the proceeds of a sale of 150 shares of American Chain Company stock. This stock originally belonged to the defendant. The story told to establish the right of his wife to this sum of money as its proceeds is that in 1880, at the time of her marriage, her husband gave her this stock; that a few months later she returned it to him; that he sold it for the sum named, and used the money for 12 years in his business, without accounting on his part, or claim on the part of his wife. A man who is solvent may make a valid gift to his wife (*Hart's Appeal*, 157 Pa. St. 200, 27 Atl. 703); but the fact of the gift and every element necessary to sustain the claim of a married woman as against her husband's creditors must be established by clear and satisfactory evidence (*Wilson v. Silkman*, 97 Pa. St. 509). If the evidence of Mrs. Sweeting and her mother should be regarded as sufficient to support a finding that the chain company stock was given to Mrs. Sweeting, and returned by her to her husband, in 1880, and that he thereby became debtor to her for its value, what have we to show its value? Sweeting was secretary of the chain company, and had the custody of its books and papers. These have all disappeared. Nothing remains of the company. Its stock is without value. The ownership of the stock by Sweeting in the first instance, the alleged sale of it by him,

the price obtained for it, depend on his corroborated testimony. His purpose to defraud the appellant and others of his estate was so apparent, and his testimony was so unsatisfactory, that the auditor found it to be unworthy of credit; and he has accordingly rejected this part of the claim brought forward by her, on the ground of what he characterizes as a "very fortuitous circumstance for her, viz. the fact that her own testimony and that of her mother support 'what is the crucial part of the case.' The crucial part of her case related to the sale of the stock, and the price received for it; and upon neither of these subjects can we understand the report of the auditor, and so much of the evidence as is before him, did either Mrs. Sweeting or Mrs. Munson profess to have any knowledge whatever. If full credence be given to their testimony, it goes no further than to establish that a paper purporting to be stock of the American Chain Company was given to Mrs. Sweeting to his wife at or soon after their marriage, and that it was returned to her on their return from their bridal tour. So far as the testimony shows, if that of Sweeting be left out, he may have the stock if it was, at this time. He may have received one farthing from it, or may be able at any time since its return to him to dispose of it at any price. We cannot, however, upon the auditor's view of the facts, and of the unreliable character of the testimony of Sweeting, we can do otherwise than hold that he was mistaken in his view of the effect of the testimony of Mrs. Sweeting and her mother, and in his conclusion that his testimony corroborated that of the defendant upon any question relating to the sale of the stock or the price obtained for it. The case of Mrs. Sweeting, as the auditor has said, is surrounded by "circumstances of suspicion"; and the evidence relied upon to show the sale of stock in a company, of which no trace remains, for nearly \$9,000 in cash, and its receipt and retention by the defendant, falls far below the standard required by *Wilson v. Silkman*, supra, and *Leiby v. Davidson*, 112 Pa. St. 380, 4 Atl. 380. The bona fides of the claim for \$2,400 does not seem to be questioned. The judgment may stand for that sum, under the authority of *Glicker v. Martin*, 50 Pa. St. 133, for that sum only it is entitled to participate in the fund. The report is now modified, reducing the sum allowed on the writ in favor of Mrs. Sweeting to \$2,400, and the order is remitted, that the court may enter the decree of distribution accordingly.

WENNER v. CITY OF WILLIAMSBURG
(Supreme Court of Pennsylvania. Jan. 1896.)

LICENSE ORDINANCE—VALIDITY.
Act May 23, 1889, art. 5, § 3, cl. 1, authorizing a city to levy and collect a license

ious mercantile occupations, empowers to classify any of those occupations, for the purpose of the imposition of license taxes, according to annual sales.

al from court of common pleas, Lycoming county; John J. Metzger, Judge.

n by the city of Williamsport against Wenner to recover \$20, the amount of a tax levied and assessed under a city ordinance. From a judgment for plaintiff, writ appeals. Affirmed.

Opinion and decree of the court below as follows:

In this case we find the following facts: That the city of Williamsport, in the county of Lycoming, was duly incorporated by the act of the general assembly of Pennsylvania, approved January 15, 1866, and appear by reference to P. L. 1866, p.

That the said city of Williamsport, by ordinance, on the 3d day of January, 1889, duly accepted the provisions of the act of the general assembly of Pennsylvania, approved May 23, 1874, commonly known as the 'Alliance Law,' and thereby became a member of the third class.

That under the provisions of the act of the general assembly approved May 23, 1889 (P. L. 1889), the said city of Williamsport is now a member of the third class.

That on the 3d day of April, 1893, an ordinance was passed by select and common council, and approved by the mayor of said city of Williamsport, entitled 'An ordinance for the levy and collection of an annual license tax on auctioneers, contract-makers, peddlers, produce or merchandise dealers, bankers, merchants, butchers, and pool tables, drays, hacks, carriages, omnibuses, carts, wagons and other vehicles used in the city for hire or pay; dealers, street railway cars, livery keepers, real estate agents, insurance companies, telephone, water, steam heating, gas, illuminating and gas companies. Allowing for the assessment, reassessment, and exoneration of said license tax.' Also fixing or prescribing penalties for violation of any of the provisions of this ordinance, which ordinance is published in a pamphlet entitled 'Mayor's Message, City Clerk's Report, and Reports of Department of the City of Williamsport, Pa., for the year 1892; Also Certified Ordinances,' on page 47, and the portions thereof material in this case read as follows:

Section 1. Be it ordained by the select and common councils of the city of Williamsport that any person, firm or corporation, hereinafter mentioned, doing business in the city of Williamsport, shall, before the first day of May annually, apply to the city treasurer for license for the period of one year; and the city treasurer shall issue said license to the applicant, upon payment of the amount of license tax provided by this ordinance: Provided, that any license may be issued for the remaining part

of a year upon payment of the pro rata of such license tax; no license, however, to be issued for a less time than three months.

"Sec. 2. The annual license tax to be paid in advance to the city treasurer shall be as follows: Clause 1. Every auctioneer shall pay an annual license tax of twenty-five dollars (\$25.00.) * * * Clause 2. Every hawker or peddler, except disabled soldiers, shall pay twenty-five dollars (\$25.00.)' [From this clause to clause 18 certain kinds of business continue to be enumerated, on which a fixed sum is assessed.] Clause 18 is as follows: 'Merchants of all kinds, druggists, grocers, confectioners, butchers, saddle and harness dealers, book-sellers, stationers, jewelers, and furniture dealers, produce or merchandise vendors, persons selling or leasing goods upon installment, shall be, and they are hereby classified and required to pay annually to the city treasurer for the use of the city, for their respective licenses as follows: Those whose annual sales do not exceed one thousand dollars shall constitute the first class and shall pay one dollar (\$1.00). Those whose sales are over \$1,000 and do not exceed \$5,000, shall constitute the second class and shall pay five dollars (\$5.00). Those whose sales are over \$5,000 and do not exceed \$10,000, shall constitute the third class and shall pay ten dollars (\$10.00). Those whose sales are over \$10,000 and do not exceed \$20,000, shall constitute the fourth class and shall pay twenty dollars (\$20.00). Those whose sales are over \$20,000 and do not exceed \$30,000, shall constitute the fifth class and shall pay thirty dollars (\$30.00). Those whose sales are over \$30,000 and do not exceed \$40,000, shall constitute the sixth class and shall pay forty dollars (\$40.00). Those whose sales are over \$40,000 and do not exceed \$50,000, shall constitute the seventh class and shall pay fifty dollars (\$50.00). Those whose sales are over \$50,000 and do not exceed \$75,000, shall constitute the eighth class and shall pay seventy-five dollars (\$75.00). Those whose sales exceed \$75,000 shall constitute the ninth class, and shall pay one hundred dollars (\$100.00).

"Sec. 3. That for the purpose of ascertaining to what class any person liable to pay a license tax under the provisions of this ordinance may belong, the assessment and classification shall be made by the city assessors between the first and fifteenth day of April of each year, in compliance with the terms of this ordinance: Provided, that should the city assessors neglect to assess any person or persons following any business named in this ordinance, the city treasurer shall add their names to the proper class, and collect the amount thereof as in other cases.'

"Sec. 5. It shall be the duty of the city treasurer to notify all persons subject to the payment of license taxes as provided by this ordinance, on or before the first day of May in each year, when said license is payable and the amount due from them; and if the same is not paid within three months, he

shall place the same in the hands of a collector, to be by him appointed, for collection, who shall give bonds in the amount of the same, with sureties to be approved by councils. Said collector shall immediately proceed to collect the same, and shall make return and pay over to the city treasurer all amounts collected by him within thirty days from the time the same shall be placed in his hands, and shall receive for his compensation five per cent. of the amount thus collected. All licenses uncollected by said collector, after the expiration of said thirty days, shall be immediately turned over by him to the city solicitor for collection, who shall immediately proceed to collect the same. The city treasurer shall enter upon the city license register the date of giving the notice required by this section and the manner of the same.

"Sec. 6. Any person or persons refusing or neglecting to apply for license and pay the tax required by this ordinance, shall be compelled by legal process to pay the same, with interest and costs, and be subject to the payment of a penalty of not less than ten dollars (\$10.00), nor more than one hundred dollars (\$100.00), to be recovered as provided by law."

"Sec. 8. Any person or persons who shall have been assessed with a license tax, under this ordinance, and claim that they are not liable for the payment of the same, or that the amount with which they have been assessed is incorrect, can make an affidavit setting forth the facts of the case before the city controller, which affidavit shall be filed with the city treasurer, who shall report the same to the councils before he places the claims in the hands of a collector for collection, whereupon councils shall consider the same, and if they shall decide that the party assessed is not liable, or that the assessment is not correct, they shall direct the city treasurer to strike the name of such person or persons from the city license register or correct the assessment, as the case may require: Provided, such affidavit is filed with the treasurer within fifteen days after the receipt of the notice of the tax."

"(5) That John Wenner, the defendant in this case, is a grocer, and was engaged in the business of keeping a grocery store in the city of Williamsport in and during the year 1893, and was assessed, in pursuance of said ordinance, in said year, with the sum of twenty dollars (\$20.00), as a grocer, belonging to the class designated in said ordinance as the fourth class.

"(6) That the city treasurer of the city of Williamsport duly notified the said John Wenner, on or before the 1st day of May, 1893, of said assessment and the amount due from him as required by section 5 of said ordinance. That the said John Wenner did not pay the same within the time prescribed by said ordinance and the same was placed in the hands of a collector, who, not having col-

lected same after the expiration of 30 days, turned the same over to the city solicitor, who instituted legal proceedings to compel the payment of the same.

"(7) That the city treasurer entered upon the city license register the date of giving the notice required by said ordinance, and the manner of the same.

"(8) That the city of Williamsport is in full compliance with all the requisites of said ordinance, and that the said defendant did not pay the said license tax.

"The ordinance referred to, by which the assessment in this case was made, is claimed by the plaintiff to have been made in pursuance of clause 4 of section 5, of the act of 1889 (P. L. p. 237), which reads as follows: 'To levy and collect for general revenue purposes a license tax, not exceeding one hundred dollars (\$100.00) annually on all auctioneers, contractors, druggists, hawkers, peddlers, producers, merchandisers, venders, bankers, brokers, merchants of all kinds, persons engaged in or leasing goods upon installment, confectioners, butchers, restaurateurs, bowling alleys, billiard tables, and gaming tables, drays, hacks, carriages, buses, carts, wagons, street railway cars, and other vehicles used in the city for hire; pay; lumber dealers, including commission men, and all persons who make a business of buying lumber at wholesale or retail; furniture dealers, saddle or harness dealers, tailors, jewelers, livery or boarding house keepers, real estate agents, agents of life or other insurance companies, express companies, telegraph, telephone, steam heating, natural gas, water, electric light or power companies or agencies, or individuals furnishing communication, light, heat or power by any of the means enumerated, and to regulate the collection of the same.' The ordinance of the city council to levy and collect a license tax from the defendant is not illegal, but it is alleged on the part of the defendant that the ordinance in pursuance of which the assessment in controversy was made is illegal and invalid, by reason of the classification made therein. It is contended, that councils of cities or municipal authorities possess no powers those which are expressly given them by law, or those which are necessarily implied from their charters or from some other source. 'Counties, cities, and towns are municipalities, created by the authority of the legislature, and they derive all their powers from the source of their creation, and where the constitution of the state otherwise provides. They have no inherent power to make laws or adopt governing regulations, nor can they exercise any power in that regard than such as is expressly or impliedly derived from the

ers or other statutes of the state.' *Laramie Co. v. Albany Co.*, 92 U. S. 307. The power of the legislature to delegate to a municipality its power to tax and its power to classify is not disputed by the counsel, but it is contended that no such power is delegated by the act of 1889. It is argued that the clause of the act of 1889 upon which the city relies in this case had been given a different construction by our supreme court than that which was placed upon a similar clause in the act of 1874; and the case of *Oil City v. Oil City Trust Co.*, 151 Pa. St. 454, 25 Atl. 24, is cited to sustain this position. After careful examination of this subject, I agree with the learned counsel that a different construction has been given to this clause in the act of 1889 by our supreme court from that put upon a similar clause in the act of 1874. It is settled that a license tax empowered to be levied and collected by virtue of the act of 1889 is a tax in a general sense, and is not levied under the police power of the city. From this it is argued that the decisions heretofore delivered by the court, sustaining the classification of subjects similar to those in controversy, have no application; that, under the act of 1874, the license tax was an exercise of the police power of the city. It is true there is quite a difference between the power of taxation and the exercise of the police power. *Burrows*, in his work on Taxation (page 396, § 122), speaking of license fees or taxes levied under the police power, says: 'The provisions for equality and uniformity do not apply to this species of tax, but, should they be held to apply, the only effect should be that each class of results should be taxed alike.' Where, however, a license tax is a tax in a general sense, there must be, under the provisions of our constitution, 'uniformity upon the same class subjects within the territorial limits of the authority levying the tax, and they must be levied and collected under general laws.' Section 1, art. 9, of the constitution of the State of Pennsylvania. This, however, in judgment, does not destroy the effect of reasoning in the cases heretofore decided. The court, in the case of *City of Allentown v. Boss*, 132 Pa. St. 322, 19 Atl. 269, in passing upon the question of the right to classify by ordinance in pursuance of the act of 1874, seems to have had in view the question of uniformity of such assessment. He says in opinion: 'It is argued here that the gradedness of the license tax according to the amount of annual gross sales is illegal, because it is not uniform; that all liquor sellers should be required to pay the same amount; and that, by making the amount of their sales the basis, it is, in effect, an income tax. But this is not the taxing of the person of the dealer or seller, but of his property, estimated by the volume of the annual sales. A tax of this character, graded in the same way, for state purposes, has been levied and collected for many years. * * * Being tax-

ation of a thing and not of a person, the classification makes uniformity the same as in the case of money at interest and real estate. The man who has \$2,000 at interest pays twice as much as he who has but \$1,000,' etc. The same may be said of the case of *Hadtner v. City of Williamsport*, 15 Wkly. Notes Cas. 138, in which the learned court held that, under article 9, § 1, of the constitution of Pennsylvania, taxes need not be uniform upon all subjects within the territorial limits, but only upon the same class of subjects. An ordinance, therefore, which imposes license taxes varying in amounts upon different kinds of industries is not void because of want of uniformity.

'We can really see no materiality in the controversy whether this license tax is a tax in a general sense, or is under the police powers, because, after all, if the authority claimed by the plaintiff here is conferred by the act of 1889, then it matters little whether you call it a tax or a license. That the legislature itself may classify the subjects of taxation does not admit of any doubt, and if this be so, does not the legislature, when it confers the power of taxation of certain subjects to a municipality, thereby confer all the power which it itself has over the subject? And if it has the right to classify, why should not the municipality have the same right? The power of classification is inherent in the power of taxation, and, in my judgment, the only limitation upon this power is that such classification be made in such manner as to produce as great uniformity and equality of taxation as possible. By the act of 1889 the legislature vested in councils the discretion to tax the subjects named in the act in any amount not exceeding \$100. Is it not clearly implied that, in the exercise of this discretion, they would have the right to classify any or all the subjects of taxation named according to the amount of their gross sales? I will go further, and affirm that, in my judgment, if the subjects named were taxed without regard to the amount of their sales, it would be most unjust and inequitable, and such assessment could not produce uniformity. The very fact that it is not a license, but a tax, makes it necessary that the municipal authorities should have the discretion to classify the subjects and graduate the assessment on some basis, particularly as regards some of the subjects named in the act, in order to produce uniformity and equality. If it were a license merely, then it might be proper that every man should pay alike for the privilege of doing a certain business, but to levy a tax upon the same principle is to say that a dealer whose sales amount to but \$2,000 or \$3,000 a year shall pay the same tax as he whose sales amount to \$200,000. The inequality of such a mode of assessment is so apparent that it needs no argument to prove it. The case of *Banger's Appeal*, 109 Pa. St. 79, is not at all in conflict with this

position. That was an attempt to classify the same occupation according to the earnings of individuals. It was very properly ruled that such a tax would be an income tax, measured by the amount of the earnings of the party; but even in that case the right to classify the tax upon property is, at least impliedly, recognized. The tax in controversy is clearly not an income tax in any sense, but it is a tax of the defendant's property, estimated by the volume of his annual sales. I might add that, to my mind, it is evident that the power to classify is delegated by the clause of the act of 1889 in controversy, from the fact that the legislature, in conferring the power to impose a license tax, did not regulate the levy and collection thereof, but left the mode of assessment and manner of collection to the discretion of the municipality, fixing only the maximum which could be levied on any one subject. We have no doubt, therefore, of the power of the municipal authorities to classify the subjects of taxation as in this case, and unless the classification adopted is manifestly unjust and unreasonable, it is not the province of the court to say that they might have adopted a more equitable mode of assessing taxes. 'The power to impose taxes, the selection of subjects for classification and the method of collection are purely legislative matters.' *Com. v. Delaware Div. Canal Co.*, 123 Pa. St. 620, 16 Atl. 584; *Com. v. Germania Brewing Co.*, 145 Pa. St. 87, 22 Atl. 240; *Com. v. National Oil Co.*, 157 Pa. St. 523, 27 Atl. 374. But in view of the fact that the classification provided for by the ordinance in controversy so closely follows that adopted by the state herself in the act of May 15, 1841, and which has been in force ever since, how can we say that the classification in this case is unreasonable and inequitable? There is, of course, no such thing as a perfect uniformity and equality in taxation. All that can be claimed is that it should approximate uniformity and equality as nearly as possible. But it is sufficient that the municipality had the power to classify as they did in this case, and that there is nothing in the ordinance itself or in any evidence in this case to indicate that there was any abuse of their discretionary power. But it is further urged by counsel in this case that, if they had the right to classify and did classify some of the subjects named in the act, they were bound to classify all subjects named therein. We can see nothing in this position. As all subjects of taxation cannot be classified by the same standard, so there are subjects which do not admit of classification at all. Classification depends, not only upon the physical nature or position of the subjects selected, but upon a variety of considerations. It may be wholly impracticable to classify certain subjects, and to attempt to do so might destroy uniformity of taxation instead of producing it, and the municipal

authorities ought not to attempt such classification in such cases, or even where such a result would be doubtful. They must exercise a sound discretion on this subject, where they do so courts will not attempt to interfere with their action. Because municipal authorities cannot classify all subjects of taxation, it does not follow that they cannot classify any. But we cannot say that the defendant in this case, whose business constitutes one subject of taxation, is not a plain because some other subject of taxation is not graded or classified in the same manner that his business is. He cannot complain that this is a violation of the provision of the constitution, because the constitution only requires that the subjects of the same class be uniformly taxed. The legislature itself, in this case, has made a classification of subjects, and the defendant belongs to a different class from the auctioneer or the peddler. Some other mere technical questions raised by the bill of particulars filed by the defendant in this case, which have been commented upon by counsel in the argument, and which, I think, are not of consequence in this case, and therefore will not take up the time to discuss.

"No points of findings of facts were submitted to the court by either party, but counsel on both sides have submitted points in which the court is requested to reach certain conclusions of law, which I state as follows: The points of the plaintiff, nine in number, are affirmed. The second, and third points of defendant's counsel are affirmed, and the fourth, fifth, and seventh points are refused. Therefore, now, to wit, July 14, 1893, it is ordered that judgment be entered in favor of the plaintiff in this case in the sum of \$20, subject nevertheless, to exceptions which may be made thereto, as provided by act of assembly, and the agreement of counsel in this case."

J. A. Beeber, for appellant. W. L. Dyer, City Sol., for appellee.

PER CURIAM. This suit was brought to recover the amount of a license or tax assessed by the city of Williamsport against the defendant, a merchant and business therein. By consent of parties, right of trial by jury was waived, and the decision of the case was submitted to the court. In a painstaking and exhaustive opinion, the learned president of the court has clearly presented his findings of fact and conclusions of law drawn therefrom. A careful examination of the record has failed to convince us that there was any error in the judgment, or in the proceedings leading up thereto. We find nothing in that would justify us in sustaining the assignments of error, nor do we find that either of them requires discussion. We have held that the ordinance under

he tax in controversy was assessed is an unwarranted exercise of the taxing power conferred by the act of May 23, 1889, would have been error. Judgment affirmed.

KURTZ v. HOKE et al.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

RIGHT OF WAY—PRESCRIPTION—CHARACTER OF USER.

1. In order to obtain a prescriptive right of way, while the use must be of substantially the same road all the time, the fact that the rack, by reason of washing or other causes, by consent of the users of it, changes a few feet, sometimes to one side of the space appropriated, and sometimes to the other, does not destroy the right.

2. Where the record shows the written point put to the court by the defendant, and an affirmation thereof, made part of the record, as provided by Act March 24, 1877, this must prevail over a showing made by the reporter's notes and a statement of the court on a motion or a new trial to the effect that the point was not read to the jury.

3. Act April 25, 1850, provides that no right of way shall be acquired by a user when such way passes through uninclosed woodland. Held, that it was error to instruct that, if a greater or larger part of the way passed through suitable land, the prescriptive right over that part drew with it the right of way through the woodland, inclosed or uninclosed.

Appeal from court of common pleas, Lebanon county; F. E. Melly, Judge.

Action by Henry Kurtz against Adam Hoke and Henry Hoke. From a judgment for defendants, plaintiff appeals. Reversed.

Luther F. Houck, for appellant.

DEAN, J. The plaintiff is the owner of a tract of land lying between the Lancaster and Cornwall pike. There are about 15 acres in the tract. When he entered into possession of his land, in 1855, only 3 to 5 acres were then cleared, the remainder being woodland. A lane, connecting with the Lancaster road on the northwest, extended for about 100 yards through the improved part in a southeasterly direction, and then over the woodland of plaintiff, Bleistein, and finally, to a connection with the Cornwall pike. The testimony showed that the road through the woodland had not been permanent, but changed as the land was cleared, keeping, however, all the time in the woods. Henry Hoke, one of defendants, the other being his son, was the owner of a small tract adjoining this woodland, and of which he entered into possession in 1861. His ingress and egress were over this road, through the woodland and lane, and such had been the use as to other occupants who preceded him; the whole period of the use of the road covering about 75 years,—that is, of a road running in that general direction, but the evidence seemed to show the roadbed had changed to conform to the clearing of the land. There was also some evidence, on part of

plaintiff, that in 1882 there had been an agreement between Bleistein, plaintiff's predecessor in title to part of the land, and defendant, by which the latter was granted voluntarily by Bleistein the right to use a lane running through the land,—defendant to pay 25 cents a year for such use, keep the lane free from briars, and maintain gates. This agreement defendant denied. Plaintiff, alleging defendant neglected to perform his agreement, closed the lane by a fence, which defendant cut down, and thereupon plaintiff brought suit for damages. There was a judgment for defendant, and plaintiff appeals.

The court instructed the jury: (1) That if such agreement had been made, and defendant had failed in performance on his part, plaintiff was entitled to recover. (2) That if, prior to the act of 1850, which declared no prescriptive right to a road through uninclosed woodland should thereafter be acquired, defendant had by prescription acquired an easement to the road through the woodland, and there was no abandonment after the act of 1850, the plaintiff could not recover. (3) That immaterial changes in the roadbed would not interrupt the continuity of the use, if it substantially remained the same road; that imperceptible changes, caused by washing of rains and time, if the identity of the road remained, would not affect the acquisition of the prescriptive right. (4) That if defendant had surrendered a prescriptive right of way over the old road, in consideration of a right of way through the lane, then plaintiff could not recover.

There was evidence bearing on each of these points, somewhat conflicting, but still evidence for the consideration of the jury, and we fail to see any error in the submission. It is true, as argued by appellant, that if the way once used had been abandoned or shifted, or if it was rambling, sometimes along one line, and sometimes along another, as is held in *Brake v. Crider*, 107 Pa. St. 212, and *Arnold v. Cornman*, 50 Pa. St. 361, no prescriptive right was acquired; but the evidence warranted the instruction, and the court kept within the line laid down by these authorities, when it said to the jury: "You must be satisfied that such a right exists,—did exist for 21 years prior to the act of 1850, continuously and uninterruptedly,—and, further, you must be satisfied, that it was substantially the same road from one end to the other; that is, you cannot establish a road with a variance of 10 or 20 feet, or running anywhere over the timber land. It must be substantially the same road." We see no error in this instruction under the cases cited. The wagon track on all roads, to some extent, changes by time. In public roads, the 33 feet generally appropriated is within the public right of use. The track, by reason of washing or other causes, by consent of the traveling public who use it, changes a few feet, sometimes to one

side of the 33 feet, and sometimes to the other, but the road remains substantially the same. Such a change in a roadbed acquired by prescription would not destroy the right.

But the affirmance of defendants' fourth point, apparently, was manifest error. The act of 25th April, 1850, declares: "That no right of way shall hereafter be acquired by user, when such way passes through uninclosed woodland; but on clearing such woodland, the owner thereof shall be at liberty to inclose the same, as if no such way had been used through the same before such clearing or inclosure." There was evidence that the way through the wood had been used for 21 years after 1850. As to its use before that time, it was, on account of fading recollection of witnesses, less clear. After 1850, no prescriptive right could be established by mere user through uninclosed woodland; but at one end the way was by, and had always been by, a short lane through improved land. Therefore defendant put this point to the court: "(4) The act of 1850 does not apply to user of a way over any other than uninclosed woodland, and if the jury believe that a greater or a large part of the way passed through arable land through an open land fenced on each side, for more than 21 years prior to the destruction or removal of the cross fence by defendants, then the prescriptive right over that part draws with it the right of way through plaintiff's woodland, inclosed or uninclosed, and the plaintiff cannot recover." This the court affirmed, and plaintiff excepted.

Such is the record as brought up to us,—the written point and affirmation. True, the reporter's notes, and the statement of the court on the motion for a new trial indicate the point was not read to the jury, nor was the instruction embodied in it given to the jury in the general charge, but we must take the record as if made up under the act of assembly. The act of 24th March, 1877, directs that when counsel shall request the court in writing to charge upon any particular point of law, the judge shall reduce the answer to the point to writing, which said point and answer thereto shall be immediately filed and become part of the record for purposes of error, and shall be considered part of the record for assignment of error. This record was made up in exact accord with this legislative mandate, and we must treat it as the record. To affirm the point, as we have already stated, was error. It in effect nullifies the act of 1850. Every road through woodland necessarily runs into roads or ways on improved land. It extends from a habitation or improvement of the user to the common highway, village, or town. To hold that, because it runs for any distance through improved land, therefore it draws with it the right through uninclosed woodland, leaves the act of 1850 nothing in the vast majority of cases to operate on. The act is so plain

that it admits of but one meaning. A right by prescription to a road inclosed woodland cannot be obtained. Answer to this point is the singular parent upon this record, and judgment must be reversed. Judgment reversed, and v. f. d. n. awarded.

In re EMERICK'S ESTATE.
(Supreme Court of Pennsylvania,
1896.)

CLAIMS AGAINST DECEDENT—LIEN OF
BY ORDER OF COURT.

1. Act Feb. 24, 1834, § 24, declares that debts of a decedent not secured by judgment, etc., shall remain a lien after his death longer than five years for action for their recovery be commenced and prosecuted within that period. Written statement of the debt, if made within that period, is filed in the prothonotary. *Held*, that the debt, if established, or become susceptible of payment, and must be an existing debt of decedent's death.

2. When part of a decedent's estate is sold within the five years after his death, provided by Act Feb. 24, 1834, § 24, for the payment of debts, and a creditor presents his claim before an auditor disposes of the proceeds, and is awarded a dividend, this will not preserve the lien of the debt as to another part of the estate sold more than five years after death.

3. An orphans' court sale for the payment of debts is not complete, nor is the inheritance at law divested, until confirmation of the court and delivery of deed to the purchaser.

4. Payment of a decedent's debts by the executor or administrator out of his own assets, or assuming payment thereof and therefor, does not extend their lien to real estate.

5. On the sale of decedent's land within five years after his death, to which Act Feb. 24, 1834, restricts the existence of his land, creditors whose claims are not satisfied at the terms of the act are not entitled to participate in the distribution of proceeds.

Appeal from orphans' court, Centre County. Proceedings for the sale of land of John A. Emerick, deceased, for the payment of debts. From the decree of the orphans' court affirming the distribution of the proceeds of the sale, Sarah E. Emerick, a creditor, appeals.

Ellis L. Orvis and Calvin M. B. B. appellant. S. D. Furst, W. F. Rees and G. Furst, for appellees.

STERRETT, C. J. On April 20, 1889, John A. Emerick died intestate, leaving him a widow—the appellant in error—and nine children. In 1889, under an order of court for the payment of debts, an estate of which he died seised, was sold to John A. Emerick for \$6,152.88, of which he paid \$300. Having refused to pay the residue of the debt, an order of court, in May, 1890, set aside the first sale and ordered a resale of the property. That order it was sold, May 20, 1890, to Joseph H. Long, for \$1,152.88, which was brought at the first sale. This

luly confirmed, and property conveyed to long, by whom the purchase money was paid. The fund for distribution consisted of 1) \$300 paid by the purchaser at the first sale, less expenses, etc., and (2) \$4,741.50 net proceeds of the second sale. As to the first item, there appears to be no ground for controversy. It was raised by the first sale, made within five years after the intestate's death, and while some of his simple contract debts—which appear to have constituted his only indebtedness—were still a lien on the land. The second item is the net proceeds of the second sale, which was both ordered and made more than five years after his decease. The learned court held that under the act of February, 1834, and decisions of this court construing the same, the debts in question had ceased to be liens on the land before the last sale, and hence the creditors of the intestate, claiming to participate in the distribution, were not entitled to do so. The fund arising from the second sale was therefore distributed to and among the widow and children of the decedent, according to their respective interests in the land of which it was the proceeds. In this, we think, the court was clearly right. The twenty-fourth section of the act of February 24, 1834, declares that no debts of a decedent, unless secured by mortgage or judgment, etc., shall remain a lien on his lands, after his death, longer than five (now two) years, unless an action for the recovery thereof be commenced and duly prosecuted against his heirs, executors, or administrators within that period, or unless a copy or particular written statement of any bond, covenant, debt, or demand, when the same is not payable within that period, shall be filed in the office of the prothonotary of the county where the real estate to be charged is situate. The debt must be established or admitted and susceptible of enforcement; not a debt barred by the statute. *Chapman's Appeal* (Pa. Sup.) 5 Atl. 460. It must be an existing debt at the time of decedent's death. Claims for services thereafter rendered and expenses incurred in the settlement of his estate are not debts within the meaning of the act. *Bohough's Appeal*, 24 Pa. St. 143. Proving a claim before an auditor within the five years is not commencing an action such as is required. *Craig's Appeal*, 5 Wkly. Notes 243. When part of a decedent's real estate is sold within the five years, under an order for the payment of debts, and a creditor proves his claim before an auditor distributing the proceeds, and is awarded a dividend thereon, this will not preserve the lien of the residue of the debt as to another part of the real estate sold more than five years after the decedent's death. *Bindley's Appeal*, 69 Pa. St. 295. An orphans' court order for payment of debts is not complete, nor is the interest of the heirs at law divested, until confirmation by the court, and de-

livery of deed to the purchaser. *Strange v. Austin*, 134 Pa. St. 98, 19 Atl. 492; *Greenough v. Small*, 137 Pa. St. 132, 20 Atl. 553. Payment of a decedent's debts by his executor or administrator out of his own money, or assuming payment thereof, and taking credit therefor, does not extend their lien upon the real estate. *Craig's Appeal*, supra; *Clauser's Estate*, 1 Watts & S. 208; *McCurdy's Appeal*, 5 Watts & S. 399; *Loomis' Appeal*, 29 Pa. St. 237; *Merkel's Estate*, 154 Pa. St. 285, 26 Atl. 428. It appears that neither of the claims on the fund in question was, or ever had been, secured by mortgage or judgment. No suit was brought on any of them before or after the intestate's death, nor was anything done whereby their lien was extended beyond the period of five years specified in the act. In any view that can be taken of them, they were not liens at the time of the last sale, and it would have been error in the court to have held otherwise. It is unnecessary to refer to the testimony on which the learned auditor based his conclusion that appellant's claim, if ever a valid and subsisting indebtedness of her husband's estate, had ceased to be a lien long before the last sale was made, or even ordered by the court. It would serve no good purpose to notice the assignments of error in detail. We find nothing in the record that would justify us in sustaining either of them. They are all dismissed. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

IN RE EMERICK'S ESTATE.

Appeal of MARTIN.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

Appeal from orphans' court, Centre county. Proceeding for the sale of the land of Daniel Emerick, deceased, for the payment of debts. From a decree confirming the distribution of the proceeds of sale, Samuel A. Martin, trustee, appeals. Affirmed.

Ellis L. Orvis and Calvin M. Bower, for appellant. S. D. Furst, W. F. Reeder, and C. G. Furst, for appellees.

STERRETT, C. J. This appeal is from the decree that has been considered and affirmed in an opinion just filed in *Re Emerick's Estate*, 33 Atl. 550. We find nothing in the record that would justify us in sustaining any of appellant's assignments of error, nor do we think that either of them requires discussion. The rejected claims were not liens on the land when the same was sold. The claims of David Dunkle and John A. Swartz, referred to in the fourth specification, were based on notes of the intestate which were barred by the statute of limitations. The Dunkle note is dated March 31, 1882, and the Swartz note May 12, 1880, both payable one day after date. Nothing appears to have been done whereby the lien of either was extended beyond the period of five years from the decease of the maker. Neither of the specifications is sustained. Decree affirmed, and appeal dismissed, with costs to be paid by the appellant.

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In re HECKMAN'S ESTATE.

Appeal of WARD.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

LEASE TO AGENT—LIABILITY FOR RENT.

Several persons arranged to organize a company for the manufacture of brick, and one of them, an experienced brickmaker, was relied upon by his associates for the selection of a proper brickyard. He was at the time employed by the owner of a brickyard to secure a tenant, with a promise that he should have part of the rent obtained; and he directed his associates' attention to this yard, and brought about a meeting between them and the owner, which resulted in a lease. The lease was executed to the person who was to become president of the company, which had not yet been organized; and, when the company was in proper condition, he assigned the lease to it. *Held*, that the knowledge of the lessor's agent that the tenant was the corporation was notice to the lessor of that fact, and hence he could not hold the president for rents or royalties under the lease.

Appeal from orphans' court, Philadelphia county; Penrose, Judge.

Proceedings for the settlement of the estate of Archimedes Heckman, deceased. From an order sustaining exceptions to the allowance of a claim for rent presented by Joseph H. Ward, said Ward appealed. Upon his subsequent death, his administratrix, Maria E. Ward, was substituted. Affirmed.

I. Hazleton Mirkil, for appellant. Franklin Swayne and A. T. Freedley, for appellee.

WILLIAMS, J. This case depends upon the inferences to be drawn from the evidence submitted to the orphans' court. The auditing judge reached one conclusion, while his associates reached the opposite one; and it becomes necessary to inquire whether the evidence fairly sustains the decree made by the majority of that court. It appears that several persons, among whom were Heckman and Shafto, had arranged to organize a company for the manufacture and sale of brick. Shafto was the only one of the number who was an experienced brickmaker, and his judgment as to the preliminary arrangements, including the selection of materials and the location of the brickyard, was relied on by all his associates. He was at the same time the agent of Ward, employed by him to secure a tenant for a brickyard owned by him, with the promise that he should have one-quarter of the rent obtained. Under these circumstances, he directed the attention of his associates to Ward's property, proposing a lease of the yard and of the right to take the clay, to be paid for by a royalty of \$1 per 1,000 bricks, with a minimum royalty of \$2,500 for the first year, and \$4,000 per annum thereafter. Two or three of his associates, including Heckman, visited the property at his instance. The brick company had not been organized. A meeting was brought about by Shafto between Ward and his own associates in the brick enter-

prise, which resulted in a lease upon terms Shafto had proposed. Heckman to become the president of the company when it was fully organized, and the lease was executed by him on behalf of the company then in process of formation; and as soon as the company was in condition to take it, he assigned it directly to the corporation. This was done in pursuance of an understanding to which his associates, including Shafto, the agent of the lessor, were parties. The bills were thereafter made by the Philadelphia Brick Company, presented to its officers, and paid, except in one instance by its checks.

Under the circumstances disclosed by the evidence, we think the knowledge of the lessor was notice to his principal that the tenant was the yard and the purchaser of the clay, the corporation, and not any member or officer thereof; that the corporation was the prospective operator and owner of the yard, and was to be looked to for the rents or royalties. The subsequent course of dealing would indicate actual knowledge of the fact, and recognition of the relation of lessor and lessee between himself and the corporation on the part of Ward.

We are not prepared to adopt the conclusion reached by the court below that the faith of Shafto in his dealings with his associates rendered the contract he negotiated between them and his employer absolutely void. As to any right of action in interest of his own, that result might follow; but we can see no reason why the lessor should not recover for his royalty at least as to so much thereof as he was actually to receive. It is not necessary, however, to enter upon that subject. We place our affirmation of this judgment on the ground already indicated. The agent negotiated the lease. He knew perfectly well who was the lessee, and by whom the enterprise was to be conducted. He was himself a member of the company for whose use and benefit Heckman became temporarily a subscriber, and it would have been a fraud on the man for Shafto to attempt to hold him personally responsible for what he well knew was understood to be the obligation of the corporation. The principal cannot secure the benefit of the contract, and repudiate it by means by which its execution was intended. He stands on the ground on which his associates have put him. The assignments of error are overruled, and the decree is affirmed.

WILSON et al. v. ARNOLD.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

LIABILITY OF PROTHONOTARY—OMISSION IN WRIT.

Where a judgment is entered by a court, and a warrant of attorney "waiving execution and inquisition," it is the duty of the prothonotary to insert such waiver in a writ of execution.

issued under the judgment, and he is liable for loss arising from his failure to do so.

al from court of common pleas, Clarion county; Harry White, Judge.

n by Wilson & Anderson, to the use of First National Bank of Clarion, Pa., for the use of J. H. Wilson, against M. J. From a judgment for defendant, appeal. Reversed.

L. Hindman, W. H. Hockman, H. R. J. and C. Z. Gordon, for appellants. Ross, F. J. Moffett, and B. J. Reid, appellee.

BARTLETT, C. J. When the defendant, prothonotary of the court of common pleas, Clarion county, was directed to issue a writ (improperly called "pluries") testaturum facias in question, it was manifestly his duty to inspect the record of plaintiff's judgment, and see that the writ conformed thereto in every material particular. He neglected to do so, and in consequence of any part of the claim was lost, he is not to respond in damages to the extent of plaintiff's loss. As shown by the record, judgment was regularly entered "by the court of attorney * * * for the sum of one hundred and one $74/100$ dollars with interest from May 31, 1875, with costs, release of errors, without stay of execution, and waiving exemption and inquisition." The concluding waivers of "exemption and inquisition" are important features of the judgment, and should clearly appear on the body of the writ or by indorsement thereon, so that the sheriff charged with execution may be fully advised that defendant has waived his right to claim benefit of the exemption law, and has assented to the condemnation of any real estate that may be taken in execution for satisfaction of the judgment. In *Maloney v. Salisberry*, 74 Pac. St. 280, it was held that the terms and conditions of a judgment, including waiver of inquisition and exemption, enter into and form part of the judgment, modifying and qualifying its effect. That being so, it follows as a matter of course that, on issuing execution process on such judgment, it is the duty of the prothonotary to follow the record, and not only recite or note the terms of the judgment, etc., but also its conditions, so far as the proper operation of the process may be affected thereby. The fieri facias to the sheriff of Clarion county, and the testatum fieri facias of Clarion county, both of which were returned nulla bona, were properly indorsed respectively: "Waivers, waiving exemption and inquisition," and "waiving stay of execution, exemption, and inquisition"; but, when the defendant came to issue the alias fieri facias in question, he neglected to note in the writ the waiver of exemption and inquisition which so plainly appears upon the record of the judgment. The result of this

was that, when the sheriff levied on personal property of one of the defendants more than sufficient to have satisfied the judgment, debt, interest, and costs, the defendant claimed the benefit of the \$300 exemption, and the property was accordingly appraised, and all set apart to him under his claim. Nothing was realized on the execution. The testimony tended to show, and the jury would have been justified in finding as a fact, that plaintiff's claim was lost in consequence of defendant's neglect to indorse the waiver of exemption on the writ. It follows from what has been said that the court erred in charging as complained of in the first three specifications, and in not affirming plaintiff's first and second points, recited in the fourth and fifth specifications. Judgment reversed, and venire facias de novo awarded.

MALONEY et al. v. BARTLETT.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

RES JUDICATA—ITEMS OF ACCOUNT—LIMITATIONS.

1. By the terms of a feigned issue to determine the amount due upon a note given upon an account generally, the note was to stand as a declaration, and the jury found that at the date of the note defendant was indebted on the account, but in an amount less than the note. Held, that this finding did not conclude the parties as to charges in the account after the date of the note.

2. In an action to recover the balance due upon a general account containing debit and credit items, it is error to exclude evidence of all items of charge which arose more than six years before suit, since there is a presumption that the subsequent payments made within six years of the dates of such items were applied to these earlier items.

Appeal from court of common pleas, Venango county; Charles E. Taylor, Judge.

Action by George Maloney and D. I. Dale, partners, doing business as Maloney & Co., against J. Kemp Bartlett. From a judgment for defendant, plaintiffs appeal. Reversed.

McCalmont & Osborne, for appellants. J. H. Osmer, for appellee.

FELT, J. The plaintiffs sued to recover a balance claimed to be due for merchandise sold and work done. The business transactions between the parties extended over a period of four years, and during this time three notes were given by the defendant to the plaintiffs on account of his indebtedness. Two of these notes were paid at maturity, and the payment of the third, a judgment note for \$250, was refused on the ground that the whole amount thereof was not due. A judgment entered upon this note was opened, and an issue awarded, the trial of which resulted in a verdict for the plaintiffs for \$120. Goods to a small amount were purchased after the date of the third note, and upon the trial of the case now before us the plaintiffs attempted to establish their claim

by proof of the whole account from the beginning, conceding a credit of \$250, the amount of the third note, although only \$120 had been paid upon it. None of the notes given were intended to cover specific items of charge, or to include the whole amount then due. They were given upon the account generally, and without reference to the exact indebtedness. At the trial of the issue to determine the amount, if any, due upon the judgment note, the defense was want of consideration, and there was necessarily an examination of that part of the account which was prior in date to the note. By the terms of that issue the note was to stand as a declaration, and there could not have been a recovery for goods sold after its date. The question was whether, at the date of the note, the defendant was indebted on the account. The jury found that he was indebted, but in an amount less than the note. The finding concluded the parties, and neither could retry the question in another suit; but, as there could not have been a recovery at the trial of the feigned issue for charges in the account after the date of the note, there was no adjudication as to them. They were recoverable in this action, and the direction to the jury which is the subject of the sixth assignment of error was erroneous, and the assignment must be sustained. The remaining assignments relate to the exclusion of testimony which was offered to establish the whole account, and it is unnecessary to consider them further than to say that the ruling in relation to the bar of the statute of limitations was not correct. The action was to recover the balance upon a general account, and it was competent for the plaintiffs to show that the payments had been appropriated to the earlier items. They might, without proof, have rested upon the legal presumption, and the line should not have been drawn arbitrarily at the period of six years. The judgment is reversed, with a *venire facias de novo*.

BRINTON v. HOGUE et al.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

EQUITY PRACTICE—DISMISSAL OF SUIT—ERROR IN NOTICE.

When defendants voluntarily appear, and without objection participate in all the proceedings, it is error to dismiss the suit because an erroneous form of notice to appear and answer was used.

Appeal from court of common pleas, Lawrence county; W. D. Wallace, Judge.

Bill by Levi C. Brinton against J. S. Hogue, A. M. Stewart, and the Brinton Park Street-Railway Company. From a decree dismissing the bill, plaintiff appeals. Reversed.

R. B. McComb and Chas. G. Martin, for appellant. S. W. Dana, J. M. Martin, and H. K. Gregory, for appellees.

STERRETT, C. J. Two or three days after the bill was filed, in March last, a general appearance was entered for all the defendants, and the matter was so proceeded in that, among other things, a receiver of the street-railway company defendant was appointed, and gave an approved bond; the defendants—Hogue and Stewart, respectively—answered the bill, and the remainder defendant demurred thereto, etc.; and the case was set down for hearing on the answer, and demurrer, and, having been argued by counsel in June, was held under advisement by the court until August. During all the proceedings, up to and including the hearing aforesaid, it does not appear that any notice was taken of the fact that the plaintiff's solicitor had mistakenly used the old form of notice to appear, answer, etc., instead of the new form prescribed by the amended equity rules. The discovery of this mistake was made by the learned judge at the common pleas when he came to decide the case, and, notwithstanding the fact that all the defendants had voluntarily appeared, and without objection actively participated in all the proceedings, he held that the omission to use the new form of notice was an incurable, fatal error, which vitiated the whole proceeding; and he accordingly entered a decree dismissing the bill at plaintiff's costs, giving as his only reason therefor the omission above referred to. In view of the undisputed facts, this was a plain error. The sole purpose of the rule required by the rule of court is to compel the appearance of the defendant, etc. When a defendant appears voluntarily, and answers without objection to the form, or even the absence of notice, all that was intended to be accomplished by formal notice in accordance with the rule has been secured; as effectual as if he had appeared, filed a waiver of notice, and submitted his answer. In *Carr v. Knapp*, 167 Pa. St. 305, 31 Atl. 638, on appeal by the court below, objection to the omission of proper notice was made in limine, and insisted on by the defendant. If, instead of pursuing that course, he had done as the defendants in this case, the result necessarily have been different. The decree dismissing the bill is reversed, and set aside with costs to be paid by the appellees; and it is ordered that the bill be reinstated, and the record be remitted to the court below, with instructions to proceed to final decree according to equity practice.

MITCHELL v. LOGAN.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

MALICIOUS PROSECUTION—PROBABLE CAUSE.

Defendant having placed his seat in a car in which he was riding, it was removed without his knowledge, and upon learning it had been seen in plaintiff's possession he

arrest. Plaintiff admitted having taken satchel, but said that he thought it belonged to a friend, and that, after leaving the car, he gave it to a man whom he did not know, who said it belonged to a friend of his. His statement of the occurrence was confirmed by three persons who had been with him. That there was probable cause for plaintiff's prosecution by defendant.

Appeal from court of common pleas, Allegheny county; Calvin Rayburn, Judge. Reversed by D. J. Mitchell against S. N. Loe. From a judgment for defendant, plain-appellate. Affirmed.

Helner, Floy C. Jones, and W. D. Porter, for appellant. M. F. Leason, for ap-

pealant. L. J. In an action to recover damages for malicious prosecution a nonsuit was granted on the ground that the plaintiff had failed to show want of probable cause. The burden of doing this rested upon him, and the undisputed testimony it was for the court to determine as matter of law whether it had been done. The testimony presented at the trial tended to show the defendant's innocence of the crime with which he had been charged, but the question of whether the cause did not turn upon the actual innocence or guilt of the accused. Probable cause is a reasonable ground of belief, or, as stated by Judge Washington in *Munns v. Mont*, 3 Wash. C. C. 31, Fed. Cas. No. 10,000, it is "a reasonable ground of suspicion, based upon circumstances sufficiently strong to induce a cautious man to believe that the person accused is guilty of the offense with which he is charged." It is the prosecutor's belief of the existence of probable cause at the time, based upon reasonable grounds. The defendant had his satchel on the seat of a passenger car in which he was riding, and without his knowledge it had been removed and carried away by some one. Having learned that it was in the possession of the plaintiff, he procured a warrant, and went with a constable to cause his arrest. The plaintiff appeared at a hearing, and entered bail for his appearance. But he admitted that he had taken the satchel, and in explanation said that he thought it belonged to a friend. When asked to produce it, he stated that on his way after leaving the car, he gave it to a man whom he did not know, but who said it belonged to a friend of his. There were no further explanations to the effect that he had been in the car with a number of acquaintances, and had taken the satchel under the impression that it belonged to one of them; but, after failing to find the supposed owner at the station, he kept it, instead of returning it to the car, supposing that the owner would leave the station in advance of him. The statement of the occurrence was confirmed by two or three persons who had been in the car, but whether it was made before or after the arrest does not appear from the

testimony. After all these explanations had been made, the fact remained that the plaintiff had taken the satchel from the train, and that, after learning of his mistake, he had not returned it or left it with the station agent, or made any effort to enable the owner, if he was still on the train, to recover it, but had carried it a mile or more into the country, and given it to a person of whom he could give no account. Assuming his entire innocence, he had acted imprudently, and surrounded himself with the ordinary indications of guilt. His explanation might have been satisfactory to those who knew him, but it would have been so from their knowledge of him, and not from its inherent probability. An entire stranger might well be excused for not giving it full credit. Every public prosecution is presumed to have been begun and carried on in good faith, and to have been founded upon probable cause. These presumptions were not rebutted. The attempt to shift the burden by proof that the prosecution was continued for the purpose of extorting from the plaintiff remuneration for the defendant's loss failed utterly. The second assignment of error is without foundation in fact, as the offer objected to was subsequently admitted, and the plaintiff had the full advantage of testimony the competency of which is, to say the least, doubtful. The judgment is affirmed.

VOSKAMP et al. v. CONNOR.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

ACTION AGAINST MARRIED WOMAN—INSTRUCTIONS.

In an action against a married woman for goods sold and delivered for use in a store carried on in her husband's name, it was proper to charge that, unless the store was actually the wife's, in order to enable plaintiffs to recover she must have represented to them that it was her store, and that she was buying the goods.

Appeal from court of common pleas, Allegheny county.

Action by B. H. Voskamp & Co. against Emma Connor, wife of A. J. Connor. From a judgment for plaintiffs, defendant appeals. Affirmed.

The first assignment of error was as follows: "The court erred in charging the jury as follows: 'To enable the plaintiffs to recover, unless you find that the store was actually the wife's (and the weight of testimony appears to be the other way), you will have to find that she represented to the plaintiffs that it was her store, and she was buying the goods. If she did that, she was bound to give them notice of a change when she quit.'"

Wm. Blakely and L. K. & S. G. Porter, for appellant. John R. Harbison and W. A. Challenger, for appellees.

PER CURIAM. In this action against Emma Connor, wife of A. J. Connor, for goods alleged to have been sold and delivered to her, the defendant interposed the following defense: That she was not engaged in the grocery business when the goods were sold, and never purchased any of them; that they were sold to her husband, A. J. Connor, and on his credit. Testimony, to which no exception appears to have been taken, was introduced by both parties, and questions of fact for the consideration of the jury were presented. Without any request for special instruction from either party, the case was submitted to the jury, and a verdict in favor of the plaintiffs was rendered.

We fail to discover any error in that paragraph of the charge recited in the first assignment. The two remaining assignments are as far from being specific as they could well be made. One of them alleges error "in charging the jury as follows," and for specification thereof it recites the entire charge of the court bodily, including the paragraph complained of in the first assignment. The other charges error "in submitting the case to the jury under the evidence." A careful consideration of the record has failed to convince us that either of these assignments should be sustained. Neither of them involves any question that requires discussion. The only serious question in the case was one of fact, and that was settled by the verdict. Judgment affirmed.

PAGE v. SIMPSON.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

EJECTMENT—SUBSTITUTED SERVICE—DIRECTING VERDICT—ABSTRACT OF TITLE—EVIDENCE.

1. Act April 18, 1853, provides that, in ejectment against a nonresident of the county, the writ may be served on any person within the county having charge of the land in behalf of the defendant claiming adversely, provided it appear that defendant has notice of the suit in time to appear and defend it. *Held*, that plaintiff could not prove that nonresident defendants, not served or appearing, had actual notice of the action, in order to make the verdict binding on them, until they were brought upon the record by a service on their agent in charge of the land.

2. The abstracts of title filed by plaintiff and defendant, as required by rule of court, showed that they both claimed under sheriff's sales under judgments against W. & B., the earlier one, under which defendant claimed, being alleged by plaintiff to have been under a judgment void as to creditors. Plaintiff, to show title in W. & B., under whom he claimed, offered defendant's abstract, "for the simple purpose of proving that the defendant is claiming under W. & B., and for no other purpose"; and it was admitted without objection for this purpose; and he also undertook to duplicate this proof by calling defendant, and asking him if he did not claim under W. & B., to which defendant answered that he did. *Held*, that the court was not justified in then giving a binding instruction for defendant on the ground that plaintiff had shown title out of W. & B. to de-

fendant by his own evidence, and had shown title subsequent to defendant's title in W.

Appeal from court of common pleas, Jefferson county; C. A. Mayer, Judge.

Ejectment by S. Davis Page against William A. Simpson and others. From a judgment entered on a verdict directed for defendant Simpson, plaintiff appeals. Reversed.

H. Clay Campbell, Alexander C. Wainwright and J. C. Bucher, for appellant. George H. Jenks and Means & Clark, for appellee.

WILLIAMS, J. The first assignment of error cannot be sustained. Three defendants were named in the præcipe and summons. As to two of them the return was "habet." Personal service was made on the third, who appeared and pleaded. The case was reached for trial on the 18th of May, 1895. At that time, so made, the plaintiff offered to prove that the other defendants had actual notice of the pendency of the action, in order to make the verdict to be rendered binding upon them under the act of 1853. This offer was properly refused. Before this proof could properly be made, it was necessary that the appearing defendants should be brought upon the record by a service on their agent employed in actual charge or superintendence of the land described in the writ. The act of 1853 authorized judgment against one brought upon the record by constructive service, if it was made to appear that he had actual notice of the fact that the action was pending. There was no constructive service in this case, but a return that the defendant Wainwright & Bryant had nothing by which such service could be made.

The second assignment raises an important question of practice. This case had been put at issue under a rule of the court of common pleas of Jefferson county which requires that a plaintiff in ejectment shall file an abstract or brief of his title. When this is done, it becomes the duty of the defendant to file in like manner an abstract of the title upon which he defends his possession. The plaintiff must then rejoin, stating the action he expects to make at the trial to the title set up by the defendant. The real basis of the controversy is thus ascertained, and the evidence is limited accordingly. In this case the plaintiff's brief of title showed that he claimed through Wainwright & Bryant by means of a sheriff's sale made in 1891, and a judgment entered against them in favor of the Spring Garden National Bank. The defendant then filed an abstract of his title showing that he also claimed under Wainwright & Bryant by virtue of an earlier sheriff's sale, made in 1890. This sale was reversed, divested the title of Wainwright & Bryant, so that no title passed to the plaintiff by virtue of the subsequent sale made by him. The question presented by the abstracts at this time was over the prior

respective sales; the defendant alleging the sale under which he claimed was in 1890, and left no claim in Wainwright & Bryant that could pass by the sale of 1891 to the plaintiff. The plaintiff's reply admitted the priority of the sale to defendant, but alleged that the judgment by means of which it was effected was to hinder, delay, and defraud the creditors of Wainwright & Bryant, and was therefore absolutely void as against the creditors sought to be defrauded, of whom the Spring Garden National Bank was one. This brought the issue down to a single question, *viz.* the judgment and sale under which the defendant's title was acquired. If it was, then, as it was first in time, it passed the title of Wainwright & Bryant to him; but if it was fraudulent, as the plaintiff alleged, then the second sale passed the title, and it was now held by the plaintiff. At the trial the plaintiff properly put in his evidence at what was shown by the defendant's abstracts to be the common source of title, *viz.* the title of Wainwright & Bryant. The defendant put in evidence the judgment against Wainwright & Bryant in favor of the Spring Garden National Bank, the sheriff's sale, and deed to himself, and the return of the sheriff to the summons in ejectment. This showed the title he claimed to have derived from the common source, and gave him a *prima facie*, to recover upon showing that the title was derived from the common source in the defendants in the judgment. The plaintiff offered to show that he could do by tracing the title from the common source down to them, or by showing that the defendant recognized their title and claimed under it. He adopted the latter, and shorter method. He offered the defendant's abstract, "for the simple purpose of showing that the defendant is claiming under Wainwright & Bryant, and for no other purpose." The offer was admitted without objection, for the purpose stated; and the case was thus brought to the attention of the court and the jury that Wainwright & Bryant were the common source of title, and that the question on which the action depended was whether the plaintiff or defendant held the title. The defendant's abstract, having been offered and admitted for a specific purpose, was before the jury for no other purpose. No particular instrument or averment was introduced in it became a part of the plaintiff's case, so as to relieve the defendant from making out his own title. What did become a part of the plaintiff's case because the offer of the abstract was that the defendant's title began with the same parties from whom the plaintiff derived his title, amounted to an admission by the defendant that Wainwright & Bryant once held title to the land. It did nothing more. The effect was the same as though the plaintiff had shown title out of the common source, and traced the same through the intermediate holders to Wainwright & Bryant. The plaintiff should then have rested. For this reason, however, that is not apparent,

he undertook to duplicate this proof, and called the defendant, and inquired of him if he did not claim title under Wainwright & Bryant. He replied that he did. He was then cross-examined by his own counsel, and stated, in substance, that the title claimed by him was under a sheriff's sale made in 1890. The only subject upon which cross-examination was proper was whether he did in fact claim under the title of Wainwright & Bryant. How he claimed, whether through a private or a judicial sale, was part of his own case, and could not be injected into the case of the plaintiff in this manner.

The motion for a binding instruction to the jury to find for the defendant rested on the reason stated by his counsel that "the plaintiff has shown title out of Wainwright & Bryant to W. A. Simpson, by his own evidence, and has shown no title subsequent to our title in Wainwright & Bryant." This was a misconception of the effect of the evidence. The plaintiff had not shown title out of Wainwright & Bryant by his offer. He had offered to show, and had shown, only "that the defendant is claiming title under Wainwright & Bryant"; or, in other words, that the defendant admitted that the title of Wainwright & Bryant was a good title. This was all, and it did not justify the instruction asked for and actually given by the learned trial judge. The burden of showing how he derived his title from the common source, and that the sale under which he claimed was prior in time to that under which the plaintiff claimed, was still on the defendant. When he had laid his title before the jury in any competent manner, the burden of showing its invalidity would then have rested on the plaintiff; but the fact that he used the defendant's admission of the validity of the title of Wainwright & Bryant, instead of establishing that title by tracing it from the common source to them, did not put that burden on him. The effect of showing a common source of title is well settled. *Turner v. Reynolds*, 23 Pa. St. 199; *Clark v. Trindle*, 52 Pa. St. 492; *Riddle v. Murphy*, 7 Serg. & R. 230. Nor can this judgment be sustained on the ground that the plaintiff did not show possession in Wainwright & Bryant at the date of the sheriff's sale under which he claimed, in accordance with the rule laid down in *Yost v. Brown*, 126 Pa. St. 92, 17 Atl. 533. In that case the plaintiff did just what the plaintiff in this case did. He put in evidence the judgment on which the sheriff's sale was made, the process upon it, the sheriff's sale, and the acknowledgment of the sheriff's deed. He then offered the summons in ejectment and the sheriff's return, and rested. The defendant then entered upon his defense, and showed a sale and conveyance of the land by the defendant in the judgment to a third person, before the judgment which the plaintiff had given in evidence was entered, and rested. Upon this state of the evi-

dence, it was held that the presumption that possession follows the title was stronger than the presumption of possession arising from a return of service upon the defendant in ejectment, and should therefore prevail until rebutted by evidence showing that the possession of the defendant in the judgment continued notwithstanding his sale. The principle on which that case was decided has no application whatever to this. This was a contest between rival claimants under successive sheriff's sales, in which the later purchaser had to attack the validity of the earlier sale, or fail in his action. If the first sale was fraudulent, then the purchaser under the second acquired the title of the defendants in the judgment, and, both as to them and the purchaser at the first and fraudulent sale, is entitled to recover.

The judgment is reversed, and a venire facias de novo awarded.

DEAN, J., dissents.

BAKER v. IRISH.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

ACTION FOR PERSONAL INJURIES — CONTRIBUTORY NEGLIGENCE—EVIDENCE—INSTRUCTION AS TO DAMAGES.

1. In an action for personal injuries, evidence that plaintiff had been guilty of negligence on previous occasions is not admissible to show that he was similarly negligent at the time of the accident.

2. The fact that plaintiff's testimony was contradicted by the preponderance of evidence does not justify the withdrawal of the case from the jury.

3. In an action for injuries to a messenger boy 16 years old, resulting in complete and permanent paralysis of the lower part of the body, the court charged that he could recover for the privation and pain and suffering he had been subjected to, and to which he was likely to be subjected, as well as the pecuniary loss sustained by him, and likely to be sustained by him during the remainder of his life; that the only evidence as to pecuniary loss was that he was a boy 16 years old; that the jury could only estimate what his earnings would have been; and that his wages at the time of the accident did not affect the question. *Held*, that the charge was adequate.

4. The fact that the verdict was against the weight of the evidence is not ground for using greater strictness in passing on the sufficiency of the charge as to damages.

Appeal from court of common pleas, Allegheny county; Christopher Magee, Judge.

Action by Herbert H. Baker, by his father and next friend, A. H. Baker, against D. C. Irish. From a judgment for plaintiff, defendant appeals. Affirmed.

Stone & Potter, for appellant. S. A. Will and Lev. McQuilston, for appellee.

DEAN, J. The plaintiff, Herbert H. Baker, was a messenger boy in the Penn Building, on Penn street, in the city of Pittsburg. The building is eight stories high, and access to

the floors is had by two hydraulic passenger elevators. The entrance to the elevators the landings is by doors, which swing outward from the shafts. The plaintiff, on August 1, 1893, was about 16 years of age and at that time was in the employ of the owner of the building, provides the elevators and employs those who, for the convenience of his tenants, operate them. The plaintiff on this day, went up to the eighth floor to meet another boy, D. R. Lean, that he had exchanged with him a book. After attending to this, he testifies he got into the elevator, came down to the third floor, where he was employed, and when in, asked the conductor, E. M. Scott, to let him off at that floor. Accordingly, it was stopped a half foot below the floor, and Scott turned the knob on the door and threw it open with one hand, holding hold of the lever which controlled the elevator with the other. Baker says, as soon as the door was thrown open, he stepped off the floor with his left foot, the other being on the platform of the elevator, when Scott, by use of the lever, suddenly dropped the elevator, the upper transom of it catching the left foot between it and the floor. The transom broke, and he fell back into the elevator, which Scott, on noticing the mishap, immediately raised. There were two passengers in the elevator at the time, Campbell and Johnson. Plaintiff's injuries were very serious. His back being broken, disabled for life. Scott, who had charge of the elevator, testified positively he did not stop at the third floor, nor did Baker ask to stop, but that, while the elevator was moving rapidly past the floor, Baker hit the knob on the floor door, and, attempting to jump out, was caught between the transom and the floor before he could reverse the motion, but he immediately did so when he noticed Baker's peril. Plaintiff alleges negligence in Scott, the servant, that he started the elevator while he, plaintiff, was in the act of getting off it, thus causing his injury, brought suit for damages against his employer, this defendant. At trial, the evidence of Campbell and Johnson, the other two passengers, although not positive in its character, tended to corroborate Scott as to the cause of the accident. The court submitted the evidence to the jury to find whether the accident was caused by the negligence of Scott in suddenly starting the elevator, or in the recklessness of Baker in jumping from it when it did not stop. The verdict was for plaintiff in sum of \$5,000, and judgment being entered thereon, defendant appeals, assigning three errors.

The first is to the rejection of evidence. Defendant proposed to prove that Baker made a practice of jumping from the elevator while in motion. To this plaintiff objected, and the objection was sustained. There was no error in the ruling. What Baker did before would warrant no inference

remote, that he had done the same on any of the accident, that the evidence is inadmissible. Says Whart. Ev. § 40, notes: "Ordinarily, when a party is sued for damages, flowing from negligence imputed to him, it is irrelevant to prove against him that he is disconnected though similar negligence. * * * So, where the question, is it against a railway company, is whether a driver on a particular occasion was negligent, it is irrelevant to prove that he had been negligent on other occasions." The rule applies where the defense is that the injury was caused by plaintiff's own negligence. Men do not usually risk life and limb without motive, and the fact that a person has done so once, or oftener, does not matter at the deduction that he did so on the particular occasion in controversy.

The second assignment is to the refusal of the court to affirm defendant's third point, which was that, "under the pleadings and all the evidence in this case, the verdict should be for the defendant." In view of Baker's own testimony, the point could not be affirmed. Baker testified positively to the fact that Scott had the elevator half a foot below the ground, threw open the door, and, as plaintiff was in the act of stepping out, dropped it suddenly, catching his leg between the frame and the floor. Scott flatly contradicted Baker and testified Baker threw open the door, attempted to jump out while the elevator was in motion. Johnson says he saw Baker

He did not know who opened the door. He heard the crash, however, before the elevator stopped. Campbell, who got in on the eighth floor, testifies he was sitting on the floor, closely examining a time-table, when he heard a crash, and he thinks there was no other crash on the third floor. An examination of the testimony, printed in the paper books, induces us to us that the weight of it was with Baker. But that is not the test of error in this assignment. To weigh conflicting testimony is not one of our functions. That is left to the jury, who not only scan the testimony, but have the witnesses before them.

This boy knew just what he did. He testified positively and explicitly told what he did, and what he narrated could have been proved just as he narrated it,—the positive testimony of Scott, even with the degree of corroboration from Johnson and Campbell, does not divest the jury's constitutional right to consider and weigh the testimony. We are in *Kohler v. Railroad Co.*, 135 Pa. St. 399, 19 Atl. 1049, that even where the plaintiff's testimony is contradicted by his own witnesses, yet if his statement make out a clear case of contributory negligence, it must stand against the jury. If his evidence must go to the jury when he credits the contradictory evidence by calling them to the stand, certainly it must go there when he discredits

The third assignment is that the charge was inadequate on the measure of damages.

In that particular, the charge was as follows: "If, in view of all the evidence, you find for the plaintiff, you may allow damages for direct expenses, if any have been made or shown. Now, there are none here, I think. The supreme court has said that is an element of damage, however; but I do not think any direct expenses, such as physician's fees and care for nursing, etc., are shown here, because the father is liable for that, and he has an action for that and for the earnings of the boy. He may recover for the privation and inconvenience he has been subjected to, and for the pain and suffering he has already endured, bodily and mentally, and which he is likely to endure. Nobody can bear that for him, and that goes as an element of damage, as well as the pecuniary loss he has sustained, and likely to be sustained during the remainder of his life, from his disabled condition. Now, as to pecuniary loss, that would have to be estimated. The only evidence you have is that he is a boy in his sixteenth year, and you can only estimate what his earnings would have been. You have his age as the only fact connected with his earning power. I do not think what his wages were would be matter that would be involved in this." It is true, this instruction on the measure of damages in a case of this importance was very brief; but that does not determine it was inadequate. Taking into view the facts here, must we say the jury was left in the dark as to their duty? This boy, when injured, was but 16 years of age. There could be no proof which would approximate his future earnings as a man. There was no dispute as to the fact that his earnings had been no higher than those of a messenger boy. His injury had resulted in complete paralysis from the lower portion of the spine to the toes. The testimony of Dr. MacCord, that this injury was unquestionably permanent, was not disputed. The degree of intelligence possessed by the boy was measurably known to the jury, from a very long examination and cross-examination before them. Taking, then, these facts, undisputed as they were, a boy of 16 totally disabled for life, the court could have said but little more than was said. It is not as if there had been dispute as to the earning capacity of the injured person, or as to the extent of the disability, or as to how long it would probably last. These would have called for fuller instructions. As the jury found the question of negligence against defendant, their verdict, in view of the nature of the injury, can hardly be called exorbitant or unduly large because of inadequacy of charge. Nor ought we to be moved to astuteness in discovering error on this last assignment, because the jury rendered a verdict against what seems to be the weight of the evidence on the question of negligence. Assuming the weight of the evidence was with defendant, and that the learned judge of the court below might well have so said,

he was not bound to do so. In the case of Railroad Co. v. Goodman, 62 Pa. St. 329, an action by a husband against the company for damages by reason of the death of his wife from alleged negligence of the company at a grade crossing, the case rested almost wholly on his unsupported testimony. Even five of his own witnesses contradicted him in the most material point, the contributory negligence of both husband and wife. So one-sided was the testimony, that it called from this court (Agnew, J.) these remarks: "The verdict in this case appears to us to have been very unwarranted, and ought to have been set aside. The evidence of negligence on part of plaintiff below on approaching the railroad crossing is very strong. * * * Yet we perceive no means of reaching the injustice on a writ of error, without ourselves undertaking to decide the facts, which fell within the province of a jury. * * * A judge is not bound to express his opinion on the facts; though we think, in this case, he would have done a service to justice had he pointed out to the jury with some emphasis the true attitude of the case on its facts." The verdict was for plaintiff in a much larger amount than here. The charge on the measure of damages was briefer, and although the point of inadequacy in this last particular was strongly pressed, the court refused to carry over an error in disregarding the weight of the evidence by the jury and court below, and graft it on the assignment relating to the question of damages, although the instruction on this last subject was not beyond criticism. So, whatever substantial error there was here, it is beyond our reach, and however manifest it may seem, we will not, on merely verbal criticism of the charge in an another particular, reverse because of an error over which we have no control. In other words, for an error of gravity over which we have no power, we will not reverse on a trivial one, where we have power, when the latter could not have done, and obviously did not do, harm. A careful examination of the whole case fails to disclose any error sufficient to warrant a reversal. Therefore the judgment is affirmed.

GALEY v. MELLON.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

CONTRACT—ASSIGNABILITY.

A contract for drilling an oil well may be assigned by the contractor when the work necessarily requires the labor and attention of a number of men, and it does not appear that, because of his knowledge, experience, or pecuniary ability, or for any other reason, the contractor was especially fitted to carry on the work.

Appeal from court of common pleas, Washington county.

Action by Samuel Galey, for the use of A.

G. and J. H. Smith, copartners as Smith Bros., against W. L. Mellon. From a judgment for plaintiff, defendant appeals. affirmed.

John W. Donnan and J. McF. Carpenter for appellant. J. M. Braden, Albert Sprowls, and John B. Chapman, for app

FELL, J. This action is founded upon contract for drilling an oil well. The personal performance of the work by the plaintiff could not have been contemplated by the parties at the time the contract was made. The work, of necessity, required labor and attention of a number of men, and it does not appear that because of knowledge, experience, or pecuniary ability, or for any other reason, Galey was especially fitted to carry it on. There is nothing of a personal nature about it, and its performance by him was not the inducement for the essence of the contract. The contract was assigned to Smith Bros., the plaintiffs, and the work under it was done by them, with the knowledge of the defendant, from the beginning. The jury found that they were not subcontractors, but upon a contract as to which they had no rights. It was competent for Galey to assign to them the executory contract, with his rights under it, or, after the completion of the work, to assign to them the right to receive the amount due on settlement. In either event they had the right to sue in his name as legal plaintiff, but in neither would their rights rise higher than his. The action was tried on the right of the plaintiff to recover. The doors were open to every defense available against him. In no aspect of the case was the defendant prejudiced because of the form of the assignment. Practically, the question at the trial was whether the legal plaintiff was entitled to recover on the contract, and that depended upon whether the fault which ultimately resulted in the destruction of one of the wells was chargeable to the defendant's superintendent. The jury found that it was, and they had the aid of a charge by a learned trial judge, which fully and correctly explains the facts and the law applicable to them. The judgment is affirmed.

McMILLAN v. FEDERAL ST. & P. PASS. RY. CO.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)
STREET-RAILWAY COMPANY—EJECTION OF PASSENGER—DISOBEDIENCE TO RULE.

1. A passenger on a street railway, requested by the conductor to go from the platform to the inside of the car, where there were vacant seats, refused to do so, though he was told that a rule of the company forbade passengers to stand on the platform when there was room in the car. As a reason for refusing to go inside, he was not going far enough to justify going inside, but how far he was going

to say. The car was then stopped, and he told that he must go inside or get off, refusing to do either, he was put off by the conductor, who used sufficient force to get him out of the railing, and to remove him from the platform, and to prevent him from getting on the car. Held, that he had no right of action against the company, the rule being a reasonable one.

The passenger having resisted the conductor in the proper performance of his duty, is not entitled to recover punitive damages from the conductor used force in removing him from the car.

Appeal from court of common pleas, Allegheny county; Christopher Magee, Judge. Reversed by H. McMillan against the Federal & Pleasant Valley Passenger Railway Company for damages on account of plaintiff's removal from defendant's car. From a judgment for plaintiff, defendant appeals. Reversed.

James & Potter, for appellant. Hudson & Smith, for appellee.

MR. JUSTICE L. J. The reasonableness of the rule of the defendant company forbidding passengers to stand on the platform when there is room inside the car seems to have been established at the trial. The questions submitted to the jury were whether, under the circumstances, the plaintiff was excused for not complying with the rule, and whether necessary force was used in putting him off the car. While the testimony as to the facts of the occurrence was conflicting, the facts are clear of doubt. The plaintiff was asked by the conductor to go from the platform to the inside of the car, where there were vacant seats, which were pointed out to him. He refused to do so. He knew the rule of the company which forbade passengers to stand on the platform when there was room in the car, and, if his attention was not called to it at that time, he understood fully that the conductor's request was in reference to the rule, and that it was his duty to enforce it. After some discussion, the plaintiff's final refusal to comply with the request made, the car was stopped, and he was told that he must either go in or get off. He persisted in his refusal to do either, and was put off. When the car started, he attempted to get on, and was rebuffed by the conductor, who pushed him off from the platform. He was not injured.

The force used was to loosen his grip from the railing, to remove him from the platform, and to prevent him from boarding the car again while it was in motion. The facts were either admitted or so clearly established by the testimony as to be undisputed. It remains to consider whether, under the circumstances, it was unreasonable to enforce the rule, and whether unnecessary force was used in ejecting the plaintiff from the car. The rule of the company was a reasonable one, intended to secure the safety and comfort of passengers. It is the duty of the plaintiff to obey it,

and the right of the company to enforce it. Cases might arise in which it would seem that the rule should not be rigidly enforced, or an immediate compliance with it required, as where the passenger was at the point of alighting, and his presence for a few moments on the platform would not endanger or inconvenience any one. But the necessity for the enforcement of the rule is not to be determined by the passenger. A rule that might be suspended at his will would cease to be a rule. The management of the car in all matters which relate to the conduct of passengers is with the conductor, and ordinarily the enforcement or suspension of a rule must rest with him. A passenger, in any event, would have no right to complain of the enforcement of a reasonable rule unless he had stated to the conductor an adequate reason for its suspension in his case. This the plaintiff did not do. He testified that he told the conductor that he was not going far enough "to justify" him in going into the car, because, if he went in and sat down, he would have to come right out again; that he would be at his stopping place, and there was no use in his going in; that he "was not going far enough to go in," and "it was not worth while to go in." When asked by the conductor how far he was going, his only reply was, "Not far." This was coupled with the assertion that he would not go in. His statement that he was not going far, with his refusal to say how far, gave the conductor no information. He might have meant a square or a mile. That he rode some distance during the controversy before the car was stopped, and afterwards attempted to get on and finish his journey, cast serious doubt upon his good faith, and confirmed the suspicion of want of candor which his previous conduct had indicated. He undertook to make himself the judge of the necessity for the enforcement of the rule. In this he was wrong.

The learned judge was inaccurate in stating in the part of his charge which is the subject of the first specification of error that the plaintiff had testified that he had been kicked. No such statement appears in his testimony. There was testimony given by others that he had been kicked, due no doubt to the fact that the conductor held his foot in a position to push the plaintiff away from the platform when he attempted to get on the car while it was in motion. The plaintiff testified that the conductor alone put him off the car; that it was done by pushing him; that he did not know that the motorman touched him. He distinctly and repeatedly stated that he was not aware of being struck or kicked, and that, as far as he knew, he was not. There is no evidence to justify the conclusion that there was any wanton or reckless conduct on the part of the conductor, and the plaintiff complained of none. The whole burden of his complaint was that he had been put off, not the manner in which

it was done. The case should not have been left to the jury to find punitive damages. When the plaintiff resisted the conductor in the proper performance of his duty he made the use of force necessary, and if, in the struggle which followed, there was not an exact and delicate adjustment of it to the end in view, he has no ground for complaint. The assignments of error are sustained, and the judgment is reversed.

UPPER TEN MILE PLANK-ROAD CO. v. BRADEN.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

PLANK-ROAD COMPANY—SPRING IN ROADBED—RIGHT TO WATER.

1. A plank-road company, having condemned a right of way over a farm, made a cut therein 10 feet deep, and in so doing a spring of water was opened 3 or 4 feet above the roadway. *Held*, that the title to the water was absolute in the owner of the farm, and that he could use it as he saw fit, provided he did not injure the company's road.

2. The right of the company to drain the water off its roadbed did not give it any right to appropriate the spring itself, or to exclude the owner therefrom.

Appeal from court of common pleas, Washington county; J. A. McIlvaine, Judge.

Bill by the Upper Ten Mile Plank-Road Company against William H. Braden. From a decree in favor of plaintiff, defendant appeals. Reversed.

Albert S. Sprowls, for appellant. Clark & Berryman and R. W. Irwin, for appellee.

WILLIAMS, J. The report of the learned master deals in an able and logical manner with the questions of fact and law involved in this case. The conclusions reached have, however, as it seems to us, been influenced by an inaccurate definition of the respective rights of the owner of the soil and the owner of the easement of way over it. The findings of fact show that the plaintiff corporation is the owner of a wagon road, the right of way for which was obtained by the exercise of the right of eminent domain. This road passes over a part of a farm known as the "Boyd Farm." In grading the road over this farm it became necessary to make a cut, the banks on the upper side of which were some 10 or 12 feet high. In making this cut a fine vein or spring of water was opened, which gushed out of the rocks some three or four feet above the roadway. For some years the water was used to supply a watering trough placed below the spring, and the surplus water was conducted away by means of a ditch on the upper side of the roadway. More recently the corporation has removed this trough several hundred feet to the land of another farm owner, has inclosed the spring in solid masonry, made watertight overhead as well as on the sides, and conducted all the water away and off the de-

fendant's land by means of iron pipes, entering a small portion of it into the trough, and making some other disposal of the rest of it. The defendant went in search of his spring, and opened a hole in the cistern, so that he could see what was being done with the water. He also informed that he had a right to use the water for his cattle, and expressed his purpose to remove the rocks at that point, and prepare a permanent and convenient place for the establishment of a watering trough for his use and the use of the public. To prevent him from opening the watertight cistern built about his spring, and to compel him to pay for repairing the damage done to his effort to find out what was being done with the water, this bill was filed, and the case went to a master to hear the evidence and to make appropriate findings of fact under the old practice. The master, upon these facts that the spring belonged to the owner of the soil on which it was, in his third conclusion of law held that the title of the owner is so qualified by the easement that the spring can only be used subject to the easement." This was a mistake, and it gave direction to all the law followed. The plaintiff's easement qualified the manner in which the defendant could use his spring, but it did not qualify his title. The title was as absolute and unqualified in the water as to the rocks out of which it issued, and the defendant had the right to take it where he pleased, and use it as he pleased. *Mills, Em. Dom. 70.* He had the right to use it in such a manner as to cause injury on the plaintiff's roadbed, but he had the right to use the whole of it, to conduct it by pipes wherever he desired, to consume it, to sell it, or to waste it. The plaintiff has no easement in the spring. It has a right of way for public travel over the land, which the waters of this spring descend, and for the purpose of preserving its bed in a condition suitable for travel it has the right to drain the water off. The right is one of drainage of the roadbed only. It is the right to appropriate, or to take exclusive possession of, the spring itself, or to exclude the owner therefrom. *Id. p. 71.* The corporation had gone much further in this than it had taken exclusive possession of the spring. It had taken upon itself, for its purpose, the responsibility of preserving the absolute purity of the water, so that it could be delivered on the land of another without contamination from surface water. For this purpose it had literally set up in a watertight reservoir, into which the pipes were introduced, by means of which the spring was transported off the land of the owner and set down some hundred feet away upon the land of another owner. Because the owner was curious to know what was being done with his spring, he had opened a hole into the reservoir, to learn the situation, this bill was

d a chancellor appealed to in order to retain his curiosity by injunction, and to punish him for his temerity in seeking to know what the corporation was doing with the spring. An injunction has been decreed, and damages have been assessed in accordance with the prayer of the bill. This result due to the mistaken definition of the rights the parties found in the third conclusion of law to which we have referred. The magistrate and the court below have proceeded on the theory that the title of the defendant has been qualified and restricted by the easement passage over the roadway, so that, as between him and the corporation, he has no right to the use of the spring if the corporation finds it convenient for the purposes of drainage to take exclusive possession of it, and transport it to any point where it may wish to use it off the land of the owner. The rule is that the easement qualifies, not the title to the spring, but the manner of its use. The corporation has a roadway at the place of which the defendant has a spring. Each must so use his own as to inflict no unnecessary injury on the other, but neither may forcibly exclude the other from what is his own. It was neither against law nor against equity for the defendant to seek access to his spring, and, although this may not have been done in a peaceable spirit, it is nevertheless in the exercise of a clear legal right. The corporation may drain its land, but it cannot, in the exercise of the right of drainage, take forcible possession of the spring, exclude the owner from access to it, and transport it for its own use, or to the use of any other person, off the owner's land. The right of drainage does not include the right of appropriation, nor does it justify the forcible exclusion of the owner from access to a spring of water that comes to the surface on his own land, outside the beaten track of the roadway. Subject, however, to the owner's right of access, the method of drainage to be adopted is for the corporation to determine. The decree appealed from is reversed, the injunction is dissolved, the bill dismissed, at the costs of the plaintiff.

HINDMAN v. DOUGHTY.

Supreme Court of Pennsylvania. Jan. 6, 1896.)

MAGISTRATE'S RECORD—PRESUMPTION OF ACCURACY.

The record of a magistrate showed an agreement by the parties to a suit before him to submit all matters to referees, and to abide by their decision, and also showed the entry of judgment for plaintiff on the report of the referees. From this defendant appealed to the court of common pleas, where plaintiff took a rule to show cause why the appeal should not be stricken off. Thereupon defendant, by his attorney, filed a writing denying that he agreed to abide by the decision of the referees, alleging that the statements in the record to that effect were untrue, and appended to this denial was

an affidavit by his attorney that the facts stated therein were true to the best of his knowledge and belief. *Held*, that it was error to discharge the rule to show cause.

Appeal from court of common pleas, Allegheny county.

Action by William Hindman against David Doughty. From an order discharging a rule taken by plaintiff to show cause why an appeal from a magistrate's judgment in his favor should not be stricken off, he appeals. Reversed.

J. M. Nevin, for appellant. J. F. Edmundson, for appellee.

MCCOLLUM, J. The transcript of the record made by the magistrate shows the institution of a suit before him, an agreement by the parties "to submit all matters in variance to William Aber, John Lewis, and Jacob Aber, and to abide by their decision," a hearing before the arbitrators, and a report by them, on which the magistrate entered a judgment for the plaintiff. From the judgment so entered the defendant appealed to the court of common pleas, where a rule was taken by the plaintiff to show cause why the appeal should not be stricken off. This rule was grounded on the agreement of the parties to abide by the decision of the arbitrators. A denial of the agreement, as written by the magistrate on his docket, was interposed in this form: "And now, to wit, September 17, 1894, comes the defendant, and by his attorney denies that he agreed to abide by the decision of the referees, as stated by the transcript in the above case; that the allegation in the said transcript that he agreed to abide by the decision of the referees is not true in point of fact." Appended to this denial was an affidavit by the attorney, who said: "The facts set forth in the above statement are true to the best of my knowledge and belief." With nothing before it but the transcript and the denial of part of the agreement shown by it, the court discharged the rule to show cause, and from the order discharging it this appeal was taken. The question presented by the appeal is whether the action of the court was warranted by the record before it. It was proper, and in the line of his duty, for the magistrate to enter upon his docket the agreement of the parties, and the entry should have been accepted as verity until it was shown to be inaccurate. On the face of the transcript it appeared to the court that the parties, by their agreement, had mutually surrendered or waived their right to appeal from the judgment. As the defendant alleged inaccuracy in the statement of the agreement, the burden of supporting the allegation by competent evidence was on him. This burden could not be discharged by his mere denial that the agreement contained a stipulation to abide by the decision of the arbitrators. We think, therefore, that the learned court erred in dis-

charging the rule. The judgment is reversed, and the rule to show cause is now made absolute.

CAMPBELL v. PREFERRED MUT. ACC. ASS'N OF NEW YORK.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

TRIAL—REQUEST FOR INSTRUCTIONS.

1. When there are several facts in dispute, and they must all be established in order to maintain the suit, defendant, if he questions the sufficiency of the evidence to support plaintiff's claim as to one of them, ought, in his request for instructions, to designate the fact to which his contention applies.

2. The fact that plaintiff's testimony in regard to a fact which was essential to the support of his claim was contradictory and confused does not justify the court in withdrawing that question from the jury.

Appeal from court of common pleas, Allegheny county; W. D. Porter, Judge.

Action by James W. Campbell against the Preferred Mutual Accident Association of New York on a policy insuring against accidents. From a judgment for plaintiff, defendant appeals. Affirmed.

Williams & Edwards, for appellant. J. A. Langfit, for appellee.

MCCOLLUM, J. The only question presented for our consideration on this appeal is whether the plaintiff complied with the condition in his policy in regard to notice of his injury. He received it on the 7th of May, and the condition required that he should give notice of it to the company within the next 10 days, or forfeit his claim to compensation for it under his policy. It was therefore necessary for the plaintiff, in order to maintain his suit, to show that the notice demanded by the condition was given to or waived by the company. The plaintiff claimed and testified on the trial that he gave the notice within the time prescribed by the condition, and the verdict shows that the jury were satisfied that he did so. The company now contends that his testimony on this point was so confused and contradictory that the court ought to have withdrawn it from the jury, and directed a verdict for the defendant, on the ground that the notice was not given in time. Before considering this contention on its merits, it is proper to note that while the company requested the court to say to the jury that, under all the evidence, the verdict should be for the defendant, it also requested an instruction that, if they found from the testimony that the plaintiff failed to give the notice required by the policy, he could not recover. The first request was refused, and the second was affirmed. There was no request for an instruction that the plaintiff's testimony as to notice was insufficient to warrant a finding that notice was given, unless the request for an instruction to find for the de-

fendant can be regarded as including, seems to us, therefore, that the question presented on the appeal was not fairly on the trial. If there are several facts in dispute, and the establishment of each of them is essential to the maintenance of the suit, the defendant who questions the sufficiency of the evidence to support the plaintiff's claim as to one of them ought, in his request for instructions, to designate the fact to which his contention applies. It is not to decide that the failure of the court to request specific instructions on the question under consideration is fatal to their case, because this is a matter not mentioned in the argument or in the paper books. It is here said about it may be regarded as a suggestion by the writer of what seems to him as a proper practice in a case like this one now before us.

It is true, as contended by the company, that the plaintiff's testimony in regard to the time of the notice was somewhat confused and contradictory, and the fact that it was so furnished a basis for a strong argument to the jury against it. But a careful examination of it has failed to convince us that the court would have been justified in withdrawing it from the jury and directing a verdict for the defendant. The contradictions in his testimony do not impeach his credibility as a witness, and they were the proper judges of that. We find in the cases cited by the company no warrant for holding that it was error to submit to the jury the question of notice on the evidence that it was properly given more than a scintilla. The plaintiff testified positively that it was given to the company within the time prescribed by the condition. The jury saw him upon the stand and heard him testify. The testimony was competent, and it was for them to say what weight should be given to it. The company's contentions are overruled. Judgment affirmed.

SEMPLE v. CLEVELAND & P. R. CO.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

CONTRACT—PARTIAL RESCISSION—CONDEMNATION OF PROPERTY—EQUITABLE DEFENSE—INJUNCTION.

1. The owner of a farm granted to a railroad company a right of way and also land for a woodhouse and water tank, and also agreed to erect a depot on the land, and to furnish a passenger car, and to sell tickets and handle freight at the depot, the company agreeing to use the depot, and to pay the owner the same as was paid for the same services to persons using the depot buildings. *Held*, that the company could not subsequently retain possession of its way, its water supply, and the land required under the contract, and avoid payment of the agreed sum, by condemning the land erected by the landowner.

2. In such case the owner of the farm is entitled to an injunction to restrain the

ings for the separate condemnation of the depot building.

3. The approval of a bond on an application for the condemnation of property by a railroad company does not pass the title thereto if entry was not rightfully made, or if the bond was rendered under such circumstances as made the proposed exercise of eminent domain inequitable.

Appeal from court of common pleas, Beaver county; Wickham, Judge.

Bill by Marion Semple against the Cleveland & Pittsburgh Railroad Company and the Pennsylvania Company. From a decree for defendants, plaintiff appeals. Reversed.

F. H. Laird and Watson & McCleave, for appellant. Mr. Daugherty, for appellees.

WILLIAMS, J. The facts in this case are novel, and the legal question raised upon them has not, so far as I am aware, been passed upon in any reported case. It seems that, when the defendant company located the route for its railroad, it was so located as to pass for the distance of 1,400 feet over the farm then held by the plaintiff's predecessors in title. The company desired to secure upon the same farm a piece of land on which to build a woodhouse, another on which to build a water tank, and a supply of water from the spring that furnished the dwelling house, to provide for its engines. Instead of instituting proceedings for the condemnation of the land and water needed, it entered into negotiations with the owner which resulted in an agreement in writing, by the terms of which the landowner granted a right of way over his land, 1,400 feet in length, and ranging from 60 to 110 feet in breadth, according to the character of the surface. He also granted the land for the woodhouse and water tank, and the water from his spring necessary to supply the water tank. He also agreed to build a suitable depot or station house on his own land adjoining the company's roadway, and to provide a person to sell tickets, take charge of passengers, and receive and deliver freight or patrons of the road, at the station. The company, on its part, agreed to make use of the depot so to be erected, and to pay the landowner the same salary or commission for receiving and delivering property or freight and money received for tickets as it paid at other stations along the line of its road where the parties who owned the land over which the road passed owned also the buildings used for railroad purposes. This was probably a favorable contract for a struggling railroad company at the outset, but it was, when looked at broadly, an unwise one. It worked well while the landowner who negotiated it lived, but, after his death, the farm passed into other hands, with whom the relations of the company were much less satisfactory, and by whom its business was not done in a manner that satisfied the officers of the company. In oth-

er words, the contract under which the company obtained all its rights upon and over this farm became a serious burden, and a source of much negotiation and controversy. The question now arises, how can the company be relieved of it, and be legally invested with the control of its own business at this station? It has the power to violate its contract, as it is now doing, by refusing to stop its trains at the depot building, or to turn over its business at that point to any person representing the owners of the farm. This does not end the contract relation, but exposes the company to an action each year, if not oftener, for the recovery of damages for the refusal to perform the contract under which it entered upon its right of way and their privileges, and for which it has paid nothing but the annual rental or value fixed by the terms of the contract. If the contract is to be rescinded, it must be by notice to the owners of the land, and a proceeding to substitute the value to be fixed by viewers to be appointed under the general railroad laws for the annual value agreed on by the parties. But the contract is an entire one. The consideration for all the rights secured by the railroad company under it is the price or commission to be paid to the landowner for his services as agent in the collection of freight and the sale of tickets at the depot building built and owned by him. The company cannot therefore rescind in part; it must stand on its contract rights, or rescind in toto, and fall back upon its right of eminent domain to protect itself in the enjoyment of its right of way and the other rights acquired originally by the contract. Now, the company has undertaken to rescind in part. It retains possession of its way, its water supply, and the land acquired under the contract, but seeks to avoid the payment of the annual rental therefor by the condemnation of the depot building erected and occupied by the landowner. The result of this proceeding must be to turn the landowner over to successive actions for the recovery of damages from time to time for the refusal of the company to pay for what it declines to surrender, or to acquire by an exercise of eminent domain. The plaintiff asserts that this proceeding is against the law because in violation of the contract under which the company entered, and against equity because intended to disable her against her will from performing the services out of which the annual compensation arises. Her position is that, so long as the company affirms the contract by holding all that it acquired under its provisions, it cannot be allowed to rescind it as to the one provision on which the compensation of the landowner rests; in other words, it cannot affirm as to what it was to receive, and rescind as to what it was to pay. We think the contention is correct, and that the bill presents a proper case for equitable relief. The company must be required to elect whether it

will pay for its right of way and other privileges as it agreed to, or, by rescinding the contract, and proceeding under the right of eminent domain, pay for it under the provisions of the general railroad laws. It may do either, but its title must rest on a subsisting contract or on a valid appropriation.

The learned judge of the court below treated this bill as a bill for the specific execution of the contract, and, because he regarded the contract as an improvident one, turned the plaintiff out of court. The company did not regard it as improvident when it was made. If now, after many years of experiment under it, and an increase in the value of its business at this point, it finds some of its provisions inconvenient and burdensome, the fair and only fair method of relieving itself is to rescind or terminate the agreement on notice, and proceed to adjust the compensation of the landowner under the general railroad laws. That is what this bill, in effect, asks, and it is in no sense specific execution. It is conceded that under existing circumstances the company is not bound irrevocably to the provisions of the contract, but what is contended for is that it is bound until it exercises its election to rescind. This it may do at its pleasure, but it cannot hold under the contract as to all it takes by means of it, and against the contract as to all it was to give by way of consideration.

It is also urged that this application comes too late, since a bond was approved by the court of common pleas on the application for the condemnation of the depot building, and the legal effect of the approval of the bond is to pass the title to the land or easement to which it relates. This would be so if the entry was rightly made and acquiesced in by the owner or upheld by the court. It would not be so if the entry was not rightfully made, or if the bond was tendered under circumstances such as made the proposed exercise of eminent domain inequitable, because palpably unjust. The cases cited in support of this contention fairly illustrate both the rule and the exception. In *Wadhams v. Railroad Co.*, 42 Pa. St. 303, the landowner objected to the bond that the penal sum was not sufficient. Upon this question he was heard in the court having jurisdiction, and that court overruled his objection, approved the bond, and ordered it filed. The right of the company to enter was not challenged. In fact, it was conceded by the form of the objection taken; and, when that was overruled, the bond stood to the owner in lieu of the easement properly acquired by eminent domain. In *Fries v. Mining Co.*, 85 Pa. St. 73, neither the entry nor the bond was objected to in any manner, so that the only question raised was over the effect of an entry by virtue of eminent domain, accompanied by the giving of security for the payment of the damages sustained thereby by the

owner. We said in that case that, "security being given in due course of the grasp of the owner upon his property loosened by the constitution itself, and consequently the easement acquired freed from his power to obtain payment otherwise than upon the bond and the proceeding by assessment of damages given by the law." But the point raised in this is over the question whether the bond has been given in due course of law. The right of the company to give it, or to require the plaintiff to accept it, in exchange for the depot building and lot, in the face of the clear and unequivocal covenants securing the use of the same to the landowner, is denied. Indeed, it is the question now determined upon final decree in this case. If we conclude that the company has the right at law or in equity to seize this building and the ground on which it stands in the face of its covenants, and while it has its right of way and other privileges secured by the same contract which secures this building to the landowner, then it follows that the company took nothing by the tender of a bond, which it had no right to insist upon, and which the landowner was under no obligation to accept, and actually refused to accept. To assert the contrary is, in effect, to assert that, although an entry was made without right, it can be made effective to divest the title of the person or corporation whose lands are wrongfully entered upon, and a bond can be gotten upon the files, approved as to the amount of penal sum and the sufficiency of the securities, before the company can be stopped by an injunction from filing it. A result so monstrous would not be accepted, and the theory upon which it was reached would be rejected as untenable. It would deprive the landowner of the benefit of the judgment of a court of equity upon his right to protection against the deliberate violation of the contract, and while grasping all he had under the conveyance, sought to wrest from him all he was to receive in return. More objectionable still, it would deprive him of recourse to a chancellor, notwithstanding the fact that the machinery of the court was being made use of as the instrument of the accomplishment of this injury. We assent to this position. The bond, if accepted, or if the right to give it under the circumstances of the case was sustained by the courts, would stand to the owner in place of the easement lawfully acquired, and would free the company from him. But if the entry is unlawful, or has been permanently enjoined by a court of equity, the bond, though approved by the common pleas and regularly filed among its records, must be treated with the proceeding of which it is a part. If we restrain these proceedings, no appropriation under the right of eminent domain can be consummated; there will be no instrument for which the bond shall afford

and it will become functus officio, remaining on the files.

see no reason, therefore, why the ff is not entitled to come into a court ility, and ask to enjoin the proceed- entered upon, to condemn her depot ng, until some other mode of pay- by the company shall be substituted place of that which it is proposed to way from her. If the contract is to cinded, she has a right to insist that l be done in toto. If the right of way her privileges are to be held against der it, she has a right to ask for the nsation provided for by it, or its fair lent in damages. This contract seems as it did to the learned judge of the below, as one that ought never to een made. It was improvident in the er in which it committed the business e company at that point to persons whom the company had little, if any, d, and absolutely no power of removal. e company made it. It acquired val- rights and privileges under it. It con- business for years under it, without nt inconvenience or friction. The e of owners, the changes of interests, e and physical disabilities of the pres- olders of the title, and the unfriendly ns that have recently sprung up, ren- desirable that the contract relation terminate, and that the company d acquire its title under the right of nt domain, or by an out and out pur- from the owners; but, as we have al- said, it cannot hold under the con- as to what it acquires, and repudiate o the compensation to be paid. While ds under the contract, it must pay the contract, or an equivalent in dam- When it takes under eminent do- it must pay under the general rail- laws for its right of way and other ges, if it wishes to retain them. Mean- an injunction must issue to restrain r proceedings looking to the separate mnation of the depot buildings while o company continues to hold, under the ct, its right of way, water supply, ts occupied for railroad purposes. The e is reversed, and the record remitted, n injunction may issue as above stated, at the court below may ascertain the amount fairly due to the plaintiff by n of the violation by the company of its ment, set forth in the bill of complaint; pellee to pay the costs of this case.

SMITH v. PEOPLE'S MUT. LIVE-STOCK INS. CO. OF PENNSYLVANIA. Supreme Court of Pennsylvania. Jan. 6, 1896.)

LIVE-STOCK INSURANCE—FALSE STATEMENTS IN APPLICATION—FORFEITURE.

In an action on a policy of insurance on e of a horse, there was evidence that de-

fendant company, before it was notified of the disease which caused the horse's death, was informed that the price paid for it was much less than stated in the application, and it appeared that the notification to the company of the disease was made on the 13th of the month, and that on the 23d defendant notified plaintiff of the cancellation of the policy because of the misrepresentation, while on the 22d defendant's surgeon, who attended the horse, had notified plaintiff that it must be killed, which was done six days later. *Held*, that it was proper to refuse an instruction which assumed that the cancellation was due to plaintiff's misrepresentation.

2. When false statements are inserted in the application for insurance by the agent of the company without the knowledge of insured, the company cannot rescind the policy on account thereof.

3. A live-stock insurance company which, in response to a verbal notice that a horse insured by it is sick, sends its surgeon, who examines the horse and continues to visit it until he finally orders it to be killed as incurable, thereby waives a right to forfeit the insurance for want of a written notice of the horse's disease, as required by the policy.

4. The fact that the surgeon sent by the company did not complain, when he saw the horse, that he had not been called in time to treat it, was evidence that notice of the disease was given promptly.

5. After filing affidavit to the merits and pleading the general issue, it is too late to assert that, under the policy in suit, jurisdiction to hear the cause is vested exclusively in another court.

Appeal from court of common pleas, Allegheny county; White, Judge.

Action by Maggie Smith against the People's Mutual Live-Stock Insurance Company of Pennsylvania. From a judgment for plaintiff, defendant appeals. Affirmed.

James Bredin, for appellant. William M. Randolph, for appellee.

DEAN, J. On 17th February, 1891, plaintiff insured in defendant company, against death, disease, or accident, a bay horse, in sum of \$200, for a term of three years. The company being mutual, the members were subject to assessments for losses. The plaintiff, up to 20th November, 1893, was called on for several assessments, amounting in the aggregate to \$80, all of which she paid. At that date, the horse, because of an incurable disease in the foot, was killed. The plaintiff demanded the amount of her policy, but the company refused payment on three grounds: (1) Misrepresentation of a material fact as to the value of the horse in her application for the policy. (2) A neglect to give notice to the company of the disease of the foot, in writing, within the time stipulated by the conditions of the policy. (3) Because the policy, as stipulated by its terms, had been canceled by the company before the death of the horse. The policy contains these stipulations: "It is understood and agreed by the holder of this policy that it may be canceled at any time during the term for which it is issued, if it be found that any misstatements were made in the application for the same, or important information withheld by the applicant.

That in the event of sickness or disability from any cause whatever of the animal insured, written notice to the company must be given of such sickness or disability within 24 hours after said animal becomes incapacitated for labor. A failure to give such notice, if death ensue, will work a forfeiture of this policy." In the written application is this interrogatory and answer thereto: "What did you pay for the above described animal? Answer: \$275." The evidence was she had paid \$165 for a pair of horses of which the insured horse was one. This constituted the material misrepresentation alleged, and which warranted cancellation of the policy. On November 23, 1893, five days before the death of the horse, written notice of cancellation because of misrepresentation was given plaintiff by the company. Written notice of the disability of the horse was not given, but within 24 hours after the driver discovered the disease was of a serious character, he called at the office, and gave verbal notice to the company, and they immediately sent their surgeon to examine the foot. He and his assistant made, altogether, five visits for treatment of the horse between the 13th and 24th of November, the last one five days before the horse was killed by order of the surgeon. It was alleged by plaintiff that the misrepresentation in the application as to the price she paid for the horse was neither written nor dictated by her; that she could neither read nor write; and that it was inserted by the agent who solicited the policy for the company. It was further argued that the company, in response to the verbal notice as to the horse's ailment, by sending its own surgeon to treat it, had waived the written notice required by the stipulations of the policy. The court submitted the evidence to the jury to find: (1) Whether plaintiff intentionally made any false representations as to the value of the horse. (2) Whether defendant, by its conduct, had waived written notice of the horse's ailment. The jury found for plaintiff the amount of the policy. From the judgment entered on the verdict, defendant now appeals, assigning seven errors, all except the last to the charge of the court on the evidence and answers to points.

The first complaint of appellant is the answer of the court to its first prayer for instruction, as follows: "If the jury find that the plaintiff misrepresented in her application the amount paid for the horse insured, the company had the right to cancel the policy, and, having done so for that reason on November 23, 1893, prior to the death of the horse, the plaintiff cannot recover." Answer: "If plaintiff knowingly made a false statement or representation in her application, which was material to the risk, or which was calculated to deceive or mislead the company, the company would have a right, immediately on discovering the misrepresentation, to cancel the policy and be relieved from

liability." It is argued by appellant that she was entitled to a peremptory affirmance of its point and without this the jury the answer were at liberty to judge whether the statement that the purchase was \$275, when it was but \$100, was material to the risk. Undoubtedly, as a fact going to determine the value, this misrepresentation was material to the risk; the point is not so framed as to state clearly an answer to that proposition, the answer must be considered in the light of the evidence and the issue raised at trial. There had been evidence that, before any notice to the company of disease in the horse, the defendant had been informed by the party from whom it was purchased that he had been paid no such price. The verbal notice of disease, according to the testimony of appellant's surgeon, who made an entry in his visiting book of the date, was on the 13th of November. On the 22d of November the surgeon notified the driver that the horse must be killed the next day, and although not killed until five or six days afterwards yet on the next day, the 23d, the company notified Mrs. Smith of cancellation of the policy because of misrepresentation. This evidence warranted the inference that notice of misrepresentation was not prompted by misrepresentation as to price, which defendant contended was material, but by another fact, very material,—a fatal disease which demanded the destruction of the insured horse. The coincidence of dates of the discoveries that the horse would be a loss and that a misrepresentation had been made was very significant, and the further fact that the company did not immediately cancel the policy on receiving information as to the price, but waited for more than a week, is also significant, either of a waiver of its point to cancel, or that it was aware the statement as to price was not that of the insured or of its own agent. Especially does this seem probable, when this agent accompanied the application with his written opinion after a thorough inspection of the horse that his actual cash value was \$275. In the light of this testimony, the point assumes an established fact, and asks the court to assume, the sole reason for the cancellation was the misrepresentation. The point stood should have been negatived, because it withdrew from the jury one of the questions in dispute, viz. whether the cancellation was prompted by misrepresentation or by a pretended one,—by a dishonest attempt to evade an otherwise inevitable liability. But, instead of negating its point, the court, having in view the testimony of the plaintiff's ignorance of the statements in the application by appellant's agent, and the written opinion of the agent as to the value and the evidence tending to show the cancellation was not in good faith, based on alleged misrepresentation, gives proper instruction on a point which might have

so as to apply to such evidence. A therefore, was not answered which have been denied, and appellant was rmed.

second, third, and fourth assignments based on the same unwarranted as- on of a fact which was in dispute on evidence. The appellant puts in evi- the application as a formal written ent of facts by plaintiff as the induce- to the company to issue the policy. intiff denies it contains her represen- and avers they are those of appel- gent, made by him on a careful per- spection of the horse, as shown by tten report, made part of the ap- n. There was evidence tending to every statement in the application was y the company's own agent. He went stable, examined the horse, then went office, and filled out what purported er statement, and on back of same ndorsed and signed his statements ector; then signed her name to the tion, took it to her, and she affixed rk. On the contradictory evidence, rt submits the question to the jury whether she did in fact make a false ntation, and whether the policy was alone on the statements made by de- 's agent. If she had admitted a false ent was made by her and inserted in lication, or that fact had been clearly the appellant's complaints of error e sustained; but each one of the three d on the assumption that every state- n the application was undoubtedly 's, when this was the very fact the ere to find. The instruction of the as based on contradictory evidence, ence from which might be drawn op- nferences. If they found the mis- ent was that of the company's own then plaintiff could recover; other- ot. And viewing the charge in this ere was no error. The case of *Ellen- v. Insurance Co.*, 80 Pa. St. 464, is e same as the one before us. There lication was for a fire insurance pol- he agent and the insured together in- the building, the agent inserting the s to the interrogatories in the appli- The insured, without reading or hav- application read to him, signed it. ent then indorsed upon it his own re- hich accorded with the statements in lication. The policy issued. The y was destroyed by fire. It turned t some of the statements in the ap- n were false, but the insured had no dge they were until after the fire. held, as he had signed a statement he t made and did not intend to make, npany was bound by the act of its est or incompetent agent. To the same are *Insurance Co. v. Bruner*, 23 Pa. *Insurance Co. v. Mahone*, 21 Wall. and many other cases.

The fifth assignment is to the answer of the court to appellant's second point, as fol- lows: "If the jury believe that the company was not notified within 24 hours of the dis- ability of the animal which resulted in his death, the plaintiff cannot recover. Answer: This is affirmed with the qualification that the notice must be given within the 24 hours after discovering there was anything serious in the matter with the horse. If the company ac- cepted and acted upon a verbal notice, it would be a waiver of a written notice." The undisputed evidence shows that, in response to plaintiff's verbal notice, the company im- mediately sent its surgeon, who examined the horse, and he and his assistant continued their visits until the case became hopeless, and the horse was ordered to be killed. This was clearly a waiver of the right to insist on a written notice. That the company im- mediately, through its surgeon, took charge of the animal's treatment, and then ordered it to be killed, is more than mere evidence from which a waiver might be inferred. It is a waiver by such unequivocal acts as admit of no other construction.

The sixth assignment has nothing of merit to sustain it. The court merely called the at- tention of the jury to the fact that Dr. Car- ter, the surgeon sent by the company, had not complained, when he saw the horse, that he had not been called in time to treat it: While but slight evidence that notice of the disease had been given promptly, it was still evidence, and therefore there was no error in adverting to the fact.

The seventh assignment is to the refusal of the court to affirm appellant's first point, as follows: "That under the policy, a suit cannot be maintained thereon in Allegheny county, but only in Philadelphia county." The policy contains this provision: "And in case any suit or action at law should be brought against the said company, the same shall be commenced in the city of Philadel- phia, Pennsylvania, and prosecuted in the courts of the city and county of Philadelphia, state of Pennsylvania, as there is where the home office and books of the company are kept, and all contracts are made and entered into." Without determining whether such a provision would be sustained if the question had been raised at a proper time and by proper pleading, it is sufficient answer here to say that, after filing affidavit to the merits and pleading the general issue, it is too late to deny the jurisdiction of the court which heard the cause and entered judgment. The plea should have been in abatement of the action, before the plea in bar. Not having been so entered, it will be deemed as waived. "The pleas to the jurisdiction of the court which can be taken as, and which are con- sidered to be, pleas in abatement, are those which, while admitting jurisdiction in some court, deny it to the particular court in which the suit is brought for some reason al- leged; for if no court has jurisdiction, the

objection goes in bar and not in abatement." *Otis v. Wakeman*, 1 Hill, 604; *Rea v. Hayden*, 3 Mass. 24; *Stewart v. Ferry Co.*, 12 Fed. 296. Here the point alleges the jurisdiction, by the contract, is in the courts of Philadelphia county, and not in Allegheny county. It is too late to so plead after a plea in bar. All the assignments of error are overruled, and the judgment is affirmed.

STEELE v. McKERRIHAN.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

EXEMPTION OF EARNINGS — GARNISHMENT IN AN OTHER STATE—RECOVERY BY DEBTOR.

A creditor residing in Pennsylvania sent his claim to West Virginia for collection out of the wages of defendant, a railroad employé, who also resided in Pennsylvania, and obtained possession of such wages, whereupon the debtor, under Act May 23, 1887, securing to laborers the benefit of the exemption laws, recovered a judgment against the creditor for the amount of such wages. The creditor then transferred his claim to his wife, who obtained judgment upon it, and issued an attachment execution against the judgment recovered by the debtor. *Held*, that the judgment recovered by the debtor represented the wages collected in violation of the statute, and hence was not subject to execution in favor of the creditor's wife.

Appeal from court of common pleas, Greene county.

Action by T. J. Steele, for the use of Lizzie M. Steele, against Thomas L. McKerrihan, defendant, and Thomas J. Steele, garnishee. From a judgment quashing the attachment execution issued by the use plaintiff, she appeals. Affirmed.

J. P. Teagarden, for appellant. R. L. Crawford, for appellee.

McCOLLUM, J. The legal plaintiff, having a claim against the appellee, sent the same to West Virginia for collection out of the wages of labor due to the latter from the Baltimore & Ohio Railroad Company. He succeeded in getting possession of the wages due from the company to his debtor, who, under the provisions of the act of May 23, 1887, recovered a judgment against him for the amount of them. He held a note against the appellee, which he transferred to his wife, who entered judgment upon it in Allegheny county and issued an attachment execution for the purpose of appropriating the wages for which judgment was recovered against her husband. The learned court below thought that the protection afforded to the laborer by the act referred to could not be taken from him in this manner, and accordingly quashed the attachment. The contention for the appellant is that the judgment against her husband represents a penalty imposed by the statute for a violation of it, and that the legislation exempting the wages of labor from attachment for debt is not applicable to the case in hand. In con-

sidering her claim, it must be remembered that the exemption of the wages from seizure on execution process was intended for the benefit of the debtor, his family, and that he cannot waive it. *Firmstone v. Mack*, 49 Pa. St. 387. It also be borne in mind that the dominant purpose of the act of May 23, 1887, was to afford additional security to the execution previously granted to them, and that the contention is sustained this purpose was substantially defeated. Her husband's violation of this act, and with intent to deprive the appellee of the right to have his earnings exempt from application to the payment of his debts, according to the act of the commonwealth, instituted proceedings in an adjoining state, and by virtue of the judgment obtained possession of his debtor's wages. He now apply the judgment recovered against him for the amount of the wages so obtained in payment of claims he holds against the appellee or has transferred to his wife. The act which gives the action against him is the recovery to the wages appropriated in defiance of it, and denies to him the benefit of the exemption laws of the commonwealth upon any execution process obtained upon any judgment obtained in the state. It seems to us, upon due consideration of the case, that the judgment recovered in this action given by the statute represents the wages collected in violation of it, and that the creditor holds the wages so collected in violation of the statute, and is not subject to the exemption applicable to the wages in the hands of his debtor's employer. The order quashing the attachment is affirmed.

LANE et al. v. PENN GLASS-SAND COMPANY, Limited.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

ACTION FOR PRICE—AFFIDAVITS OF DEFENSE—NONCOMPLIANCE WITH CONTRACT.

A contract for the sale of machinery for a glass-sand company stipulated for machinery "including and intending to include all necessary and needful for the setting up, furnishing a complete apparatus for crushing, washing, conveying, and drying sand, of full capacity herein guaranteed" by the seller, and the sellers further agreed "to guarantee such machinery to have a" certain capacity. Suit was brought for the price of the machinery and the affidavits of defense denied that the plaintiffs substantially performed their contract. The court averred that "the mill, plant, or machinery which they agreed to put up 'was not completed or constructed in accordance with the terms of such contract, but in such an unworkable and defective manner as to cause the great loss and damage,' and that it was defectively constructed in workmanship, and such defective material as to render the plant almost wholly useless for the purpose for which it was intended," and alleged, "that without taking into consideration the injury defendant sustained by reason of the defective work done by the mill, owing to the material and construction, and failure of the plaintiffs to perform their contract, the

at sustained damages to more than the amount alleged to be due on the original contract." *Id.*, that these affidavits contained a substantial defense to the claim.

Appeal from court of common pleas, Venango county; Merrick Davidson, Judge.

Action by H. H. Lane and Thomas S. Johnson, assignee of the said H. H. Lane, against the Penn Glass-Sand Company, Limited, for the cost of certain machinery. From a judgment for plaintiffs, defendant appeals. Reversed.

J. W. Lee, for appellant. Dunn & Carlschael, for appellees.

STERRETT, C. J. Pending the rule for judgment for want of a sufficient affidavit of defense to the plaintiffs' claim, as presented in their statement, the defendant company filed a supplemental affidavit. It was afterwards suggested by the court that, if the plaintiffs so desired, leave would be granted them to withdraw all the items of their claim except the 1st, 13th, 14th, and 15th, and the rule for judgment would be made absolute for the amount of these excepted items, less payments made on account thereof. Acting on this suggestion, they withdrew the 2d, 12th items of claim, inclusive, and judgment for want of sufficient affidavit of defense was accordingly entered against the defendant for \$2,154.20, the residue of said unexcepted items. The only question presented by the assignments of error is whether the court was right in thus adjudging the affidavits of defense insufficient to carry the case to the jury on either of said excepted items of claim. The solution of that question depends on the averments of fact contained in the statement of claim and affidavits of defense, respectively. As will be seen by reference to the former, the plaintiffs base their claim on the contract, a copy of which is attached to and made part of their statement, coupled with an averment of performance thereof on their part. After referring to the agreement, its purpose, etc., they say: "That the said machinery, etc., was furnished as provided by the contract, and put in place in such a workmanlike manner to do the work required in crushing, washing, drying, and making the sand ready for market. That not only the machinery, but also the labor required in placing the same, was of the best, and in a workmanlike manner done, and was accepted by the managers of the said Penn Glass-Sand Company, after it had been properly tested by the plaintiffs. That thereupon the sum of \$3,125 became due and owing plaintiffs, as is provided in said contract." In immediate connection therewith, they admit payments on account amounting to \$1,112.40, and as to the residue, \$2,012.60, they aver that no part thereof has been paid, "and no further offset is due defendant." It may be conceded that plaintiffs' averments of performance, of which the foregoing is the substance,

would be sufficient to entitle them to judgment, were it not for the fact—which seems to have been overlooked by the court below—that the defendant company, in its affidavit of defense, has so far substantially traversed and denied said averments as to put the plaintiffs to proof thereof before a jury. After enumerating in detail the things to be furnished by the plaintiffs, the contract specifically provides that "the said machinery, etc., including and intending to include all things necessary and needful for the setting up and furnishing a complete apparatus for crushing, washing, conveying, and drying sand, to the full capacity herein guaranteed by the said first parties,—the parties of the first part agree to furnish all the above machinery, and send one man to put up in complete working order and start said machinery. And the said first parties further agree to guarantee said grinding and washing machinery, when put up, to have a capacity of eight tons per hour, and the dryer to have a capacity of four tons per hour." Without referring at length to the affidavits of defense, it is sufficient to say they expressly deny that plaintiffs substantially performed their contract, and aver that "the mill, plant, or machinery" they agree to put up under the contract "was not erected or constructed in accordance with the terms of said contract, but in such an unworkmanlike and defective manner as to cause the defendant great loss and damage," etc.; that the same was "so defectively constructed in workmanship, and of such defective material, as to render the said plant almost wholly useless for the purpose for which it was intended." After specifying wherein the plaintiffs failed to comply with their contract, etc., it is further averred "that, without taking into consideration the injury defendant sustained by reason of the defective work done by the mill, owing to faulty material and construction, and failure of the plaintiffs to perform their contract, the defendant sustained damages to more than the amount alleged to be due on the original contract," etc. The defendant's affidavits contain all the elements of a substantial defense to the plaintiffs' claim, and the court erred in holding otherwise. Judgment reversed, and a procedendo awarded.

COUNTY OF WESTMORELAND v. FISHER.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

COUNTY OFFICERS—AUDIT OF ACCOUNTS—CONCLUSIVE—ESTOPPEL.

1. The decision of the county auditors upon an investigation of the accounts of a county officer under Act April 15, 1834, is conclusive, if not appealed from, and cannot be opened for the correction of errors, or again inquired into by the auditors or by the court.

2. A county officer, in regard to whose accounts the county auditors have once p-

report under Act April 15, 1834, is not, by a subsequent attendance at a meeting at which his accounts are re-examined, and by his presentation of his books and papers at that meeting, estopped to deny the jurisdiction of the auditors to review their former decision.

Appeal from court of common pleas, Westmoreland county; John J. Wickham, Judge.

Petition by Phillip Fisher, late treasurer of the county of Westmoreland, to strike certain supplemental auditors' reports and judgments thereon finding him to be indebted to the county. From a decree refusing him such relief, petitioner appeals. Reversed.

James S. Moorhead and John B. Head, for appellant. D. S. Atkinson, for appellee.

FELL, J. By the act of April 15, 1834, it is made the duty of the auditors of each county to audit, settle, and adjust the accounts of the commissioners, treasurer, sheriff, and coroner of the county, and to make report thereof to the court of common pleas, together with a statement of the balance due from or to the officer. The act provides that the report, when filed, shall have the effect of a judgment, and, if not appealed from within 60 days, execution may issue thereon. The auditors are empowered to issue subpoenas and attachments to compel the attendance of witnesses and the production of papers, and to commit persons refusing to testify. Since the passage of the act, it has been uniformly held that the special tribunal created by it for the settlement of the accounts of the county officers named is exclusive of all others, and that its decision, if not appealed from, is final and conclusive, and cannot be opened for the correction of errors, or again inquired into by the auditors or by the court. *Northumberland Co. v. Bloom*, 3 Watts & S. 542; *Wilson v. Clarton Co.*, 2 Pa. St. 17; *Northampton Co. v. Yohe*, 24 Pa. St. 305; *Blackmore v. Allegheny Co.*, 51 Pa. St. 160; *Glatfelter v. Com.*, 74 Pa. St. 74; *Siggins v. Com.*, 85 Pa. St. 278; *Northampton Co. v. Herman*, 119 Pa. St. 373, 13 Atl. 277; *Schuylkill Co. v. Boyer*, 125 Pa. St. 226, 17 Atl. 339. In the case before us the county auditors met the treasurer, after the expiration of his term of office, for the purpose of auditing his account for the year 1893. After an examination,—which they now allege was incomplete, as they were unable to go over the tax lien and treasurer's sale books thoroughly,—they prepared, and on March 26, 1894, filed, their report in the common pleas, charging the treasurer with a balance of \$18,089.72. This report contained numerous items of charge for amounts realized from tax liens and treasurer's sales. No appeal was taken by the treasurer, and the balance found to be due by him was promptly paid. Without consulting the treasurer, and without notice to him, the auditors adjourned, to meet at a time when they could have a better opportunity to examine the books. They met

again on July 9th, and at subsequent times, and re-examined the books; and on September 3d they filed their separate reports for the years 1891, 1892, and 1893, in each of which they charged the treasurer with an additional amount found to be due thereby. The treasurer had no knowledge of these meetings until July 28th, when he was notified to attend a meeting to be held on the 30th. He was present at this meeting, and assisted in the examination of the accounts by producing his books and papers. The court directed the reports for 1891 and 1892 to be stricken from the records, and refused to make a similar order as to the report for 1893, holding it to be valid and binding.

It appears from the opinion filed by the learned judge of the common pleas, in recognizing the force and effect of the reports to which we have referred, that the second report, covering the year 1893, could be sustained as a valid judgment, on the ground that the treasurer, by appearing before the auditors and assisting in the examination, had waived his right to object to their jurisdiction to re-audit his accounts. To this conclusion we do not assent. The finding of the auditors, in 1893, and its effect, was final. It became a judgment, and, by lapse of time, a final judgment. Their jurisdiction as to the accounts upon which it was based was ended. The power to review was vested in the common pleas. In *Northampton Co. v. Yohe*, supra, it was said: "It seems to be an obvious deduction that the board of auditors have filed their report, and they have no further power over it. It passes into the custody of a court of law, and becomes a judgment, and is no more subject to the supervision and review of the auditors who made it than the judgment entered by an award of arbitrators is liable to be set aside or annulled by them." Nor was the treasurer estopped from alleging their want of jurisdiction. The earlier meetings had been held without his knowledge. He attended one meeting of which he had notice, and presented his books and papers, but he made no representation, and did nothing to indicate an intention to waive any right which he possessed. The tribunal was one of limited power. The jurisdiction of the subject-matter was exhausted, and it was the duty of the appellant to assert this at the time on the rule to show cause. In *the Schuylkill Co. v. Minogue*, 160 Pa. St. 443, it was admitted that the auditors had exceeded their powers in requiring the accounts of an attorney employed by the commissioners; but it was argued by the defendant, by appealing from the report of the auditors, had recognized the jurisdiction of the judgment, and was estopped from alleging their want of jurisdiction. In the opinion, the present chief justice says: "Want of jurisdiction may be taken advantage of at any stage of the case."

peal from the judgment, taken out of abundance of caution, cannot have the effect of making a void judgment either a voidable or a valid one. If void in its inception, for want of jurisdiction in the county auditors, it is still void." The order of the court of common pleas of May 25, 1895, in as far as it relates to report No. 69, is reversed and set aside; and it is now ordered and decreed that the rule of September 29, 1894, to show cause why the report should not be stricken from the record, be made absolute.

EIFERT et al. v. LYTLE et al.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

TRESPASS ON LAND—ISSUE AS TO BOUNDARY LINE—CREDIBILITY OF WITNESS—REBUTTING TESTIMONY.

1. On an issue as to the line between plaintiffs' and defendants' property, defendants requested a charge that, as the line claimed by plaintiffs gave them more land than their deed called for, and the defendants less land than their deed called for, this circumstance should have "great weight" in sustaining the latter's contention. *Held*, that it was proper to refuse this, and to tell the jury that the circumstance should be accurately weighed in favor of the line claimed by defendants, and that it was for them to determine what weight should be accorded to it, in connection with other circumstances.

2. In an action for cutting timber on plaintiff's land, where defendants claimed that it was on their side of the line between their respective properties, declarations by plaintiffs opposed to, and tending to discredit, their contention on the trial, as to the location of the line, while inadmissible, cannot bar their right to compensation for the timber cut on their land, unless the defendants, in cutting it, were misled or influenced thereby.

3. When a witness states, in answer to a question, that he was never sent to the penitentiary from a certain county, testimony that he was missing for a year directly after one of exactly the same name was convicted of larceny and sent to the penitentiary, and that he was the only person of that name in that part of the country, was admissible.

4. When part of certain testimony is competent, and part incompetent, it is proper to refuse a motion to withdraw it all from the jury.

Appeal from court of common pleas, Somerset county.

Action by Ernest Elfert and Sarah J. Elfert against H. M. Lytle and A. C. McCune for trespass in cutting timber on plaintiffs' lands. From a judgment for plaintiffs, defendants appeal. Affirmed.

Scott & Ogle, F. J. Kooser, and W. J. Baer, or appellants. A. C. Holbert, J. H. Uhl, and N. H. Koontz, for appellees.

MCCOLLUM, J. The first, second, third, fourth, and fifth specifications of error call in question the accuracy and fairness of the charge. The sixth relates to the denial of the defendants' motion to withdraw from the consideration of the jury the testimony which identified their witness Robert Nichol-

son as the Robert Nicholson who was convicted of larceny in the court of quarter sessions of Somerset county in August, 1860, and sentenced to imprisonment for one year in the Western Penitentiary. The seventh complains of the refusal of the court to grant a new trial.

The defendants requested the court to charge the jury that, as the line claimed by the plaintiffs gave them more land than their deed called for, and the defendants less land than their deed called for, this circumstance should have great weight in sustaining the latter's contention that "the line, 62 degrees 40 minutes west, 279.1 perches," was the true line between the parties. The court declined to say that great weight should be given to the circumstance mentioned in the request, but instructed the jury that it should be accurately weighed in favor of the line claimed by the defendants, and that it was for them to determine what weight should be accorded to it in connection with the other circumstances in the case. As we cannot detect in this instruction any partiality or tendency to mislead, or find in the evidence or the law applicable to the case any ground for hostile criticism of it, we overrule the specification of error which complains of it.

It is contended by the defendants that there is error in the instruction in regard to the effect of the acts and declarations of the plaintiffs concerning the location of their line, and under this branch of their contention the second, third, and fourth specifications may be considered together. The defendants, in their fifth and sixth points, virtually requested the court to say to the jury that if they cut timber on the plaintiffs' land under a misapprehension of the location of the latter's line, induced by what Ernest Elfert said and did, there could be no recovery in this action. The court affirmed their points as to timber cut subsequent to and in consequence of the acts and declarations mentioned, but denied them as to timber cut before anything was said or done by the plaintiffs, or either of them, which misled the defendants as to the true location of the line. The learned court also said, in substance, that if the timber was cut by the defendants in assertion of their claim, and in cutting it they were not influenced in any respect by any act or declaration of the plaintiffs, the former were liable in this action, to the latter, for the value of it. In these instructions respecting the effect of the acts and declarations of the plaintiffs upon the liability of the defendants, we concur. They are clear, impartial, pertinent to the questions raised by the points, and, we think, correct. While any act or declaration of the plaintiffs opposed to, and tending to discredit, their contention on the trial was admissible and calculated to weaken their claim concerning the true location of the line, it cannot operate as a bar to their right to compensation for the timber cut by the de-

defendants on their land, unless the defendants, in cutting it, were misled or influenced by such act or declaration.

The fifth and sixth specifications may be considered together, because both relate to the testimony affecting the character of the witness Robert Nicholson. The sixth complains of the refusal to withdraw this testimony from the consideration of the jury, and the fifth of the instructions in regard to the effect of it. There was no objection made to the admission of the testimony of McNear and Phillippi, and no exception taken to it or to the testimony of Klink. It was offered and received to contradict Nicholson, who, in answer to a question by the defendants' counsel, had said that he was not sent to the penitentiary on any charge from Somerset county. Some of the testimony tended directly to show that the Robert Nicholson who testified in this case was missing for about a year directly after Robert Nicholson was convicted of larceny and sent to the penitentiary, and this, independent of the general understanding of the people as to his whereabouts, was entitled to some consideration in ascertaining whether he was the Robert Nicholson who was sent to prison. Some of the testimony also tended to show that he was the only Robert Nicholson in the section of the country where the larceny was committed. If the testimony to which we have specifically referred was competent on the question of identification, and we think it was, the motion to withdraw was properly overruled, because it included the entire testimony of the parties named in it. If a part of the testimony was incompetent, and a part of it competent, the motion should have been confined to the objectionable part. In addition to what we have already said in support of the refusal to withdraw the testimony, we think it was warranted by the opinion of this court in *Robinson v. Snyder*, 25 Pa. St. 203. We see nothing in the instruction complained of in the fifth specification which calls for a reversal of the judgment, and nothing in the case to warrant a departure from the settled rule that the refusal of a new trial will not be reviewed on appeal. All the specifications are overruled, and the judgment is affirmed.

HILLIARD v. TUSTIN.

Appeal of WILSON.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

SHERIFF'S SALE—DISTRIBUTION OF PROCEEDS—DISCHARGE OF MORTGAGE.

The land of defendant in execution was subject to a mortgage recorded before the entry of the judgment, and to mechanics' liens filed after such entry. *Held*, that as the purchaser at the execution sale was entitled to rely

on the record to determine whether the mortgage was prior to the mechanics' liens, the date of the liens being therefore determined by the date of their filing, the lien of the mortgage was not divested, and hence it was not to share in the proceeds of the execution sale.

Appeal from court of common pleas, Somerset county; John J. Wickham, Judge.

Action by George M. Hilliard against Benjamin C. Tustin. A judgment was rendered in favor of plaintiff, and a writ of fieri facias issued thereon. From a decree distributing the proceeds of the execution sale, John M. Tustin, the holder of a mortgage against the land, appeals. Affirmed.

John M. Buchanan and Wm. A. Mellon, for appellant. W. J. Mellon, for appellee.

FELL, J. The real estate of the defendant in the execution was subject to a mortgage recorded May 17, 1893, and to a lien of a judgment entered September 11, 1893, and to two mechanics' liens, one of which was entered September 26, 1893, and the other November 11, 1893. It did not appear, from the record, when the building was commenced, or when the bills of particulars attached to them were filed, or the date of the mortgage. A sale of the land by the sheriff took place under the judgment, and the fund realized was paid into court for distribution. The contest before the court was between the mortgagee and the mechanics' lien claimants, and the fund was awarded to the latter. The right of the appellant to participate in the distribution depended upon the question whether the mortgage had been discharged by the sheriff's sale. This was to be determined by the record, and not by what might be shown, had the liens been before the court for adjudication. *Goepp v. Goepp*, 35 Pa. St. 130; *Coyne v. Souther*, 61 Pa. St. 457; *Meigs v. Bunting*, 141 Pa. St. 588. The importance of a fixed rule in such cases, which bidders at a sheriff's sale are to be guided by, and the rights of purchasers determined, has been uniformly recognized and upheld in our cases. The purchaser is bound to look beyond the record, and is not affected by, and could not be affected by, anything beyond it. It could not be shown by parol evidence that the mortgage related back to a time which antedated the mortgage, and the dates in the claimant's deed would not have that effect. The date of the mortgage was therefore the date of the lien. *Fell v. Hopson*, 90 Pa. St. 494. Had the mortgage been discharged, a different case would have been presented, and the priority of the lien might have been shown by parol evidence. The learned auditor was ruling that the question before him was governed by *Reading v. Hopson*, supra. Judgment is affirmed.

PERSON v. PEOPLE'S NATURAL GAS CO.

Supreme Court of Pennsylvania. Jan. 6, 1896.)

DEDICATION OF STREET—EVIDENCE—DEDICATION—RESERVATION IN DEED.

A deed of land excepted and reserved a part of the above-described property within the lines of B. street, as laid out in the plan of the city," but the street was not named as a boundary, or referred to in the description. The grantee conveyed parts of the land bounded by B. street, and his grantees conveyed lots as fronting on B. street. The street had not been opened, and no proceedings for its opening had been begun. *Held*, that the land conveyed was not a highway on which a gas pipe could enter in order to lay pipes, and the original owner could sue for a trespass.

Appeal from court of common pleas, Allegheny county; Christopher Magee, Judge.

Appeal by Andrew Patterson against the People's Natural Gas Company. Upon the appeal the said plaintiff, his executrix, Amelia Patterson, was substituted as plaintiff, and, upon the verdict for her, defendant appeals.

W. H. Miller, for appellant. W. H. Lemon and C. Duncan, for appellee.

MR. JUSTICE. The defendant justified its enjoyment and use of the plaintiff's land for the purpose of laying gas pipes upon the ground that the land had been dedicated for a public street. In 1884 the plaintiff conveyed a tract of unimproved land to John Reaman. On the city plan a proposed street had been located, which passed over this land. No lots had then been taken, or have since been taken, by the city or any one, to open the street. It was merely a plotted street. In the conveyance the plaintiff reserved a strip within the lines of the street. The purpose of the reservation are, "Excepting and reserving from this conveyance that part of the above-described property lying within the lines of Bates St., as laid out upon the plan of the city of Pittsburgh." The street was not named as a boundary, nor referred to in the description. Reaman, the plaintiff, divided the tract and conveyed parts, describing them as bounded by B. street. Some of his grantees subdivided the parts they had purchased into lots, and sold them as fronting on B. street. The land within the lines of the street was graded by these grantees, and it is a public street. This was the condition of the property when, in 1888, the gas pipes were laid, and it has remained practically the same ever since. The mere placing of a street upon the city plan conferred no right to the use of the land as a highway upon any one. The plaintiff made no conveyance by the implied covenants of which the land was to be left open for the use of his grantees and the public, and we find no act or omission to justify the inference of dedication.

He reserved from the land described a part lying within the lines of a projected street. The street was not opened. No proceedings had been instituted to open it. It had no existence, except upon paper. It was not a boundary, and was not named in the description of the land conveyed. Before the conveyance the plaintiff was at liberty to make such use of the land conveyed as he wished. He could have inclosed and cultivated it, or have built upon it, subject to the right of the city to take it without payment for improvements made after notice of the location of the street. None of these rights were lost by his conveyance, and, of course, they could not be affected by the subsequent conveyances of his grantee. It is not the case of the right of way over a street named in the description as a boundary, nor of a street laid out by the grantor over land which he has sold in lots, nor of the acquiescence of the owner in a use for such a length of time that public convenience or private rights would be materially affected by its interruption. There is nothing in the evidence upon which to found an implied dedication which would operate as an estoppel. "A dedication to the public of the use of land must rest on the intention or clear assent of the owner, which may be manifested by writing, sealed or unsealed, or by parol, or by acts inconsistent or irreconcilable with any inference except such consent; but the dedication must be under such circumstances as to indicate an abandonment of the use to the community by the owner, * * * and the acts and declarations to effect a dedication should be unambiguous and unequivocal." *Dovaston v. Payne*, 2 Smith, Lead. Cas. 155. The measure of damages was the injury caused the plaintiff by the use to which his land had been subjected by the defendant. The instruction on the subject in the general charge and in the answers to the points was correct, and the amount of the verdict makes it certain that the rule was followed by the jury. The objections to the admission of testimony which appear in the seventh assignment of error might well have been sustained, as the questions asked were wanting in clearness, and tended to present a wrong standard for the assessment of damages, but, as it is evident that they did no harm, the case should not be sent back. The judgment is affirmed.

HILEMAN v. HILEMAN DISTILLING CO.
(Supreme Court of Pennsylvania. Jan. 6, 1896.)

AMENDMENT—DISCRETION OF COURT—JOINT TORT FEASORS—DAMAGES TO DATE OF TRIAL.

1. The action of the court in allowing an amendment after one trial, and when a new trial has been granted, without imposing costs as a condition of such amendment, is within its sound discretion.

2. In an action for damage caused by the

pollution of a stream, it was proper to admit evidence that defendants were the co-owners and co-proprietors of a distillery, and that they negligently permitted the refuse therefrom to enter the stream which flowed through plaintiff's land, in order to prove the defendants jointly answerable.

3. Act May 2, 1876, allowing the recovery, on notice given before trial, of damages up to the date of trial, is applicable in an action for damage caused by the pollution of a stream through the regular dumping of refuse therein from defendants' distillery.

Appeal from court of common pleas, Armstrong county; Calvin Rayburn, Judge.

Action by Joseph Hileman against William Hileman and John Ott, doing business in the firm name of the Hileman Distilling Company. From a judgment for plaintiff, defendants appeal. Affirmed.

Orr Buffington, Floy C. Jones, and W. D. Patton, for appellants. Austin, Clark, McCain & Christy, for appellee.

DEAN, J. The plaintiff, Joseph Hileman, was the lower landowner on a small stream. The defendants operated a distillery on the stream above him. He alleged that they, by slops and other refuse from the distillery, so polluted the water as to render it unfit for use, and thereupon, on 27th June, 1892, he brought trespass for damages. The case came on for trial 5th June, 1893, and resulted in a verdict for defendants. On motion for new trial, the verdict was set aside and new trial granted. Plaintiff then moved to amend by striking from the name of defendants the words, "doing business under firm name of Hileman Distilling Company." This motion was granted, and the case again came to trial March 9, 1894. There was a verdict for plaintiff for nominal damages. From the judgment entered on this verdict, defendants appeal, assigning eight errors.

The first and second are to the ruling of the court, permitting the amendment of the record. The plaintiff obviously made a mistake in charging the defendants as partners, instead of as joint wrongdoers. Such a mistake, under our statute, is clearly amendable. The juncture at which the amendment was moved for was, however, after one trial, and when a new trial had been granted. Then a considerable bill of costs had been incurred. As the record here presents itself, apparently, this amendment ought to have been allowed only on terms which would have imposed costs upon plaintiff; but this was in the discretion of the court below. What may have appeared to the learned judge of that court which we do not see, is only conjectural. The presumption is that his discretion was exercised wisely and grounded on sufficient reasons. We will not assume it was arbitrarily exercised, and there is no sufficient proof that it was. The statutes of amendment are to be construed liberally, so as to effect the intent of them. Their object was to reach a trial on the merits, and any reasonable exercise of the discretion re-

posed in the trial court ought not to be disturbed in a court of review, when, as necessarily be the case, our knowledge of the circumstances leading to the amendment may not be as full as that of the judge allows it. Therefore, these two assignments are overruled.

The third, fourth, fifth, and sixth assignments practically raise the same question. The court permitted plaintiff to offer evidence that defendants were the owners and operators of a distillery, and that they negligently permitted the noxious refuse to enter the stream which flowed through plaintiff's land. The purpose in polluting the stream was not malicious, but merely selfish. Plaintiff disposed cheaply of that which occasioned damage to the lower landowner, not with intent to injure him, but merely to help themselves. It was not as if he had charged them with breaking his close or cutting down his timber. It was of operating, as owners of a manufacturing establishment in such a manner as necessarily injured him. The defence that, as co-owners, they operated the distillery, was in this view of the case inadmissible, and from it the jury might find both were guilty of the wrongful act. Plaintiff could have offered evidence in rebuttal, tending to show it was not the joint act of both. While as to distinct acts of trespass, such as cutting down trees or tearing down fences, evidence of a partnership would not have been admissible to charge two or more defendants jointly, yet under the facts here, it did tend to prove these defendants jointly answerable, and there was no error in admitting the evidence.

The seventh and eighth assignments are to the ruling of the court permitting plaintiff, under Act May 2, 1876, to give notice of claim for damages up to date of trial, and to offer evidence under the notice. The statute says: "In all actions now pending on or after to be brought for the recovery of damages, or mesne profits, it shall be lawful for the plaintiff at any time not less than ten days before trial, to give notice to the defendant or his attorneys that he proposes to claim damages or mesne profits up to the date of trial of such suit; and on such notice the plaintiff may recover such damages or mesne profits, not barred by the statutory limitations, to the time of such trial, and shall be warranted by the law and the evidence. Clearly, the purpose of the act was to relieve from the necessity of multiple actions. If the right of a plaintiff is determined in one action, it tends to a cessation of strife and prevention of accumulation of costs to have his damages determined in the same trial. In three distinct instances in one short section, the disjunctive is used in the legislature: "Damages or mesne profits." This indicates an intention to extend the act to cover, also, cases other than those for the possession, as against the plaintiff, of the wrongful. It seems to have been intended

ly to reach those cases where the trespasser has been kept out of his rightful possession by the trespasser, but it goes further and brings within its scope other actions for damages. What actions? Apparently those trespasses of a continuing nature such as the one before us,—those in which a second action might be brought for damages sustained after service of writ, but the point to which would be determined by the verdict in the first suit. Damage from the pollution of a stream by the upper landowner or a manufacturer, in most cases is a continuing wrong down to trial. If the lower landowner's right be determined at the trial, why should he be put to the vexatious costs of a second action? It was this burden the legislature sought to remove by this act. Undoubtedly, the learned counsel for appellant is right in saying the act cannot embrace all actions for damages. Those wrongs which do not require a continued possession of land by the rightful owner, nor an assumed duty by the upper landowner to continually pollute a stream to the damage of the lower landowner,—wronges which, from their very nature, are perpetrated at only distinct or intermittent intervals,—are not within the meaning of the act. Suppose, instead of establishing a millery, permanent in its character, debris had dumped into this stream the contents of an outhouse vault; the right of the lower landowner would have been violated. They have repeated the wrong, but it would not have been the case intended by the act. A trespass, if held to be within the act, would possibly result in an absurd condition. The plaintiff having failed to prove any wrong before suit brought, might nevertheless prove one after. We, then, would have the case of sustaining an action brought on that cause, and a verdict for a wrong granted thereafter. The act of 1876, certainly contemplated no such absurdity. The point raised here is new, and appellant's argument is plausible, still we are of opinion the act includes within its terms such cause of action as from its nature is a persistent, continuing wrong. Therefore the seventh and eighth assignments of error are also overruled, and the judgment affirmed.

WARD v. JACK.

Supreme Court of Pennsylvania. Jan. 6, 1896.)

ACTION OF ACTIONS — ACKNOWLEDGMENT OF DEBT.

Evidence that, when plaintiff asked defendant "about the settlement of his books," defendant replied, "that ought to have been settled long ago, and you shall have your money within ten days," does not show an acknowledgment sufficient to remove the bar of the statute.

Appeal from court of common pleas, Washington county; McIlvaine, Judge.

v.33A.no.13—37

Action by James Ward against J. S. Neel. Upon the death of said defendant, J. D. Jack, his executor, was substituted. From a judgment for plaintiff, defendant appeals. Reversed.

Todd & Wiley, for appellant. T. Jeff. Duncan, for appellee.

McCOLLUM, J. The learned court below properly characterized the plaintiff's claim as stale, and held that under the pleadings he could not recover upon it, unless the bar of the statute was removed by the conversation testified to by Watson. The case was submitted to the jury under instructions which allowed them to find in the conversation referred to a clear and unequivocal acknowledgment of the claim, a reference by which the amount of it could be definitely ascertained, and a promise to pay it. Whether the conversation authorized the conclusions drawn from it is the principal question to be considered on this appeal. It was brief, and we quote the material part of it. Watson said: "Mr. Neel and I were sitting on some lumber, and Mr. Ward came down, and asked Mr. Neel about his books. He asked Mr. Neel about the settlement of his books. Mr. Neel said, 'Mr. Ward, that ought to have been settled long ago, and you shall have your money inside of ten days.' Before this, though, Mr. Ward said to him that the limitation was about to cut him out. Neel replied to him, 'Mr. Ward, I wouldn't allow that limitation to cut you out, if it was now,—if it was six years now.' He said he would have Flint look after the books." There was nothing developed in the cross-examination of the witness which qualified his testimony as we have quoted it, and we must therefore accept it as a correct statement of the conversation relied on by the plaintiff to toll the bar of the statute. In order to give it the effect he claims it is entitled to, it must be held to contain a clear and unequivocal acknowledgment of the debt, a specification of the amount of it, or a reference to something by which the amount can be definitely and certainly ascertained, and an express or implied promise to pay it. If these essentials to the maintenance of the suit are included in the conversation detailed by Watson, they must be found in that part of it which may be correctly summarized thus: "Ward asked Neel about the settlement of his books," and Neel replied, "That ought to have been settled long ago, and you shall have your money within ten days." The expression, "You shall have your money" means no more than the words, "I will pay you all I owe you"; and these were regarded as insufficient, in *Miller v. Baschore*, 83 Pa. St. 356, to remove the bar of the statute, although they plainly referred to the balance due on Miller's note, which Baschore then held. In *Landis v. Roth*, 109 Pa. St. 621, 1 Atl. 49, the promise of the former was express, and

related to a note which the latter held; and it was adjudged insufficient, although it was not shown that "Landis had given Roth any other note than the one in suit." These decisions followed the rule on which *Burr v. Burr*, 26 Pa. St. 284, was determined, and in which Knox, J., speaking for this court on the subject we are now considering, said: "The better rule, undoubtedly, is that the acknowledgment must not only be clear, distinct, and unequivocal, of the existence of a debt, but that it must also be plainly referable to the very debt upon which the action is based. It matters not where the uncertainty lies,—whether in the acknowledgment or in the identification,—its existence is equally fatal to the plaintiff's recovery." We cite these cases as illustrations of the rule in regard to the identification of the debt alleged to have been acknowledged, and because we think the case in hand is fairly governed by them. "Ward asked Neel about the settlement of his books" is too vague and uncertain to be justly regarded as an identification of the debt, or such a reference as the law requires as a substitute for it. Judgment reversed, and venire facias de novo awarded.

GIFFIN v. SOUTHWEST PENNSYLVANIA PIPE LINES.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

PERSONAL ACTION—RIGHT TO INTEREST IN LAND.

Where a pipe-line company receives oil from the person in possession of the well which furnishes such oil, another claimant of the oil cannot sue the company for the oil, or the value thereof, as this involves the question of title to the well.

Appeal from court of common pleas, Allegheny county; S. A. McClung, Judge.

Action by Samuel Giffin against the Southwest Pennsylvania Pipe Lines. From a judgment for plaintiff, defendant appeals. Reversed.

Henry A. Miller, A. Leo Well, and C. M. Thorp, for appellant. J. B. Chapman and N. W. Shafer, for appellee.

GREEN, J. There is no doubt whatever that P. C. Friend, as receiver of the Liberty Oil Company, Limited, did in point of fact assume to take possession of the well in question from and after January 16, 1892, and conducted the operations at the well, employing and paying the men from the time of his appointment as receiver. The testimony as to his actually taking possession of the well is so positive, and proved by so many witnesses, and really disproved by none, that it must be assumed as an established fact. T. D. Casey, one of the owners, testified as follows on this subject: "Q. You were a member of the Liberty Oil Com-

pany, Limited, were you? A. Yes, I believe you were president of the Oil Company? A. Yes, sir. Q. State who was in possession of this well on the Deschamps lot, McDonald borough, Allegheny county, in which Mr. Giffin had this interest, in December, 1891, and January, 1892. A. The Liberty Oil Company, Limited. Q. Who delivered possession of it to Mr. Friend, receiver of the Liberty Oil Company, Limited? A. The Liberty Oil Company, Limited, delivered him possession. Q. State, if you know, whether Samuel Giffin at any time had possession of this property. A. Not that I know of. Q. What interest did the Liberty Oil Company, Limited, own in this well? A. They owned one-eighth. * * * Q. Who had possession of the other eighth? A. Well, C. S. Casey, I believe. Q. Who drilled this well on the Deschamps lot? A. Charles S. Casey. For whom? A. For the Liberty Oil Company, Limited. Q. Who built the well over this well? Who had it built? A. The Liberty Oil Company, Limited. Q. Who paid for the materials—boiler, engine, and tubing—that went into this well? A. The Liberty Oil Company, Limited. Q. Who paid the expenses of operating this well up till the time it was delivered to Mr. Friend, receiver? A. The Liberty Oil Company, Limited. Mr. Friend, the receiver, testified that he was the receiver of the Liberty Oil Company, Limited, and was in possession of the well on the Deschamps lot, McDonald borough, in Allegheny county, in May, 1892. A. I had possession of that time as receiver. Q. How long did you have possession of it? A. From my appointment in the early part of 1892. Q. Until when? A. Until I disposed of the property in 1893. Q. During this time was any one else in possession of this property? A. No, sir. Q. Did you employ the men who were at work on the property? A. I did. Q. Who paid for the property? A. I did. Q. State if you notified any one of the claim to oil from this well. A. I did; yes, sir. Q. State what you gave them. A. I notified them that the property had come into my hands through the court as receiver. * * * Who put you in possession of this property? A. I took possession of that property from my appointment as receiver. Q. Did you deliver the possession to you? A. Yes, Mr. Casey, and Mr. Wallace, and Mr. Sturgeon, and Mr. Vezie, at that time. Q. Do you mean the Liberty Oil Company, Limited? A. The Liberty Oil Company, Limited. They constituted, at that time, the managers of the Liberty Oil Company, Limited, did they? A. Yes, sir. Q. Yes, Mr. Casey, Mr. Sturgeon, and Mr. Vezie. A. Yes, sir. Q. During the time you were in the possession of this property as receiver, state if Mr. Giffin had possession

property, to your knowledge, in any manner. A. Why, no, sir; he did not." C. S. Vezie was asked: "Q. You were in possession of this property in January and February, 1892? A. Yes, sir. Q. For whom did you hold possession? For whom were you working? A. I was working for the Liberty Oil Company. Q. I say in January, 1892, for whom were you working? A. For C. Friend. Q. And in February? A. Yes, sir. Q. You were superintending for me at that time? A. Yes, sir." Cross-examined: "Q. Well, were you in possession of the property before Mr. Friend took possession? A. Yes, sir. Q. For whom were you working then? A. Well, I had an interest there, and I was working for myself and all the rest of them. Q. Who were the rest of them? A. Mr. Casey, Mr. Wallace, Mr. Sturgeon, Mr. Welsh, and myself. Q. Then, at the time the receiver took possession, you were in possession for these parties and for yourself? A. Yes, sir. Q. Were you in possession for them as the Liberty Oil Company, Limited, or individually? Why it was called the Liberty Oil Company." The assertion, made in the appellant's counter statement, that there were two separate companies, one called "Liberty Oil Company," and the other called "Liberty Oil Company, Limited," and that the well in question was a different well from the one claimed by the Liberty Oil Company, Limited, is entirely unsupported by any testimony, and is manifestly incorrect. The whole of the testimony shows, beyond all question, that there was but one well about which there was controversy, and that is the very well which was actually taken possession of by Mr. Friend as receiver of the Liberty Oil Company, Limited. It was the same well from that well that was in dispute, and that well the plaintiff did not have possession, in any sense, at any time after the receiver took possession. The plaintiff was injured in his own behalf, and he states nothing in contravention of this. He does not pretend to say that he had any kind of possession of the well, or that he had anything to do with running it. He said he bought on December 9, 1891, a part of the interest of A. A. Welsh in the well, which gave him a sixteenth interest. The other interests were owned by the other persons named in the testimony, all of whom testified, including the president, said that the company was the Liberty Oil Company, Limited, and that the possession was transferred to the receiver in January, 1892. Does the testimony of the plaintiff's witness A. A. Welsh at all affect the situation? He says he was in possession up to December 22d or 23d, when he left and did not return. He says he left Vezie in possession until December 24th. But he makes no pretense of saying that the well in controversy was not the well of which the receiver took possession, or that there was any

other well than this particular one whose oil product was in dispute.

This being the state of the testimony we think the case comes within the line of decisions of which *Transit Co. v. Weston*, 121 Pa. St. 485, 15 Atl. 560, is a pertinent illustration, in which it was held that neither trover nor replevin would lie to recover the value of oil removed from the premises by one who was in the adverse possession of the land, during the time of his possession, except in so far as the act of May 15, 1871 (P. L. p. 268), gave a special remedy by replevin. In *Mather v. Trinity Church*, 3 Serg. & R. 509, Tilghman, J., said: "I understand the substance of the charge to be that, although the jury should be of opinion that the defendant had the exclusive and adverse possession of the land from which the stones were taken, for any time less than 21 years, yet the plaintiff might recover in this action of trover. This is not the proper form of action in which to try the title of land, nor have I been able to find any case where it has been sustained for that purpose. * * * Neither do I find any case where trover has been supported when the possession of the land was held adversely to the plaintiff. * * * That the law draws possession to the property of personal chattels unconnected with the land may be true, and yet it does not follow that the possession is drawn in like manner to the property of that kind of chattels which was part of the soil until severed from it, when the soil itself, at the moment of severance, was held by another. I should rather suppose that in such case he who had possession of the land had possession also of the stones dug from it, and against him another who had the right to the possession of the land could not support trover. He certainly could not support trespass. But he would not be without remedy, for he might first recover the possession by ejectment, and then recover the mesne profits in an action of trespass." In *Baker v. Howell*, 6 Serg. & R. 476, the action was assumpsit for money had and received. The defendant had taken certain sand from certain premises and sold it. The plaintiff claimed title to the premises from which the same was taken, and the action was brought to recover the proceeds of the sale of the sand. It was held that an action of assumpsit would not lie, as it involved conflicting titles to land. There are many other cases to the same effect. *Brown v. Caldwell*, 10 Serg. & R. 114; *Lewis v. Robinson*, 10 Watts, 338; *Lehman v. Kellerman*, 65 Pa. St. 489. The learned court below conceded the correctness of the foregoing proposition, and as there was no real conflict as to the actual possession of the well, we think the first point of the defendant should have been affirmed. But the court adopted a theory that the defendant was still the agent of the plaintiff for the purpose of carrying the oil to its lines or

tanks, and therefore the possession of the receiver was not the exclusive possession of the well. We are unable to agree to this theory (1) because we cannot discover any evidence of the fact that the defendant had any pipe line upon the premises for the purpose of carrying the oil from the wells to its own lines; (2) because, if the fact were so, we cannot regard the defendant as anything more than a common carrier, bound to receive and transport, for all persons alike, all goods intrusted to its care. Such carriers are not in any sense to be deemed as agents for the persons committing goods to their care, and with power either to affect their rights by acts or declarations or to conserve the litigated claims or rights of their customers as between them and other persons. When the defendant received notice of the change of possession of the well from the receiver, they were obliged to consider their own position and liability in the premises, and if they were then receiving the oil which they originally received from the plaintiff, but now received from another person clothed with legal control over the oil, by reason of ownership changed by act of the law, they were not at liberty to disregard the notice. No theory of a prior agency and consequent liability to the original consignor would suffice to relieve them of their liability to the present consignor. The question, therefore, recurs, who was in possession of the oil as it was then being delivered to the defendant? And that is an independent question, to be decided upon its own merits. As we regard the merits of that question, they are all with the defendant, and the court should have delivered a binding instruction to the jury to find for the defendant. The assignments of error are all sustained. Judgment reversed.

✓ **CLARION TURNPIKE & BRIDGE CO. v. CLARION COUNTY.**

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

TOLL BRIDGE—CONDEMNATION BY COUNTY—MEASURE OF DAMAGES—TURNPIKE COMPANY.

1. Act April 10, 1862, chartering the Clarion Turnpike & Bridge Company, and authorizing it to appropriate a certain old turnpike, and to charge tolls for its use, by section 5 empowered the company to erect a toll bridge over the Clarion river in case the county commissioners failed to do so. *Held*, that the authority granted by this section was distinct from the general power to maintain a turnpike, so that in a proceeding by the county under Act May 8, 1876, to acquire the bridge erected by the company, the value of the turnpike franchise was not to be considered.

2. The fact that the bridge and the turnpike as a whole yielded no net income, the income from the bridge being absorbed in maintaining the road, did not affect the amount of damages to be given for the taking of the bridge.

3. Where a bridge is taken by a county for public use under Act May 8, 1876, the measure of damages is just compensation for the loss

suffered by the owner in consequence of taking; this being the value of the substructure, and approaches, together with the franchise or right to take tolls.

Appeal from court of common pleas, Clarion county; E. Heath Clark, Judge.

Proceeding by the Clarion Turnpike & Bridge Company against the county of Clarion to determine the amount of damages to be paid for the taking of plaintiff's bridge by defendant. From a judgment of the court awarding plaintiff the sum of \$5000, with costs. County appeals. Affirmed.

G. A. Jenks and Hindman & Hochstetler, appellants. J. T. Moffett and Charles H. Bet, for appellee.

DEAN, J. The Susquehanna & Western Turnpike Company was by special charter of February 22, 1812, chartered to construct a turnpike from Waterford, in Erie county, to the Susquehanna river, near the mouth of Anderson's creek, in Clearfield county. The company was duly organized, and in the year 1820 built its road on its route from Waterford to the terminals, from Brookville, Jefferson county, to Franklin, Venango county. In the year 1856, this part of the pike was abandoned, and was taken in charge as a public road by the supervisors of the township through which it ran. By the act of April 10, 1862, the plaintiff company was rechartered, and authorized to appropriate the route of the old Waterford turnpike as between the west line of Clarion county and the borough of Brookville, Jefferson county, and, further, to charge such tolls as might be allowed to be collected by the charter of the old company. It was also, by the act of April 10, 1862, authorized to maintain a bridge over the Clarion river where the old turnpike struck the river, and to charge tolls for the use of the bridge an amount not exceeding such tolls as were authorized to be collected by the charter of the company for two sections of five miles each on the turnpike. By a subsequent act of April 14, 1863, the same company was authorized to reconstruct all of the turnpike east of the Allegheny river, and, further, to increase its rate of tolls for use of the turnpike between the Allegheny river and Brookville about 19 per cent. In 1863 the company built the bridge over the Clarion river, a mile west of the borough of Clarion, consisting of a wooden covered bridge, about 100 feet long, with a single span, with stone abutments and approaches. This took the place of the old bridge erected by the company two years before, but which had been swept away by flood. The company went on collecting tolls for the use of the bridge until April 1, 1890, of Clarion county, when the bridge was taken by the county and was to be maintained under the act of April 10, 1876, to acquire the bridge for the use of the public. That act provides that on the taking of at least 20 taxpayers to the court at the next sessions, setting forth that a

ary to the accommodation of the travel-
public, and that the payment of tolls
onsome, the court shall appoint view-
no shall view and report whether the
is necessary as a free bridge for pub-
accommodation, and whether the pay-
of tolls is an unjust burden on the
ing public and the people of the town-
where the same is located; also, the
t of damages which shall be sustain-
the company owning the bridge by the
thereof. The right of appeal from
ard on confirmation of the report by
mmon pleas was given to both the
y and the county. In this case view-
are appointed, who awarded damages
um of \$2,500. The company appealed,
trial the jury awarded \$7,081.61. On
for new trial, the court directed the
y to remit all in excess of \$5,700, or
ial would be granted. On the compa-
ing paper remitting excess, judgment
tered on the verdict against the coun-
\$5,700. The county now appeals, as-
eight errors.

These alleged errors hinge on the con-
on or effect to be given to the fifth
of the act of 1862, which authorized
ection of the bridge. That section
thus: "That should the commissioners
rion county elect to erect a county
over the Clarion river at or near the
where the Susquehanna and Water-
turnpike road strikes said river, and
in and keep the same in repair, the
y hereby incorporated, shall have no
or authority over the same, but it
e the exclusive property of said coun-
d under its control; but should the
nty commissioners neglect and re-
erect a bridge as aforesaid, the com-
foresaid are hereby authorized to erect
bridge at its own expense and costs,
have the exclusive control thereof,
levy a toll on all persons and prop-
assing over the same, not to exceed
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ctions of the turnpike, and on all foot-
not to exceed two cents for each and
assage." The reasonable interpreta-
be given this section, when read in
tion with the whole act, authorizing
ropriation of the roadbed of the old
e company, is that the authority to
ct and maintain the bridge at this
s a grant distinct and separate from
neral powers to maintain and operate
pike. In fact, the only reference to
turnpike is that part of the section
measures the authorized tolls by the
t allowed to be charged on two sec-
of the turnpike. When the authority
t the bridge is given, the right of the
is expressly saved. If it declines to
then only is the company authorized
ld. The company has authority to
t a particular point, and to have the
ve control thereof. Then it will have

two separate properties and franchises,—the
turnpike road and the bridge. If the coun-
ty had built the bridge, it would not have
affected the right of the company to operate
its road on each side of it. The bridge
would have been free, but the traveler over
it would have had no right of free passage
through the turnpike gates. So, the coun-
ty, by the proceedings, acquired the bridge,
but not a part of the turnpike; and by this
acquisition it not only took the structure
and approaches, but a distinct and separa-
ble part of the company's franchise.

The question, then, simply is, what damage
did the company sustain by the taking of the
bridge and the loss of the franchise? All
the evidence as to how much the company
lost on the turnpike and bridge as a whole
is to a great extent immaterial, because it
has but little, if any, bearing in a deter-
mination of the value of the bridge to the
company. The rule is that adopted by the
court below, as stated by this court in *Mif-
flin Bridge Co. v. Juniata Co.*, 144 Pa. St. 374,
22 Atl. 896, and in *Montgomery Co. v.
Schuylkill Bridge Co.*, 110 Pa. St. 54, 20 Atl.
407: "Where a bridge is taken by a county
for public use under act of May 8, 1876, the
measure of damages is the value of the prop-
erty to the owners, not to the county taking
it; and such value is to be ascertained, not
only by the cost of the structure, but by the
value of its franchises. The value of its
franchises depends largely upon its' earning
power." The court, after stating this rule,
then called the attention of the jury to the
elements entering into an estimate of the
value, such as the cost of the structure, the
net tolls, and market value of stock, if it
had a market value. There was evidence
that the original cost of the structure was
ten to twelve thousand dollars; that when
taken by the county, in 1890, it had been in
existence and use about 25 years. There
was conflicting evidence as to the extent of
deterioration by time and use; some of the
evidence tending to show it was almost
worthless, and would soon have to be re-
placed; and other evidence, that it was about
as substantial as when first erected. Then,
as to the net receipts of tolls for the five
years prior to the taking, it was shown they
averaged about \$700 per year. At times part
of the net receipts were appropriated to keep
up the turnpike road, but this in no way
tended to depreciate the value of the bridge.
That there were net earnings was important.
What use was made of them was immaterial.
All the conflicting evidence was submitted
to the jury in a very full and careful charge,
the summing up of which is the instruction
requested in plaintiff's third point: "That
the true measure of damages is just compen-
sation for the loss suffered by plaintiff in
consequence of the taking by defendant of
plaintiff's property, being the substructure,
superstructure, and approaches of the bridge,
together with the franchise or right to take

tolls; and the jury have no right to find less." There could have been no more correct statement of the law.

The argument of appellant that the supplement of April 14, 1863, established a new rate of tolls for both turnpike and bridge company in place of that in the act of 1862, and that no tolls could thereafter be charged for the bridge, separate from the turnpike company, cannot be sustained. The act of 1863 throughout has reference to tolls on the turnpike road, and by no reasonable construction can it be made to include the bridge expressly authorized by the fifth section of the act of 1862, for which a special rate of tolls was fixed. Even if the bridge were an inseparable part of the turnpike, and the whole should, as appellant contends, be treated as one corporate property, the part taken, the bridge, should be estimated at its true value, when compared with the whole. If the gross receipts of this part were larger in proportion, and the net also, than any other part of the property, and the bridge be taken from them, they lose that part of their property which is of the greatest value. The principle contended for by appellant that if the corporate property, as a whole, yields no net income, a part of it is of no value, is palpably unsound. The productiveness of a comparatively small part of a railroad, canal, or turnpike may maintain for public use and keep in repair, under the charter, the whole. With this valuable part the corporate property may be kept in serviceable condition, and operated, without dividends, until a change of times, increase in population, more rigid economy, or wiser management, makes the whole remunerative. Take away this productive part, and the corporation is at once hopelessly bankrupt. Common observation has demonstrated that many corporate enterprises have become sources of large income to their stockholders, by the mere ability to survive for a few years, in the absence of any net income from the property as a whole.

It will be noticed the act of 1876 provides that, when paying tolls is too burdensome to the public, the county is authorized to acquire the bridge. The argument of the learned counsel for appellant tends to the conclusion that, if the property be burdensome to the owners, the public should come to their relief by confiscating it. This is a misapprehension. The act is not based on a sort of guardianship of improvident owners, who persist in holding onto unproductive property, but on the idea that private property may be taken for public use, when the interest of the public is thereby promoted; but, when thus taken, the public must pay for it in reasonable damages.

All the assignments of error are overruled, and the judgment is affirmed.

KLINFELTER et al. v. BAUM
(Supreme Court of Pennsylvania.
1896.)

SCIRE FACIAS—MECHANIC'S LIEN—DEFECTS

In scire facias on a mechanic's sufficiency of the lien on its face cannot be attacked under a plea of nonassumpsit and payment with leave.

Appeal from court of common pleas, Lehigh county; E. H. Stowe, Judge.

Scire facias by J. S. and J. G. Klinefelter against George W. Baum on a mechanic's lien. From a judgment for plaintiffs. Appeal affirmed.

J. J. Miller, for appellant. L. K. Porter, for appellee.

FELL, J. The error assigned is to the omission in evidence of the record of the mechanic's lien. The objection urged was on the insufficiency of the lien as appearing on its face. The plea to the scire facias was assumpsit, set-off, payment with leave. In *Lybrandt v. Eberly*, 36 Pa. St. 347, it was held, following *Lewis v. Morgan*, 18 Pa. St. R. 234, that the formal validity of a mechanic's lien is not put in issue by a plea of payment, and that no issue for the insufficiency of the lien could be raised on the formal defects of the claim, as they were questions of law, and should be raised by demurrer or by motion to strike off the claim. Following this it was decided, in *Howell v. City of Philadelphia*, 38 Pa. St. 471, that pleading to the scire facias must be considered a waiver of defects as to dates in the lien. In *Lee v. Lee*, 66 Pa. St. 336, the plea was no lien, payment, and set-off with leave, and it was held by *Sharswood, J.*: "It was the issues raised by these pleas that the jury was to try, and impaneled to try. No question of the sufficiency of the claim upon its face could arise at the trial. That would be an issue of law. There might arise a question of variance between the evidence as to the date of the claim and the claim as filed and recited in the scire facias, but not whether that claim was regular and sufficient." And he adds: "A short plea of no lien was not a demurrer, general or special, and raised no question of defects on the face of the claim." There is no conflict between these cases. In *Coal Co. v. Martz*, 75 Pa. St. 384 (where it was held that, as the act of assembly required the plaintiff no such lien as was filed, the fatal error in the claim was not a mere formal defect, by going to the issue of payment), and *Fahnestock v. Speer*, 92 Pa. St. 146 (where the special plea concluded to the court, and was held in effect a demurrer). The judgment is affirmed.

FARABEE v. McKERRIHAN.

Appeal of McKERRIHAN.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

RECORD OF INSTRUMENT—NEGLECT OF RECORDER.

1. When the holder of an instrument leaves with the recorder to be recorded, it is to be regarded as recorded from that time, though it is not then actually recorded, or is recorded in the wrong book.

2. A mortgage given to secure future advances to the mortgagor may embrace a sum or which the mortgagor gave to the mortgage, on the day of the execution of the mortgage, a note under seal, payable in four years, containing a clause, "being part of the amount secured by" said mortgage.

Appeal from court of common pleas, Greene county; S. L. Mestrezat, Judge.

Proceeding for the distribution of the proceeds of the sheriff's sale of the real estate of Joseph McKerrihan under a judgment in favor of Benjamin Farabee. From the decree rendered, George McKerrihan, a judgment lien creditor, appeals. Affirmed.

J. P. Teagarden and Ray & Axtell, for appellant. R. L. Crawford, for appellee.

GREEN, J. The only question in this case is whether a mortgage left at the recorder's office to be recorded, but actually recorded in the Deed Book and indexed in the Index of deeds, was sufficiently recorded to constitute lien from the time it was left for record. In the case of Luch's Appeal, 44 Pa. St. 519, we held that mortgages must be recorded in mortgage books, and are not properly recorded in any other species of book, where they cannot be found by means of the mortgage index. But in Glading v. Frick, 8 Pa. St. 460, Luch's Appeal was distinctly overruled in an elaborate opinion delivered by Mr. Justice Paxson, in which the subject was reconsidered and carefully reviewed. Summing up the whole matter, the opinion declares: "In contemplation of law, a paper is recorded the moment it is lodged in the office and the fees paid. In point of fact it may not be, and in many instances is not, actually entered in the books until months afterwards. Where a man has complied with the law by depositing his papers in the recorder's office, and paying the fees, it would be a hard rule that would deprive him of his lien or his estate because of an error of the recorder in recording the instrument in the wrong book. It would be different were there an act of assembly directing in what book the particular paper should be recorded. In such a case the recorder might be liable upon his official bond or a failure to record as required by law. In the absence of any such act, we are unable to see how we can declare that a paper is not recorded, when the holder has done all that the act of assembly requires in placing it on record. To do so would seem very

much like legislation." We ruled in this case that, where certain instruments of writing are not required by law to be recorded in a particular book, they may be recorded in any book kept by the recorder, and a building contract is valid, though recorded in a deed book. We have never departed from the ruling in Glading v. Frick. In the case of Stockwell v. McHenry, 107 Pa. St. 237, our late Brother Clark, delivering the opinion, said: "Prior to the act of 18th March, 1875, at least, it was well settled that a deed was, in contemplation of law, recorded when it was left in the recorder's office, and put upon the entry book for that purpose. The duty of the recorder was to record it, and the responsibility rested upon him for any default in the proper discharge of that duty. The consequences of his default could not be visited upon the owner, who had done all that the law required, in depositing the deed in the office for that purpose. A different doctrine was perhaps declared in Luch's Appeal, 44 Pa. St. 519, where it was held that mortgages must be recorded in a 'mortgage book,' and that they are not properly recorded in any other book, where they cannot be found by means of a 'mortgage index'; but that case was expressly overruled in Glading v. Frick, 88 Pa. St. 460, where it was said by Paxson, J., 'We feel ourselves constrained to return to the rule laid down by Chief Justice Gibson in M'LANAHAN v. REESIDE, 9 Watts, 511. 'It is, indeed, of no account,' says the chief justice, 'that the conveyance and the articles were not recorded in the book set aside for mortgages. The keeping of such a book is an arrangement to promote the convenience of the officer, by contracting the surface over which he is to search for a particular thing. He is bound to furnish precise information, get it as he may, of every registry in his office, whether made in the right place or not.'" In Clader v. Thomas, 89 Pa. St. 343, we said, speaking of Luch's Appeal, "That case, however, has since been overruled by this court in Glading v. Frick, 88 Pa. St. 460; and it is now settled that a deed is, in contemplation of law, recorded when it is left for record in the recorder's office, and the record cannot be lost by being transcribed by the recorder or his clerk in the wrong book." In the case of Palge v. Wheeler, 92 Pa. St. 282, referring to a defeasance which was not recorded in the Mortgage Book, but in the Agreement Book, Mr. Justice Mercur, delivering the opinion, said: "Inasmuch, however, as the defeasance was not recorded in the Mortgage Book, but in the Agreement Book, it is claimed that it was improperly recorded, and therefore, if in fact a mortgage, the sheriff's sale passed a title discharged therefrom. It may be conceded that this was the correct view under the authority of Luch's Appeal, 44 Pa. St. 519. That case, however, has been expressly overruled by Glading v. Frick, 88 Pa. St. 460. It is there held that such an

instrument of writing is properly recorded in any book kept by the recorder of deeds." In *Shebel v. Bryden*, 114 Pa. St. 147, 6 Atl. 905, the present chief justice, referring to the fact that a deed of assignment was first indexed in the Limited Partnership Docket, and not in the Deed Book Index, said: "This did not invalidate the recording of the instrument. In contemplation of law, it was recorded and took effect from the time it was left with the recorder for the purpose of being duly recorded. This principle is recognized in *Glading v. Frick*, 88 Pa. St. 463; *Clader v. Thomas*, 89 Pa. St. 343; *Paige v. Wheeler*, 92 Pa. St. 282; and *Marks' Appeal*, 85 Pa. St. 231." After all these utterances, it is in vain to contend that *Luch's Appeal* is any longer of authority, or that *Glading v. Frick* is not the law as declared by repeated decisions of this court. The principle of that case is that, when the holder of an instrument to be recorded has left it with the recorder to be recorded, it is to be regarded as actually recorded from that time, whether it was actually recorded at that time or not, or whether it was recorded in the wrong book.

But it is urged that the act of 18th March, 1875 (Purd. Dig. pp. 565, 569), in effect, changes the law upon this subject as it was prior to its passage, and that under that act all mortgages must be recorded in mortgage books, and indexed in mortgage indexes, in order to constitute notice to subsequent purchasers and incumbrancers. We are unable to sustain this contention. The act of 1875 contains no direction that deeds shall be recorded in deed books, or mortgages in mortgage books, and, so far as that aspect of the subject is concerned, there is manifestly no change in the law as it stood up to the date of the act. All that the act does is to direct that, in addition to the indexes which the recorders in each county are required to keep, they shall prepare and keep two indexes of deeds and two of mortgages, direct and ad sectam, in one of which the recorder shall enter the name of the grantor, the name of the grantee, and the volume and page in which the instrument is recorded, and in the other of which he shall enter the name of the grantee, the name of the grantor, and the volume and page of record, all in the order named in the act. The indexes are directed to be arranged alphabetically, and in such a way as to afford an easy and ready reference to the deeds and mortgages, respectively. The second section provides that as soon as the indexes are prepared the recorder shall index in its appropriate place and manner every deed and mortgage thereafter recorded in his office, and the time the same is recorded. The third section provides that the entry of recorded deeds and mortgages in said indexes shall be notice to

all persons of the recording of the instrument. This act contains no repeal of any prior legislation of the state, nor is it inconsistent with any part of it. It did not assume to create any new rule of construction of recorded instruments. The act of 28th March, 1820 (Purd. Dig. p. 588, p. 122), provides that mortgages left for record shall be liens from the time they are recorded or left for record, and the effect of the appellants would practice is to destroy that part of this act which gives the same effect to being left for record as to being actually recorded. In *Wyoming Bank's Appeal*, 11 Wkly. Notes Cas. 100, it was held that a mortgage actually recorded, though not entered upon the index, is entitled to precedence over a subsequent mortgage. We said, "Whatever the effect of the failure of the recorder to enter the mortgage on his book of entries would have in the case of a lien intervening between the time and the recording of the mortgage, we think such recording is a valid entry of record against a subsequent judgment creditor. There is no answer to this, or any of the cases before cited, to say that they were decided either before the act of 1875 was passed, or upon facts arising prior to its passage, or because that act is not in conflict with prior law. Moreover, the appellee's mortgage was actually recorded in the Book of Deeds on August 2, 1884,—nearly eight years after the judgments of the appellant were recorded. Being there recorded, it was in full notice of the title of the mortgagor, and would have been at once discovered by any creditor desiring to investigate his title. Without tending the argument, we dismiss all assignments of error relating to this subject."

The sixth assignment raises a question upon the construction of the mortgage, and the effect that it was given only to the future advancements to the mortgagor, and therefore could not embrace the sum of \$645.71, which it is agreed was advanced before the mortgage was given. But the court is very correctly disposed of this question by showing that on the day the mortgage was executed the mortgagor gave the mortgagee a note under seal for \$645.71, payable in four years, which contained the clause, "being a part of the amount secured by my deed dated March 20th, 1884." The parties thus made the sum named in the mortgage the sum named in the note of the indebtedness to secure which the mortgage was given, which they had a perfect right to do. It had precisely the same effect as if the mortgagor had paid the amount to the mortgagee, and then immediately taken back the money, as a prepayment. There is no merit in this remaining assignments, and they are dismissed. Decree affirmed at the cost of the appellant.

In re CLARKE et al.

Supreme Court of Rhode Island. May 13, 1895.)

CONSTRUCTION—DURATION OF TRUST.

A testator devised his residuary estate, included all his realty, to his widow, in trust to apply from the income annually \$400 for her own use and the balance for the maintenance of two minor children "till" both or either attained majority, when, after retaining from the estate \$20,000 in trust, and a sufficient to produce an annuity of \$400 for her, she was to pay over the remainder of the trust fund to the surviving child or children. That a conveyance of the realty to the children on attaining majority was impliedly made.

Where a trustee, on the extinction of the trust, holds the legal title to realty, a conveyance by him and the persons entitled to the trust conveys a good title.

Appointment by Susan C. Clarke for the condition of the will of James Hamilton Clarke under the judiciary act (chapter 20,

Francis B. Peckham and William P. Sheffield, Jr., for different petitioners.

JUSTICE, C. J. We are of the opinion that the provision contained in the residuary clause of the will of James Hamilton Clarke, which reads as follows, namely: "I intend to embrace under this last clause of my will not only the twenty thousand dollars trust fund, but all other trust property after specific trusts thereon are discharged, mentioned in this will,"—has no relation to the real estate which the testator had at his death, but relates solely to the trust funds which he had directed should be set apart under portions of his will, to wit: (1) the \$20,000 trust fund mentioned in the will; (2) the fund of \$3,000 bequeathed to Frederick N. Cottrell, in trust for the testator's grandsons, Hamilton Clarke Seabury, and his child or children; (3) the fund to be paid by Susan C. Clarke, the testator's widow, to produce the annuity of \$400 bequeathed to her in lieu of dower. The real estate passes under the residuary clause, by which the testator gives, devises, and bequeaths all the rest and residue of the estate which he has or is entitled to at his decease to his beloved wife, Susan C. Clarke, to hold for her as she remains his widow, in trust to apply from the income \$400 per annum to her sole and separate use, which is to be in lieu of dower; then out of the remaining income to provide a suitable maintenance and support, including education and what else should be suitable and proper, for his children, Elizabeth Russell Clarke and Frederick Hamilton Clarke, until they should arrive at the age of 21 years, or, if one should die, until the survivor should attain majority; and then to retain from the proper income of the estate the sum of \$20,000, and continue to hold the said \$20,000 in trust for the benefit as subsequently provided, and

pay over what should remain of the trust fund, after reserving enough thereof to constitute a fund from which to raise the annuity of \$400 for her benefit, to the said Elizabeth and Frederick, or the survivor of them. It will be observed that the trust created by the residuary clause, except as to the \$20,000 and the fund to produce the annuity, is continued only till Elizabeth and Frederick, or the survivor of them, should attain the age of 21 years. Then the fund for \$20,000 and the fund to raise the annuity are to be set apart, and the residue of the personalty is to be paid over to Elizabeth and Frederick. There is no direction, it is true, that the trustee shall convey the real estate to Elizabeth and Frederick, but such conveyance is implied by the direction to retain from the said trust property and the estate \$20,000 and the fund for raising the annuity, for which purposes the retention of the real estate was unnecessary, and by the fact that no authority is given to the trustee to retain any other portion of the estate than these two funds. Elizabeth and Frederick having both attained the age of 21 years, the personal estate having been sufficient for the setting apart of the trust funds as directed, the funds having been set apart out of the personal estate, the duties of the trustee in reference to the real estate having ceased on the attainment of the age of 21 years by Elizabeth and Frederick, the trustee from that date held the legal title to the real estate as a mere naked trust for Elizabeth and Frederick, who could have acquired a conveyance of it to themselves. This case shows that, after attaining the age of 21 years, Elizabeth and Frederick conveyed to Susan, their mother, an undivided third of the real estate in question by deed dated September 5, 1892. Since then Susan has been seized and possessed of an undivided third of the land in her own right, and of the other two undivided thirds in trust for Elizabeth and Frederick, the trust being a mere naked trust. We are of the opinion, therefore, that Susan, Elizabeth, and Frederick together can make a good title to the land which they have contracted to sell to the other petitioners, John F. Carton and Charles A. Faris.

EISING v. ANDREWS.

(Supreme Court of Errors of Connecticut.
March 5, 1895.)

BOND—BREACH—CONCEALMENT BY PRINCIPAL—SURETY—LIMITATIONS.

Gen. St. § 1389, provides that a right of action fraudulently concealed shall be deemed to accrue when discovered by him in whose favor it exists. *Held*, that where the principal in a fidelity bond concealed from the obligee a breach of the bond, limitations did not run in favor of the surety until discovery by the obligee of his right of action.

Appeal from superior court, Fairfield county; Thayer, Judge.

Action by Emanuel Elsing against Charles S. Andrews, executor, for breach of an employé's fidelity bond on which defendant's testator was surety. From a judgment for plaintiff, defendant appeals. Affirmed.

Howard B. Scott, for appellant. Lyman D. Brewster and John H. Perry, for appellee.

ANDREWS, C. J. The plaintiff is the only living partner of the late firm of E. Elsing & Co. The defendant is the sole surviving executor of the will of Thomas F. Fay, late of Danbury, deceased. In his lifetime Fay had become obligated in a bond as surety for one Thomas F. Rowan, as principal, for which he bound himself, his heirs, executors, and administrators, jointly and severally with the said Rowan, in the penal sum of \$2,000 to the said E. Elsing & Co., conditioned that the said Rowan, who had been employed by the said firm as salesman and collector, "shall well and faithfully discharge his duties as such collector and agent, and shall also account for all moneys, property, and other things which may come into his possession or control by reason of his appointment and employment as such agent and collector." Fay died on the 25th day of June, 1892. On the 5th day of July next thereafter, the court of probate for the district of Danbury limited and allowed six months from said date for the presentation of claims against his estate. After Fay's death, and between June 25, 1892, and August 26, 1893, Rowan received as such collector and agent from the customers of E. Elsing & Co. more than \$2,000 of money which belonged to the plaintiff, but which he appropriated to his own use, of which amount the sum of \$739.41 was misappropriated by Rowan after May 26, 1893. This defalcation of Rowan was by him fraudulently concealed from the plaintiff, and was not discovered by the plaintiff until the 1st day of September, 1893. He then made demand of Rowan that he should account for and pay over to the plaintiff the said amount which he had misappropriated, but Rowan has at all times neglected and refused so to do. He was then and at all times since continues to be wholly insolvent. The plaintiff notified the defendant of such defalcation on the 26th day of September, 1893, and presented to him, as such executor, the claim of said partnership on said bond; and on the 18th day of November, 1893, made demand on him for the amount of the said bond, but the defendant refused to pay it. This suit was brought on the 21st day of November, 1893. The defendant claimed as matter of law that upon these facts the plaintiff was barred by the statute of limitations from recovering in this action for any sums of money misappropriated by Rowan prior to May 26, 1893; and that the fraudulent concealment by Rowan of his misappropriation did not prevent the statute of limitations from

running in favor of the defendant, nor postpone the time of the arising of the cause of action upon the bond until the plaintiff discovered the misappropriation. The court does not so hold, but rendered judgment for the plaintiff for the amount of the bond less interest from the date of the demand until the defendant appealed to this court.

The bond on which this suit is based contains two conditions: First, that the defendant should faithfully discharge his duty as agent and collector for the said copartnership; and, second, that he should account for all moneys, property, or other thing that may come into his hands, possession, or control by reason of his employment as such agent and collector. A breach of each of these conditions is alleged in the complaint, and the facts found by the court show that each condition has been broken by Rowan. Section 581 of the General Statutes—being a statute concerning the estates of deceased persons—provides that "when a right of action shall accrue to a creditor by reason of the death of the deceased, it shall be barred and prohibited within four months after such right of action shall accrue"; and that, if the claim is not exhibited within such time, the creditor shall be forever debarred of all right to recover the claim. The breach of the second condition named in the bond took place, and the right of action thereon accrued, not earlier than the 1st of September, 1893, and within four months next before the claim was exhibited to the defendant. The superior court might well have rendered its judgment in favor of the plaintiff on the breach of that condition of the bond (*McKim v. Glover*, 161 Mass. 37 N. E. 443), and there is nothing in the case to show that it did not. Counsel for the defendant does not dwell on this point in the case.

Under the statute above recited the plaintiff admits that the plaintiff is entitled to recover the sum of \$739.41, that being the amount of money misappropriated by Rowan within the four months next before the claim was exhibited to him. And he claims that because of that statute the plaintiff cannot recover for any moneys wrongfully appropriated by Rowan prior to the said four months. If that statute stood alone, it would be more than likely that this action would never have been contested. It is another statute which causes the dispute. Section 582 enacts that: "If any person, liable to a claim by another, shall fraudulently conceal from him the existence of the cause of action, said cause of action shall be deemed to accrue against said person so liable from the time when the person entitled to sue thereon shall first discover its existence." Applied to a cause of action, the term "to accrue" means "to arrive; to commence; to come into existence; to become a present enforceable demand." And the meaning of this statute is that in cases in which it is applicable, the cause of action does not come into existence until it

covered by the person entitled to sue thereon. The effect of this statute upon the present case is that no cause of action came into existence by reason of Rowan's defalcation until it was discovered by the plaintiff. It is admitted by the defendant that this is the effect of the statute if limited to Rowan himself. But the defendant says that the fraudulent concealment by Rowan does not prevent the accruing of a cause of action against him, the defendant. He says that fraudulent concealment of a cause of action prevents the running of the statute of limitations only in favor of the very party who commits the fraudulent concealment. He cites Wood, Lim. (2d Ed.) p. 139, and the cases there referred to, as authority. Stated in somewhat different language, the claim of the defendant is that, although the accruing of a cause of action was, by reason of the last-quoted statute, suspended, as against Rowan, until the defalcation was discovered, yet the accruing of a cause of action was not suspended against this defendant; that as against him, this defendant, the cause of action arose when Rowan committed the defalcation; and, as it appears by the case that all of the defalcation, except the sum of \$739.41, was committed more than four months before the claim was exhibited to him, he cannot be made liable for that part. It seems to us that there is a fallacy—or, rather, it is a fatal error—in this argument. It conflicts with the most essential feature of the law relating to surety and principal. The plaintiff seeks to recover damages on account of the defalcation of Rowan. The argument of the defendant assumes that a cause of action for such defalcation could exist against him before any cause of action therefor against Rowan had accrued. But the law relating to principal and surety forbids this. The rule is that a cause of action cannot exist against a surety, as such, unless a cause of action exists against his principal. Ordinarily, the liability of such a surety is measured precisely by the liability of the principal. Brandt, Sur. § 121; Seaver v. Young, 16 Vt. 658; Boone Co. v. Jones, 54 Iowa, 709, 2 N. W. 987, and 7 N. W. 155; Patterson's Appeal, 48 Pa. St. 345; McCabe v. Raney, 32 Ind. 309. So long as no cause of action existed against Rowan, the principal, no cause of action existed against the defendant or his surety. And the statute of limitations does not begin to run in favor of any person until there is a cause of action. The obligation of a surety is an obligation accessory to that of a principal debtor, and it is of the essence of this obligation that there should be a valid obligation of some principal. Thus, where one agrees to become responsible for another, the former incurs no obligation as surety, if no valid claim ever arises against the principal. Chit. Cont. (11th Ed.) 788. If the principal is not holden, neither is the surety, for there can be no accessory if there is no principal. De Col.

Guar. & Sur. (Am. Ed.) 39; Add. Cont. § 111. The existence of a principal debtor is a condition precedent to the operation of the contract of a surety. Hazard v. Irwin, 18 Pick. 95; Swift v. Beers, 3 Denio, 70; Mountstephen v. Lakeman, L. R. 7 Q. B. 202; Mallet v. Bateman, L. R. 1 C. P. 163. This is only in accordance with the general law of contracts, which prevents a contract from becoming operative unless and until all conditions precedent are fulfilled. Brandt, Sur. § 214; Bank v. Kingsley, 2 Doug. (Mich.) 379. So, too, whatever discharges the principal debtor discharges the surety. The liability of a surety on a claim which is good as against the principal, ceases as soon as the claim is extinguished against the principal. The nature of the undertaking of a surety is such that there can be no obligation on his part, unless there is an obligation on the part of the principal. "It is correctly laid down in Chitty on Contracts that the contract of a surety is a collateral engagement for another, as distinguished from an original and direct agreement for the party's own act; and, as stated in Theob. Prin. & Sur., * * * it is a corollary from the very definition of the contract of suretyship that, the obligation of the surety being accessory to the obligation of the principal debtor or obligor, it is of its essence that there should be a valid obligation of such a principal, and that the nullity of the principal obligation necessarily induces the nullity of the accessory. Without a principal, there can be no accessory. Nor can the obligation of the surety, as such, exceed that of the principal. * * * It would be most unjust and incongruous to hold the surety liable, where the principal is not bound." Storrs, J., in Ferry v. Burchard, 21 Conn. 603. The same general doctrine is held in many other cases in this state. Willey v. Paulk, 6 Conn. 74; DeForest v. Strong, 8 Conn. 522; Bull v. Allen, 19 Conn. 101, 106; Glazier v. Douglass, 32 Conn. 398; Candee v. Skinner, 40 Conn. 464. It follows, then, that the fraudulent concealment by Rowan, the principal, as it prevented the statute of limitations from running in his favor, also stopped it from running in favor of the defendant, his surety. Bradford v. McCormick, 71 Iowa, 129, 32 N. W. 93; Boone Co. v. Jones, 54 Iowa, 660, 2 N. W. 987, and 7 N. W. 155; Charles v. Hoskins, 14 Iowa, 471. There is no error. The other judges concurred.

O'KEEFE v. NATIONAL FOLDING BOX & PAPER CO.

(Supreme Court of Errors of Connecticut.
Feb. 8, 1895.)

MASTER AND SERVANT—ACTIONS—PLEADING.

A complaint in an action by a servant against his master for injuries received while steaming colored paper so that it might be folded into proper shape, a method not ordinary

ly used by defendant, by reason of the volatilization of poison in the paper, which fails to allege that defendant knew, or facts showing that he ought to have known, of the presence of the poison in the paper, is demurrable, though it alleges that defendant negligently placed plaintiff at such work, and that plaintiff's injuries were due to defendant's negligence.

Appeal from superior court, New Haven county; George W. Wheeler, Judge.

Action by John J. O'Keefe against the National Folding Box & Paper Company to recover for personal injuries. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. No error.

Jacob P. Goodhart, for appellant. James T. Moran, for appellee.

BALDWIN, J. The complaint alleges that the plaintiff, who was but 19 years old, while in the employment of the defendant as a feeder of a folding press, supplying it with paper or pasteboard, was directed temporarily to leave that employment, and was negligently put to work in placing colored paper, saturated with poison, into a box greatly heated with steam, and then taking it out again, when softened, for more easy folding; that he did not know the paper was poisoned, or of the effect upon his health that his so handling it would have; that the steam and heat of the box caused the poison to exhale and mingle with the steam, which poisoned steam the plaintiff was compelled to breathe while at the work; that the heat also caused him to perspire very freely, and the poison on and in the paper which he was compelled to handle worked into his whole body, and became absorbed into his system; that such a mode of treating colored paper in a heated box was not customary or usual in the business of the defendant, and the defendant knew, or ought to have known, the effect it might have on the plaintiff; that he knew nothing of the poisonous nature of the paper, nor of its natural effect when so treated, and the defendant gave him no notice of its poisonous nature, or of the dangerous effects that might result from the work; that the defendant negligently kept him at the work continuously on each day from 10:30 a. m. on April 7th to noon on April 10th; that on April 10th he began to feel the effects of the poison; and that, in consequence of the work he thus did, through the negligence of the defendant, his body became saturated with poison, and swollen, his sight nearly extinct, and his health destroyed for life.

The repeated charges of negligence thus made are of no avail unless supported by averments of facts sufficient to show in what manner the defendant failed to perform its obligations to the plaintiff. He had been employed to feed a folding press. The defendant determined to soften some colored paper, which could not easily be folded, by putting it in a heated steam box. This was not a customary or usual process in its factory. The paper in question was saturated

with poison. How this occurred is not alleged. It may have been the result of accident, after the paper was made; it may have been due to the process of manufacture or the materials employed. The plaintiff does not know that the paper was poisoned, and he does not allege that the defendant knew of it. The court may properly take judicial notice that some colored paper is dyed with poisonous substances, but it is equally true that the court may take judicial notice that this is not the case of all colored paper. The injury to the plaintiff was due solely to the presence of poison in the paper. He does not allege that the court cannot assume, that there was any danger to health from softening colored paper which is not poisoned, in a steam box. A master owes his servant the duty of exercising reasonable care to provide him with a reasonably safe place, in which to work, and reasonably safe appliances and instructions, and mentalities with which to work. *McEwen v. Randolph*, 61 Conn. 157, 22 Atl. 109. If the employer knows in what he knows or ought to know to be a dangerous kind of business, or furnishes him with materials to work with, which he knows or ought to know to be of a dangerous nature, it is his duty to warn him of the danger to which he is exposed, unless this is equally within the knowledge of each. Any violation of these duties, whether intentional, is a willful wrong; if unintentional, it is actionable negligence. *Fry v. Railroad Co.*, 60 Conn. 239, 246, 27 Atl. 675, 22 Atl. 544.

The plaintiff alleges that the defendant knew, or ought to have known, that the steaming colored paper in a box would or might have on the health of the plaintiff who conducted the process. This (considered as it must be, most strongly against the plaintiff) amounts simply to a charge that the defendant ought to have known the effect the work might have on those engaged in it. But it is nowhere alleged that in fact it was a dangerous process. The danger came from the use either of an improper and unusual kind of colored paper, or of a proper kind of colored paper in an improper and unsafe condition. If the defendant failed in duty by not notifying the plaintiff of the danger, or by not acting of this paper, and the effect might result from using it in this way, the omission of any such notice is charged. Here is the turning point in the case.

Was the defendant, though in fact ignorant of the presence of the poison, bound to know of it? If so, it was bound to warn the plaintiff of it, unless he had equal knowledge. The defendant had been for years a manufacturer of paper boxes, and steaming colored paper, in the manner allowed in this instance, was not customary or usual in its establishment. In adopting this method of softening it, the defendant was, however, bound to anticipate the natural effects of heat and steam on such a substance as colored paper. Had the

ch it supplied to the plaintiff had, to an experienced eye, any appearance of being poisoned, it would have been the defendant's duty to warn him of the risk he was assuming for the volatilization of poison by the use of steam is a matter of common knowledge. But it is not alleged either that before any such appearance, or was of a kind in the manufacture of which poison is commonly used, or that the defendant had neglected to submit it to proper inspection and examination. Before the paper was put in the steam box it was presumably seen by the defendant's proper representatives, it was certainly seen by the plaintiff. The plaintiff was 19 years old, and had been earning about a man's wages. So far as appears, the means of determining whether the paper was poisoned were as good as the defendant's. If it were not so, the complaint should have stated the facts which made the difference. *Hayden v. Manufacturing Co.*, 29 Conn. 548; *Seymour v. Maddox*, 20 Law J. 3. 327, 5 Eng. Law & Eq. 265; *Bailey v. Fanning*, 29 Conn. 1, 6; *Griffiths v. Docks Co.*, 100 N. B. Div. 259.

The work of softening paper, so that it may be more readily folded by a press, is properly incidental to that of feeding the press. The risk, therefore, which the plaintiff encountered in steaming the colored paper was fully within the scope of his contract of service. Not being naturally dangerous, and such dangers as there proved to be being of a kind as obvious to the senses of a boy as to those of a man, the mere fact of infancy is of no importance. An employer does not warrant the goodness of the materials which he puts in the hands of his servants, whether they are of tender age or of full age. He is not absolutely bound, under all circumstances, to know whether they are good or bad, safe or unsafe. He is not bound to anything more, in this respect, than to exercise of reasonable care, in view of the particular kind and condition, and the uses to which they are to be applied. There is nothing in the complaint to show any neglect of such care on the part of the defendant or of any of its agents. No neglect of the plaintiff is charged in such a manner as to withhold a demurrer, either with respect to purchasing or providing unsuitable paper, or in inspecting its condition, or testing its quality. There is no error in the judgment of the superior court. The other judges concurred.

ALDERMAN v. HARTFORD & N. Y. TRANSP. CO. et al.

Supreme Court of Errors of Connecticut.
March 5, 1895.)

MECHANIC'S LIEN—WHO MAY CLAIM—INTERPLEADER.

1. That the owner of land on which a building is to be erected had knowledge that the

contractor had sublet a portion of the work, and that material purchased by the subcontractor was delivered on the premises with his knowledge and consent, does not show that the material was furnished the subcontractor "by consent of the owner of the land" (Gen. St. § 3018), so as to entitle the material man to a mechanic's lien therefor.

2. In interpleader by the owner of a building against the contractor and a material man furnishing material to a subcontractor, and claiming a lien therefor, that the subcontractor, who was not made a party, had directed the contractor to pay the balance due him to the material man, and as a witness in the case claimed that the money due him should be paid to the material man, does not authorize a judgment for such amount for the material man, in case his lien is not sustained, as assignee of the subcontractor.

Appeal from city court of Hartford.

Bill in the nature of interpleader by James S. Alderman against the Hartford & New York Transportation Company and another. There was a judgment for the transportation company, and respondent Hardendorff appeals. Error.

Timothy E. Steele and Frederick A. Scott, for appellant. Charles A. Safford, for appellee.

TORRANCE, J. This is a complaint in the nature of a bill of interpleader, brought against Hardendorff and the transportation company, as adverse claimants of a fund of \$150 in the hands of the plaintiff. The lower court decided against Hardendorff, and from its judgment he brings the present appeal.

In April, 1892, Hardendorff agreed to build and fully complete for the plaintiff, Alderman, on the lot of the latter in the city of Hartford, a store and tenement for \$3,300. The building was duly completed, and the plaintiff paid Hardendorff therefor in full, with the exception of \$150, which is the fund in dispute. Hardendorff claims the entire fund as the balance due to him on the building contract, and the plaintiff is ready and willing to pay it to him if he can be protected against the claims of the other defendant. Hardendorff sublet the work of building the cellar and foundation walls of said store and tenement to Thomas Coleman and one Kelly at the agreed price of \$3.20 per perch; Coleman and Kelly to furnish all the materials and labor therefor. Kelly, however, very soon dropped out of this subcontract, and Coleman went on with it alone. In April, 1892, Coleman purchased a boat load of stone of the transportation company at the agreed price of \$140. This stone was delivered to him on Alderman's lot on the 8th of April, 1892, and, with the exception of six perch, worth \$10.50, all of it was used in building the cellar and foundation walls aforesaid. Coleman never paid any part of the price of said stone, and on May 23, 1892, the transportation company gave notice in writing to the plaintiff, Alderman, of its intention to claim a lien on his lot and building aforesaid for the price of said stone; and on June 4, 1892, said

company lodged for record in the office of the town clerk of the town of Hartford a mechanic's lien against said premises for \$140. The claims of the transportation company as set up in its answer are based solely upon this claimed lien. In addition to the above facts, the court below found as follows: That the full amount due from Hardendorff to Coleman under the subcontract was \$323.20; that on or before April 23, 1892, Hardendorff had paid Coleman under said contract \$270, leaving due thereon the sum of \$53.20; that Hardendorff also owed Coleman the further sum of \$10.50 for the six perch of stone before mentioned not used in Alderman's building, which stone it was found Hardendorff had sold, making in all \$63.70 due from Hardendorff to Coleman; that Coleman purchased the boat load of stone from the transportation company with the knowledge of Hardendorff, and all of it "was delivered on the premises of the plaintiff with the knowledge and consent of the plaintiff and of Hardendorff that said stone came from said company." The finding continues as follows: "Both plaintiff and Hardendorff have known that the transportation company have been paid nothing on account of said stone, and ever since April 23, 1892, they have known that it was the desire of said Coleman that all moneys due to him from Hardendorff should be paid to the transportation company on their claim for said boat load of stone. Said Coleman voluntarily appeared as a witness on the trial of this cause, and in open court claimed that the money due him should be paid to said company. Hardendorff has never made any offer or shown any willingness to pay what is due on said amount, either to Coleman or to said company. And on the last occasion when Coleman applied to him for a final settlement, Hardendorff drove him from the premises with abuse." Upon these facts, substantially, Hardendorff claimed: First, that the transportation company had no valid lien on the premises of Alderman, because the stone was not furnished by virtue of an agreement with or by the consent of Alderman, as required by the statute, and because the company, in furnishing said stone, was not a subcontractor within the meaning of the statutes on that subject; second, that if it had any valid lien for the stone that went into the building, it had none for the six perch which were not used in the building. The court decided that "upon all the facts above set forth the transportation company was equitably entitled to the above-mentioned sums, to wit, \$53.20 and \$10.50, in all \$63.70, out of the moneys in the hands of the plaintiff, and the plaintiff is ordered to pay the same to said Hartford & New York Transportation Company, together with its lawful witness fees. The plaintiff shall further deduct from said \$150 his taxable costs in this complaint, and shall pay the balance remaining to said respondent, Hardendorff." Coleman was not a party in this proceeding.

Strictly speaking, the transportation company had no claim to the fund in dispute such, and in its answer it made none. Hardendorff claimed the entire fund, and the company claimed a lien upon Alderman's premises for \$140, and it threatened to close that lien. Under these circumstances, Alderman sought, and was probably refused in seeking, the aid of a court of equity. Whether the court below, in arriving at the conclusion reached by it, held that the claim of the transportation company was or was not a valid one, contrary to the claim of Hardendorff, does not, perhaps, with certainty appear, but we think the fair implication from the record is that it held the lien to be valid. We think the transportation company had no valid lien upon Alderman's premises for the stone furnished, because the court has not expressly found that they were furnished by virtue of any agreement with, or by the consent of, Alderman, or of some person having authority from him, rightfully acting for him, as required by the statute; nor do the facts found warrant such finding. All that is found upon this point is, in substance, this: That Alderman had knowledge of the subcontract with Hardendorff, and did not object to it; and that the boat load of stone was delivered on the premises with his consent, and with his knowledge that they came from the transportation company. This, clearly, is not enough. *Huntley v. Holt*, 58 Conn. 441, 18 Atl. 445; *Lyon v. Champion*, 62 Conn. 71, 18 Atl. 392. And, whatever might be said about the stone that were used in erecting the building, clearly there could be no claim for the stone not so used, but sold to others and used elsewhere.

As this disposes of the claim of lien, we deem it unnecessary to consider the point made as to whether the transportation company was, under the circumstances, a closed, a person who could in any case claim a lien. But the transportation company insists that, whether it had a lien or not, it stood in Coleman's shoes, and that the court below was justified, upon the facts found, in deciding that it was equitably entitled to the sum actually found to be due from Hardendorff to Coleman, and that since it is found Coleman desired to have paid to the transportation company. We are inclined to think this was the view of the case taken by the court below, and upon which its decision proceeded; and, if the record and the facts found warranted such a view, we should be glad to sustain the judgment. The trouble, however, is that neither the record nor the facts found warrant such a conclusion. The transportation company does not stand in Coleman's shoes, and does not, on the record, claim by assignment from him. So, as the record shows, it stood entirely on its own claim of lien. Coleman was a party to this proceeding, and is not bound by or in any way legally affected, by the

ment. It is true, he voluntarily appeared as a witness in the case, "and in open court claimed that the money due him should be paid to said company," and the court finds that "Hardendorff and the plaintiff have been repeatedly verbally instructed by Coleman to pay" the amount due to him to the transportation company; but all this falls very far short of an assignment. The most that can be said of it perhaps is that it evinces a vehement desire to make an assignment, and to have the amount paid to the company. The court below does not expressly find that there was any such assignment; nor has it found any facts from which it can reasonably be inferred that there was any such assignment. On the contrary, the whole record shows that no such assignment had been made in fact, and that the transportation company did not rely upon any such assignment, but upon its own claim of lien. If Coleman desired to transfer his claim against Hardendorff to the transportation company, it would have been an easy matter to have done so; or if the parties had desired to bind Coleman in this proceeding, it would have been an easy matter to have made him a party; but neither of these things was done. As the case stood, then, upon the facts found, and upon the claims made by it on the record, the transportation company had no right, legal or equitable, to the fund in the plaintiff's hands, and as against it the fund belonged to Hardendorff. There is error in the judgment of the court below, and it is set aside, and the case remanded to the lower court to be proceeded with in accordance with this opinion. The other judges concurred.

PINNEY et al. v. NEWTON et al.

(Supreme Court of Errors of Connecticut.
April 5, 1895.)

WILL — CONSTRUCTION — DEVISE OF RESIDUUM — DEVISEES — EXECUTORS — TRUSTEES — LIABILITY FOR TRUST FUND.

1. A testator first devised all the property of which he expected to die seised (three of the devisees being life estates in sums of money, several for the specific sum of \$1,000 each, and one to his only heir at law for \$100), and provided that, in case any legatee did not survive him, his share should be divided among the surviving devisees, except his heir at law, who should "in no case whatever be paid" more than \$100. He then, after stating that certain property conditionally conveyed might revert to him before his death by clause 14, provided for the disposition of the life estates on their reversion, together with "whatever else in the shape of a fund" might belong to his estate, by devising \$1,000 out of the first life estate reverting to him, and the balance thereof and of the other life estates, on reversion, one half to a society, and the other half to be equally divided among all devisees receiving only \$1,000, and one other person (especially excepting his legal heir), and that "any fund which may still belong to my estate" shall be used to pay the inheritance tax on the devisees. *Held*, that the residuum of the estate was devised, one half to the society, and

the other half equally to legatees receiving the precise sum of \$1,000, among whom H. would be included, payable on the death of all the life tenants, and that the heir at law took nothing therein.

2. Where a testator directs his executors to place the principal of a sum of money, the income of which he has devised for life, with some security company for investment, unless they themselves succeed in investing it, the executors are made trustees of the fund.

3. Where executors are by the will made trustees of a fund, and directed to place it with one of several companies for investment, they will not be liable on default of the company selected if they exercise due care in selecting it.

4. A letter written by a testator after execution of his will is admissible to prove that he intended to include a devisee named in the will among "my above-named devisees," to whom he devised part of his residuary estate.

Case reserved from superior court, Litchfield county; Fenn, Judge.

Bill by Lucien V. Pinney and others, executors, against Kate C. Newton and others, for construction of their testator's will. Reversed by the superior court, on facts stated in the complaint, for the advice of this court.

Clause 14 of the testator's will, by which he devised the residuum of his estate, was as follows: "(14) On the death of my cousin S. Elizabeth Gillette, or of my aunt Urania, or of the said Mrs. Marie Howland, the sums given to their use will, of course, revert to my estate; and I make the following disposition of them, together with whatever else in the shape of a 'fund' may belong to my estate, to wit: First. I direct that, as soon as any one of the above-named Elizabeth Gillette's or Urania Whiting Wilder's or Marie Howland's death shall be duly made known to my executors or administrators, then one thousand dollars (\$1,000), clear in money, over and above any rascally state tax, or 'collateral inheritance tax,' which may be demanded of my estate, shall be paid to Ellen Hayes, or Nellie Hayes, as she is more commonly called, who has lived with me and my late mother for twelve years past, which sum of \$1,000 I hereby give and bequeath to the said Ellen Hayes (to whom I am indebted at this present writing in the sum of \$800, evidenced by my note for that amount, which note falls due the last day of 1891, but which I now expect to pay long before then). Secondly. I further direct that whenever the said sums of \$14,000 and \$8,400 ('bonds' and Naug. R. R. stocks or 'shares') given to my cousin Elizabeth Gillette's use, and the \$4,000 assigned to my aunt Urania's use, and the \$5,000 assigned to Mrs. Howland's use, shall revert to my estate, then (after the payment of one thousand dollars to Ellen Hayes as aforesaid) one half of each and all of said sums shall be given to that Society for the Prevention of Cruelty to Animals, which has its office in the city of New York, and of which the late Henry Bergh was a chief promoter, and head, or 'president' (if I have not correctly quoted its name, the above is, I think, its sufficiently distinct designation, — 'Bergh's Society'), to

which society or corporate body I give and bequeath said one half. The other half I direct to be divided into as many parts or small sums as is—that is, shall be found on inquiry to be—the number of individuals among my above-named legatees then living to whom I have in this will bequeathed the sum of only one thousand dollars (the \$3,000 and \$2,000 ones not be considered, and my niece Mrs. Newton also excepted), plus Elizabeth Gillette, if she shall be living when Mrs. Wilder and Mrs. Howland or either of them die or dies; and to each of such number living one of said parts shall be given; my executors or administrators to endeavor to pay the abominable collateral inheritance tax on said sum—the two halves—out of any fund which may still belong to my estate.”

The question also arose whether Ellen Hayes, named in clause 14, should be included within the class described in that clause as “my above-named legatees,” and whether, in support of her claim to be so included, she could introduce in evidence a letter to her written by the testator subsequent to the execution of the will.

A. T. Roraback, for Ellen J. Hayes. Charles J. Cole and Samuel A. Herman, for Kate C. Newton. Horace Russell and Jabish Holmes, Jr., for American Society for Prevention of Cruelty to Animals.

HAMERSLEY, J. We think the testator has disposed of all the residuum. Examining the provisions of the will, we find in the first 13 clauses the following: A specific disposition of substantially all the property which he estimates will belong to his estate at his death, to 17 legatees, 3 of them taking a life estate only; a devise to his principal legatee, Miss Gillette, of real estate, apparently all he has, except such as may be needed to pay legacies and expenses of settlement; an explanation that in part execution of his purpose, to evade the payment of any collateral inheritance tax, he had conveyed to others, in trust for himself during life, certain bonds and landed properties, a disposition which probably would prove final, although some of said bonds or land might revert to him; a further explanation that, after a careful estimate, he is convinced that his property remaining at his death will be sufficient to pay all specific legacies, and leave a balance to the credit of his estate, without selling the land not specifically devised, but, as such estimate may be mistaken, and the whole of his property, personal and real, may prove insufficient to pay in full the specific bequests, he therefore directs that in such case all bequests and devises to Miss Gillette be first satisfied in full; a sarcastic pretense that this reminds him of an intended bequest he had overlooked, viz. a bequest to his niece Mrs. Newton, of \$100, which bequest (in the event of such insufficiency of assets) he directs shall

be paid in full, after the payment of the bequest to Miss Gillette, and in explanation of this bequest, and of the insulting manner in which it is made, he fills one or two pages in justifying himself for thus cutting off his sole heir at law, as well as in giving directions and advice to his executors, and a view of the possibility that Mrs. Newton and her friends may be disposed to “make a mistake”; a provision that, in case any one of the legatees should not survive him, the residue bequeathed should be divided between the surviving legatees, except Mrs. Newton, and that she in no event be paid whatever be paid over or more than one hundred dollars.” Having made these specific provisions and explanations, the testator in clause 14, undertakes to dispose of the remainder of his property, which he has had clearly in mind, i. e. the amount of the three legacies given for life only, the residue or land that possibly might revert to him before his death, the estate, real and personal, if any, that might not be needed to pay the specific legacies and expenses of settlement. In execution of that purpose he directs that, upon the termination of the first life estate in the legacies given for life, his executors shall pay \$1,000, free of inheritance tax, to Ellen Hayes, and she shall give one half of the sum remaining to the American Society for the Prevention of Cruelty to Animals, and shall give the other half in equal portions to his legatees then living to whom \$1,000 only has been bequeathed; and upon the termination of each of the other life estates, the amount of each legacy shall be given, one half to the Society for the Prevention of Cruelty to Animals, and the other half in equal portions to the \$1,000 legatees then living. He also directs that “any property which may still belong to my estate” shall be used to pay the collateral inheritance tax on the amounts above mentioned, and the residue proceeds to dispose of “whatever else in the estate of a ‘fund’ may belong to my estate.” The testator then, in clause 15, bequeaths to his favorite legatee, Miss Gillette, his furniture and all his personal belongings, even his clothing.

The claim is made, and supported by many ingenious and plausible, that the “fund,” as used by the testator, is indefinite and not broad enough to cover the whole residue of his estate; and also that the language used in describing the disposition of the “fund,” whatever that may mean, indefinitely confines any actual disposition of the residue to the sums given to legatees for life. We are satisfied from the will itself that it was the intention of the testator to give to his only heir and next of kin with a balance of \$100, to dispose by will of his whole estate, and to divide any residue there may be in the manner specified in clause 14. That, whatever difficulties may be suggested, it certainly cannot be maintained that clause 14 is clearly insusceptible of a construction

which carries out that intention. The rules of construction in such case are well settled. The clear intent of the testator as expressed in the will should prevail. An obvious general intent to be gathered from the will is rarely defeated by an inaccurate inconsistency in the expression of a particular intent. Every intendment is to be made against holding a man to be intestate and sits down to dispose of the residue of his property. *Alsop v. Russell*, 38 Conn. 101; *Rich v. Lambert*, 10 Conn. 452; *Warner v. Ballard*, 54 Conn. 472, 9 Atl. 136. Applying these rules to this very peculiar will, and taking it in the light of the testator's manifestly so patent on its face, and in connection with his general purpose, expressed with earnestness and certainty that excludes any possibility of misunderstanding, we cannot say that when the testator, in clause 14, said, "I make the following disposition of the sums bequeathed to legatees for life and whatever else in the shape of a 'fund' belong to my estate," he intended to, and did, dispose of all the residuum. Ellen Hayes is plainly included among the named legatees to whom I have in my will bequeathed the sum of only one hundred dollars." The force of the language unquestionably includes her among the legatees cannot be weakened by the suggestion as to whether she is also included for a different purpose, under the provisions of clause 13, among "the other legatees in this instrument named."

A letter offered in evidence is plainly inadmissible.

We think the executors are made trustees of the bequests for life to Mrs. Wilder and Marie Howland, and that they may properly lawfully commit the trust funds to the management of a security company as is described in clause 2.

The superior court is advised to render judgment answering the questions submitted as follows:

1. The residuum of the estate is given, one half to the Society for the Prevention of Cruelty to Animals, and one half in equal portions to the persons named in the will as legatees of the precise sum of \$1,000, who were living at the death of Miss Gillette, to be paid on the final settlement of the estate at the death of all life tenants.

2. The sums given to Miss S. Elizabeth Gillette for life became, upon her death, to be paid by the executors, as follows: \$1,000, free of any collateral inheritance tax, to Ellen Hayes, and one half of the remainder to the Society for the Prevention of Cruelty to Animals, and the other half to the \$1,000 legatees living at the death of said Gillette; payments to be made free of any collateral tax.

3. The sum given to Mrs. Urania W. Wilder for life is payable on her death as follows: One half to the Society for the Prevention of Cruelty to Animals, and the

other half to the \$1,000 legatees living at her death. And the sum given to Mrs. Marie Howland for life is payable on her death as follows: One half to the Society for the Prevention of Cruelty to Animals, and the other half to the \$1,000 legatees living at her death. All these payments to be made free of any collateral inheritance tax.

Fourth. Ellen Hayes is included among the \$1,000 legatees, and is entitled to the portion of such legatee upon the division of the life legacies and of the residuum.

Fifth. The executors are made trustees of the \$4,000 bequeathed by clause 3 to Mrs. Urania W. Wilder for life, and of the \$5,000 bequeathed by clause 4 to Mrs. Marie Howland for life. They are authorized to commit these funds to the care and management of a security company such as is described in clause 2, and, exercising due care in the selection of such security company, and in continuing it as agent, will not be held responsible for the defaults of such company in regard to said funds.

The other judges concurred.

ANDERSON v. TOWN OF NEW CANAAN.

(Supreme Court of Errors of Connecticut.
March 5, 1895.)

COSTS—APPEAL.

In an action under Gen. St. § 2698, to recover the penalty for failure to maintain guideposts on a highway at necessary or convenient places for the direction of travelers, that the justice's court rendered judgment for defendant on the ground that the roads were not highways, while on appeal the common pleas court held the roads highways, but rendered judgment for defendant on the ground that the places were not necessary or convenient, does not make the latter judgment "more favorable" (Gen. St. § 1121), so as to entitle plaintiff to costs.

Appeal from court of common pleas, Fairfield county; Curtis, Judge.

Qui tam action under Gen. St. § 2698, by Susan Anderson against the town of New Canaan. From a judgment for defendant on appeal by plaintiff to the court of common pleas, plaintiff appeals. No error.

Joseph A. Gray, for appellant. John H. Light, for appellee.

TORRANCE, J. This is a qui tam action, brought under section 2698 of the General Statutes, to recover penalties for the neglect and refusal of the defendant town to erect and maintain guideposts at certain points in the highways in said town, described in the complaint. The complaint contains two counts, and the case was first tried before a justice of the peace in the defendant town upon a general denial. The court found the issues for the defendant, rendered judgment for it, and the plaintiff brought the case by appeal to the court of common pleas. In that court the case was tried upon the plead-

ings as they stood in the justice's court; the issues were found for the defendant, and judgment rendered in its favor for full costs. From that judgment the present appeal was taken, and the errors assigned are three in number, namely: First, in holding, upon the facts found, that "neither of the places described in the two counts of the complaint was a necessary or convenient place at which to locate guideboards under the statute"; second, in holding "that because the defendant had permitted the highways described in the complaint to get out of repair, and remain so out of repair, they were not required to place guideboards at the places described in the complaint"; and, third, in rendering judgment for the defendant to recover costs upon the appeal, when, as the plaintiff claimed, she had "recovered a more favorable judgment, and a different judgment on her appeal."

Section 2697 of the General Statutes provides as follows: "The selectmen of every town shall erect and maintain a guidepost, at every necessary or convenient place, for the direction of travelers," etc; and section 2698 provides that "every town which neglects or refuses to erect and maintain guideposts, as required by law, or suitable substitutes therefor, shall forfeit annually five dollars for every such post," etc. Under this latter section a town is liable for the refusal or neglect of its selectmen to erect and maintain guideposts, as required by the former section. *Bronson v. Town of Washington*, 57 Conn. 346, 18 Atl. 264.

In the case at bar the court below made, strictly speaking, no finding of facts, but it has stated in writing, on the margin of each paragraph of the separate written requests for a finding made by the plaintiff and the defendant, the claimed facts which it found to be proven or not proven. These requests, with the marginal statements of the court, were treated by the parties as a formal finding by the court; and, although this is irregular, we will treat the claimed facts as if they were embodied in a formal finding. The court below found that four of the roads described in the complaint were public highways of the defendant town. It also found that "the places specified in the complaint are not necessary or convenient places to erect and maintain guideposts for the direction of travelers." In cases of this kind the question whether the place at which it is claimed a guidepost should be erected or maintained is a "necessary or convenient" one, within the meaning of the statute, will ordinarily be one of fact, so called, to be determined by the trier upon consideration of all the evidence in the case bearing upon the main question; and in such cases, upon an appeal to this court, the record would, ordinarily, present no question of law for review. If the above conclusion reached by the court below is to be regarded as a conclusion of fact in this sense, then it cannot

be reviewed by this court upon this. But the court below has found in detail certain subordinate facts, and the claims that the above conclusion is one entirely upon them as a conclusion which can be reviewed by this court. The record, in some cases of this kind, so present the facts that a conclusion thereon similar to the one in question, may be regarded by this court as one of undoubted truth; but conceding that further, for the sake of argument, the conclusion in question is one of law, it will not help the plaintiff; for, even on that point of the matter, we think the facts found by the court, as matter of law, in the finding in question. This disposes of the first assignment of error.

As to the second assignment of error, we think there is no foundation for it in the record.

With reference to the third assignment, the claim of the counsel for the plaintiff appears to be this: He says that the issues in the justice's court were: First, whether the roads described in the complaint were public highways; second, whether the places specified in the complaint were necessary or convenient places at which guideposts should be erected; that in the justices' court the first point was found against the plaintiff, and judgment was rendered against her on that account, while in the court of errors this point was found in her favor, and judgment was rendered against her on the other point. And further, he claims that the latter judgment is a "more favorable" one, within the meaning of section 1121 of the General Statutes. This is clearly not tenable. It was incumbent upon the plaintiff, in order to succeed in her appeal, to prove both of said points in both courts. Failure to prove one was as fatal to her case as failure to prove both. Unless she could prove both points in the upper court, its judgment must necessarily be the same as that of the justice's court, namely, a judgment against her for costs; and that judgment is a "more favorable" one, within the meaning of the statute. There is no error. The judges concurred.

COOK v. TOWN OF MORRIS

(Supreme Court of Errors of Connecticut)
April 5, 1895.)

PAUPER—ACTION FOR SUPPORT—EVIDENCE—FRAUD.

1. The support of a person by her father cannot be charged to a town as for support of a pauper, he still having in his property belonging to her.

2. In an action by a conservator of a person against a town for her support as a pauper, the probate record settling his account with the conservator, showing that he had expended for her estate, may be attacked for fraud.

3. In such action the question of whether the conservator still had property of the

notwithstanding such settlement of his estate, for the reason that the town, not being a party to the proceedings in the probate court, was not bound by its judgment.

Appeal from superior court, Litchfield county; Robinson, Judge.

Action by Charles Cook against the town of Morris. Judgment for defendant, and plaintiff appeals. Affirmed.

Bert E. Hall, for appellant. James Hunt-
ton, for appellee.

DREWS, C. J. This is an action brought for support furnished by the plaintiff, one Sarah A. Bostwick, a settled inmate of the defendant town, and alleged in the complaint to be a pauper in need of support. The plaintiff, at the time the support was furnished, was, and for some considerable time before had been, the legally appointed conservator of the person and estate of the said Sarah, appointed by the court of probate in the district of Sharon. The superior court found that at the time when support was furnished for which this action was brought the said Sarah A. Bostwick was not a pauper in need of support, but that the plaintiff during all said time, as conservator, had in his hands and possession property belonging to her of the value \$100 or thereabouts. She could not be liable to the town so long as that property remained unexpended. 1 Swift, Dig. top 419; *Peters v. Town of Litchfield*, 34 Conn. 264; *Town of Wallingford v. Town ofington*, 16 Conn. 431; *Stewart v. Inhabitants of Sherman*, 4 Conn. 553, 5 Conn. 244; *Inhabitants of Newtown v. Inhabitants of Danbury*, 3 Conn. 553. This finding is decisive of the case, unless the trial court committed some error in reaching its conclusion. The plaintiff insists that there is error. Upon the trial the plaintiff offered in evidence a duly-certified copy from the probate records of Sharon, of a settlement by him with said court of his account as the conservator of the said Sarah, in which it appeared that all her property estate had been expended in her necessary support, previous to the time when the support was furnished to her by the plaintiff, and for which he sought to recover in this suit. It appeared that the said settlement had been accepted and approved by the court of probate, and that no appeal had been taken therefrom. The plaintiff admitted that this record was conclusive on the question of his having in his hands any property belonging to the said Sarah. The defendant claimed that the said account was fraudulent, and that the settlement and the support were procured by the fraud of the plaintiff. The superior court found "that the said account was a false and fraudulent account, and that the presenting of said account to the court of probate, and the procuring its acceptance and allowance by the court of probate, were for an improper and fraudulent purpose, and all a part of a

fraudulent scheme on the part of the plaintiff to prevent the said Sarah's estate from obtaining the just and full benefit of her interest in the lands belonging to her, and the proceeds thereof when converted into cash by the plaintiff"; and thereupon overruled the claim of the plaintiff, and rendered judgment for the defendant.

The plaintiff's reason of appeal—the only one which is material—is that the court erred in overruling his claim that the probate record was conclusive. A judgment can never be invoked to sustain fraud. *Freem. Judgm.* § 250. A probate record may always be impeached for fraud. *Gen. St.* § 436. See, also, *Lynch v. Hall*, 41 Conn. 238; *Feltz v. Walker*, 49 Conn. 93. And on another ground we think the whole matter of the possession and ownership of property by Miss Bostwick was open to the defendant, notwithstanding said accounting. The town of Morris was not a party to the proceedings in the court of probate. At that time the town had no interest in the matter so that it could have been made a party to the proceedings in the court of probate, or could have appealed from the decree, even if it had wished to do so. A judgment never binds those who are not parties or privies. *Town of Bethlehem v. Town of Watertown*, 47 Conn. 237; *Burdick v. City of Norwich*, 40 Conn. 225; *Greenl. Ev.* § 524. There is no error. The other judges concurred.

HEARNS v. WATERBURY HOSPITAL.

(Supreme Court of Errors of Connecticut.
April 5, 1895.)

CHARITABLE CORPORATION—LIABILITY FOR NEGLIGENCE OF SERVANTS.

1. A hospital incorporated under special act to furnish medical treatment and care for the sick, without capital stock, and from which its members derive no profit, is a charitable corporation.

2. A hospital, which is a charitable corporation, is not liable for injuries to a patient, due to the negligent treatment by the physicians and nurses employed by it, where it has exercised due care in their selection.

Appeal from superior court, New Haven county; George W. Wheeler, Judge.

Action by Hugh Hearn against the Waterbury Hospital for negligent treatment while a patient. From a judgment for defendant, plaintiff appeals. Affirmed.

John O'Neill and William Kennedy, for appellant. Stephen W. Kellogg and John P. Kellogg, for appellee.

HAMERSLEY, J. The Waterbury Hospital was incorporated, by special act of the legislature, "for the purpose of establishing and maintaining a hospital in the town of Waterbury." Under this authority it was organized "for the purpose of furnishing medical and surgical care, nurses, medicines, and food, to patients suffering from disease

or from injuries." It has no capital stock, and its members can derive no profit from the corporation. These features clearly indicate a "charitable corporation," within the meaning of our law. *American Asylum at Hartford, etc., v. President, etc., Phoenix Bank*, 4 Conn. 172; *Bishop's Fund v. Eagle Bank*, 7 Conn. 476; *Town of Hamden v. Rice*, 24 Conn. 350. To this hospital the plaintiff applied for treatment of a fractured kneecap, and brings this action to recover damages for injuries caused, as he claims, by the unskillful and negligent treatment which he received at the hospital. The complaint, after stating the incorporation of the hospital, and the adoption of certain by-laws, alleges that the plaintiff requested of the proper officers admission to the hospital, and promised to pay the defendant such reasonable compensation as it should demand; that the defendant, in consideration thereof, agreed to treat him with care and skill, and furnish him with surgical care, etc., for that purpose; that the defendant was guilty of negligence in the manner specified, and thereby violated its said agreement and duty, whereby the plaintiff was injured; etc. The defendant's answer denies the negligence and injury, and sets up a special defense to the action, reciting the purposes of its incorporation, and alleging that its by-laws provided that "neither the medical and surgical staff, nor physician or surgeon designated by them, nor any officer of the corporation, shall receive compensation from the hospital in any form for the duties performed in its behalf." To this special defense the plaintiff demurred. The court below overruled the demurrer, and gave judgment for the defendant, and the plaintiff appealed from that judgment.

The demurrer to the defendant's answer cannot entitle the plaintiff to judgment if his complaint is insufficient. We therefore pass over the question which might have been raised as to the special defense alleged being a strictly legal way of presenting the defendant's claims, and consider the only question argued before us, namely, does the negligence alleged in the complaint entitle the plaintiff to recover damages from the defendant? The negligence which caused the injury is stated to have been that of the attending surgeon and attending nurses while in performance of their duties; and in order to confine the issue as closely as possible, it was stipulated by the parties that, solely for the purpose of the disposition of this appeal, and without prejudice to any future proceedings, the court should assume, upon the record, that the defendant exercised due care in the selection of nurses, physicians, and surgeons, by whose alleged negligence or want of skill and attention the plaintiff was injured. Possibly it might be claimed that the complaint raises the further question of the defendant's liability for its own negligence in failing to perform its alleged duty

of appointing a house physician, or *terne*, so called; but such claim has been made, and we do not think it can properly be made upon this appeal. Even if the question were not excluded by the stipulation of the parties, the record fails to show that it was raised on the trial and decided by the court below. It is not specified the reasons of appeal, and in the argument before us was not discussed. The only question with which we have to deal is the liability of the defendant for the negligence of physicians and nurses employed by it, and in the selection of whom it has exercised due care. The conclusion we have reached makes it unnecessary to pass upon the question whether the hospital's acting physicians can really be regarded as standing to the corporation in the relation of servant to master, or to discuss the nature and extent of the corporate liabilities of an eleemosynary corporation. All questions presented by this appeal are settled by the finding upon the liability of the defendant for the negligence of its servants, i. e. w. a corporation like the defendant employs a servant who does not represent it in the same way that every corporation must be represented by its directors or managers, but is employed for a special work in the same manner as if employed by an individual. The same work, is such corporation liable for an injury caused in the course of his employment by such servant, and due solely to his negligent conduct?

This question has never been decided in this state. It has, however, arisen in many states and in England, and has been so mingled with the different one of the corporate liability of eleemosynary corporations for their own corporate negligence that in our review we make of cases illustrating the treatment the subject has received in other courts will necessarily include cases bearing more directly on the question.

The question arose in England in 1846 in the court of common pleas, in the case of *Hall v. Smith*, 2 Bing. 156. Commissioners for the town of Birmingham ordered a tunnel through a public street. The surveyor and contractor appointed by them to construct it failed to put up guard rails or to provide lights. The court held that the commissioners were not liable,—not because such a corporation or quasi corporation for public purposes was not liable for its negligence, but because the surveyor and contractor were not the servants of the corporation. In an early case of *Bush v. Steinman*, 1 Bos. & P. 404, had not then been overruled; but because the rule of *respondeat superior* did not apply. Best, C. J., said: "The maxim *respondeat superior* is bottomed on the principle that he who expects to derive a benefit from an act which is done by another for him must answer for any injury

third person may sustain from it." And the reason of the rule does not apply to trustees for public purposes, acting according to their best judgment and with the best advice.

1839, *Duncan v. Findlater*, 6 Clark & F. was decided by the house of lords. It was a Scotch case,—an action against the trustees of a turnpike road for injuries caused by the negligence of a surveyor appointed by them. The only question actually decided in this case was that the trustees were not liable for an injury caused by the neglect of a person not standing in the relation of a servant to the trustees. But the language of Lord Cottenham went further, and stated the principle that unpaid trustees for public purposes can in no case be liable in their corporate or quasi corporate capacity. This statement was rejected in subsequent cases, and in *Trustees, etc., v. Gibbs*, L. R. 1, 93, was distinctly held unfounded in

the same year *Parnaby v. Canal Co.*, 11 Q. B. 223, was decided, and held that in a statute of incorporation authorized a company to construct a canal, and did not in special terms impose any duty in reference to its use, the general law imposed upon the company the duty to use reasonable care in making navigation secure. The case is pertinent only because it defines the principle of limited corporate duty corresponding to limited corporate powers, which principle in subsequent cases holds applicable to powers delegated to trustees for public purposes and to corporations for charitable purposes, as well as to corporations organized for profit.

Trustees, etc., v. Ross, 12 Clark & F. 507, decided in 1846, has been frequently cited in American cases. The action was an attempt to apply trust funds, given by a private donor for founding a hospital for the maintenance of fatherless boys, to be governed in accordance of statutes established by him, towards the payment of damages caused by the refusal of the trustees of the fund to obey the statutes of the founder in respect to an applicant for admission to the hospital. The Scotch court of session ordered damages to be assessed against the fund, and upon appeal to the house of lords two questions were presented: Did the statutes of the founder give to every eligible person a right of admission on application, without any discretion in the trustees as to selection? And, second, can the damages caused by the wrongful refusal of trustees to admit an applicant entitled of right to admission be recovered from the trust fund? The house refused to consider the first question, and reversed the order of the court of session on the ground that the wrong, if any, done to the applicant, was done by the individual trustees who voted against his admission, and that they were liable in an action, and the trust fund was not. In *Duncan v. Findlater*, supra, the claim had been made that

the Scotch practice of using trust funds to pay damages for injuries caused by their managers was authorized by Scotch law, and the house of lords had decided that it was not authorized by Scotch law; and now, within a few years of that decision, when a Scotch court again holds that the condemned practice is authorized by Scotch law, the house makes short work of the case, refuses to consider a doubtful and important question involved, or to discuss an authority, except *Duncan v. Findlater*, which had not been duly respected. The pith of the case appears in the remarks of each of the law lords in reference to *Duncan v. Findlater*. Lord Brougham says: "It would have been better had the court paid more attention to the high authority of that case as decided in this house than here appears to have been paid to it." The main significance of *Trustees, etc., v. Ross*, is in the assertion of the supremacy of the house of lords in determining questions of Scotch law. The uniform severity with which the case has been ignored by the courts at Westminster, in the cases which have since dealt elaborately with the question of the liabilities of corporations for public and charitable purposes, indicates that it is not regarded as an authority on the subject in that jurisdiction, and certainly there is nothing in the case that can aid the courts of other jurisdictions.

Holliday v. St. Leonard's, 11 C. B. (N. S.) 192, decided in 1861, held that the defendants, the vestry of a parish, were not liable for the negligence of servants in the performance of a public duty with which they were intrusted by statute. The case is decided on the ground that trustees for public purposes are exempt from the application of the rule of respondeat superior which would apply to private persons under like circumstances. It was afterwards claimed that the opinion of Erle, C. J., seemed to favor the erroneous dictum of Lord Cottenham in *Duncan v. Findlater*, that the exemption rested on the immunity of such corporations from all corporate liability, and not the exemption from the application of the rule of respondeat superior as stated by Best, C. J., in *Hall v. Smith*; but when this claim was pressed in argument of *Coe v. Wise*, 5 Best & S. 440, Erle, C. J., said, "I certainly never intended so wide a proposition."

In 1863, the court of queen's bench, in the case of *Hartnall v. Commissioners*, 33 Law J. Q. B. 39, held that trustees for public purposes charged with not having performed a duty cast on them by statute were liable for special damage, and the court distinguished the case from *Metcalf v. Hetherington*, 11 Exch. 257, where such trustees were held not liable, because in that case the duty alleged to have been neglected did not clearly appear to have been imposed.

In 1864, *Coe v. Wise*, 5 Best & S. 440, was tried in the court of queen's bench. Commissioners were directed by statute to make

a cut, and maintain at its opening a sluice to exclude tidal waters. The sluice was properly made; but owing to want of care in the persons employed to maintain it, it burst, and flooded adjoining lands. There was no proof of negligence in employing unskillful agents. A majority of the court (Mellor, J., and Cockburn, C. J.) held the defendant not liable. Blackburn, J., dissented. Mellor, J., places the exemption from liability on the ground that the statute in this case did not impose an absolute duty to maintain the sluice, but that the real duty imposed on the trustees was bona fide to employ such agents as they believed to be skillful. He assumes the corporate liability for violation of corporate duty in all cases, irrespective of the objects of the corporation, and classifies the cases maintaining the liability of trustees for public purposes as follows: (1) Individual liabilities, where trustees exceed or abuse powers; i. e. where the wrongful act is individual and not corporate, the individual and not the corporation is liable. (2) Where a duty imposed on trustees has been violated by reason of orders given by them for doing the acts from which damage resulted; i. e. liability follows when the negligence is strictly corporate negligence and not the collateral negligence of servants. (3) Where trustees are authorized to maintain works of a trading character, i. e., works to be supported by selling the right to use them (in their nature a substitution on a large scale for individual enterprise), in such cases, although the quasi corporation is organized for public purposes, yet its corporate liability is not confined to negligence resulting from its direct corporate act, but includes negligence resulting from conduct of its servants, apparently on the ground that the duties imposed by statute on such quasi corporation towards the persons to whom it sells the use of the works it is authorized to maintain cannot be distinguished from those of a railroad or canal company in dealing with those who purchase the use of their works, and are not affected by the charitable object of the corporation. There is no such element of trading use in the works maintained by the defendant. Cockburn, C. J., places the exemption from liability on the ground that the negligence complained of is that of servants only, and also that, upon proper construction of the statute under which the trustees act, there is no fund at their disposal for the payment of damages resulting from negligence, and that it is absurd to hold that an action will lie where judgment cannot possibly be satisfied. Blackburn, J., dissents, and holds that the defendant is liable on the ground that the jury has found that the injury was in fact caused by want of due care on the part of the defendant in maintaining the sluice. The question whether such a corporation is liable, not only for its direct corporate negligence, but also for the negligence of its

servants, does not arise. The verdict of jury that the negligence was the corporate negligence of defendant is conclusively referring to the cases which hold that trustees for public purposes are exempt from liability where there has been no direct corporate negligence, but the only negligence due to the wrongful conduct of persons whom they stand in the relation of master and servant, he says: "These decisions at least the greater part of them, are supported on the ground that the relation of master and servant did not exist; but this explanation does not apply to *Day v. St. Leonard's*, the ratio decidendi of which seems to me to express that there is an exception from the general rule that masters are responsible for the negligence acts of their servants, when the master is within the class somewhat indefinitely of 'trustees for public purposes'; but the doctrine in question has, as it seems to me, no bearing on the present case, since the commissioners are not sought to be charged for the collateral negligence of their servants, but for the nonfulfilment of a duty which was, it is alleged, imposed on them by an act of parliament on the drainage commissioners themselves." He also holds that the question raised by Cockburn, C. J., as to the power of the trustees to apply the funds under their control to the payment of damages does not arise in the case, and is no sufficient ground to deny the right of the plaintiff to a judgment. An appeal was allowed from the judgment of the majority of the court to the exchequer chamber. In the exchequer chamber the appeal was held to await the decision in *Trustees, etc., v. Gibbs*, then pending before the house of lords, and after the decision in that case was announced the judgment of the court of queen's bench was reversed on the grounds stated in the dissenting opinion of Blackburn, J., as delivered in the court below. *Coe v. Veale*, 11 Best & S. 440.

In 1866, *Trustees, etc., v. Gibbs*, 11 H. L. 93, was decided. The Mersey Dock Trustees were a corporate body, created by an act of parliament, charged with the management of the Liverpool docks, and with the collection of the rates levied for their use. The rates so collected, after defraying the expenses of maintenance, were to be applied to the payment of debts incurred in construction of the docks, a view to the reduction of the rates for which the purpose was public, and the motive was charitable. Two actions were brought against the trustees by owners of vessels damaged in entering the docks. The wrong complained of in each action was that the trustees, by neglecting to repair the entrance of the dock to be unfit for the purpose, had neglected to repair it, and knowingly allowed it to continue in a condition unfit for the purpose while it was used by vessels with the result of damage to the cargo. Judgments were given against the trustees. Upon appeal to the house of lords the two cases were heard as one, and

ments below were sustained. In the opinion of lords the unanimous opinion of the non-law judges was submitted by Blackburn, J., and was adopted by the house as the ground of its decision. This is the leading and best-considered English case on the subject; but to understand the bearing of the opinion it must be read in connection with the opinions of Mellor and Blackburn, in *Coe v. Wise*. The judges of the queen's bench, who had differed in the latter case, agreed in the opinion in *Trustees, etc., v. Gibbs*, and that opinion, as given by Blackburn, J., is plainly drawn on the lines of the opinion of Mellor, J., as well as of his dissenting opinion in *Coe v. Wise*. And immediately after the decision of *Trustees, etc., v. Gibbs*, the same judges who had participated in that decision (except the judges of the queen's bench), sitting as judges of the exchequer chamber, reversed the judgment of the queen's bench in *Coe v. Wise*, on the grounds of the dissenting opinion of Blackburn, J., and in the course of argument Mr. C. J., affirmed the authority of the decision in *Holliday v. St. Leonard's*, which had been discussed and not dissented from in *Trustees, etc., v. Gibbs*. Only by considering the two cases of *Coe v. Wise* and *Trustees, etc., v. Gibbs* together, can we ascertain the bearing of the opinion in the latter case. The precise questions presented and answered were: Was the duty imposed on the trustees an absolute duty to maintain the docks in a state fit for use? Can the trustees be liable for negligence without actual knowledge that the docks are unfit for use? Both were answered in the affirmative. In answering the first question the court holds that the duty of corporate duty and liability laid down in *Arnaby v. Canal Co.* depends on the nature of the corporate powers and duties, and on the fiduciary or beneficial purpose of the corporation; and these powers and duties are to be determined upon a true interpretation of the statute creating it. When the legislature imposes on trustees for public purposes the duty of maintaining works by tradition in their use so that they are in the nature of a substitution for private enterprise, it will be presumed, in the absence of anything to show the contrary, that the legislature intends "that the body created by the statute shall have the same duties, and the funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same thing." And so, in this case, the legislature intended to impose upon the trustees the same absolute duty of maintenance to the same extent as the general law imposes such duty on an individual carrying on a similar enterprise. In answering the second question the court holds that, although the duty of keeping the dock in a fit state for use could be performed by a corporate body only through its servants, yet if the corporation had means for knowing, by its servants, that the dock

was in an unfit state, and were negligently ignorant of its state, such negligent ignorance is the neglect of the corporation. In one of these actions the fact of such corporate negligence is admitted by the demurrer. In the other, it is found by the jury. The question whether the negligence of the persons actually in charge of the docks was only the collateral negligence of the servants of the corporation, and whether a charitable corporation is liable for the collateral negligence of its servants, is not involved in the decision. The trustees, however, while not admitting the rule of construction adopted by the court as determining their duty and liability, mainly relied on the broader claim that such bodies as theirs are, by the general law of the country, trustees for public purposes, and, being such, they are not, in their corporate capacity, liable for damages caused by the neglect of their servants to perform the duties imposed on the corporation; or, at all events, that the duty of such corporations is limited to due care in the choice of officers, and, such care being exercised, redress must be sought against the officers alone. The court treats this claim elaborately and holds that it has no foundation in law; that the cases supporting the principle that one who is a public officer, in the sense that he is a servant of the government, and as such manages some branch of government business, is not responsible for the negligence of those in the same employment, have no application, because they are decided on the ground that the government is the principal and the public officer its servant, and therefore not liable on general principles of the law of agency. This principle is laid down by Story in his work on *Agency* (section 313). Here the defendants are not servants of the public in that sense. The class of cases cited, which depends on the principle that when the legislature directs a thing to be done, and damage results merely from doing that thing, the person acting under such authority is not liable, but compensation can be recovered only under special provisions of the statute legalizing the wrong, has no application. The cases apparently bearing in favor of the defendant's claim were decided either on the ground that the injury was caused by a person not standing in relation of servant to the defendant, or upon the ground that, in the case of corporations organized to carry on an enterprise in the nature of a public charity, there is an exception to the rule making a master liable for the collateral negligence of his servant. In such a case as the present the liability does not depend on the relation of master and servant, but on the existence of a corporate duty, and the liability for a direct corporate negligence in the failure to perform that duty. *Duncan v. Findlater* was properly decided on the ground that the relation of master and servant did not in fact exist, and this was all that was actually de-

cided. The dictum of Lord Cottenham, that in no case can such a body be liable for negligence in its corporate capacity, has been rejected in subsequent cases, and is unfounded in law. While much that was said in the judgment in *Holliday v. St. Leonard's* is based on the opinion of Lord Cottenham in *Duncan v. Findlater*, and open to the same objections, it does not support that dictum; but the point actually decided was that there is an exception from the general law making a master liable for the negligence of his servant where the servant is employed by a public body. This point, which the case decides, does not now arise. And the court significantly says: "It is necessary, in considering these authorities, to bear in mind the distinction between the responsibility of a person who causes something to be done which is wrongful, or fails to perform something which there was a legal obligation on him to perform, and the liability for the negligence of those who are employed in the work." In the case of the latter liability, i. e. the liability of a master for the collateral negligence of his servant, it has been decided that there is an exception from the general law when the servant is employed by a public body, and that point does not arise in this case. In respect to the former liability, i. e. the liability of a corporation for corporate neglect in the performance of a corporate duty, there is no case which decides there is an exception from all liability in favor of public or charitable associations; and the dictum of Lord Cottenham in *Duncan v. Findlater* is not law.

Levingston v. Guardians, etc., 2 Ir. Com. Law, 202, decided in Ireland in 1868, is of interest as showing one bearing given to the decision in the above cases at the time. The action was against the poor-law guardians in their corporate capacity. It was held that where a corporation or public trustees, acting gratuitously for public purposes, cause damage by a tortious act, without having funds with which to compensate the party injured, they are responsible in their corporate capacity. *Whiteside, C. J.*, says (page 219): "Upon the ultimate decisions in these two cases (*Trustees, etc., v. Gibbs*, and *Coe v. Wise*), it must, I think, be now taken as established: First, that unless the provisions of the legislature, by express enactment or necessary implication, otherwise determine, an action for such a wrong as that which is the subject of the present suit lies against a corporation or public trustees acting gratuitously for public purposes; secondly, that they are not exempted by the legislature from this liability, because the legislative provisions which regulate them do not provide funds out of which damages recovered in an action against them can be paid, or because these provisions specially apply their funds to purposes not including the payment of such damages; and, thirdly (what, indeed, may be considered as, in principle, comprised in the

second proposition), that this liability exists, although no property, whether created by act of parliament or otherwise, is shown to exist, liable to execution in judgment."

In 1871, the court of queen's bench, in the case of *Foreman v. Mayor, etc.*, L. R. 214, undertook to overrule the decision of the court of common pleas in *Holliday v. Leonard's*. The opinion is given by *Burn, J.*, and he says that *Holliday v. Leonard's*, as an authority for the proposition that there is an exception to the rule of respondeat superior when the servant is employed by a corporation for public or charitable purposes, was overruled by the decision of the house of lords in *Trustees, etc., v. Gibbs*; forgetting that in the opinion in that case delivered by himself, and in which *Chief Justice* of the court of common pleas who delivered the opinion in *Holliday v. Leonard's* concurred, he said that the decision in the latter case "does not affect the present case, so that it is unnecessary directly to decide anything upon it." *Foreman v. Mayor, etc.*, is not a well-considered case on this point. Indeed, the point was not at all discussed on principle, and the decision rests wholly on an assumption of the authority of the house of lords which the records do not seem to be untrue. The authority of *Holliday v. Leonard's* on this point was distinctly and carefully left unquestioned, both in *Trustees, etc., v. Gibbs* and in *Coe v. Wise*. That that can be said is that in *Foreman v. Mayor, etc.*, the court of queen's bench differed from the court of common pleas. The influence of the decision, however, is to be plainly seen in subsequent cases.

In *Reg. v. Williams*, 9 App. Cas. 418, decided in 1884, the rule in *Trustees, etc., v. Gibbs* was applied where similar powers and duties had been given by act of parliament to the executive government of New Zealand. The action was brought under authority of the crown suits acts of 1881.

In *Gilbert v. Trinity House*, 17 Q. B. 795, decided in 1886, the defendant was a private guild or corporation, established about 600 years ago, for charitable and public purposes, such as the relief of the poor, maintenance of religious services, promotion of the interests of mariners, etc. In very early days, when beacons along the coast were mainly private property, it undertook the maintenance, at first, perhaps, as a duty, and gradually acquired rights and powers to collect tolls. Such funds, however, were devoted wholly to the original charity of relief of poor mariners. Under recent acts, the powers and duties of the corporation were extended to lighthouses and beacons, and largely increased. The corporation was liable for damages caused by negligence in the removal of a beacon, leaving a portion of the coast under water. The broad claim made in favor of trustees for public purposes, in the above cases, was again made in behalf of the

corporation. The question was: "Are defendants liable to be sued at all in re- of injuries caused by reason of the neg- condition in which beacons, or the re- of beacons, vested in them, are kept?" court held that the recent legislation, en- g the powers of the defendant, did not it an agent or servant of the govern- or alter the character of the corpora- It remained a private corporation as . The principle of Trustees, etc., v. was applied to this corporation, and more broadly and with less discrimina- than it was stated in that case 20 years . Day, J., says: "The law is plain that ever undertakes the performance of, or and to perform, duties, whether they are imposed by reason of the possession of ty, or by the assumption of an office, iver they may arise, is liable for in- caused by his negligent discharge of duties. It matters not whether he money as a profit by means of dis- ing the duties, or whether it be a cor- on or an individual who has undertaken charge them. It is also immaterial er a person is guilty of negligence by if or by his servants. If he elects to m the duties by his servants, if in the e of things he is obliged to perform the by employing servants, he is respon- for their acts in the same way that he sible for his own."

English rule was recently (1890) ap- in New Brunswick to trustees incorpo- for the maintenance of a public hospi- Donaldson v. Commissioners, 30 N. B. . The action was for injury caused to on admitted to the hospital, by negli- failure to supply the necessary medical surgical attention. The questions were by a demurrer to the declaration. court held that the duty the defendant the plaintiff, as alleged, was admitted e demurrer, and a breach of that duty e negligent failure to supply any med- surgical attendance which he had the tc have supplied, was also admitted, herefore the claim that the duty im- on the defendant was in fact fulfilled r exercising due care in selection of physi- and in having necessary appliances, was not in the case, for such facts, if re an answer, should be set forth by f plea; that, admitting the defendant a public charitable institution, that fact ot exempt it from this action for neg- e. A public charitable institution is to be sued for negligence.

first case in the United States to which attention has been called was decided in ia in 1867. City of Richmond v. Long's s, 17 Grat. 375. It was an action for alue of a slave lost by negligence on art of servants of a hospital. Liabil- as denied on the ground that the man- of the hospital exercised governmental s, that under the Virginia laws the

managers of the hospital were exercising gov- ernmental powers, and the government was the principal or master, and therefore the- rule of respondeat superior did not apply.

Maxmillian v. Mayor, etc. (1875) 62 N. Y. 160, was an action against the city. The- only question decided was that under the New York statute the commissioners of pub- lic charities were not the agents or servants- of the city, and therefore the city was not responsible for the negligence of a servant employed by the commissioners.

McDonald v. Hospital, 120 Mass. 432, was decided in 1876. It was an action against the hospital for negligent surgical treatment. The court distinctly held that a hospital, be- ing a public charitable institution, is not lia- ble for the negligence of a servant when it has exercised proper care in his selection. But the ratio decidendi is not entirely clear. Apparently the decision is based on the au- thority of Holliday v. St. Leonard's, and, if so, it is an authority for the principle that there is an exception to the rule of respon- dat superior when the negligent servant is employed by a public charitable corporation. Subsequently a similar question arose in Benton v. Trustees, etc., 140 Mass. 13, 1 N. E. 836. The accident was caused by the negligence of the superintendent of a build- ing owned by the city of Boston and used as a hospital under the management of cor- porate trustees appointed by the city. The court said that, if the trustees could be re- garded as trustees of a public charity, the case came within McDonald v. Hospital, but held that, under the statute incorporating them, the trustees were agents for the city; that the city, in the performance of the duty of maintaining the hospital, was not liable for negligence, because the case came with- in the principle of Hill v. City of Boston, 122 Mass. 344, where Judge Gray, in an elab- orate opinion and exhaustive review of the cases, defended the Massachusetts doctrine of nonliability of municipal corporations, and also of Tindly v. City of Salem, 137 Mass. 171, which somewhat extends that doc- trine. And in Donnelly v. Association, 146 Mass. 163, 15 N. E. 505, the court states that McDonald v. Hospital was decided on the ground "that the defendant was a pub- lic charitable institution under the laws of the commonwealth," and Benton v. Trus- tees, etc., on the ground that the real duty was imposed by statute on the city for pub- lic benefit, and that the city would not be liable under the rule stated in Tindly v. City of Salem and Hill v. City of Boston, and there- fore a mere statutory agent without prop- erty, intervening between the city and the ac- tual wrongdoer, was free from liability.

In 1880, the question came up in Rhode Island, in Glavin v. Hospital, 12 R. I. 411. The plaintiff claimed damages—First, on the ground of negligence of the corporation in the selection of an interne who was em- ployed as a surgeon, and to whose surgical

care the plaintiff was committed. The court held that the defendant was liable for its corporate negligence in the selection of its physicians. Second, on the ground of the negligence of the interne, while acting as a surgeon, in his careless and unskillful treatment of the plaintiff. The court held that the defendant was not liable on this ground, and that the hospital does not undertake to treat the patient through the agency of the surgeon, but only to procure his services, and therefore the relation of master and servant does not exist, and the hospital is only liable for a breach of its duty to use proper care in the selection of the surgeon. Third, on the ground that the plaintiff, being in a critical condition, it was the duty of the interne, under a hospital rule, to send immediately for an attending surgeon, and the duty of the corporation, under a special provision of its charter, to put the rule in execution. The court held that, while the interne acts as surgeon, and, when so acting, he may not be the servant of the corporation, yet he also is appointed to perform other duties, and when acting in such capacity the relation of master and servant exists; that the corporation undertakes in critical cases to send for one of its staff of surgeons. This duty is imposed upon it in pursuance of the special terms of its charter, and can only be performed by the corporation through an agent. The interne is its agent for that purpose, and his neglect is that of the corporation, and for such neglect the defendant is liable. The broad claim was also made that the defendant, by reason of being a public charitable corporation, was exempt from all liability. The court held: That this broad claim was not supported by any cases cited, discussing the English and Massachusetts cases. That the theory of a public policy which forbids the use of corporate funds in any case to compensate for injuries inflicted is not sound. There is no such public policy, and the establishment of such a policy is a question for the legislature. That the theory that the corporate funds are trust funds, and their use to pay a judgment would be a violation of trust, is unsound. That the result of the English cases is: (a) Where there is a duty, there is a prima facie liability for neglect; and a corporation being created for certain purposes which cannot be executed without the use of care or skill, it becomes the duty of the corporation to exercise such care, and funds acquired for the purposes of its creation will be applied to satisfy a judgment for its default in this respect. (b) The corporate funds can be applied, notwithstanding the trusts for which they are held, because the liability is incurred in carrying out the trusts and is incident to them. That these rules for corporations for public purposes apply equally to corporations like the Rhode Island hospital.

Fire Ins. Patrol v. Boyd, 120 Pa. St. 624, 15

Atl. 553, was decided in 1888. This action against a corporation organized the city government of Philadelphia for the preservation of life and property at fires, injury caused by the negligence of its agents employed at a fire. The court held under the laws of Pennsylvania, the agent, in the performance of its duties, acting in aid of the municipal government, in the performance of a governmental function, and in such case the rule of respondeat superior has no application, for the superior is not the defendant. The court further held that the funds of a public corporation cannot be taken to compensate injury caused by the negligence of agents, and says: "It is not the doctrine of respondeat superior to an unreasonable and dangerous length. That doctrine is at best, as before observed, a hard rule."

In 1891, the question was somewhat discussed in the New York court of appeals, in *Harris v. Hospital* (Com. Pl. N. Y. Supp. 881). But the case was decided on questions of fact. No actual negligence was found on the part of the hospital authorities, the surgeons, or the nurse.

During the past year the question has arisen in three cases: In Kentucky, the case of *Williams v. Industrial School*, 106 Ky. 1065, where the liability of the defendant for injuries committed by its agents was denied, on the sole ground that this corporation was a mere agent of the state exercising governmental functions. In Michigan, *Downs v. Harper*, reported in 60 N. W. 2d 100, where a hospital for the insane was sued by the representatives of a patient who had fallen from the strong room of the hospital, and died from a window, and so was killed. The negligence alleged was that of the defendant in the construction of the building, and the negligence of the employees in the care of the patient. Judgment was given for the defendant. It perhaps the decision might be sustained on other grounds, but the reasoning of the court fairly tends to support the extreme view of the defendant in this case. There is, however, a distinction that may have been influenced the language of the court in *Harper Hospital* was originally a foundation by deed conveying property to trustees on a specific trust. These trustees were subsequently incorporated under a general statute. It is possible that by reason of incorporation the corporate powers were limited to administration of the original trust in accordance with the laws established by the founders. If this were so, the capacity would be reduced to the minimum, and the defendant might be held not liable upon a construction of the terms of the trust, without questioning the liability of a charitable or eleemosynary corporation for injuries committed in pursuance of its corporate duties. The case of *Railway Co. v. Artist*, 94 U. S. 14, 60 Fed. 365, decided by the United

cuit court of appeals, does not deal at all with the relation of a corporation, whether business or eleemosynary, to its corporate funds, nor directly with the nature of the duties imposed on a public or charitable corporation by its charter. The only question considered or decided in respect to a corporation is that any corporation, when it undertakes an act of charity not within the purposes of its incorporation and which it undertakes under no legal obligation to perform, assumes the same personal duties, neither more nor less, than an individual assumes who undertakes a similar act of charity, and that a corporation, in administering a trust fund distinct from its corporate funds, held by it for a specific trust, stands in the same position as an individual who administers a trust fund for a similar purpose. But the issue is of peculiar interest as maintaining the proposition that an individual establishing a hospital accommodations as a charity undertakes no duty towards those who accept them as a free gift, except the duty of using reasonable care in providing such accommodations, and that if one is injured through negligence, not of the individual in the performance of his personal duty, but of the servants employed by him, the principal is not liable, because such case does not come within the reason of the rule of respondeat superior, and such rule has no application. In this proposition is true of a corporation as well as of an individual, the court held that the railroad corporation which had established hospital accommodations as such charity, was not liable in a suit to recover for injuries caused through the negligence of the servants it had employed; that the doctrine of respondeat superior has no justification, and "it was responsible for the discharge of its own personal duty, and not for the performance of the duties of its employees." This is the most direct application we have found in an American case of the doctrine which, in *Hall v. Smith and Holliday v. St. Leonard's*, was applied to corporations established for public and charitable purposes.

It is apparent that there are marked differences in these cases, both as to results and the process by which results are reached. These differences mainly appear in the tests adopted for ascertaining in each case what is a corporate duty and what is a corporate neglect; in the confusion of the legal trust, arising from the restriction which binds every corporation to apply its corporate funds to the purposes for which it was organized, with the relation of a strictly legal trustee to his trust funds; and especially in the various means by which courts have sought to escape the patent injustice of applying the extreme doctrine of respondeat superior to the personal defaults of employees of charitable institutions. But we think the drift of all the cases clearly indicates a general conviction that an eleemosynary corporation should not be held

liable for an injury due only to the neglect of a servant, and not caused by its corporate negligence in the failure to perform a duty imposed on it by law, and we are satisfied that this general conviction rests on sound legal principles. The law which makes one responsible for his own act, although it may be done through another, and which is expressed by the primary meaning of the maxim, "*Qui facit per alium facit per se*," is based on a principle of universal justice. The law which makes one responsible for an act not his own, because the actual wrongdoer is his servant, is based on a rule of public policy. The liability of a charitable corporation for the defaults of its servants must depend upon the reasons of that rule of policy, and their application to such a corporation. The rule is distinguished as the doctrine of respondeat superior, although that phrase is used broadly in reference to any relation of principal and agent, thereby causing much confusion. Here we use it in the narrow meaning suggested by its origin. The phrase is taken from the words of the statute of Westm. II. (Car. II.). "*Si custos gaolæ non habeat per quod justicietur vel unde solvat, respondeat superior suus qui custodiam hujus modi gaolæ sibi commisit.*" As Lord Coke tells us (2 Inst. 382), this law was intended only for those who "having the custody of gaols of freehold or inheritance commit the same to another that is not sufficient." As sheriffs originally profited through the appointment of their subofficers, the rule of the statute was applied to sheriffs, although they were not included in its letter. This statute was passed before the first Year Book was kept, at a time when the English law was "without form." It recognized an injustice, and declared a rule of public policy, i. e. an injury done by one who is irresponsible must be answered for by his superior, when for his own convenience and emolument that superior has given the wrongdoer the opportunity of committing the injury. This rule of public policy modified the development of the law of master and servant from the beginning, and in this way infused into the law of agency a sort of fictitious agency, depending, not on the principle of justice that makes one responsible for his own act, but on a rule of public policy which, under certain circumstances, estops one from showing that the act in question was not his own. This view is suggested by the opinion of Best, C. J., in *Hall v. Smith*, supra, and is the occasion of his emphatic declaration that respondeat superior is bottomed on the principle that he who expects to derive the advantage from an act done for him by another must answer for any injury which a third person sustains from it. The reasons for the rule have been differently stated by others. In *Maxmillian v. Mayor*, etc., supra, the rule is based upon the right

which the employer has to select his servants, to discharge them if not competent, and to control them while in his employ. In *Dacey, Parties*, rule 102, p. 446, the liability is stated as "analogous to the liability of an owner for injuries committed by animals belonging to him. Neither the master nor owner is liable because he has himself done the particular act complained of. He is responsible because the wrong is the result of his having in the one case employed the incompetent servant, and in the other kept an animal of habits injurious to his neighbors." Here the policy stated seems to be that the master should not only be liable for his negligence in the employment of servants, but should be held as a guarantor that none employed by him should abuse their opportunities. And a similar notion is expressed in *Wood, Mast. & S. § 277*, i. e. that the penalty of liability is imposed in order to secure in the master "the exercise of proper care and diligence in the selection and retention of his agents." *Whart. Neg. § 157*, gives, as the reason of the policy, that "he who puts in operation an agency which he controls, while he receives its emoluments, is responsible for the injuries it incidentally inflicts," relying on Lord Brougham's statement in *Duncan v. Findlater*, "I am liable for what is done for me and under my orders by the man I employ, for I may turn him from that employ when I please; and the reason that I am liable is this, that by employing him I set the whole thing in motion, and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it."

This defendant does not come within the main reason for the rule of public policy which supports the doctrine of respondeat superior. It derives no benefit from what its servant does, in the sense of that personal and private gain which was the real reason for the rule. Again, so far as the persons injured are concerned, especially if they be patients at the hospital, the defendant does not "set the whole thing in motion," in the sense in which that phrase is used as expressing a reason for the rule. Such patient, who may be injured by the wrongful act of a hospital servant, is not a mere third party, a stranger to the transaction. He is rather a participant. The thing about which the servants are employed is the healing of the sick. This is set in motion, not for the benefit of the defendant, but of the public. Surely, those who accept the benefit, contributing also by their payments to the public enterprise, and not to the private pocket of the defendant, assist as truly as the defendant in setting the whole thing in motion. But the practical ground on which the rule is based is simply this: On the whole, substantial justice is best served by making a master responsible for the injuries caused by his servant acting

in his service, when set to work by him, to prosecute his private ends, with the intention of deriving from that work a benefit. This has at times proved a good rule, but it rests upon a public policy firmly settled to be questioned. It is now asked to apply this rule, for the first time, to a class of masters distinct from others, and who do not and cannot act within the reason of the rule. In other words, we are asked to extend the rule to declare a new public policy, and to say that the whole, substantial justice is best served by making the owners of a public enterprise involving no private profit, responsible only for their own wrongful negligence, and not also for the wrongful negligence of the servants they employ only for a public purpose and a public benefit. We think this does not justify such an extension of the rule of respondeat superior. It is, perhaps, immaterial whether we say the public policy which supports the doctrine of respondeat superior does not justify such extension of the rule, or say that the public policy which encourages enterprises for charitable purposes requires an exemption from the application of a rule based on legal fiction, which, as applied to the owners of such enterprises, is clearly opposed to substantial justice. It is enough that a charitable corporation like the defendant, whatever be the principle that controls its liability for corporate neglect in the performance of its corporate duty, is not liable, on grounds of public policy, for injuries caused by the personal wrongful neglect in the performance of his duty by a servant whom it has employed with due care; but in such case the servant is alone responsible for his own negligence. This result is justified by the opinion in *Hall v. Smith*, *Holliday v. St. Leonard's Hospital*, *Railway Co. v. Artist*, supra, substituted on the grounds above stated, and is justified for one reason or another, by the fact that a number of courts that have dealt with the particular liability of a corporation for negligence in public or charitable purposes. There is no error in the judgment of the superior court. The other judges concurred.

C. & C. ELECTRIC MOTOR CO. v. ILLINOIS BIE & CO.

(Supreme Court of Errors of Connecticut, March 5, 1895.)

PRINCIPAL AND AGENT—POWER—EVIDENCE BY COURT—ORDER OF PROOF—SALE—EVIDENCE OF WARRANTY—REMEDY—ACCEPTANCE

1. On the issue as to the authority of the agent to purchase goods for his principal, it appeared that the agent, who was the agent of the sale in certain states of electric motors at the time of his negotiations with plaintiff for the purchase of an elevator, to be resolved in connection with a motor, had over his official correspondence simply bearing the principal's name, and that the correspondence with plaintiff used pay

letter head bearing the principal's name, and signed the letters in the principal's name. The principal knew of such use, and prior to the negotiations for the purchase of the elevator, in referring plaintiff to the agent, spoke of his office as "our office." The principal never notified plaintiff as to the authority of the agent, though plaintiff was at its place of business repeatedly during the negotiations. *Held*, that a finding of the trial court that the agent was authorized to make the purchase would not be disturbed.

2. The trial court, in determining issues of fact, is not required to pass upon all claims of law made by the parties as applicable thereto.

3. In an action on a contract entered into through an agent, the admittance in evidence, against the principal, of conversations with the alleged agent, before proof of the fact of agency, is within the discretion of the trial court.

4. In an action on a contract entered into through an agent, statements made by the agent soon after the execution of the contract, not in the presence of the other party, as to the terms of the contract, are inadmissible against the latter.

5. In case of the sale of an elevator for a building, the buyer, after acceptance, by retention after a reasonable time for trial, cannot return the elevator for breach of warranty.

6. In the sale of an elevator with warranty that it prove satisfactory to the owner of the building in which it was to be placed by the buyer, it appeared that the elevator was run without complaint from the owner of the building for five weeks, after which complaint on account of some trifling defects was made, which were fixed, and the elevator again run for a considerable time, after which the elevator was not used, and after the expiration of nine months the elevator was tested by the buyer and the owner of the building, and found defective. *Held*, that a finding that the elevator had been accepted, on account of the detention being unreasonable, would not be disturbed.

7. In the sale of an elevator to be placed in a building by the buyer, the buyer, after a delay on the part of the seller which would have entitled him to rescind the contract, wrote to the seller, in response to a telegram that the elevator had been shipped, that if the owner of the building was willing, the elevator might be put in, but he would not expect to pay therefor until it had been paid by the owner of the building. *Held*, that the fact that the seller, in answer, failed to dissent to the condition in regard to payment, does not constitute a modification of the original contract in that respect.

8. Nor did such failure to dissent estop the seller from denying that the contract was so modified.

Appeal from superior court, New Haven county; George W. Wheeler, Judge.

Action by the C. & C. Electric Motor Company against D. Frisbie & Company. There was a judgment for defendant, and plaintiff appeals. No error.

Talcott H. Russell and George D. Mumford, for appellant. William A. Wright, for appellee.

FENN, J. The plaintiff is a manufacturer of electric motors, located in New York. The defendant is a manufacturer of elevators and hoists, located in New Haven. There had been business dealings between them for some years prior to this suit. The defendant sold elevators and hoists to the plaintiff, and purchased motors from it. The plaintiff used for the commencement of its action the form of complaint denominat-

ed "the common counts." It then filed a bill of particulars embracing many items. The defendant's answer was a general denial. To this was added a counterclaim alleging an indebtedness, at the time of the commencement of the action, from the plaintiff to the defendant, for goods, wares, and merchandise sold and delivered, an itemized statement of which was appended as an exhibit. To this the plaintiff replied by a denial. A further reply was made which had reference solely to a single item in the defendant's statement, namely, a charge of \$1,200 for a direct passenger elevator, as follows: "Paragraph 1. Defendant, at the time of selling said direct passenger elevator mentioned in the bill of particulars, warranted it to be constructed in a thorough and workmanlike manner, and reasonably fit for the purpose for which it was constructed,—that is, for a passenger elevator,—and agreed that said elevator should be satisfactory to one Shattuck, for whose use said elevator was constructed, and should be accepted by him; that if not satisfactory or not accepted by said Shattuck, it should not be considered sold, and should not be paid for. Said elevator was not satisfactory to Shattuck, and was not accepted by him. Paragraph 2. The direct passenger elevator described in the defendant's bill of particulars was worthless and of no value, by reason of the defective and unworkmanlike construction of the same by defendant, and by reason of such defective construction was not reasonably fit for the purpose for which it was sold, to the damage of plaintiff \$1,500. Paragraph 3. Plaintiff refused to accept said elevator, and returned the same to the defendant on or about the 1st day of April, A. D. 1892, and as soon as they had an opportunity to inspect the same." The case was tried to the court, which rendered a judgment for the defendant.

The only items of dispute in either bill of particulars arose from two transactions,—the first relating to a mine hoist furnished by the defendant to the plaintiff, for use in a mine in Montana; the second, to the direct passenger elevator. The hoist was shipped to the mine, and there broke. The items of dispute growing out of the transaction were three charges in the plaintiff's bill, aggregating \$214.27, expended by the plaintiff in consequence of and to repair such breakage, and one charge in the defendant's bill, of \$208.03, expended by the defendant for the same purpose. It was found that all of these items were reasonable charges. Which should be allowed, and which disallowed, depended upon the determination as to which party was responsible for the breakage. It was the claim of the plaintiff that the machine failed because it was not suitable for the work for which it was constructed, and which there was an implied warranty that it would do; that there were defects in the hoist which made it unfit to

perform the operations for which the defendant knew it was procured. The court found that the cause of the breakage was negligent handling of the hoist by the plaintiff's servants in setting it up, together with the carrying with it of a very much heavier load than the specifications called for; that it arose from the negligence of the plaintiff, and not from the breach of the implied warranty of the defendant. This finding, by proceedings duly taken under chapter 174 of the Public Acts of 1893, we are asked to reverse. But we are unable to do so. *Styles v. Tyler*, 64 Conn. 461, 30 Atl. 165. Granting that we were at liberty to go as fully into the examination of the testimony, as well as of the numbered requests to incorporate facts and the memorandum of decision, as the plaintiff claims, we fail to find the conclusions of the trial court complained of to be "clearly against the weight of evidence." Since the finding made must stand, it disposes of this part of the case.

But concerning the elevator many difficult questions are presented. It was ordered of the defendant by a Mr. Howard. The first inquiry is whether he, or rather the copartnership called "Howard Bros.," composed of himself and brother, did at the time act for and represent the plaintiff in the transaction. The finding of the court on this point was: "I find that Howard Bros. were in fact the agents of the plaintiff in the elevator purchase, and held themselves out as such with the knowledge and consent of the plaintiff; and the defendant, relying upon such holding out, parted with its elevator, valued at \$1,200." The facts from which this conclusion was drawn appear at considerable length in different parts of the record,—in the finding, in the memorandum of decision, in correspondence marked as exhibits and referred to in the finding, and in the plaintiff's requests to find, marked "Proven" or "Partially proven" (which latter form does not comply with the statute, and is indefinite and improper). These facts are substantially as follows: At the time the negotiations were opened in reference to the elevator, in the latter part of August, 1891, H. A. Howard, or Howard Bros., had their place of business in Boston. Under the terms of a contract dated April 12, 1890, made with the plaintiff, Howard Bros. were the exclusive selling agents of the plaintiff in New England, and so continued up to March 1, 1892; and thereafter, by written agreement, they became the managers of the plaintiff's business in New England. Under the arrangement in force to March 1, 1892, neither Mr. Howard nor Howard Bros. had authority to bind the plaintiff for goods purchased. They possessed the sole right to sell the apparatus of the plaintiff in New England, and had no other connection, and no authority from the plaintiff to purchase goods or use its credit; and they never purchased any goods on behalf of the plaintiff, nor pledged its credit. So far as it

appeared, the transaction in question was only one in which it was ever claimed that the plaintiff was liable for their act to said date of March 1, 1892. The defendant never knew of the arrangement between the plaintiff and Howard, or Howard Bros. Before the negotiations for the elevator began, the plaintiff referred the defendant, as early as May 7, 1891, to "our New York office," namely, the office in charge of Howard Bros. The sign over the Boston office bore the plaintiff's name, and nothing else, from April 12, 1890, to March 1, 1892. The plaintiff knew this fact, and through its officers, often visited the defendant's office, and never objected to such use. The defendant visited the Boston office after May 7, 1891, and many times thereafter, and six or seven times during the negotiations pending the contract for the elevator. Howard, or Howard Bros., were in charge of the office from May 7, 1891, to April 1, 1892. From the beginning of the negotiations, the correspondence between the defendant and the Boston office was all upon paper headed either the heading, "C. & C. Electric Motor Co., Howard Bros., Managers," or the heading used by the New York office, "C. & C. Electric Motor Co., plaintiff." The signatures of the managers of the Boston office to the defendant, from the time the elevator was first put up, were all by rubber stamp, with the name "C. & C. Electric Motor Co.," except one signed by Howard, dated March 1, 1892, two weeks after Howard Bros. became managers of the plaintiff. After the elevator was installed, the correspondence between the Boston office and the defendant was sometimes signed, by rubber stamp, "C. & C. Electric Motor Co.," and sometimes "Howard"; and letters of the defendant to the Boston office were addressed, some to "C. & C. Electric Motor Co.," and some to "Howard or Howard Bros." The defendant knew of such use of its name, and never objected to such use. Letters from the Boston office during the period, signed by a rubber stamp, "C. & C. Electric Motor Co.," and never objected to such use by the plaintiff, through its New York office, were always referred to the Boston office as "our house" and "our New England office." The defendant addressed all of its letters to the Boston office, to the C. & C. Electric Motor Co., up to the time the elevator was installed. The plaintiff knew of the contract for the elevator as soon as made, and when about to be installed; and sought and obtained information from the defendant regarding it, in order to notify "our Boston." Mr. Frisbie, representing the defendant, was frequently in the New York office pending the negotiations for the elevator, and thereafter; but the plaintiff never notified him of its relation with Howard Bros. The entry upon the defendant's books was against the C. & C. Electric Motor Co., and was made one week after the elevator was put in. Neither Howard nor

ard Bros. ever notified the defendant of their relations with the plaintiff, nor stated to the defendant that they were not the agents or managers of the plaintiff in New England. The sale of the elevator was made by the defendant, as it believed, to the plaintiff, through Howard Bros., whom defendant believed to be the agent and manager of the plaintiff.

Upon this branch of the case it is the claim of the plaintiff that the conclusion of the court, that Howard Bros. were in fact agents of the plaintiff in the elevator purchase, was without support in evidence; and therefore, under the decision in *Styles v. Tyler*, 64 Conn. 432, 30 Atl. 165, this court may correct the finding by erasing such conclusion herefrom. Conceding that it would be proper to do this, provided it appeared to be unsupported by any evidence; conceding, also, that the only facts which can be claimed to support it are those which have been recited, together with the additional one, which also appears in the record, and is indeed urged by the plaintiff in explanation of its conduct, that the plaintiff had a direct interest in the matter because it was to sell the motor for use in connection with the elevator, and therefore was peculiarly interested in the success of the compound machine,—we cannot agree that there is no evidence to support the finding of actual agency in connection with this transaction. It is true, the evidence was not positive; but it is also true that it is not essential that it should be. It is familiar law that "it is the right, and sometimes the duty, of the trier to infer that a man has actually done from his conduct, beyond the positive testimony in a case." *Bank v. Middlebrook*, 33 Conn. 100; *Dubuque v. Coman*, 64 Conn. 479, 30 Atl. 77; *Bunnell v. Bridge Co.*, 66 Conn. 24, 33 Atl. 533. "Such inference is one of fact, and cannot present a question of law, at least here, as in this case, the inference is one which cannot be said to be palpably wrong." *Bunnell v. Bridge Co.*, supra. Regarding it as a fact, every reasonable presumption is to be made in support of the finding. *Dubuque v. Coman*, supra. But even if this were reversed, the further finding would remain that Howard Bros. held themselves out as agents of the plaintiff in the elevator purchase, with the knowledge and consent of the plaintiff, and that the defendant, relying upon such holding out, parted with its elevator. This, the plaintiff insists, is a mixed question of law and fact, upon the evidence brought up in the record; that the question of implied agency presented in this case depends upon certain acts of the plaintiff, and upon certain duties of the defendant with reference to those acts.

As embodying the principles of law which were relevant, the plaintiff claimed, and asked the trial court to rule, as follows: "(21) That a general authority to an agent to make sales does not carry with it any implied au-

thority to make independent purchases on behalf of the principal, not necessarily incidental to such sales, and that the principal is not bound by such purchases. (22) That the person dealing with an agent must act with ordinary prudence and reasonable diligence; and if there is anything unusual in the transaction, likely to put a reasonable man on his guard as to the authority of the agent, he may not shut his eyes to the true state of the case but it is his duty to inquire whether the contract about to be consummated comes within the province of the agency, and will or will not bind the principal. (23) That if the plaintiff never held out Howard to the defendant as its general agent to make purchases on its behalf, but simply recognized him, and allowed him to hold himself out as its sales agent, and Howard had never stated to defendant that he was authorized to make such purchases, and had only made sales to the defendant, and had never made any purchases from defendant as the agent of the plaintiff prior to the purchase of the elevator by him, the latter transaction, both from the fact that it was the first purchase made, and from the amount involved and the credit given, was of sufficiently unusual a character to put the defendant on its guard, and impose upon it the duty of inquiring into Howard's authority to make the purchase." The finding, after reciting all the claims made, 18 in number, says: "But the court overruled said claims and rendered judgment, as on file." The argument is that, since the court did not say that these principles of law were inapplicable to the facts, but overruled them, it held in effect that they were unsound claims; that they are claims of pure law, are overruled, and unless indeed unsound or so wholly abstract that a mistake in regard to them on the part of the court could not have affected its judgment as to whether or not there was a holding out, the court erred. But it seems to us that it ought not to be held necessary for a trial court, hearing and determining issues of fact, to pass upon all the claims of law made by counsel; to sort them out; to decide which are unsound, which inapplicable, and which are both correct and applicable, so far as rules governing the court in reaching its decision, but exhausting themselves, the same as the evidence on which they are based, when that decision is reached. In either case, provided they do not have the effect sought by the party making them, whether because deemed incorrect, inapplicable, or insufficient, they may alike properly be said to be overruled. Upon appeal, what claims were made in the court below will appear; and if proper subjects for review, such claims will be there considered. But in the absence of any contrary indication in the record, the presumption ought to be that the court, in drawing its conclusion of "mixed law and fact," was guided by correct principles in refer-

ence to that portion of the compound which is regarded as fact. We think the conclusion of the court below, upon the question of the liability of the plaintiff for the acts of Howard in reference to the elevator, must stand.

There remains, however, to be considered, upon this branch of the case, certain rulings regarding evidence, which were duly excepted to. The record states: "The defendant offered the testimony of Mr. Frisbie, president of the defendant company, as to his conversation with Mr. Howard while negotiating for the elevator. The witness Frisbie answered the question at some length. The plaintiff thereupon objected, because no connection of Howard as the agent of the plaintiff had been shown. The court overruled the objection because coming too late, viz. after the question had been answered. Thereupon the plaintiff moved to strike out the answer, which motion the court denied. The answer had been relevant to the question propounded. Some evidence had been offered, as it was claimed, tending to prove the agency, and the court had already stated, as it did subsequently, that if the connection was not shown, the evidence was of no importance in the case." No error can be found in this ruling. The evidence was not offered or received as tending to prove agency. If agency was otherwise proved, then, and then only, was it important. Its relevancy was expressly made to depend on such proof. The order in which evidence of such dependent character shall be admitted is most wisely, and by well-established rule, left to the sound discretion of the trial court. *Stirling v. Buckingham*, 46 Conn. 461. Such discretion is not subject to review. *Dubuque v. Coman*, supra.

The record further states: "Defendant offered the testimony of one Frisbie, as follows: Q. You charged on your bill of particulars the C. & C. Electric Motor Company with an electric passenger elevator, \$1,200. What have you to say in regard to that charge? A. The bill was made for an elevator that was sold to the C. & C. Electric Motor Company, on an order given to us by Mr. Howard, their Boston manager, to be shipped to Lowell." This answer was objected to, the words "Boston manager" struck out, and the rest of the answer allowed to stand. This ruling was correct. Doubtless, whether the transaction constituted a sale involved questions of law for the court, and not for the witness, to decide. So, also, whether, if a sale, the elevator was sold to the C. & C. Electric Motor Company. But there was, and could have been, no danger that the court would be affected in its determination of these questions by the conclusions of the witness as expressed in the statement. The grounds on which the court held the plaintiff liable for the acts of Mr. Howard have already been stated. Those on which it held the transaction to be a sale will subsequently appear. No possible harm

came to the plaintiff by permitting defendant's witness to answer a relevant question, in ordinary language, and in a way, by stating the matter as it appeared to him. It would have been no better idle waste of time to have required him to alter his language, so as by locution to avoid the statement of the influences which existed in his mind, whose language would probably equally have been dictated.

The defendant further offered the testimony of said Frisbie, as follows: "I may state whether or not the C. & C. Electric Motor Company had an office in Boston, to which I know. (Objected to.) The Court: 'I know of your personal knowledge of the fact, Mr. Frisbie, you can answer that question. Witness: Yes, sir; they have a Boston office. (To this question objection was made, the objection was overruled, the question admitted.)' Whether the defendant had, in fact, a Boston office, was a pretty largely a question of fact. In which the record, taken as a whole, shows that the witness was quite competent to answer. But the admissibility of the evidence depended solely upon whether it was material to the inquiry to be made at all. If so, the fact being expressly cautioned not to rely on the fact, less that fact was one within his personal knowledge, was correctly heard. The cross-examination then afforded the plaintiff ample means of testing the adequacy of such knowledge upon the subject.

The defendant offered a letter from the plaintiff, dated May 7, 1891, to which the plaintiff objected as not tending to prove authority from the plaintiff to Howard to order the elevator in question. The court overruled the objection, and admitted the letter, which was as follows: "Refer to your visit to our office to-day to make inquiries with regard to prices and details of motors to be used in New Haven, and ask you to write for information to our New England office, No. 32 Oliver St., Boston. The Boston office has charge of these motors in New England, and are the proper persons to whom to make application." If the plaintiff insists, "simply refer to the sale of motors," it at least tends to throw some light upon what the next preceding objection indicates to have been a question,—that is, whether the plaintiff had a Boston office. We agree with the court below in thinking it admissible.

The plaintiff offered the testimony of Howard, of Boston, the surviving partner of the firm of Howard Bros., as follows: "What was said to you by the Frisbie company, or by Mr. Frisbie, in reference to the terms of payment for this elevator? The principal part of that, I think, was over between Mr. Frisbie and myself. Q. Is your brother living? A. My brother is not living; no, sir." The plaintiff then offered to prove the declarations made

the deceased brother to the witness, immediately after the conversation between said Howard, the deceased, and Frisbie, as to the conversation between them in regard to the terms of payment for the elevator. This was objected to by the defendant, and excluded. Such exclusion was proper. The evidence offered was not admissible as part of the *res gestæ*. *Rockwell v. Taylor*, 41 Conn. 59, and cases cited. Indeed, the plaintiff refers to no case, and we doubt if any exists anywhere, in the infinite range of discussion of this subject, which gives color to the claim that the statement made by a person, not a party, as to what conversation took place between him and another person, not then present, at a previous interview, could ever, under any circumstances whatever, be admissible on this ground. But it is urged that, "if not evidence to prove the fact as to what took place at the interview in question, it is relevant as being one of the circumstances and conditions under which Mr. Howard wrote the letters in evidence"; that these letters "must be construed to some extent, at least, in connection with his knowledge in regard to the negotiations already pending." Certainly, the evidence was claimed for no such purpose in the court below. But if it had been, there is nothing in the language of the correspondence itself to indicate the necessity of a construction of any part of it to which this extrinsic information would be germane.

The elevator transaction, as found by the court below, was substantially as follows: In the latter part of August, 1891, Howard Bros., or, as the court has found, the plaintiff, through them as its agents, opened negotiations with the defendant, relative to the placing by the defendant of a passenger elevator in the building of one Shattuck, of Lowell, Mass., who was a customer of said Howard Bros., in connection with a motor of the plaintiff's manufacture. On September 2, 1891, the plaintiff wrote the defendant, inclosing the data for estimating upon the elevator. Shortly after this Mr. Frisbie, president of the defendant company, went to Lowell with Mr. Howard, and as a result of this visit Mr. Shattuck gave Mr. Howard an order for an elevator. Thereupon Howard contracted with the defendant to put in the elevator, in connection with a motor of plaintiff's manufacture, and according to the details submitted, partly in writing, and in part orally, to Mr. Shattuck and Mr. Howard by Mr. Frisbie, and to install the motor and elevator, for the consideration of \$1,200. The defendant accepted the contract above set forth, and gave Howard Bros. a guaranty that the elevator should be a satisfactory working machine for one year. No written specifications or plans for the elevator were made. The elevator was to have been completed and put in in November, 1891, but, owing to the defendant, the elevator was not put in until the latter part of March, 1892.

This delay was caused wholly by the defendant, and was the occasion of causing Howard to doubt whether Shattuck would accept the elevator. Under the circumstances, the plaintiff would have been justified in refusing to accept the elevator and canceling the contract for the same. On March 14, 1892, in response to a telegram from the defendant saying, "To avoid further delay we send machine and man to-night; rebate can be satisfactorily arranged later," Mr. Howard wrote to the defendant as follows: "We have written to Mr. Shattuck, and if he is willing the elevator can probably be put in without further delay. We know of one tenant who has not paid any rent on account of not having the elevator, and his rent amounts to \$100 per month, since December 1, 1891. Mr. Shattuck will probably expect this to be made good. If you put the elevator in, and it works satisfactorily, Mr. Shattuck will probably accept and pay for it, if he is satisfied with the rebate. He will probably want time to test it, however, and we shall not expect to be called on to pay for it until he has accepted and paid for it. With this understanding, if you think best, the elevator can be put in, and we trust will prove a complete success. We shall be very glad when the matter is settled." The defendant, on March 17, 1892, replied to this letter, saying: "We shipped the machine to Lowell last Monday, and our man went on Tuesday, and says that he found Mr. Shattuck quite pleasant. He started right in to unpack car, and we shall expect to have him happy in a few days now. Our Mr. Frisbie will probably go on when they are ready to start up. We do not anticipate any trouble in reaching a satisfactory basis of settlement with Mr. Shattuck. Of course the party you refer to as not having paid his rent, which is \$100 per month, since December 1st, is no doubt entitled to some rebate because he has not had the use of elevator; but it is ridiculous for him to hold back the whole amount, and we believe Mr. Shattuck to be too fair a man not to see it." The defendant, further, in subsequent statements, agreed to make rebate of any damage to the plaintiff from the delay in putting in the elevator. Neither the plaintiff nor Howard ever canceled, or attempted to cancel, the original contract, because of the defendant's failure to complete it in time. The defendant at no time ever accepted the conditions imposed in the letter of March 14, 1892, nor was the original contract at any time changed. The plaintiff never renewed the claim made in said letter of March 14, 1892. The elevator was run for a month or five weeks without complaint by Shattuck to Howard or to the defendant. The latter part of May, Shattuck refused to pay for the elevator, because the freight car did not come up even with the top floor. Howard notified the defendant, and it sent its mechanic, a Mr. Storer, to repair it. Shattuck thought the man did not understand his

business, refused to allow him to make the repairs, and sent him away. The elevator then remained unused, and neither Shattuck nor Howard made any effort to have the same repaired until late in August, when Mr. Frisbie came up and fixed the defect Shattuck had complained of. Several other trifling defects, at times, were noticed. On November 10, 1892, Howard demanded a settlement with Shattuck. He refused to accept until a test had been made. The test was then made, and the clutches failed to hold the elevator. On December 19, 1892, the state inspector ordered the elevator closed, because of the defect in the safety device. This could have been easily remedied. Neither Shattuck nor Howard, after condemnation, requested the defendant to repair the machine. On each occasion, when Frisbie repaired the elevator, he left it in working order. From the time the elevator was put in by the defendant, about March 25, 1892, down to November 1, 1892, the defendant repaired the elevator five or six times, and it did this in order to have Shattuck make a satisfactory settlement with Howard, and in order to carry out its guaranty with Howard. The elevator could have been tested and examined in April and May, and its defects discovered. The first test of the machine made by Shattuck or the plaintiff, purposely to test it, was in November, 1892, nearly nine months after it had been put in, during four to five months of which time it had been in operation. On November 26, 1892, the plaintiff wrote the defendant: "Mr. Shattuck has sent word that he is not satisfied with the elevator, and will not accept it. He has had an inspector look at it, who says that it cannot be passed. Mr. Shattuck says he is going to have some other elevator put in." In January, 1893, the plaintiff took the elevator out and shipped it to the defendant. There was no fraud in the sale of the elevator, and the contract of sale of elevator did not permit it to be returned on any account. The defendant refused to accept the elevator so returned to it. The elevator did not operate during the time it was in Shattuck's building in accordance with the guaranty or warranty of the defendant. The court further found in these words: "The plaintiff was entitled to a fair opportunity to reasonably test this elevator before acceptance, and within such reasonable time the plaintiff did not refuse to accept the elevator. * * * I find that the plaintiff, through its agents, Howard Bros., accepted said elevator, and that Shattuck, the customer of said plaintiff, accepted said elevator. The plaintiff, through its agents, Howard Bros., was negligent in not pressing Shattuck for payment, and compelling him to expressly accept or reject the elevator, and in permitting him to return the same. The plaintiff's only remedy, upon the facts found, was for breach of warranty, and damages for delay in completing contract, and loss consequent thereto. No evidence was offered of

the difference in value between the as warranted and the elevator as it to be, nor of any loss or damage from the delay in completing the contract the time agreed, nor was any claim the trial of the cause for recovery grounds."

The claims of law made by the in the court below, in reference to the action, were these, in substance: First, the letter of March 14, 1892, with answer thereto of March 17, 1892, hereby recited, constituted the contract between parties as to the terms and conditions of payment; second, that the facts for the plaintiff to be responsible; third, that the circumstances of the acts of Shattuck and Howard did not amount to an acceptance of the elevator. We will consider these claims first. The case of *Scruggs & Co. v. Trading Co.*, 37 Conn. 130, was an action on a bank check given by the plaintiff to the defendants, for 47 barrels of potatoes and 4 barrels of onions, sold by the plaintiff to the defendants, and bought by them, after an examination and inspection to their satisfaction. The goods were sold on a warranty of their fitness and quality by the plaintiff, which warranty was broken; but there was no fraud on the part of the plaintiff, and no agreement that the goods might be returned if the warranty proved untrue. The goods were delivered in warm weather, and a day after the purchase were found to be of inferior quality and decaying. The defendants thereupon notified the plaintiff of the condition, and that they should not return them, and offered to return them, which the plaintiff declined. This court held that the defendants could not, on account of a breach of warranty, rescind the contract and return the goods, in the absence of any agreement to that effect; that the defendants could only recover for the value of the goods broken, the rule of damages being the difference in value between the goods as warranted and as they proved to be. This case differs from the case before us in many particulars, and, beginning with the first, the court in this case correctly decided that the case was correctly decided concerning which we entertain no doubt, and that it declares the settled law of this state, let us first inquire wherein the differences lie, and what should be the result. This court, in the opinion, cites the language used in the earlier and well-considered case of *Kellogg v. Denslow*, 14 Conn. 411, in which condition that the vendee may return the property in a certain event is implied in the case of executory contracts, as when the article is ordered from a manufacturer, and the contract that it shall be fit for a certain purpose, and the article sent as such is completely accepted by the party. The court adds, "The judge seems to have made a distinction between executory and

acts in this regard." After further citation of *Merriman v. Hinman*, 32 Conn. 140, which contains a remarkably lucid statement of principles applicable in the case of a sale by sample, the court adds: "Here again the same distinction seems to be made which is expressly stated in the cases cited from the modern English law and the decisions of our sister states, that if the contract of sale is executory there is an implied agreement that the property may be returned if it does not conform to the sample which is the basis of the contract, or the order made upon the manufacturer or seller of the goods. But if the sale is executed, and free from fraud, the property is accepted under the contract, which was made in good faith, no implication exists. * * * The distinction between an executory and executed contract of sale in this respect is manifest. In one case the property is accepted under the contract, and in the other it is not. In the case under consideration the defendant had an ample opportunity to inspect the goods and satisfy themselves whether they conformed to the warranty. They became satisfied on the subject after examining them to their full satisfaction, and they accepted the goods received them under the contract. If the goods are bought by sample or order from a manufacturer, no such opportunity for inspection exists before the property is received, and, when received, the vendee should have a reasonable opportunity for inspection and examination of it, before he should be required to accept it under the contract." To the same effect is the language of Lord Blackburn, in his work on *Contracts* (pages 360, 361), cited by the plaintiff's counsel in their most admirable brief and supplemental brief to which we are under great obligations, as well as to the oral argument in their support, for assistance in the examination of the questions in this case. Lord Blackburn says: "If the contract was for the sale of an earmarked chattel, and was an executory one, so that the property in the goods did not pass at the time of the contract, then the vendee may refuse to accept when tendered if they are not such as the vendor warranted they should be. If he accepts them, then he cannot return them, and has his remedy in an action for damages. It may become a question whether the vendee has accepted the goods." All this is clearly expressed, and the meaning is obvious. In order to constitute a completed sale there must be an acceptance of the goods sold. In case of what is called an executed sale, the very fact that it is executed involves the existence of opportunity for inspection before receipt by the vendee, such opportunity existing, acceptance is required, from receipt, and under the contract. But in case of sale by sample, or of an order to be manufactured, no such opportunity exists at the time of the contract.

When, therefore, the goods are tendered, the vendee may refuse to receive them if they are not such as warranted. And even when received, such receipt will not constitute acceptance, provided it does not afford a present reasonable opportunity for examination and inspection; for until such opportunity the vendee is not to be held to have accepted. But after acceptance there is no longer any difference between an executed and executory sale, for the simple reason that there is no longer any executory sale. It has then become executed. The case before us was originally one of executory sale. This the trial court fully recognized, for it found that "the plaintiff was entitled to a fair opportunity to reasonably test this elevator before acceptance." The further statement in the finding, that "the contract of sale of the elevator did not permit it to be returned on any account," was manifestly intended to be construed in connection with such preceding finding, and not as contradictory thereof; and therefore as meaning that it embraced no express provision for such return. The ground of decision was that "within such reasonable time the plaintiff did not refuse to accept the elevator," and that, in fact, both the plaintiff and Shattuck did accept it. The consideration of the case is therefore advanced, in the language above quoted from Blackburn, to the "question whether the vendee has accepted the goods." The court below held it had. Was such ruling erroneous?

Before proceeding to consider this question, however, it may be well to say that it seems of little importance, so far as the decision of the present case is concerned, what view may be adopted of the character of what has been termed an "executory sale," during the time that it remains in the incomplete state which causes it to be so denominated. If, as the plaintiff asserts, it is not a sale at all, but a consignment on approval, the sale only to take effect on approval and acceptance of the article, then, when so approved and accepted, it became a sale. Our present inquiry is not so much what it was, as whether the court below was correct in its conclusion as to what it became. For the same reason it is, perhaps, not necessary largely to inquire what force there is in the point, made by the plaintiff, that "in an executory contract for the sale of goods to be manufactured for the vendee, a warranty that they shall, when delivered, be satisfactory to the vendee, makes the buyer the sole judge, and the sale absolutely conditional upon the latter's satisfaction. The only limitation is that his decision that it is not satisfactory must be made in good faith, and not arbitrarily or from caprice. The article to be delivered must be to his fair satisfaction. If it is not, he has the right to reject it and rescind the sale." In support of this proposition *Zaleski v. Clark*, 44 Conn. 218, is cited; also *au-*

merous cases in other jurisdictions. But this right, wherever it exists, is manifestly one to be exercised before acceptance, not after. Whether the case before us is one for the proper application of this principle need not be considered. If it is, the plaintiff has no occasion to avail itself of it, provided the elevator was not accepted, and cannot invoke it if the elevator was accepted. Was it accepted? The court found paragraph 64 of the plaintiff's requests to incorporate facts in the finding ("Shattuck never expressly accepted said elevator, nor did the Howard Bros., nor did the plaintiff") to be "Proven partially," and paragraph 65 of said requests ("The acceptance, if there was such acceptance, must be inferred from the acts and transactions between the parties") to be "Proven." There appears to have been no evidence of any express acceptance. On the contrary, paragraph 95 of plaintiff's requests ("Said Shattuck always refused to pay for said elevator, on the ground that it was not satisfactory to him") was marked "Proven." Nevertheless, there is nothing necessarily inconsistent with this in the finding of the court that both the plaintiff and Shattuck did accept it. It was in the power of the court to find acceptance as an inference from acts and transactions proven (*Dubuque v. Coman*, 64 Conn. 479, 30 Atl. 777), and such inference might be drawn and such acceptance exist, notwithstanding the party held to accept, himself refused to recognize that he had done so (*Brown v. Foster*, 108 N. Y. 390, 15 N. E. 608). Not only do actions sometimes speak more loudly than words; they also speak to a different purpose and effect. It is true, as the plaintiff asserts, that there is no claim here for damages for refusal to accept; that the question at issue is not whether the plaintiff rightfully or wrongfully refused, or whether under the circumstances a refusal or a failure to accept would have been right or wrong. The court below thought that it would have been justifiable, but that it did not exist. The grounds upon which the court reached this conclusion appear in the finding: "The elevator was run for a month or five weeks, without complaint by Shattuck to Howard or to the defendant. The elevator could have been tested and examined in April and May, and its defects discovered. The first test of the machine, made by Shattuck or the plaintiff, purposely to test the machine, was in November, 1892, nearly nine months after it had been put in, and during four to five months of which time it had been in operation. The plaintiff, through its agents, Howard Bros., was negligent in not pressing Shattuck for payment, and compelling him to expressly accept or reject the elevator, and in permitting him to return the same." Now, while some of the authorities lay down the proposition that mere retention of property for a period of time does not constitute—that is, is not itself—acceptance,

they all agree that it is evidence, and is not satisfactorily explained, so as to excuse it, may warrant a conclusion that the property has been accepted; or, sometimes said, may be a waiver of the right to rescind and return, and equivalent to acceptance. In this case there was nothing more than mere retention. The retention coupled with use for a considerable time without complaint. There was further retention, coupled with use and storage, all of which time, in the aggregate, to about nine months. And so the question comes to this: plaintiff asserts: "Was plaintiff's retention of the elevator in his building for nine months before finally rejecting it a reasonable delay, under the circumstances of this particular case?" We mean to say that this was the question before the trial court, and the trial had been to the jury, that the question would have been submitted to them in *logg v. Denslow*, 14 Conn. 422; *Campbell v. Pemberton*, 53 Conn. 221, 2 Atl. 311; *Atl. 682*. As it comes before us, it is as broad as that, for we can only review the action of the superior court in passing on this issue of fact, or jury question, to the extent of determining whether it reaches a conclusion which the law does not

Such being the question before us, we examine the claims of the plaintiff in relation to it. They are: First, "In examining the elevator, it was found that it was not a reasonable time for rejecting goods, and the conduct of the seller may be taken into consideration,—as where he attempts to sell them in a proper condition, or as where, by a misrepresentation, he has induced the buyer to prolong the trial." This is supported by the citation of authorities, perhaps the best warrant for it is the principle of conformity to reason and justice. The court hesitatingly adopt it as correct. But it is nothing to lead us to think the court below did not do so also, and give to the consideration full weight. The finding states that in the latter part of May (after the elevator, as is found, had been running four or five weeks without complaint, and could have been tested and examined), Shattuck refused to pay for it, on a specific ground, that the freight car did not come to the top floor. Other trifling defects, at times, were noted, and the defendant repaired the elevator five or six times, on occasion leaving it in working order, and using this in order to have Shattuck make a satisfactory settlement with Howard Bros. to carry out its guaranty with him. No payment was demanded by Howard Bros. until November, 1892, and then, for the first time, the test which could have been made in April and May was required. Under such circumstances we cannot say that it is a matter of law, that there was such a delay, by plaintiff a

that the lapse of time fails to furnish evidence of acceptance by them of the elevator in question. It may be added that there is nothing in the record to indicate that any explanation or excuse was offered for neglect to test and examine the elevator before or May, by which its defects would have been discovered, or for its use without warranty for four or five weeks, during the months. That, alone, would have sustained the conclusion of the court below. *Lowell v. Reynolds*, 39 Conn. 31; *Kellogg v. Manslow*, supra. But again, it appears "the defendant gave Howard Bros. a warranty that the elevator should be a satisfactory working machine for one year." The plaintiff insists, was a condition of sale, and gave the plaintiff, by its express warranty, a year in which to reject; that the sale was in fact made within the year, on the ground that it did not comply with the warranty, as the court found to be the case.

This claim was not indicated in the pleadings, not made in the court below, nor placed in the reasons of appeal, and manifestly, from the entire record, is a view which did not enter into the minds of the parties in the day and time of the transaction. But, besides this, it is evident that it is not the nature of an express warranty to fix the length of time an article, either in existence at the time of the contract, or after to be made and delivered, shall continue to keep in order, or work satisfactorily or well, to be a condition precedent to passing of title, or to the acceptance of the article. Such a warranty is not a condition at all. If it were, it would be a substantive, not a precedent, one. The time stipulated in the warranty would not begin to run until the contract was complete,—until the executory sale became executed by delivery, receipt, and acceptance. Cases similar to those cited by the plaintiff, where there is an express provision in the contract that the goods are not to be paid for until a certain event happens or condition is performed, or where the period named is stipulated to be a time of trial, belong to a different class, and are subject to other rules.

We have thus far been considering the questions which arise from the original contract between the parties. But it is further noted that such contract was modified by the defendant's letter of March 14, 1892, and the plaintiff's letter of March 17, 1892, and by the defendant's going ahead, after receipt of said letter of March 14, 1892, to install the elevator. The court below held that the original contract was never canceled or changed, and that the defendant at no time ever accepted the conditions imposed in the letter of March 14, 1892. This is said to be error. At the time the letter of March 14th was written, the circumstances of delay on the part of the defendant, which were the occasion of causing the plaintiff to doubt whether Shattuck would install the elevator, would have justified the

plaintiff itself in refusing to accept it, and in canceling the contract for the same. Under these circumstances, replying to a telegram from the defendant, that the elevator had been sent to Lowell, Howard said: "We have written to Mr. Shattuck, and if he is willing the elevator can probably be put in without further delay. We know of one tenant who has not paid any rent on account of not having the elevator, and his rent amounts to \$100 per month, since December 1, 1891. Mr. Shattuck will probably expect this to be made good. If you put the elevator in, and it works satisfactorily, Mr. Shattuck will probably accept and pay for it, if he is satisfied with the rebate. He will probably want time to test it, however, and we shall not expect to be called upon to pay for it until he has accepted and paid for it. With this understanding, if you think best, the elevator can be put in, and we trust will prove a complete success." Now let us see in what way this proposition, if accepted, can be said to have altered the preceding contract. As Mr. Shattuck was willing that the elevator should be put in, and the defendant agreed to make rebate, the portion of the letter referring to these matters may be passed over. Passing, next, the statement of what Mr. Shattuck would probably do, including that he would probably want time to test it, all of which were his rights under the contract, which rights, or the contract as to him, it is not claimed were enlarged or altered by the letter, it adds: "We shall not expect to be called on to pay for it until he has accepted and paid for it. With this understanding, if you think best, the elevator can be put in." Now, as to the defendant's letter of March 17th, there is certainly nothing in it expressing any assent to this condition. If any is to be held to have been given, it is certainly on the ground which the plaintiff asserts,—failure to dissent, and proceeding to install the elevator. But, without anticipating the question of estoppel, to which we shall presently come, we think it would be a dangerous doctrine to hold that the effect of proceeding to install the elevator, after the receipt of the letter, is to be deemed an acceptance of any conditions which it sought to impose. The effect would be to give to parties situated as this plaintiff was an undue advantage. For aught that appears, the defendant may in good faith have considered that it had the right to install the elevator under the contract, although the court below has held the fact to be otherwise. If the plaintiff had refused to permit the defendant to do so, and rescinded the contract, the defendant could have tested the question in a proper suit for the breach. But if the plaintiff, not refusing, can nevertheless, without the consent of the defendant, impose a condition materially altering the contract, under which contract, so altered, and not the original one, if the defendant proceeds, it must be held to have

acted, then it would seem that it could neither sue for damages by reason of the rescission of the original contract, since the plaintiff has waived the asserted right to make such rescission, nor for compensation for its performance, since the imposed condition of such waiver, to which the defendant, by proceeding, is held to have assented, has altered such contract, and substituted, as it is asserted, a vitally different one in its place.

Neither do we think the court erred in refusing to rule that the defendant, by proceeding to install the elevator while expressing no dissent from the conditions contained in the letter of March 14, 1892, is estopped from denying that such letter constituted the contract between the parties, and that, Shattuck never having accepted or paid for the elevator, the plaintiff was not responsible. We will adopt, as applicable to this case, the definition of equitable estoppel arising from acts purposely done to affect the person who invoked the estoppel, which the plaintiff quotes from Sir James Stephen (Dig. Ev. art. 102): "When one person, by anything which he does or says, or abstains from doing or saying, intentionally causes or permits another person to believe a thing to be true, and to act upon such belief otherwise than, but for that belief, he would have acted, neither the person first mentioned nor his representative in interest is allowed, in any suit or proceeding between himself and such person or his representative in interest, to deny the truth of that thing." But we cannot say that the defendant, by anything which it did or said, or abstained from doing or saying, had any intention or thought of inducing the plaintiff to believe it to be true that the defendant assented to the conditions, or to act on that belief otherwise than but for that belief the plaintiff would have acted. On the contrary, the language of the letter of March 17, 1892, replying to that of March 14th,—beginning with a repetition of the information contained in the previous telegram that the machine was already shipped, adding that Mr. Shattuck had been "willing," that is, "quite pleasant," and had "started right in to unpack car, and we shall expect to have him happy in a few days now," and assenting to such rebate as might be required on account of delay,—was presumably intended as a full answer and compliance with the plaintiff's proposition, as it was understood by the defendant. If not understood by the plaintiff to be such, there would, we think, be equally good ground to claim that the plaintiff should have forthwith notified the defendant that it was not satisfactory, and that no modified assent to its imposed conditions would be acceptable; but unless such conditions were fully agreed to, the work then in progress must stop, and the contract be regarded as rescinded and at an end. There would be quite as much reason for holding the plaintiff estopped for failure to dissent to the defendant's

letter, as the defendant for failing to do that of the plaintiff. More especially this true, provided the construction to be placed on the plaintiff's proposed conditions, as claimed, not merely that the plaintiff was not to be responsible until Shattuck accepted, but, since it is found that Shattuck did accept, that it is not liable until Shattuck pays, although, as found by the court, the plaintiff "was negligent in not pressing Shattuck for payment, and compelling him to expressly accept or reject the elevator in permitting him to return the same." We do not think the court committed any error in refusing to apply the principle of equitable estoppel, for the purpose of enabling the plaintiff thereby to enjoy the benefit of the original contract, protecting itself from the results of its own laches and negligence, and authorizing it to take advantage of its fault.

Another claim in this connection, made by the court below and presented by the plaintiff on appeal, ought, perhaps, although not necessary, to be referred to in the briefs or in argument. It was noticed. The plaintiff claimed "that in the contract between Howard Bros. and the defendant, understood the contract in the letter of March 14th, the defendant understood that there was no sale of the elevator to the C. & C. Motor Company, there was no meeting of the minds of the parties, and therefore no contract." In the absence of explanation, we are not sure whether the intended meaning is, if Howard Bros. understood the contract to be what the letter stated, that they understood that a modification of the contract by the letter was assented to, then there was no meeting of minds and no contract. If the former is intended, then the court found what the contract was, and there is nothing to indicate that the plaintiff understood it differently. Indeed, evidence that the effect would not have been admitted in *Hotchkiss v. Higgins*, 52 Conn. 205, 211, decides, if there had, for the reason stated, that no express contract, the one which the plaintiff would have implied from the delivery of the elevator to the plaintiff's agents, and the defendant's assent, as found by the court, would have been its equivalent in effect. But if the plaintiff means that there was no modified contract or contract to modify the former one, it seems to us, is precisely what the court found; for a different reason, it is true, of which finding the plaintiff complains. We will only add that we have carefully examined all of the numerous authorities cited by the plaintiff's counsel, and discovered nothing in them in conflict with the conclusion which we have reached upon the questions in this case, except so far as the trines in certain jurisdictions cited are in direct conflict with well-established principles in our own. *Brown v. Foster*, 108 N. H. 15 N. E. 608, is in some respects very different from the present case. But to the extent it is in point, it appears to us to be a

authority against the plaintiff, instead of in its favor. There is no error in the judgment complained of. The other judges concurred.

Appeal of STAUB.

(Supreme Court of Errors of Connecticut.

April 5, 1895.)

ANTENUPTIAL AGREEMENT—RELEASE OF STATUTORY ALLOWANCE.

1. An agreement by a woman, in contemplation of marriage, not to claim any statutory allowance during the settlement of the husband's estate in case he dies first, is not against public policy.

2. An antenuptial agreement by which the man covenants to pay the woman a certain sum in lieu of dower and all other rights and interest and claims" which she would but for the agreement "have had in the estate," and she covenants to receive the money "in lieu and as full payment for her dower right and of all other claims and interest she otherwise would have had in his estate," and agrees "that she will not claim or receive any other part or share of the estate of" said man "after his decease," covers a statutory allowance during the settlement of his estate.

Appeal from superior court, Litchfield county; Robinson, Judge.

Sarah Peck claimed an allowance as widow of John Peck, deceased, during the settlement of his estate. From a decree of the probate court authorizing the allowance, Nicholas Staub appealed to the superior court, which reversed the decree of the probate court, and Sarah Peck now appeals affirmed.

Lyman D. Brewster, for appellant. James Huntington and Frank W. Marsh, for appellees Staub and others.

TORRANCE, J. The principal questions in this case arise upon the following written agreement: "Marriage being contemplated between John Peck, of New Milford, in Litchfield county and state of Connecticut, and Sarah Cranston, of Brooklyn, in the state of New York, and after marriage said parties intend to reside in the state of Connecticut, and said Peck having passed the meridian of 30 days (the parties make the laws of the state of Connecticut to govern this agreement), and by the laws of said state the parties can make a binding contract regarding their property, and what portion each shall have in the estate of the other on his or her decease, which shall be in bar and room of a portion he or she would have in such estate if such agreement had not been made: Now, if said marriage occurs, this covenant and agreement, made by and between the parties, is as follows: Each of said parties covenant and agree to perform their obligations and duties with and towards the other, in the relation of husband and wife demands during the continuance of said marriage relation. Said John Peck covenants and agrees, if said Sarah Cranston survives him, to pay her the sum of two thousand dol-

lars six months after his decease, with interest after it is payable, said amount to be paid by his administrator or executor, from his estate, which sum is to be in room and in lieu of dower and all other rights and interest and claims said Sarah would have had in the estate of said John Peck if this agreement had not been made. Said Peck also covenants and agrees, if he survives the said Sarah, not to claim or receive any part or interest in her estate, but he will give up all interest he would otherwise have therein, and that he will release and convey all such claim or interest to her devisees or heirs at law, on their request. And the said Sarah Cranston, if said marriage takes place, covenants and agrees, if she survives the said Peck, to receive said sum of two thousand dollars as herein agreed, with interest after payable, in lieu and as full payment for her dower right and of all other claim and interest she otherwise would have had in his estate, and that she will not claim or receive any other part or share of the estate of said John Peck after his decease, but she will release and convey all other claim, right, or interest she may or might have therein if this agreement had not been made, on the request of the devisees or heirs at law of said John Peck. But this agreement is not to, and shall not, prevent said John Peck from giving her during his lifetime or by his last will and testament such property and sums as he may choose, nor shall it prevent her from claiming and receiving all such property and sums so given besides said sum of two thousand dollars. In witness whereof, the parties have hereunto, and to a duplicate hereof, set their hands, the day of November 30th, 1887."

After the execution of this agreement, the parties thereto intermarried, and resided in New Milford, in this state, where John Peck died testate, leaving the aforesaid Sarah, his widow, surviving him. Pending the settlement of his estate in the court of probate, the widow applied for an allowance, under the provisions of section 604 of the General Statutes of this state. His executors and residuary legatee opposed the allowance, on the ground that the widow, by virtue of the provisions of said written agreement, was barred and estopped from claiming or receiving the same. The court of probate held otherwise, and decreed to her an allowance. The case then came by appeal to the superior court, where several reasons of appeal were filed, but all of them were subsequently withdrawn, save the first, which reads as follows: "That on November 30, 1887, and previous to her marriage with said John Peck, deceased, the appellee made and executed a written contract with said deceased (a copy of which is hereto annexed, marked 'Exhibit A'), by virtue of which contract so entered into by said parties said widow is barred and estopped from claiming or receiving any allowance for her support from

said estate by said court, or otherwise than as provided in said marriage agreement." To this reason of appeal the following demurrer was filed: "The appellee, Sarah Peck, widow of said John Peck, demurs to the first reason of appeal, because there is nothing in said antenuptial agreement, marked 'Exhibit A,' which bars, estops, or prevents the court of probate which granted said allowance to her from so doing, or which bars, estops, or prevents her from receiving the same as a matter of law or equity." The superior court overruled said demurrer, and ordered the widow to answer over, which she neglected and refused to do. Thereupon the court reversed the decree of the court of probate from which said appeal had been taken; and from that judgment the widow took the present appeal to this court.

The principal question in the case relates to the effect of the antenuptial contract upon the right of the widow to claim or receive an allowance. The power of the court of probate, and of the superior court sitting as a court of probate on the appeal, to entertain and decide this question, seems to have been taken for granted by all concerned, for no question as to the existence of such power in either court is made upon the record; and we entertain no doubt that such a power in cases like the present exists in both courts. *Hall v. Pierson*, 63 Conn. 332, 28 Atl. 544.

The questions discussed in the argument before this court were these two, namely: Whether the widow could by any agreement of this kind, however specific in its terms, bar and estop herself from claiming an allowance; and, if so, whether the agreement here in question includes such right within its scope. Before discussing these questions, it may be well to note, in passing, that, by the terms of the antenuptial agreement, it is not the promise of the money, but the money itself, that the widow agrees to receive in lieu of whatever rights she gives up and relinquishes. It is not the covenant, but the cash paid in pursuance of it, that she is to be satisfied with. And it does not appear on the record whether the money has or has not been paid to her, nor whether the estate is or is not able and willing to pay, nor even whether the time agreed upon for payment had or had not elapsed, when the reason of appeal demurred to was filed. But all parties concerned in the case have throughout treated it as one where, assuming the money to have been paid or secured to the widow, the question is whether she is then estopped from claiming the allowance; that is, can she have both the money under the agreement, and the allowance? This appears to have been the real question tried and decided in both of the lower courts, and certainly it was the real question argued before this court. It seemed to be conceded on the argument that the widow was barred as to all her other rights as widow, save as to the

allowance, and this concession would have been made unless the money had been paid to her, or was certain to be as agreed. In view of all this, we assume, for the purposes of the discussion, the money has been paid, or that it will be paid, and will consider the questions presented in the light of that action.

The first question is whether the widow could, by any agreement whatever, bar and estop herself from claiming an allowance under our statute. On her behalf the claim is made that any agreement of this kind which she might make is void on grounds of public policy; that it is the duty of the law to preserve as far as possible the integrity and continuity of the family, to protect it even against the thoughtless or imprudent acts of men and women; and that contracting contrary to such policy are void. The widow cannot assent to this broad claim. On the other hand, the court, in its opinion, says: "In principle, there appears to be no good reason why such an agreement, if fairly made, entered into, by a woman of full age, and for adequate consideration received, should be binding upon her. Such an agreement, when fully carried out, has been held to be binding upon her in reference to her right to dower. *Andrews v. Andrews*, 8 Conn. 332; *Selleck v. Selleck*, Id. 85, 86, in note 1. In the case at bar it is conceded that she thus binds herself as to all her other rights in her deceased husband's estate, save as to one in question; but, if she can thus bind herself as to her principal rights, it is not difficult to see why she may not also do so as to this minor and incidental right to an allowance. The following authorities support the conclusion that a fair antenuptial agreement to relinquish, or not to exercise, the right to an allowance, whether fixed or discretionary in amount, is neither void nor voidable, but, when carried out, will be enforceable against the widow in some proper form. *Paine v. Hollister*, 139 Mass. 144, 26 N. E. 541; *Weaver v. Weaver*, 109 Ill. 225, 42 N. E. 541; *Peck*, 12 R. I. 485; *Tiernan v. Blount*, 10 Pa. St. 248; *In re Heald*, 22 N. H. 265. The agreement here in question is a fair one, made by persons of full age, and upon adequate consideration, does not appear to be questioned by anybody; and, on the assumption that its provisions have been or will be fully carried out on the part of the estate, we see no good reason why they should not be held to be binding upon the widow and the widow.

The next question, then, is whether the contract includes the right to the allowance as well as all her other rights as widow, and to determine that we must look to the terms. The contract does not appear to be the work of a skillful and careful lawyer. Some of its provisions appear to be ambiguous. The preamble is not as clear as it might be, and doubts may be raised as to the meaning of some of the terms.

Nevertheless, looking at the agreement as a whole, the main thing intended to be accomplished by the parties appears with tolerable clearness, and that, we think, was that the state of the one dying first should remain to his or her heirs, devisees, or legatees, freed and discharged from every burden to the survivor, save and except those imposed by the agreement. That the agreement covers, and was intended to cover, every other right, interest, claim, or demand of the survivor, save his matter of the allowance, is conceded; but it is claimed that they did not intend to include that, because they have, it is said, carefully chosen words which exclude it. His claim is based upon these words in the covenants of the respective parties, namely: John Peck says the \$2,000 shall be in lieu of dower and all other rights and interests and claims said Sarah would have had in the estate of said John Peck if this agreement had not been made." Sarah agrees to receive the money "in lieu and as full payment for her own right and of all other claim and interest she otherwise would have had in his state." The argument is that the widow lives up only rights, claims, and interests in his estate; that the right to an allowance is not a right, interest, or claim in his estate, and consequently is not included within the agreement. Now, it may be true, speaking technically, and with the strictest accuracy, that the right to an allowance is not a right, or a claim, not an interest in the estate, nor a property right at all; but it certainly is a right which the law confers upon the widow in proper cases, and which it recognizes and enforces in her behalf on her application; and it is one which may diminish the estate, and, as we have seen, one which the widow may agree not to exercise, which agreement, under certain conditions, will be enforced against her. The discretion vested in the courts of probate, both as to the granting of an allowance and as to its amount, is a legal discretion, and not an arbitrary one. *Leavenworth v. Marshall*, 19 Conn. 408, 418. The distinction, then, between this right to an allowance out of the estate, which may diminish it by some hundreds of dollars, and a right in the estate, which diminishes it by a like amount, would be, to the mind of everybody but a trained lawyer, a distinction without a difference; and it may well be doubted whether the parties to this agreement or the persons who drew it up supposed there was any such distinction. If, then, the case turned wholly upon the meaning of these noted words, it seems a somewhat strained construction to say they do not include a right the exercise of which may impose quite a burden upon the estate,—a burden, too, the extent of which must be largely a matter of conjecture. But the case does not turn upon these words, for the widow agrees specifically "that she will not claim or receive any other part or share of the estate of said John Peck after his decease"; and these words,

we think, cover the right in question. The allowance granted to the widow by the court of probate in this case certainly comes out of the estate as a "part" or "share" of it, within the ordinary meaning of these words; and it comes to her upon her own suit and application. Looking at the agreement as a whole, we think she covenanted not to ask for, nor to receive, an allowance, and that, under the circumstances, this covenant is binding upon her. There is no error. The other judges concurred.

FORMAN v. FORD et al.

(Court of Chancery of Delaware. Dec. 15, 1886.)

Bill by Ann B. Forman against Peter J. Ford, Thomas Ford, and Thomas F. Ryan for an injunction. Decree for plaintiff.

Victor Dupont, Edward G. Bradford, and Willard Saulsbury, Jr., for complainant. William C. Spruance and George Gray, for defendants.

SAULSBURY, Ch. The complainant is the owner of a farm or tract of land situate in Christiana hundred, containing about 110 acres, through which a natural stream of water, known as "Silver Brook," flowed, until it emptied into another stream in said hundred, known and commonly called "Mill Creek," which creek finally discharges its waters into the Christiana river, in said county. The present and prior owners and tenants of said farm have from time immemorial used and enjoyed the waters of said stream called "Silver Brook" in their natural, pure, and unadulterated condition, for watering live stock, and for general farming, agricultural, and domestic purposes, and for these purposes the waters of said stream seem to have been sufficient. The bill alleges that the complainant is dependent on said stream for water for the purposes aforesaid, and that no other convenient or practicable means existed therefor on said farm. It avers that the waters of said stream, run, or brook, from its entry on said farm to its junction with Mill creek, are and ever have been of sufficient quantity and purity for the use of live stock, farming, agricultural, and domestic purposes on said farm of the complainant, and on the several farms or tracts of land through or along which said stream, run, or brook flows, until its junction with said Mill creek; that it is of great importance to the complainant and others using the waters of said stream for like purposes that the waters thereof should remain in a pure and unpolluted condition; that said stream or run in its ancient course flows for a short distance through and over certain lands recently included, by legislative enactment, within the limits of the city of Wilmington, and forming the extreme western or southwestern portion of the territory of said city. The defendants, the bill states, are engaged in erecting a building to be used and peculiarly adapted for a morocco factory on the banks of, or in immediate proximity to, the said stream or run, and have built into the foundation walls of said building six iron pipes, of considerable dimensions, which project over the ancient bed of said stream, and through which impure and foul water, used in connection with the manufacture of morocco, and containing decayed animal matter and certain mineral poisons, and the general refuse of a morocco factory, consisting of divers other foul, noxious, offensive, and polluting substances, will be discharged in large quantities from day to day into the said

stream or run, if the said building shall be completed and used for the purpose for which it is intended and being constructed, namely, the manufacturing of morocco. The bill charges that the discharge from the proposed morocco factory of such impure water and refuse and poisonous substances will pollute the waters of said stream, and render them unfit for their accustomed uses aforesaid, and render the tract of land and farm less valuable, and will be of irreparable injury to the complainant. It appears that the complainant, together with other owners of land on said stream, caused written notice to be served on the defendants, warning them to abstain from the pollution of the waters of said stream, and that they should insist, by all legal and equitable means, upon their rights to the use of the same in its accustomed pure and unpolluted condition. Notwithstanding said notice, the defendants continued the erection of their said factory and building.

Upon the above statement of facts, the chancellor granted a preliminary injunction restraining the defendants, until further order of the court, from using or permitting to be used the said building, when erected, as a morocco factory, from which would be discharged into said stream or run any impure or foul water used in connection with the manufacture of morocco, or containing decayed animal matter, blood, lime, tannic acid, mineral poison, excrement of animals, or any noxious or offensive refuse mentioned in said bill. The answer filed by the defendants in the cause admits the title of the complainant to the farm or tract of land, and the location thereof, and the receipt of said notice, but alleges that the said morocco factory is more than 3,000 feet above said farm of complainant, and states that the water of Silver brook, in flowing that distance, will become so purified as to render innoxious any matter which might be discharged from said factory in said stream; and they deny that any matter or thing will be discharged from the said factory which will be a material, substantial, and irreparable injury to the said complainant in her use of the water of said silver brook for the purposes in said bill mentioned. They deny that they will discharge, or permit to be discharged, from said morocco factory, directly or indirectly, into the waters of said Silver brook, any noxious or offensive matter or refuse, or any impure or foul water which will so pollute, discolor, or injure the waters of said brook as to render them unfit for watering live stock and for general farming, agricultural, and domestic purposes, and say that most of the things described in said bill as noxious and offensive refuse will be saved and utilized by the defendants, and that the others of them, even if discharged into the waters of said Silver brook, would not so pollute, injure, or discolor the said waters as to render them unfit for the watering of live stock and the other purposes in the said bill mentioned. They also say, in their answer, that they have made and will make such arrangements and devices as will, in their opinion, and in the opinion of experienced and competent persons whom they have consulted, effectually prevent the discharge from said factory of any matter or thing which will so pollute, foul, or discolor the waters of said Silver brook as to render them unfit for the use of the complainant for the purposes in said bill mentioned. They also state that the rights and duties of the complainant and defendants in respect to the waters of said Silver brook have never been ascertained or established by an action at law; and that the apprehended injuries complained of in said bill are such as are susceptible of adequate pecuniary compensation in damages; and that they are ready and willing and abundantly able to pay any damages which may at any time hereafter be sustained by the complainant by reason of any unlawful act or neglect of them, the said defendants, in respect to the said waters. The defendants also say

that the erection and operation of the factory are lawful and useful, and are not nuisances; and that the injuries complained of in said bill are certain, indefinite, and contingent. It cannot now be definitely or conclusively ascertained that the operation thereof for the morocco will cause any loss or injury to the complainant; and they deny that the complainant is entitled to any equitable relief in the premises.

Soon after the filing of said answer, was made for the dissolution of the injunction; and, upon the question of the affidavits should be read on or not to solve said injunction, the chancellor, under rule 64 of equity rules, being not of so pressing a nature, was not time for the examination of an examiner should be appointed to take the testimony of witnesses on both sides against the motion to dissolve, but the defendants' counsel insisted that the dissolution of the injunction was of so great importance as to preclude this, ex parte affidavits; complainant's counsel offered affidavits already taken in support of the motion, and wards one or more attachments for the violation of said preliminary injunction were granted, which, by agreement on both sides, the chancellor continued the injunction discharged. Finally, the preliminary injunction granted in this cause was, upon the motion of defendants' counsel, and made perpetual.

JESSUP & MOORE PAPER CO. vs. Peter J. Ford et al.

(Court of Chancery of Delaware.)

WATERS AND WATER COURSES—UPPER BRANCH—POLLUTION—PRELIMINARY INJUNCTION.

In a suit by a lower agricultural mill owner to enjoin the pollution of the waters of said stream by refuse from defendant's mill, the court granted a preliminary injunction should issue where the plaintiff does not deny that the act charged is such as to seriously injure plaintiff's mill.

Bill by the Jessup & Moore Paper Co. against Peter J. Ford and other defendants from polluting a stream by erecting a mill for the manufacturing of leather on the stream above plaintiff's mill, and thereby causing irreparable injury to plaintiff. Preliminary injunction granted.

Victor Dupont, Edward G. Ford, Willard Saulsbury, Jr., for the defendants, vs. William Spruance and George Ford, plaintiffs.

SAULSBURY, Ch. It appears from the affidavits filed in the cause that the defendants have erected, and since the filing of the bill have begun to operate, an extensive manufacturing establishment on the city of Wilmington, on the bank of a small stream called Silver brook, from that point flows a distance of 6,100 feet until it empties into Mill creek, from the point where it empties into it, flows a distance of 10,400 feet, until it empties into the Christina river, at said mills of the plaintiff. The complainant contends

tion of the waters of Mill creek, and the dyestuffs and impure substances used in the refuse matter discharged from said factory, will render the water of Mill creek totally unfit for use in the complainant's pulp works; that the lime and water would kill the "bleach," a part of the process in manufacturing wood pulp, by utilizing the chlorine; that loose hair, falling down said stream, would mingle with the paper pulp and paper, and render it unsalable; and that the necessary result of the operation of the morocco factory by the defendants, and the discharge into said stream of the said refuse matter, will be the damage of the said pulp works, thus depriving the other mills of the complainant of supply, from the said pulp works, of material necessary for the manufacture of paper, causing it loss of trade and great irreparable damage.

I have given careful attention to the contents of the affidavits filed in support both of the bill and answer, and while giving due weight to all the witnesses, both of the complainant and the defendants, the best judgment which I am able to form in respect to the statements is that the discharge of the refuse matter from said morocco factory in said Silver brook, the waters of which necessarily flow into and mingle with the waters of Mill creek, would be perilous to the business of the complainant, as set out and described in its bill of complaint. If the defendants have commenced operation of their factory, they seem to have run refuse and polluted waters into ponds, located off near their factory, and adjoining Silver brook. These ponds have several broken dams, and the contents of the same have been discharged into Silver brook, the water of which has been blackened and discolored all the way from said ponds to Mill creek, and also the waters of Mill creek have been blackened and polluted to considerable distance below said factory. The small fish in said Silver brook have been killed by the pollution of the waters thereof. The water has been made unusable for the use of cattle for days after such discharge. The bottom of the stream has been blackened by sediment, and black scum in some places has covered the water. This operation of the water extended a considerable way into Mill creek. The superintendent and assistant superintendent of the pulp works swear that the waters at Mill creek have not been so pure as usual, and larger quantities of bleaching matter have had to be used to counteract the effect of the pollution caused by a few discharges of this refuse. They say that they cannot account for this change in the water in any way. Without attempting a reference to the statements contained in the affidavits in support of the bill and answer, great many affidavits have been put in which are sufficient to say that, in my judg-

ment, it is reasonable to believe that the continued discharges of the refuse matter from said factory into Silver brook, and thence into Mill creek, will work serious injury and damage to the business of the complainant, and all others who are compelled to rely on the waters of Silver brook and Mill creek for a proper supply of pure and unpolluted waters. The damage to the owners and proprietors of land on Silver brook sufficiently appears by the affidavits read on the hearing of this rule; and in addition to the testimony of numbers as to the consequences of the pollution of the waters of Mill creek to the business operations of the complainant at its mills is the positive testimony of the superintendent and assistant superintendent before referred to.

This case appears to be one which calls for the interposition of this court by way of preliminary injunction. Where a complainant shows a reasonable and well-founded apprehension of immediate, threatened, and irreparable injury and loss, it is a duty of courts of equity, in cases within their jurisdiction, to restrain the commission of such injury and infliction of such loss. I shall not attempt to discuss all the questions raised by the respective parties to this cause in the arguments of their respective solicitors, nor shall I notice in detail in this opinion the many authorities cited in their arguments, which arguments were learned and elaborate. I have, however, carefully considered these authorities and weighed the arguments of the solicitors. I shall content myself, however, with stating a few propositions well established by authority, and which admit of no reasonable doubt. The complainant has a legal right to the flow of water of said Mill creek in its accustomed channel and in its usual volume. It has a legal right to the flow of said stream in its accustomed purity, unpolluted by riparian owners above. To so pollute a stream as to render it useless to riparian owners below is practically, as to them, to destroy the stream, and to destroy their rights therein as riparian owners. The authority of a court of equity to restrain the pollution of natural streams of water, where such pollution will cause irreparable injury and loss to a riparian owner in his accustomed and necessary legal use of the waters thereof, is unquestionable, and established by numerous authorities, some of which have been cited in arguments in this cause. Where the danger threatened is of such a nature that it cannot easily be remedied in case of a refusal of relief, and the answer does not deny that the act charged is contemplated, an interlocutory injunction will be allowed, unless the equities of the bill are satisfactorily refuted by the defendant. *U. S. v. Duluth*, 171 U. S. 409, 15 Fed. Cas. No. 15,001. It seems, in that case, that numerous affidavits of engineers and others were offered on both sides as to the effect of the work sought to be en-

joined; the opinions expressed being quite conflicting. The court, Miller, J., said: "The affidavits on both sides are numerous. They demonstrate what all courts and juries have so often felt, that where the question is one of opinion, and not of fact, though that opinion should be founded on scientific principles or professional skill, the inquiry is painfully unsatisfactory, and the answers strangely contradictory. In this emergency I am relieved by a principle which has generally governed me, and which, I believe, governs nearly all judges in applications for preliminary injunctions. It is that when danger or injury threatened is of a character which cannot be easily remedied if the injunction is refused, and there is no denial that the act charged is contemplated, the temporary injunction should be granted, unless the case made by the bill is satisfactorily refuted." A preliminary injunction is awarded, as prayed in the bill.

STOCKBRIDGE v. BECKWITH et al.

(Court of Chancery of Delaware. Sept. Term, 1887.)

RECEIVERS—POWER TO SUE IN FOREIGN JURISDICTION.

A receiver appointed in Maryland cannot sue in Delaware to recover a debt due the corporation which he represents, from a resident of the latter state.

Bill by Henry Stockbridge, receiver of the Duffy Malt Whisky Company of Baltimore city, to restrain Samuel C. Beckwith and others from levying execution on money in the hands of Nathan B. Danforth, and to compel said Danforth to pay over such sum to complainant. Rule to show cause why a preliminary injunction should not issue. Discharged.

Benjamin Nields, in support of the rule.
H. H. Ward, against the rule.

SAULSBURY, Ch. This case must be governed by that of Booth v. Clark, 17 How. 324, and the reasoning of Wayne, J., who delivered the opinion in that case.

A receiver is an officer of the court appointing him. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in custodia legis for whoever can make out a title to it. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court. He has no powers except such as are conferred upon him by the order of his appointment, and the cause and practice of the court. A receiver's right to the possession of the debtor's property is limited to the jurisdiction of his appointment; and he has no lien upon the property of the debtor except for that which he may get the possession of without suit, or for that which, after having been permitted to sue for, he may reduce into pos-

session in that way. A receiver has no transitory power of official action which the court appointing him can withdraw with authority to enable him to go to a foreign jurisdiction to take possession of the debtor's property; none which can give him authority to sue upon the principle of comity, a private right in a foreign court or another jurisdiction, as the judgment creditor himself might do, where his debtor may be amenable to the tribunal which the creditor may sue in. Mr. Justice Wayne, in Booth v. Clark, 17 How. 324, said: "Our industry has been taxed unsuccessfully to find a case in which a receiver has been permitted to sue in a foreign jurisdiction for the property of the debtor. So far as we can find, it has not been allowed in any English tribunal. Orders have been granted in the English chancery for receivers to execute their functions in another jurisdiction, but we are not aware of any having been permitted by the tribunals of the last." This was said in 1854. The case of Hurd v. City of Elizabeth, 41 N. J. 1, decided in 1879, held that a receiver appointed in a foreign jurisdiction, clothed with authority to take the designated property wherever situate, may sustain a suit for the property in the courts of New Jersey, but that this was the rule whenever the cause of the person represented by the receiver was not to intervene. But this case is not inconsistent with the view I take of the case before me. It recognizes the case of Booth v. Clark as rightly decided. In speaking of that case, the learned chief justice of New Jersey said: "But that case belongs to a train of decisions which have been, undoubtedly, rightly decided, but which are to be regarded as ruling the precise point in issue. The decisions thus referred to may be found in High, Rec. § 239; and they all cases involving a controversy between the receiver and the creditors of the corporation whose property has been placed under the control of such receiver. In such a case, of things, it is manifest that different considerations should have force from those which are to control when the litigation does not involve the rights of creditors in opposition to the claims of the receiver. That the decision of a foreign court should not be regarded as against the claims of creditors here, to remove from this state the assets of the debtor, is a proposition that appears to be asserted by all the decisions."

In the case before me, creditors of the corporation represented by the receiver have intervened. Two of these creditors are corporations in this state. The other is a corporation in the state of New York; but he has obtained a judgment in this state against the insolvent corporation of Maryland, and is proceeding to collect the latter judgment against a garnishee of that corporation. There is no principle of law which forbids his doing so. And in this case is therefore discharged.

LEARY v. KING et al.

Court of Chancery of Delaware. Sept. Term, 1887.)

FRAUDULENT CONVEYANCES — DEED BY SINGLE WOMAN PENDING MARRIAGE ENGAGEMENT.

A single woman, pending an engagement to marry, and without her affianced husband's knowledge, deeded certain lots to K., who, after the marriage and death of her grantor, deeded them to C. Both deeds were without consideration. Afterwards C., for a nominal consideration, conveyed the lots to a minor child of the original grantor and her husband. *Held*, that all of such conveyances were in fraud of the marital rights of the husband, and void as to him.

Bill by Edward C. Leary against Ann E. King and Mary Leary to set aside certain deeds as in fraud of the marital rights of complainant. Decree for complainant.

Anthony Higgins, for complainant. James L. Hoffecker, for defendants.

SAULSBURY, Ch. It sufficiently appears by the bill, answer, and proofs in this cause that Lucinda Loper, on or about the 5th day of August, 1876, was married to the complainant, and that she afterwards died, on or about the 29th day of September, 1883. There were two children born to the husband and wife during their marriage. The said Lucinda Loper was in her lifetime, and before her marriage with the complainant, seized and possessed of two certain lots or parcels of land and tenements, situate in the city of Wilmington, in this state, which are particularly described in the bill of complaint. After engagement of marriage by the said Lucinda with the said complainant, during its pendency, and before the marriage, without the knowledge and consent of the complainant, the said Lucinda made, executed, and delivered a conveyance and deed in gift of the said lands and tenements to Ann E. King, one of the defendants. Ten days after the execution and delivery of the said deed, and while the complainant was in ignorance of any deed or conveyance by the said Lucinda, she and the complainant were married. Shortly after the death of said Lucinda, Ann E. King made, executed, and delivered a deed of all the said lands and tenements, without the knowledge of the complainant, to Samuel Culbert. It appears that no consideration for said conveyance was ever paid by the said Culbert to Ann E. King. One of the children of the said marriage died in the lifetime of its mother. Mary Leary, the other child, still survives. The alleged consideration of \$500, for the said deed by Ann E. King to the said Samuel Culbert, has never been paid by the said Culbert to the said Ann E. King, nor was the same, or any part thereof, ever paid by the said Samuel Culbert and Ann E. King, or by either of them, to the complainant or to the said Mary Leary. Culbert, on the 4th day of

April, 1887, for a nominal consideration, granted and conveyed the said two parcels of land and premises, which had as aforesaid been conveyed to him by Ann E. King, to the said Mary Leary, an infant of about five or six years of age. Ann E. King and the guardian of Mary Leary have answered the bill, and, in respect to all material matters, have confessed the facts as stated in the bill to be true. The bill prays, among other things, that the said deed of Lucinda Loper to Ann E. King may be decreed in fraud of the marital rights of the complainant, and void; that the said deed of the defendant Ann E. King to Samuel Culbert may be decreed to have been made in fraud of the rights of the complainant, and void; that the said deed of the said Samuel Culbert to Mary Leary, the surviving infant child of the said marriage, be decreed to be in fraud of the rights of the complainant, and void to the extent that the same shall be set aside for and during the lifetime of the complainant; and that the complainant, as the husband of the said Lucinda Leary, be decreed to have title to and possession of the said lands and tenements, as the tenant by the curtesy for and during his life.

I must consider the statement of fact contained in the bill as sufficiently confessed and proved before me, and I have no hesitation in deciding what the decree in this case should be. This case must be ruled in accordance with the principles decided in the case of *Chandler v. Hollingsworth*, 3 Del. Ch. 99. In that case, Chancellor Bates said: "It is enough to say that this court will protect a husband against a voluntary conveyance or settlement by the wife of all her estate, to the exclusion of her husband, made pending an engagement of marriage, without his knowledge prior to the marriage, even in the absence of express misrepresentation or deceit, and whether the husband knew of the existence of the property or not. The concealment of what it is the right of the husband to know, and what it is the duty of the wife to disclose, is itself fraud in law. It is a doctrine of equity—not so fully developed at the date of *Countess of Strathmore v. Bowes*, 1 Ves. Jr. 22, as now—that the concealment, to the prejudice of another party with whom one is dealing, of facts which, if known to him, might affect his decision, and which there is an obligation, arising out of the transaction, to disclose, is a fraud. It is so treated in equity, without respect to the motive of the party in the concealment, being what is termed a 'constructive fraud.' But whether a conveyance or settlement made under the circumstances I have stated is always void, or whether it may be sustained upon such equitable considerations as were admitted in the earlier English cases, and in *St. George v. Wake*, 1 Mylne & K. 610,—such as the reasonableness of its provisions, as being made for children of a former marriage, or its embracing only a part

of the wife's estate, or such as the husband's inability to make a settlement upon the wife. —I leave as questions open in this state until they arise judicially." I have no doubt that each and all of the aforementioned deeds of conveyance were in fraud of the marital rights of the complainant, and that, as against him and his rights, they should be decreed fraudulent and void; and I shall decree that he is entitled to a life estate, by the curtesy, in the said two several lots and parcels of land and premises. Lucinda, the wife of the complainant, was a poor, ignorant negress, and died possessed of no personal property. The said Mary Leary is an infant of very tender years, and was at the execution of said deeds, and is now, perhaps, incapable of any intention of fraud. Ann E. King was and is an ignorant woman, and denies—which, perhaps, is true—any intention of fraud. Samuel Culbert, a white man, and the most guilty, perhaps, of fraudulent intention, of any of the parties named in the proceedings before the court, is not a party to these proceedings. The complainant is an ignorant negro, but he is entitled to his rights; and I shall decree that he is unaffected in those rights by any of the conveyances hereinbefore mentioned, and that, as against his marital rights, those conveyances were fraudulent and void. Let a decree be drawn accordingly.

CUMMINS v. JERMAN.

(Court of Chancery of Delaware. Sept., 1887.)

EQUITY—PLEADINGS.

Where no interrogatories are annexed to or accompany a bill, the answer need not be under oath; and, if it is made under oath, it cannot be used as evidence for defendant, though any admissions of fact therein may be used against him.

Bill by William Cummins against Noble T. Jerman for an injunction restraining the collection of a debt. Bill sustained.

Edward Ridgely and James L. Wolcott, for complainant. N. B. Smithers and George V. Massey, for defendant.

SAULSBURY, Ch. No interrogatories were annexed to or accompanied the bill of complaint. The answer of the defendant was not required to be under oath; and, although it was in fact made under oath, under our rules of court it cannot be used as evidence in behalf of the defendant. If it contains any admission of facts, those admissions may be used against the party making them. Except for our rule of court on this subject, the answer of Jerman, being responsive to the statements of the bill, would be evidence for him; and it would be necessary to overcome that answer by the testimony of two witnesses, or the testimony of one witness and such strong corroborating circumstances as would, in ef-

fect, amount to the testimony of a third witness. Such being our rule, I must therefore, in the decision of this case, be governed solely by the testimony of the complainant.

Isaac D. Hamilton has been examined as a witness on behalf of the complainant, and his testimony fully sustains the bill. I am therefore of the opinion that the bill should be decreed a witness, and I am therefore compelled to decree in favor of the complainant, under that a perpetual injunction is prayed by the bill. Let a decree be drawn accordingly.

HOFFECKER v. CLARK et al.

(Court of Chancery of Delaware. March, 1887.)
WILLS—BEQUESTS—PAYMENT OF DEBTS—
OF SUBJECTION.

Where a testator bequeaths to legatees, during their natural life, the income from certain stocks, which are to pass on the death of such legatees to their children, and bequeaths other stocks to his executor in fee, such bequests to become absolute after five years, the stocks bequeathed to the executor will be first sold, where property of the bequests named has proved insufficient to satisfy the debts of the testator.

Bill by John H. Hoffecker, administrator, with will annexed, for instructions as to the duty under the will.

The bill alleged: That the testator, John H. Hoffecker, died possessed of 355 shares of the public stock of the city of Montreal, also of 196 shares of the capital stock of the Bank of Montreal, and also of 250 shares of the Canadian Pacific Railway of Commerce at Toronto. That the will contained the following provisions: "I give, devise, and bequeath to my daughter, Mary, during her natural life, one-third of the interest and dividends on all my stock in the Bank of Montreal, and all the 4 per cent stock against the city of Montreal; and, after her death, one-third of the stock I give to her children. I give to my son, Walter, during his life, one-third of the interest and dividends on all my stock in the Bank of Montreal, and all the 4 per cent stock against the city of Montreal; and, after his death, I give one-third of the stock I give to his children. In case of the death of either one or two of said named children, Walter, or Dryden without children, then the survivors or survivor, as they may be, shall have all of said city and Bank stocks; and, in the event that none of the three children shall leave any issue, the said son Horace shall have said stock, if he is alive, but, if not alive, his children shall have it. Neither of said children, Mary, nor Walter, shall have power to mortgage or mortgage, incumber,

any lien upon any dividends or any interest on the stock of the Bank of Montreal or stock against the city of Montreal. I bequeath all my stock in Canadian Bank of Commerce at Toronto to my executors or administrators, in trust, in four equal parts, for my four children, Mary, Dryden, Walter, and Horace, except fifty dollars a year shall be paid from the dividends and paid to William H. Clark, commencing on the first day of January after my decease, and to continue for five years, if said William lives so long after my decease; but, if said William dies sooner than five years after my decease, the said payment of fifty dollars per year shall cease. After the lapse of five years, on the death of said William, the said Bank of Commerce stock shall end, and said Bank of Commerce stock shall go absolutely and without limitation, in four equal shares, to my four children, Mary, Dryden, Walter, and Horace. The above bequest of said William shall be in lieu and satisfaction of all claims whatsoever he may attempt to set up against me or my estate." That the testator legally bequeathed all the personal securities constituting his personal estate, except any insignificant part thereof, and subsequently in his said will made the following provision: "All the personal property that I may have any interest in, not given away or disposed of in some part of this will, I bequeath to my three youngest children, Dryden, Mary, and Walter, which shall be a fund in my executors' hands to pay any just claims against me, to defray the expenses of administration, funeral expenses, and charges." The will further provided: "I appoint James Doran, of Montreal, trustee for my son Dryden. I appoint George W. Stevens, of Montreal, trustee for my daughter, Mary; and I appoint Thomas Workman, of Montreal, trustee for my son Walter." That each of the said persons so designated as trustees agreed to accept the trusts. That the personal estate, other than that so specifically bequeathed, is wholly insufficient for the payment of the debts.

George V. Massey and N. B. Smithers, for complainant. James Pennewill, for defendant.

SAULSBURY, Ch. A trust is created by the will of Horace Dryden Clark as to the stock in the Bank of Montreal and the one per cent. stock of the city of Montreal, by said will bequeathed; and I instruct and direct the complainant to assign the said stock to such person or persons as may be named after duly constituted and appointed trustees in the room and stead of the named persons in the said will as trustees, who have heretofore renounced and agreed to assume the said trusts; and I direct the complainant to sell so much of the stock of the Canadian Bank of Com-

merce, bequeathed by the said will, as shall be necessary to pay the debts and expenses connected with the administration of the said estate (after applying such funds of the estate not otherwise disposed of as remain in his hands), and also the costs and expenses incident to this proceeding.

GREEN v. SAULSBURY.

(Court of Chancery of Delaware. March, 1880.)

DOWER—BEQUEST IN LIEU—JURISDICTION OF ORPHANS' COURT.

1. A widow who has elected to take a bequest of an annuity in lieu of dower, not exceeding the value of her dower interest, is entitled to preference over creditors of the estate.

2. The orphans' court, in which a widow has elected to take a bequest of an annuity in lieu of dower, and in which an order of sale of decedent's property to pay debts has been made, having jurisdiction of the subject-matter and equity powers, can entertain a petition of the widow praying for preference of her annuity over the claims of creditors, the proceeds of the sale not being sufficient for both annuity and claims, or that she be allowed to revoke her election; and may, under Act March 26, 1869, order investment of a fund to produce the annuity, as in a case where the widow, waiving her right to assignment of dower by metes and bounds, elects to take in lieu thereof interest on a third of the proceeds of the sale of her husband's real estate.

Petition of Eliza Green, widow of John Green, deceased, for rule on Gove Saulsbury, administrator c. t. a. of John Green, deceased, to show cause why she should not be allowed to revoke her election to take a bequest of an annuity in lieu of dower, or have a sum invested out of the proceeds of the sale of her husband's real estate sufficient to pay the annuity, in preference to creditors of the estate, the estate not being sufficient to pay both the annuity and the claims. Rule granted, and ordered amended to make creditors codefendants.

Eli Saulsbury, for plaintiff. Charles H. B. Day, for defendant.

SAULSBURY, Ch. John Green, in and by his last will and testament, dated the 5th day of August, A. D. 1876, devised a house and lot in Dover to his wife during her natural life, and also gave her annually the sum of \$200, to be paid in equal semiannual installments. He directed his executrix to rent the farm on which he lived during the minority of his youngest daughter, and out of the proceeds therefrom to pay semiannually to his wife the sum of \$100, which semiannual payments were, during the minority of his said daughter, by the clear intendment of his will, to constitute the said legacy of \$200. After his said daughter should arrive at age, he directed his real estate, except the house in Dover, so as aforesaid devised to his wife, to be sold at public sale, and the sum of \$3,333.33%, with interest, payable semiannually, to be secured on said lands by way of mort-

gage. The object of this investment was to secure the payment to his widow the legacy of \$200 during her life in lieu of the payment of said sum out of the rents before the sale. The devise and bequest of the testator to his widow was expressly made in lieu and bar of dower. On the 25th day of March, A. D. 1879, the executrix in the will having previously renounced, Dr. Gove Saulsbury, administrator c. t. a. of the deceased, applied in due form to this court for an order to sell the real estate of the deceased, or so much thereof as might be necessary for that purpose for the payment of the debts of the deceased. The petition was granted, and an order made on the 24th day of September, A. D. 1879, for the sale of said real estate, except the house and premises in Dover, so as aforesaid devised to his widow. The administrator stated in his petition, among other things, as follows: "Should the widow of said deceased elect to take under the will of her said husband, the residue of the estate would be sufficient to pay debts; but, as a considerable amount of the proceeds of the real estate would necessarily have to be applied to the payment of surety debts, which are liens upon said lands, it would require the sale of all the lands not devised to the said widow in lieu of dower to satisfy and discharge the debts due from the estate." On the same day that the order was made the widow appeared in open court, and made her election to take under the will of her husband, which election, indorsed on the petition, and signed by the widow, is as follows: "And now, to wit, this 24th day of September, A. D. 1879, Mrs. Eliza Green, widow of John Green, deceased, voluntarily appears in open court, and elects to take under the will of her said husband in lieu of dower in the lands of said John Green, deceased." By virtue of said order, the lands of the deceased, mentioned in said order, were sold by the said administrator, and return of said sale was made by him to this court on the 24th day of March, A. D. 1880. On the same day the widow preferred her petition to the court, representing and praying as follows: "That, believing that she could not be prejudiced by so doing, and would in any event be paid fully the annuity aforesaid, in order to enable the administrator c. t. a. to sell said lands unincumbered by her dower rights therein, she made her election in open court to take under the will of her husband. That the right to dower thereby surrendered was a full equivalent for the provision made for her in said will, and the payment to her of said annuity cannot and will not prejudice the rights of creditors of her said husband, as her dower rights would have been unaffected by liens against said lands with the exception, perhaps, of a recognizance in this court amounting to \$2,214.60%, with less than one year's interest thereon. That your petitioner has been informed and believes

that, owing to the existence of surety against the estate of her said husband, the proceeds of the sale of the lands sold by the order of this court will not be sufficient to pay all debts and leave a fund sufficient to raise her aforesaid annuity. She therefore prays the court to issue a rule upon the administrator c. t. a. to show cause why he should not invest in the manner directed by said will, or otherwise, the sum of \$3,333.33% out of the proceeds of the sale of the lands sold under the order of the court, the interest thereon, payable to your petitioner during her natural life, or to her heirs, said sum of \$3,333.33% into this court for the purpose of raising the aforesaid annuity for your petitioner. Your petitioner represents that her aforesaid election was made under the belief that the estate would be ample to pay her annuity and against the estate from the best interest she could obtain from other sources, as the statements in the petition for the order to sell the lands for the payment of debts, and by reason of said election the lands have been sold free and discharged of dower for a much larger sum than otherwise they would have brought. She therefore prays the court, in case she cannot obtain relief upon the hearing of this petition, to allow her to withdraw her aforesaid election, and to grant her a waiver of the right to assignment of the lands by metes and bounds, and elect to take in lieu thereof an equivalent share of the proceeds of the sale of the real estate in ordinary cases of sales of real estate for the payment of debts." The rule prayed for was granted by the court, and the court, for us to determine is, has this court jurisdiction and authority to grant the relief sought by the petitioner, or to afford her any other relief which the circumstances may justify, if true, may seem to demand?

To determine this question it will be necessary first to consider the jurisdiction and power of the orphans' court under the constitution and laws of this state. The question is a novel one in our practice, similar one, to my knowledge, has not been presented for the consideration of the orphans' court in any county of this state. It seems to merit careful consideration. In the first place, it is important to observe in this discussion that the three counties of Delaware were formerly, and for a considerable period of time, governed by laws enacted by the province of Pennsylvania for the three territories, which territories were the three counties of New Castle, Kent and Sussex, on the Delaware. At an assembly held at Philadelphia, in that province, on the tenth day of the first month,—March,—1700 (see Charter and Laws of the Province of Pennsylvania from 1682-1700, p. 13) it was enacted: "That the justices of the respective county court shall sit at their respective county courts every year to inspect and take care

estates, usage and employment of orphans, which shall be called the orphans' court, and sit the first third day of ye week in the first and eighth month yearly; that care may be taken for those that are not able to take care of themselves." This was abrogated by William and Mary, king and queen, in the year 1693, and was re-enacted the same year. At an assembly held at New Castle the tenth day of the third month,—May, 1684,—it was enacted (chapter 156, p. 167, Pa. Col. Laws): "That monthly and quarterle sessions be held in every county in this province and territories by the respective justices; and that each quarter sessions be as well a court of equity as law concerning any judgment, given in cases by law capable of trial in the respective county sessions and courts." This law was abrogated by William and Mary, king and queen, in the year 1693, and re-enacted the same year (section 71, p. 214, Pa. Col. Laws), and was supplied by law passed in the year 1701. See 1 Bioren's Laws, p. 33. The act establishing the orphans' courts in this government is to be found in the first volume of the Laws of Delaware, p. 87, c. 30. The act for establishing courts of law and equity within this government was enacted at the same session of the general assembly (page 121, c. 54), one of which courts was the court of general quarter sessions of the peace and jail delivery. Chapter 10 of the act before referred to empowered the justices of the quarter sessions to hold the orphans' court. Under the act establishing courts of law and equity in this government, referred to, a supreme court was established, to be composed of three judges, who, by section 7 of said act, were empowered "to hear and determine all and all manner of pleas, complaints, and causes in law or equity, which shall be removed or brought there from the respective general quarter sessions of the peace, to be held for the respective counties of New Castle, Kent, and Sussex, by writs of certiorari, writs of error or appeal, or from any other court of law or equity in his government, by virtue of any of the said writs or appeal, after final judgment or decree shall be given in the said courts." By section 15 of said act the county court of common pleas was established to be holden four times in every year, at the times and places where the general quarter sessions of the peace are directed, and by section 21 a court of equity was established to be held by the justices of the said respective county courts of common pleas four times a year, at the respective places, and near the said times, as the said courts of common pleas are held, in any county in this government. This court, thus established, and thus to be held, was not an appellate court or a court of errors, as the court of common pleas was, "to hear and determine all and all manner of pleas, complaints, and causes in law or equity, which, or might be brought there from the respective general sessions of the peace,"

but it was a court of original jurisdiction; and the judges of the court of common pleas holding it were empowered and authorized to hear and decree all such matters and causes of equity as shall come before them in the said courts where the proceedings shall be by bill and answer as heretofore. It will thus be perceived from a careful scrutiny of these acts and their provisions, that the court of quarter sessions, which was empowered to hold the orphans' court, possessed equity powers, and, of course, equity powers in respect to such matters as were the subjects of its jurisdiction, and to which equitable principles could be properly applied, with the right of appeal therefrom to the said supreme court, and not to the court of common pleas, which was empowered and authorized to hold a court of equity, where the proceedings were to be by bill and answer. No one can doubt that the subjects cognizable by the orphans' court thus established, and so to be holden by the judges of the court of general quarter sessions, were subjects to which equitable principles could be properly applied. If so, it follows, necessarily, that in passing upon such subjects the judges of the general quarter sessions sitting as the judges of the orphans' court possessed equitable powers and could exercise equitable jurisdiction in respect to all subjects properly cognizable before them as such orphans' court. The court derives its jurisdiction from the law creating it, and vesting the power of holding it in the manner described. In determining such matters as should come before it, the court had not only jurisdiction to entertain, but to hear and finally determine them, without remitting a party interested to any other tribunal, or even to the court of equity established by said act, subject only to the right of appeal from its decisions to the said supreme court. The orphans' court thus established and thus to be holden by the court of general quarter sessions was so continued to be holden by the said court until the adoption of the first constitution of this state in 1776, which provided in article 12 that "the president and general assembly shall, by joint ballot, appoint three justices of the supreme court for the state, one of whom shall be chief justice and a judge of admiralty, and also four justices of the courts of common pleas and orphans' courts for each county, one of whom in each court shall be styled 'Chief Justice.'" It will thus appear that the power of holding the orphans' courts was vested in the same judges as those which constituted the courts of common pleas, but the jurisdiction of the orphans' courts was in no manner changed. Article 24 provided that "all acts of assembly in force in this state on the fifteenth day of May last (and not hereby altered or contrary to the resolutions of congress, or of the late house of assembly of this state), shall so continue until altered or repealed by the legislature of the state, unless where they are

temporary, in which case they shall expire at the time respectively limited for their duration." Article 13 of this constitution was as follows: "The justices of the courts of common pleas and orphans' courts shall have the power of holding inferior courts of chancery as heretofore, unless the legislature shall otherwise direct." What were these inferior courts of chancery which the orphans' court had theretofore been authorized to hold? It certainly was not the general court of equity established by virtue of the act hereinbefore referred to, wherein the proceedings were by bill and answer, because such court of equity was to be held by the court of common pleas, who had also independently the power of holding inferior courts of chancery. I take it, therefore, that by "holding inferior courts of chancery as heretofore" was meant that the courts of common pleas and orphans' courts were empowered to hear and determine the several matters within the respective jurisdiction of each according to the rules and principles, both of law and equity, as the same might be applicable to said matters; and that, having jurisdiction of a subject-matter before them, they had authority to determine it, and all questions in respect to it, according to the very right of the matter, whether the ascertainment of that right depended upon principles either of law or equity; and that their jurisdiction in such case was complete and perfect for its determination, and that the parties to any such cause were not to be turned over to any other tribunal for its adjudication. And here it may be remarked, that there had never been theretofore, during the connection of the three counties on the Delaware with the province of Pennsylvania, or, to use the language employed in the acts of that period, of the province of Pennsylvania and the territories, a separate court of chancery or other equitable tribunal, but all the courts of general jurisdiction exercised both legal and equitable powers; nor have there been such separate equitable tribunals since in Pennsylvania; nor was there any independent equitable tribunal of general jurisdiction in this state or colony after it ceased to be connected with the province of Pennsylvania, until the act before referred to passed in the early part of the eighteenth century, the precise date whereof is not, however, known, entitled "An act for the establishing courts of law and equity within this government." In those states where there are no courts of separate, exclusive equitable jurisdiction, as is now the case in most of the states of the Union, but where the same courts administer both law and equity, it is customary to speak of the law side and equity side of said courts, and such, I take it, was the character of the court of the general quarter sessions, orphans' court, and supreme court, as first established in Delaware; and what is meant in article 13 of the constitution of 1776 as inferior courts of chancery which the court of com-

mon pleas and orphans' court should have the power of holding was nothing effect than the hearing and determining matters before them on the equity side of said courts, when the application of legal principles to their determination became necessary and proper. Under the constitution of 1776, the same judges who held the court of common pleas held the orphans' court in each county, and determined all matters cognizable by them, either according to legal or equitable principles, as the same might be applicable; but when, deciding according to equitable principles, and not upon legal principles, as distinguished from equitable principles, exercised in the language of that constitution "the power of holding inferior courts of chancery as heretofore." With such power in this manner, were the orphans' courts in this state constituted and held until 1792, when a new constitution for the state was adopted. This constitution (see article 6), provided that: "The judges of the court of common pleas, or any two of them, shall compose the orphans' court in each county and may exercise the equity jurisdiction heretofore exercised by the courts, except as to adjusting and settling executors', administrators', and guardians' accounts, in which cases they shall have appellate jurisdiction from the sentence or decree of the register." Here the power of the orphans' court is distinguished, and its equity jurisdiction a part of the constitution. What the equity jurisdiction theretofore exercised, and is continued by this section, I have endeavored to show, viz. that it extended to all matters cognizable before the court in the determination of which depended the application of equitable principles, where the proceedings were not by bill and answer. In the latter case equity jurisdiction had theretofore been exercised by the court of common pleas, and not by the court of common pleas or the orphans' court holding inferior courts of chancery as heretofore (constitution of 1792 (article 6, § 14) provided that: "The equity jurisdiction heretofore exercised by the judges of the court of common pleas, shall be separated from the common-law jurisdiction and vested in a register, who shall hold courts of chancery in the several counties of this state." The equity jurisdiction here referred to included matters exercised by the court of common pleas when acting as an inferior court of chancery, as distinct from the orphans' court acting as an inferior court of chancery, as well as theretofore exercised by the court of common pleas when sitting as a court of equity, as provided in section 54, of the act entitled "An act for the establishing courts of law and equity within this government," hereinbefore referred to, the powers of which courts of equity had hereinbefore been mentioned, and were more fully described in said section.

court of common pleas continued to hold the orphans' court, and to exercise all the jurisdiction thus given to the orphans' court under the constitution of 1792, until that constitution was amended in the year 1802, as follows, viz.: "The chancellor shall compose the orphans' court of each county and exercise the equity jurisdiction heretofore exercised by the orphans' court, except as to the adjusting and settling executors', administrators', and guardians' accounts, in which cases he shall have an appellate jurisdiction from the sentence and decree of the register." The effect of this amendment was simply to revert the court of common pleas of the power of holding the orphans' court of each county, and of vesting the power of holding said courts in the chancellor. The equitable jurisdiction of the orphans' court was expressly reserved, although it was to be exercised by the chancellor, who composed said courts with appeal from the orphans' court thus composed in the matters of its original jurisdiction to the supreme court. Thereafter the chancellor composed the orphans' court, exercising its equitable jurisdiction as distinct from the jurisdiction which he exercised as chancellor under sections 1 and 14, art. 6, of the constitution of 1792. The power of the orphans' courts in the respective counties of this state after the adoption of the amendment of 1802, as aforesaid, continued to be exercised by the chancellor composing said courts, until the adoption of the present constitution of this state in 1831. That constitution provides (section 10, art. 6) that the orphans' court in each county shall be held by the chancellor and the associate judge residing in the county, the chancellor being resident." And "this court shall have all the jurisdiction and powers vested by the laws of this state in the orphans' court." This court has all such jurisdiction and power now.

The question then arises, what is that jurisdiction, and what are those powers? We have already seen that the original court of general quarter sessions holding the orphans' court had, from the beginning, equitable jurisdiction and powers. That the orphans' court, when held by the judges of the old court of common pleas, possessed equitable jurisdiction and powers. That by the constitution of 1792 the judges of the court of common pleas, or any two of them, composing the orphans' court of each county, might exercise the equity jurisdiction theretofore exercised by the orphans' court, except as to the adjusting and settling executors', administrators', and guardians' accounts, in which case they should have only appellate jurisdiction from the sentence or decree of the register. This equitable jurisdiction under the constitution of 1792 was both original and appellate, for that constitution provides that appeals may be made from the orphans' court in cases where that court has original jurisdiction to the su-

preme court, whose decision shall be final. This equitable jurisdiction was continued in the court by the amendment to that constitution in 1802, when the powers of the court were vested in the chancellor; and this equitable jurisdiction and these equitable powers under the laws of this state were, by the present constitution of the state, vested in the orphans' court as now constituted. In fact, there has been no period since the first establishing the orphans' court in this state when that court has not possessed and exercised equitable jurisdiction and powers which may properly be termed original. In reference to what, therefore, may this equitable jurisdiction and these equitable powers be exercised? Reasonably we should suppose in reference to all matters coming under the cognizance of said courts to which the application of equitable principles and powers are necessary and proper for their determination, unless there be any case where the exercise of such jurisdiction and such powers have been prohibited. Is there any such prohibition in respect to the case before us? This court has jurisdiction to hear and determine the application of the administrator c. t. a. of John Green, deceased, for an order for the sale of his real estate for the payment of his debts. It had the authority to hear and consider the election of the widow to take under the will of her husband, and not her dower at law. The facts stated in the petition of the administrator are before the court, as are also the circumstances under which she made her election as stated in her present petition to the court. Has any court the power to afford her the relief she asks, or granting her prayer for leave to withdraw her election, or to have the benefit of the devise and bequest made in her favor in the will of her husband, which benefit was the inducement to her of waiving her right of dower at law? If this court should be satisfied that the injustice and wrong would be done the widow of holding her to her election without her being secure in the enjoyment of that benefit, has it or has it not the power to afford her the relief which she seeks, or must the court dismiss her petition, and leave her either remediless or to the privilege, if she has it, of seeking for relief by a bill in equity? Has she a cause for equitable relief, and, if so, can this court afford that relief? We have seen that the orphans' court has, and always has had, equitable jurisdiction and powers. We have indicated to what matters the exercise of that jurisdiction and the exercise of those powers may be applied. We have not been able to see any prohibition upon such exercise in respect to the matters before us, either in the constitution or laws of the state, and hence the inquiry becomes important whether there is anything in the nature and character of the application, or of the mode and manner and means by which the relief sought can be afforded,

which precludes this court in the exercise of its equitable jurisdiction and powers from affording such relief, and to this question I now address myself. And first, in what position does the petitioner stand before the court? She is the widow of John Green, deceased. Surviving him, she was entitled by law to one-third of his real estate, legal and equitable, as her dower therein during her natural life. She stands before the court in a different light from that of a mere legatee. She is not, as a legatee, a mere object of the bounty of the deceased. She is entitled to be regarded in the light of a purchaser. She surrenders a clear legal right, and gives a valuable consideration for the benefit which she claims under the will. The surrender of her rights at law to dower in her husband's real estate in consideration of the devises and bequests contained in his will has all the merits of a contract, and has by some courts been treated in the light of a contract between her and her husband. It is clear that she would not be subject to abatement of the bequests made to her in favor of mere legatees; and, if the facts stated in the petition be true, there is no reason why the bequest should be subject to abatement in favor of creditors of the deceased, the truth of which facts this court has the power to ascertain, if it has the power to entertain the application at all. The petition states, in substance, that by her release of dower the real estate sold by the administrator sold for an amount in excess of that for which it would have sold if her right of dower by metes and bounds had not been released by her election equal to the amount which she claims shall be reserved out of the proceeds of the sale, and not be applied by the administrator to the payment of debts during her lifetime, but invested so as to raise the amount of her annuity. If so, no creditor of the deceased would or could sustain loss, but would in fact be benefited, because such excess of sale caused by her election to take under the will would, after her death, be applicable to the payment of any unsatisfied debts against her husband's estate. If, however, she is to be held to her election, and to be subjected to a diminution of her annuity, she will be the loser to the amount of that diminution, although she surrendered a valuable consideration for her whole annuity, and thus the creditors would receive the benefit to which they would not have been entitled but for her election. Would this be just or equitable as between her and the creditors. At most the payment of their claims would only be postponed to a future period, while she would suffer a present and a continuing loss. It may be said that a testator is bound to be just before he is generous, and that creditors who have legal rights are not to be postponed to the mere objects of the testator's bounty. The petitioner, if the facts alleged in the petition are true, is not affected by

this principle. She was not the object of the testator's bounty. She was a purchaser for a valuable consideration,—the surrender of her rights to dower at law in his real estate in consideration of the devises and bequests in her favor contained in the will. She is not to be deprived of the benefits secured to her by the will by the claim of another person possessing an equity superior to her own. This has been decided again and again in favor of a widow, under such circumstances as this case, is not subject to the abatement of a legacy in her favor in relief of legatees; and I hold it to be true that the claims of creditors are not to be paid to those of a widow who waives her right of dower by metes and bounds, and elects to take the devises contained in the will, in her favor, in lieu of her right to dower at law, unless where the bequest made for her in the will in her favor is so disproportionate to the value of her dower at law as would amount to fraud upon creditors. I shall do no more further than to quote from two cases in support of these positions, and append in a footnote¹ to this opinion a reference to a few cases where the learner on this subject may be consulted.

In the case of *Isenhart v. Brown*, 1 Ves. Ch. 411, it was decided by the vice-chancellor of New York that a bequest to a widow of her right of dower, and the acceptance of that bequest, amounted to a matter of contract between the testator and the wife, and the wife is to be paid her share of the bequest in preference to other legatees without abatement. In this case the vice-chancellor says: "The legacies given [the widow] by this will are partly specific and partly pecuniary, and they are subject to the provision made for her by the testator in lieu of her right of dower in his estate. It is the price put by the testator himself for that right, and which she is at liberty to accept. Her relinquishment of dower is a valuable consideration for the testator's gifts. In this point of view she becomes a purchaser of the property left to her by the will. So, on the other hand, the husband offers a price for his wife's legal right of dower which he proposes to extinguish. If she agrees to the terms, she relinquishes her right and is entitled to the price. It is then a matter of convention or contract between them, and what she thus becomes entitled to receive is not by way of bounty, but as a purchase of her share in the general bequests, but as purchase money for what she relinquishes, and which consequently must be paid in preference to legacies." Then, after reviewing a number of cases on the subject the vice

¹ *Butricke v. Broadhurst*, annexed to *Ves. Jr.* 171; *Wake v. Wake*, *Id.* 30; *Brady v. Brady*, 1 P. Wms. 127; *Morret*, 2 Ves. Sr. 420; *Daventry v. Daventry*, 1 Amb. 244; *Heath v. Dendy*, 1 R. & W. 1; *Isenhart v. Brown*, 1 Edw. Ch. 411; *Case*, 1 Bland, 205.

"Considering all these cases, I am inclined to regard the law as settled that under circumstances like the present a widow is entitled, after payment of the debts, to the provision which the husband chooses to make for her by his will in lieu of dower, in preference to all other legatees who are consequently to be postponed where there is a deficiency of assets. Of course, the debts are to be paid before she can be entitled even to specific legacies." I quote these last objections of the vice chancellor not to adopt the will, but to express my dissent from them in as they convey the idea that a widow is not entitled to the provision made for her in the will in lieu of dower until after payment of the debts of the testator, and I say "on the other hand" this is not true where the value of the right of dower relinquished in connection with the devise and bequests in the will is of equal value with that of such debts and bequests. And why? Because the right of dower which she relinquished in her husband's real estate was not subject to, and was not to be made subject to, the payment of the debts due by her husband, and his creditors could have no claim upon the proceeds of the sale arising from lands to which she was entitled as dower, without her relinquishment of dower thereon; and she takes under the will of her husband property equal in amount in value to the right which she would have as relinquished, and taking as a purchaser, and not through the bounty of the testator, it would be inequitable to postpone her rights under the will to the claims of her husband's creditors. In support of the view presented I refer to Hall's Case, 1 Bland, in which it was decided that a widow elects to take the estate devised to her in lieu of dower is to be deemed a purchaser for a fair consideration to the value of her husband's property, and must have her claim sustained in preference to that extent in preference to creditors.

As this case is very similar in its facts to the one before us, I will give it in full. The case is reported thus: "This case was presented upon a creditors' bill filed on the 5th of October, 1825, by George Mackubin and Margaret Hall, the widow and executrix of John Hall, deceased, against his devisees, Daniel Matthews and others, alleging that his personal property was insufficient to pay his debts, and praying that his real estate should be sold for that purpose. A decree was passed on the 30th of June, 1826, for the sale of the realty accordingly, and the decree reported that he had made sale of a part of it, which was finally satisfied on the 1st of March, 1827. On the 1st of March, 1827, the plaintiff Margaret, by her petition, asked that her late husband had by his last will devised to her a large portion of his real estate to hold a part during her life and another part for a term of years; that she had elected to take under the will of her husband immediately after his death, when she was unacquainted with his affairs; but that

it is now ascertained that the claims against his estate will absorb so much of it as, if paid to her exclusion, will deprive her of all benefit intended by the will, and leave her in a much worse situation than if she had rested altogether upon her common law rights. And therefore, as her election was improvidently made, and at the time when she was destitute of the information which alone could enable her to act knowingly upon the subject, she prays that it may be annulled that she may be allowed the value of her dower, or be relieved according to the nature of the case," etc. The chancellor said: "The will of the deceased husband of this widow lay before her, and presented to her a choice between the estate therein bequeathed and that given by the law. In her election to take under the will there is no apparent room even to suspect fraud, nor has the existence of any been intimated; and it is difficult to perceive how there could have been any mistake. But, supposing it possible to show that a mistake had occurred, I should require from her a strong and clear case of misapprehension. She has heretofore formerly made her election in the manner prescribed by law, and has solemnly reaffirmed that choice by bringing this suit. An election thus deliberately made, repeated and adhered to, ought not to be lightly shaken or easily annulled. This widow must therefore be held firmly bound by her election, and can have no relief but such as may be altogether compatible with the choice she has thus made. A devise which is merely of the nature of a donation, or that appoints persons to take as heirs in place of those designated by the law, must certainly be considered as void against creditors. But a devise in lieu of dower is one of a different character, and of much higher merits. It discharges a highly favored debt due from the testator; it relieves his real estate from a lien imposed by law in favor of his wife in preference to all others with which he himself could have incumbered it by any contract of his own. In the language of the act of assembly, a widow electing to take under the will of her husband is to 'be considered as a purchaser with a fair consideration.' It is clear, therefore, that this devise is fraudulent as against creditors only as far as it exceeds the value of the dower in lieu and discharge of which it was given and has been accepted. The creditors have associated themselves with the widow and devisee of the deceased, and have asked to have the real estate sold for the payment and satisfaction of all. But these creditors now, it seems, propose to have their claims first satisfied in preference and exclusion of the devise to the widow. They who are the widow's opponents would thus bind her to her election to take under the will which satisfied her claim that had a preference over theirs; and yet they would leave her to take by that devise nothing, or less than

the amount of her legal claim. This cannot be allowed. They who ask equity must do equity. These creditors must either permit the widow to take the whole amount under the will, as is her choice, or allow her to obtain full satisfaction for her dower; because to the value of that at the least she is both at law and in equity "a purchaser with a fair consideration," and to that extent therefore the devise must be sustained. The widow is clearly entitled to one or the other, either the devise or the dower; and since her taking the whole of the subject devised, which was and is her choice, has been objected to, she must be allowed to take as devisee to the full value of her dower which she has relinquished, but no more. The chancellor made the following order, viz.: "Therefore it is ordered that the said Margaret Hall be, and she is hereby, allowed one-seventh part of the proceeds of the real estate in the proceedings mentioned in bar and satisfaction of all that portion of the real and personal estate devised to her by her late husband, Joseph Hall, and which property so devised she had elected to take in lieu of her dower."

This case was decided in chancery for the reason, I suppose, that under the law and practice of Maryland, the court of chancery alone had jurisdiction to award a sale of the realty of a deceased person for the payment of his debts where the sale of the realty became necessary for such purpose. The course to be pursued was by a creditors' bill against the devisees and others claiming the land when a decree was made for the sale of the land. Of course, it became necessary to make return of the sale to the court which had made the decree for the sale, and every claim upon the proceeds of sale had to be presented to that court, and might be, as was done in this case, by petition by the claimant. The principle applicable in this respect to the present case and to all similar cases is that the court vested with the power of ordering the sale, and to whom a return of the sale must be made, and which has authority in respect to confirming or refusing confirmation of sale, and, of course, in case of refusal of confirmation, to order a return of the purchase money to be made to the purchaser,—in short the court having jurisdiction of the subject-matter of sale and the proceedings thereunder, and more especially when such court possesses equitable powers in respect to matters within its jurisdiction,—has authority, as a necessary incident to the exercise of its jurisdiction, to pass upon all matters, either legal or equitable, necessary and proper, to a just determination in respect to those matters, unless there is some limitation to the exercise of its powers imposed by law, or unless it finds itself inadequate to do complete justice between contending parties, and can remit such parties to some other tribunal where justice can be more effectually administered.

In the case before us, the claim of the petitioner being just and equitable in itself, so far as not to be prejudiced by election, this court ought not to submit to the expense and delay of making a bill to the chancellor for relief in equity if this court can itself grant that to which she is entitled. And why not? The extent of the equity claimed must be the same in either court. The relief may be afforded as well upon petition as by bill and answer. In the case already cited in Bland, relief afforded to the widow was upon petition after sale, and the bill mentioned in that case was simply to obtain an order for the sale of the lands, which, under the law of Maryland, and the practice in the courts of that State, seems to have been necessary, although unnecessary where the question related to the application of or right to the proceeds. In the present case the order of sale was obtained, not on bill in equity after sale, but thereto by persons claiming the realty, as in the case in Maryland, but upon petition to the orphans' court having jurisdiction to make the order, and upon notice to the heirs or persons interested in the realty. The proceeds of sale being in the hands of the administrator, subject to the order of the court, and to the payment of the debts of the deceased, so far as the fund shall be retained to be applicable, can there be any doubt as to the right of the court to determine whether such fund is subject to the equity or rightful claim paramount of the creditors? The measure of proof must be the same in one court as in the other, and the mode and manner of proof is necessarily dissimilar. I am therefore of opinion that this court has ample authority to determine the questions arising upon the petition, and that it is the only tribunal ought to pass upon those questions. Whether it ought to grant either one of the claims of the petitioner depends upon the facts alleged therein. Some of the facts we know by the record. We know that the sale was made, the amount of the sale, that it has been returned to this court by the administrator, the statements made by the administrator, the petition of the administrator for the order of sale, the election of the widow to take under the will indorsed upon the petition; and there is nothing in the petition showing any fraud on her part, or on the part of any one else; and we have no reason to believe from anything before us that she could have had, any knowledge in respect to the condition of the estate other than that obtained from the petition upon which the order was made. Did she, by electing to take under the will of her husband, thereby waiving the assignment of the realty by metes and bounds, surrender of the realty equivalent for the interest on the sum of \$3,333.33%, which sum she now asks to be invested or secured so that the service

interest thereon be paid to her during her life according to the direction of her husband in his said will.

There is no doubt that in a case arising in the court of chancery in which the right to elect between two interests, or to revoke an election already made and to be remitted to rights waived upon election, the court would feel itself compelled to decide, in conformity to the long train of decisions on the subject, that before a party can be compelled to elect such party would be entitled to be informed fully in respect to his or her interests, and to the situation of the estate or funds in respect to which they might arise, and for that purpose to have accounts taken in that court. According to the English law (and the same is doubtless true in this country wherever the question has arisen in chancery), before a widow can be compelled to make her election between her right of dower at law and a devise in lieu of dower, she is entitled to be fully informed of the comparative value of the two rights or subjects-matter of choice. This principle is one of such obvious fairness that I know of no case in which the contrary thereof has been judicially held. Other circumstances, however, besides an accurate knowledge of the comparative value of the two things which are the subject of election may be sufficient to bind; but, as has been well remarked, these circumstances (whether arising out of original intention, acquiescence in the acts of others, or the effect of acts of the party having the right of election in the interest of third persons) must be so infinitely varied and modified in different cases that no rule applicable to all can be laid down; each must be determined on its own particular grounds. In the case of *Wake v. Wake*, 1 Ves. Jr. 335, it was decided that the receipt of a legacy and annuity under the will for three years did not prevent her right of election, being presumed not to have acted with full knowledge which would bind her. I conceive it to be settled law that acts done by a party before he or she is fully informed of his or her rights will not, generally speaking, amount to an election; and, where an election has in fact been made, as in this case, without full information, and without the means of full information, I conceive it would be inequitable to hold a widow to such an election if no other relief than allowing her to revoke it could be afforded. And if such revocation, under proper circumstances, can at all be made as the authorities show, it certainly ought to be made in the tribunal in which the election was made. What jurisdiction has any other court to allow a revocation to be made? As to revocation itself, what authority would a court of chancery have to compel this court to allow it? An appeal from this court does not lie to the court of chancery, but only to the superior court when the opinion of the judges composing the orphans' court are opposed. Now, in a case where revoking an election

ought to be allowed in order that justice and right should be done, and this court should refuse to allow such revocation, I submit that the court of chancery would be powerless to afford relief. This is the only tribunal in which such revocation could be made, and that the right of revocation does exist where equitable circumstances demand it cannot be questioned in view of the uniform rulings of courts upon that subject. In this case the widow made her election in this, the only tribunal in which the right of election is provided for under the statute. The order for sale free of dower was made by the court, the sale has been returned to the court, and it now appears that the election was made by the widow without full knowledge of the condition of the estate, as she alleges, and without the opportunity for such knowledge, but upon the faith of the statements contained in the petition made by the administrator upon which the order of sale was obtained; statements doubtless believed at the time by all parties to be true. The proceeds of sale are in the hands of the administrator. Do not the equities of the widow attach to those proceeds, and fasten them, as against creditors, in the hands of the administrator during the life of the widow? And, if so, cannot this court make an order that the administrator shall reserve out of the clear residue of sales a sum sufficient to satisfy the equitable lien upon them, and apply only the balance of said proceeds in discharge of the debts of the deceased during the lifetime of the widow? I think it may. The principal of the sum so reserved would, however, after the death of the widow, belong to the administrator, and be in his hands to pay any unsatisfied debts of the deceased, and, in case there were no such debts, to be paid by him to the parties respectively entitled to receive it under the will of the deceased. It may be true that the administrator and the widow may have a right, either separately or conjointly, to apply to the court of chancery for an order as to how, in what manner, and in what funds the said sum so reserved by order of this court may be invested, treating it as a fund burdened with an equity; or, in the absence of any order of any court having jurisdiction in respect thereto, I see no objection to its being retained by the administrator, and safely invested by him as such administrator to raise the annuity for the widow during her life, and afterwards to be applied according to law. Nor do I see any objection to this court making such order, the whole subject-matter of the sale and the rights of the parties being before it. It is true, no statute of the state expressly gives the authority to this court to make the investment, but, the court being one of equity powers in respect to any subject-matter within its jurisdiction and calling for the application of equitable principles, and in view of the positive legislation of the state in respect to securing the rights of

the widow in the proceeds of her husband's real estate, when the same shall be sold for the payment of his debts, she waiving her right to an assignment of dower therein by metes and bounds, and electing to take in lieu thereof the interest on one-third of the proceeds of sale, and the statutory authority of the court to secure such third part so that the interest may be paid to her during her life, I do not think that this court would be transcending its fair, legal, and constitutional authority, to order a proper investment of the sum, but it would be acting within the spirit and intention of the law in such cases in granting the prayer of the petition in this respect. "Qui hæret in litera, hæret in cortice." Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal in opposition to them. *Elliott v. Peirsol*, 1 Pet. 340. I take the principle to be this: that where a court has jurisdiction of the subject-matter, having the right to decide every question occurring in the cause, the correctness of its decision in respect to any such question can only be inquired into upon a writ of error or upon an appeal therefrom. In this case no writ of error would lie, and an appeal, and that to the superior court only for the county, in case the opinions of the judges composing this court should be opposed, could be taken. This should only make us the more careful of the propriety and correctness of the decision we shall make, but it should make us equally careful not to avoid the exercise of a jurisdiction which we rightfully possess, and not to remit the determination of a question to another tribunal possessing no jurisdiction, or at best only a doubtful jurisdiction, in respect to it either original or appellate.

If it be true that a widow is entitled to revoke her election, to take the devises and bequests in her husband's will in lieu of her legal right to dower in real estate, and if such revocation of election can only be made in the court in which the election was made, and if it be true that the widow should be remitted either to her right at law, as if such an election had never been made, or should be compensated by a just equivalent out of the proceeds of the sale of the real estate under an order of sale for the payment of debts, it would seem that the court in which the election was made, or the right to revocation of election or of just compensation instead thereof, is, and should be, the proper court to ascertain and determine the amount or extent of that compensation. Such amount being thus ascertained and determined not being a sum awarded absolutely in gross as absolute property, but only the annual inter-

est upon such sum, it would be proper to serve the principal sum for the benefit of those who might be entitled to it, and the interest thereon should be no longer to the widow. If the court in which proceedings for the sale of the real estate was necessarily the orphans' court, that court possesses, as we have seen, the same powers, and if it has jurisdiction of the cause before it, and if, as we have seen, a court having jurisdiction of a cause has the right to decide every question which occurs in such cause, it would follow that the orphans' court is the proper court to decide in respect to the safety and security of such principal sum, and that if, in judgment of the court, the investment of the principal sum should be necessary or proper for such security or safety, then said court would have the authority, and should exercise it, to make the investment. If the petitioner is entitled in law or equity to a share of the proceeds of sale of the real estate of her husband as would be the case if she were not barred thereof by her election, she is entitled to have the same, and if she submit, be brought within the spirit and intention of the act of March 26, 1869, the court would be invested with the authority to do so, as contemplated in that act. The act of 1869, section 557, which provides as follows: "That hereafter upon the return of a sale of real estate by any executor or administrator to pay the debts of the decedent pursuant to section 4 of chapter 90 of the revised Statutes of this state, in cases in which the widow of the decedent is entitled to a share of the proceeds of the sale, or an equivalent for her dower, the purchaser may, at his election, either secure such sum pursuant to the provisions of the said act, or he may pay the same into the court, in which case the said share shall be invested or otherwise secured under the direction of the said court for the benefit of the parties interested in the same." In this case, why may not the administrator, instead of himself, by leave of the court, have become the purchaser, pay the sum into the court, and the court may adjudge equitable into the hands of the parties interested in the same? The direction of the court for the benefit of the parties interested in the same? appears by the return of sale made by the administrator that the sale of the real estate amounted in the aggregate to the sum of \$946, one-third of which would be the sum of \$315.33, the annual interest upon which would be \$238.92, which sum annually during the life of the widow would be more than an equivalent for the annual interest on the sum of \$3,300,—to wit, \$200,—which the petitioner may be secured to her. The petitioner's widow states that the real estate of her husband ceased in which she was entitled to a share was not incumbered by any lien prior to her claim, unless perhaps the lien of her recognizance in this court amounting

14.60%, with less than one year's interest hereon. If the amount so due on said recognizance be deducted from the aggregate amount of the sales at the time of her election to take under the will, it would leave a balance of about \$9,598.54, one-third of which would be \$3,199.51%, the annual interest on which would be \$191.97, being \$8.08 less annually than the sum of \$200, to which the widow claims to be entitled. The deceased also, in his will, as a part of the consideration for his wife's relinquishment of dower, devised to her a house and premises in Dover. What would be a fair annual rental of said house and premises we do not know, or can we tell whether two third parts of such rental value should be considered in determining the proportion of the amount of sales which should be reserved for the benefit of the widow, nor do we know whether the amount of said recognizance should be taken into consideration by us as at present advised. These matters are subject to proof which may hereafter be presented to us, and in respect to which no opinion is expressed further than to say that the court would not be warranted in concluding that the devise and bequest to the widow in lieu of dower was a fraud in respect to creditors, or so unjust to them as to justify the court in any manner disturbing or lessening it. I think, therefore, that the widow should amend her petition and rule by leave of the court so as to make the creditors of John Green, deceased, co-defendants with the administrator on said rule, and that the rule should be served upon the creditors commanding them to appear in court by a certain day therein to be named, and show cause why the prayer of the petition should not be granted, so far, at least, as said prayer relates to the investment of the sum of \$3,333.33%, under the order of this court. I express no opinion at present in respect to the alternative prayer of the petition for leave to revoke the election already made under a misapprehension of facts, other than to say that that part of the prayer should not be allowed if that which is equitable and right towards the widow can be otherwise effected.

CAREY v. REED et al.

Court of Appeals of Maryland. Jan. 9, 1896.)

REMOVAL OF EXECUTOR—MISCONDUCT—POWERS OF ORPHANS' COURT.

1. An executor returned under oath an inventory, and two months thereafter returned a second inventory, which he claimed to be a correction of the first, and in which he charged himself with less than one-half of the first inventory. More than one-half of this second inventory was at the time pledged for his individual debt. Shortly thereafter he was placed under an order to give new security by a certain day, which he failed to do. *Held*, that the court was justified in removing him.

2. Under Pub. Laws, art. 93, § 230, giving the orphans' court full power to secure the rights

of orphans and legatees, and administer justice in all matters relative to the affairs of deceased persons, the court may revoke the appointment of an executor who has neglected his duties.

Appeal from orphans' court of Baltimore city.

Petition by Henry C. Reed and others for the removal of Charles J. Carey as executor of Anna Reed, deceased. From an order granting the relief prayed, said Carey appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Wm. J. O'Brien and Wm. J. O'Brien, Jr., for appellant. Wm. A. Fisher, W. Cabell Bruce, and D. K. Este Fisher, for appellees.

ROBERTS, J. This appeal is taken from an order of the orphans' court of Baltimore city passed in the matter of the estate of Anna Reed, deceased, in course of settlement in said court. The deceased was an aged lady of 86 years, possessed of a large estate, and died about March 5, 1895, leaving a last will and testament, whereby she bequeathed a number of pecuniary legacies to the appellees and others, and left the residue of her property to Charles R. Carey, son of the appellant, and appointed the appellant her executor, excusing him from giving bond. The will was duly probated, and letters testamentary granted to the appellant, on March 20, 1895, who gave bond in the penalty of \$500. About June 11, 1895, the appellant, as executor, returned his inventory of the personal property, under oath, showing that it amounted to \$33,960.30, and an inventory of the real estate, valued at \$11,000. On July 5, 1895, Charles J. Carey (the executor) and appellant made an assignment for the benefit of his creditors. On the following day, by leave of the court below, he returned what he alleged to be an amended inventory of the goods and chattels, etc., in which he states that "in the original inventory filed in this estate on the 11th of June last certain securities were included which were not the property of deceased, and for the purpose of correcting said error this amended inventory is returned." He then enumerates in said inventory certain coupon bonds, stocks, and cash, amounting to \$15,462.46, and swears that it is a true and perfect inventory of all and singular the goods and chattels of said deceased. After the appellees had become aware of the misconduct of the appellant in his management of the estate of his testatrix, on the 22d of July, 1895, they filed in the court below a petition setting forth their grievances, and praying that he be compelled to give new security, and, failing to do so, that his letters be revoked, and a new administrator with the will annexed be appointed. On the same day, the court, in compliance with the prayer of this petition, ordered the appellant to give a new bond in the penalty of \$75,000 within one week, provided a copy

of the order be served on him within three days; and further, that unless he gave said bond within the time limited his letters should be revoked. The copy was served on the appellant on the same day with the passage of the order. And again, when called upon by certain of the legatees for information concerning the settlement of the estate, he deliberately assured them that the estate would amount to \$120,000 to \$130,000. When his attention was subsequently called to this statement, he said under oath that he did it to mislead Mr. Reed, one of the appellees, and that the statement was not correct; and he further admitted that the first inventory was not correct, but that the second inventory filed was a correct statement of the personal property belonging to the estate at the time of the death of his testatrix. While this may or may not be true, the assets, in part, making up the second inventory, were in a somewhat unfortunate state of deposit for assets belonging to an estate in course of settlement. As, for instance, the appellant had hypothecated with the Eutaw Savings Bank seven of the bonds mentioned in said second inventory as collateral security for two loans which he had personally negotiated with said bank for the total amount of \$7,000, and deposited with the Provident Savings Bank, for a like purpose, one more of said bonds, for a loan of \$1,000, making a total of \$8,000, which he swore to be part of the assets of said estate, and which were in the hands of the two banks to secure his individual debts at the time he returned his inventory. The appellant answered the last-mentioned petition, admitting most of the material allegations contained therein, but denying the jurisdiction of the court below to pass upon the questions at issue therein. We will later on give attention to these questions.

It is a most remarkable fact, yet strictly in keeping with the other facts of this case, that the testatrix had scarcely been deposited in her last resting place before the appellant had announced his purpose to avoid the payment of the collateral tax due the state of Maryland by failing to report to the court the amount due his son, as the residuary legatee, and which the appellant estimated as being about \$80,000. It is very clear, then, that this appellant executor had very vague notions as to the binding effect of an oath, and that when he swore "to diligently and faithfully regard, and well and truly comply with, the provisions of the laws imposing a tax on commissions allowed to executors and administrators, and of the laws imposing a tax on collateral inheritances, distributive shares, and legacies, to aid in paying the debts of the state," he seemed to think that it was his duty as executor to avoid the payment of such taxes, doubtless for reasons quite apparent in the record, that he had debts of his own, which required prompt attention. After the foregoing proceedings were had in the court below, testimony was taken and hear-

ing had of the matter of the petition of the appellees asking that the appellant be required to give new security upon the terms showing, as required by article 10 of the Code, that the appellant was wasting the assets of the estate, and that the assets of the estate were in danger of being lost. However, accomplish no useful purpose, the determination of this case to follow the further details of the unworthy actions of the appellant, which clearly showed his absolute unfitness for the office of executor from which he has been very properly removed.

The sole question arising on the petition in this cause is, had the orphans' court, under the circumstances of this case, the power to remove the appellant? If we are to hold that the contention of the appellant concerning the jurisdiction of orphans' courts is correct, exercised in the determination of the petition below, we would not only be compelled to declare that the court was in error in its decision, but that it was shorn of any authority to enforce its orders and decrees upon facts fully recognized in the law, and peculiarly within the province of its decision. When it is said that the courts of this state can exercise only general and limited jurisdiction, the law did not say, nor mean to say, that these courts may exercise jurisdiction over particular subjects-matter, they are never, authorized to enforce their judgments in dealing with such subjects. Of course, cannot be true, for it is a necessary incident of the powers of all courts, and too, without specific statutory enactment, that they possess inherent control over their own officers, and the right to make their own judgments under circumstances similar to those stated in this case, without extending the argument to unnecessary length, it will be ascertained from the statement of facts herein that at the time of the appellant's removal from the office of executor he was before the court on several occasions. He had on May 29, 1895, returned under oath, one inventory, in which he charged himself with \$33,960.30; and on the 7th of July, 1895, he returns, under oath, a second inventory, which he claims to be correct, in which he charges himself with \$15,462.46, less than one-half of the assets of the estate shown in the first inventory; and, as already stated, more than one-half of the second inventory was in fact the same, he swore to the same, hypothecated to secure his individual indebtedness. Moreover, the appellant was, on the 22d of July, 1895, placed under an order of the court below to give new security by a day, which he failed to do. In fact, in the performance of the duties of his office as executor, he has failed to exhibit in any manner the stance wherein he had a just and proper conception of his responsibilities, and proper discharge. It will be found, on examination of the various decisions

states construing statutes establishing orphans' courts or courts of like character, and defining their jurisdiction, to be as Mr. Schouler, in his work on Executors and Administrators (section 154), says: "It is perceived that statutes of this character confer upon the court, and most appropriately, too, a broad discretion as to the various instances which may justify removal. Whenever, from any cause, the executor or administrator becomes unable to perform properly the substantial duties of his office, he may be regarded as evidently unsuitable. Unsuitableness may be inferred also from willful misconduct, or even from obstinate persistency in a course plainly injurious to the interests of the estate, and impairing its value; and in fact, as a rule, any unfaithful or incompetent administration which will sustain an action on one's probate bond should be sufficient cause for his removal. Causes of unsuitableness operating at the time of the appointment, but disclosed more fully in the course of administration, and upon experiment, may afford the ground of one's subsequent removal from office; the point here being, not that the unsuitableness operated when the appointment was made, but that it operated at the time of the complaint." The appellees have alleged in their petition, verified by affidavit, that the assets of the state in the hands of the appellant were in danger of being lost, wasted, or misappropriated; and, it appearing to the court that danger did exist, it thereupon passed an order giving him a week to file a substantial bond. He did not comply with this order, but filed an answer denying the jurisdiction of the court. The court, without enforcing its order, set a day for the hearing, and the matter of the petition and answer thereto were heard upon full testimony and argument. Under these circumstances, we think the court below had express authority, under article 93, § 41, of the Code, to revoke his letters, if the proof warranted its action in so doing.

In conclusion we entertain no doubt about the correctness of the action of the court below in removing the appellant from the office of executor, which was done by the passage of its order of August 9, 1895. The legislature, by the language of Code, art. 93, § 230, which declares that "the court shall have full power * * * to secure the rights of orphans and legatees, and administer justice in all matters relative to the affairs of deceased persons," meant to enlarge its discretion, and relieve it of a too narrow construction of its powers. So that in *Cox v. Chalk*, 57 Md. 570, in a case where an executrix was charged with having neglected her duties, etc., the court said "that the charges set forth in the petition, if sustained by proof, are sufficient, in our opinion, to justify the orphans' court in removing the appellant from the office of executor." In that case the proof was not be-

fore the court, but in this case the proof is before us in its most amplified form. For reasons stated, we affirm the order of the court below in removing the appellant from the office of executor of Anna Reed, deceased. Order affirmed, with costs.

CITY & SUBURBAN RY. CO. v. BASSHOR et al.

(Court of Appeals of Maryland. Jan. 9, 1896.)
SALE OF BOILER—SPECIFICATIONS—HEATING SURFACE—ASSUMPSIT—CONTRACT AS EVIDENCE.

1. Plaintiffs contracted to manufacture and erect for defendant five horizontal return tubular boilers, of 200 horse power capacity each, in accordance with certain specifications, in which occurred the following clause: "At the water tube boilers standard factor (11½ sq. ft. per H. P.), these boilers will give 1,000 H. P., and we guarantee them to stand 135 lbs. working pressure." *Held*, that this course could not be construed as requiring plaintiffs to furnish five boilers which, when measured by the standard factor of 11½ square feet, would give a heating surface of 2,300 square feet for each boiler, since the amount of heating surface in the boilers was clearly shown by figures in the specifications, which rendered it merely a matter of calculation.

2. An agreement to furnish boilers that will give 200 horse power each does not bind one to furnish boilers giving that power with the best economy in the consumption of coal.

3. In a suit on the common counts for a balance due for boilers furnished under a contract, which was offered in evidence without objection, it was proper to tell the jury that the contract might be considered in determining the value of the boilers, for which plaintiff could recover.

Appeal from the Baltimore city court.

Action by Thomas C. Basshor and C. Hazleton Basshor, copartners trading as Thomas C. Basshor & Co., against the City & Suburban Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, and ROBERTS, JJ.

John K. Cowen, E. J. D. Cross, H. L. Bond, Jr., and George H. Penniman, for appellant. John P. Poe and Edgar H. Gans, for appellees.

FOWLER, J. The City & Suburban Railway Company and Thomas Basshor & Co. agreed in writing that the latter should supply the materials for, and manufacture and erect, five horizontal return tubular boilers, of 200 horse power capacity each, to be used by said railway company at its temporary plant at Waverly, on the York road. These boilers, it was agreed, should be made in accordance with certain specifications furnished by Basshor & Co., the whole work to be completed and in running order not later than May, 1893. The work was finished and accepted by the railway company, and the boilers have been used by it for more than a year. A part of the contract price was withheld, upon the ground that the heating

surface of the boilers was not as great as the contract called for, and to recover the amount claimed to be due them Basshor & Co. sued the railway company in assumpsit on the common counts, and recovered a judgment. During the course of the trial six exceptions were taken by the defendant to the rulings of the court below, five of them relating to the exclusion of evidence and one to the rulings on the prayers. All of the exceptions, however, except the last named, have been abandoned, and therefore the only question we have to determine is whether there was error in granting the plaintiffs' prayer, and refusing to grant the defendant's first and second prayers, and in granting defendant's third prayer as modified.

By the plaintiffs' prayer the jury were instructed that, under the contract given in evidence, "the plaintiffs are not obliged to prove, in order to recover, that each boiler has 2,300 feet of heating surface, nor that each of said boilers will give 200 horse power with the best economy in the consumption of coal." The contention of the defendant, as set forth in its second and third prayers, is based upon a construction of the contract the exact reverse of that contended for by the plaintiffs, and contained in their first prayer; and to support its construction the defendant relies upon the following clause, which will be found in the last paragraph of the specifications furnished by the plaintiffs, as follows: "At the water tube boilers standard factor (11½ sq. ft. per H. P.) these boilers will give 1,000 H. P., and we guaranty them to stand 135 lbs. working pressure." The defendants contend that the true meaning of this clause is that the plaintiffs were to furnish five boilers of the kind described in the contract, which, when measured by the standard factor of 11½ square feet of heating surface per horse power, would give a heating surface of 2,300 square feet for each boiler. The plaintiffs, however, contend that, under a fair construction of the contract, in connection with the specifications, they were required only to manufacture and set up in running order five horizontal tubular boilers of 200 horse power each, and that the amount of heating surface they agreed to furnish for each boiler is clearly shown in the specifications, which are a part of the contract. Testimony of experts was taken to show what is the true meaning of the terms used in the clause in question; but, as might have been expected, the witnesses did not agree. In our opinion, whatever doubts may exist as to the construction of this particular clause, standing alone, the meaning and intention of the contracting parties is clear when the specifications, on which the contract is based, are also considered. As one of the witnesses said: "The amount of heating surface in the boilers is in the figures given in the specifications, and it is simply a matter of calculation from these figures." Another witness

testified that, notwithstanding the clause are considering, it is very clear, from specifications, that the boilers which plaintiffs agreed to furnish were not to the heating surface which is now demanded by the defendant. The construction on by the defendant cannot be maintained without putting aside a most important vision of the contract. Manifestly, it be contrary to all rules of construction allow one of two or more doubtful constructions of one part of the contract to over and nullify the manifest intent of the parties, as declared in another part of the contract. It being conceded that the boilers, as to heating surface, are according to the specifications, the plaintiffs must be held, in this respect, to have complied with their contract.

But, in the next place, it is insisted by the defendant that the plaintiffs were under the contract, to furnish boilers which would give 200 horse power with the best economy in the consumption of coal. We find in the contract itself no warranty of this contention. It is clear, from the terms of the contract, that the power agreed to be furnished was 200 horse power for each boiler, and that the fact obtained, but without regard to the amount of coal used. It will be objected, however, that the contract contains no stipulation as to the quantity of fuel to be consumed, and that it is necessary to consume to get the stipulated power; and we are asked to introduce such a stipulation into the contract because we do not find it there, and to sustain the defendant's suggestion of an implied warranty. But there is no implied warranty under the facts in this case, for it is well settled "that where a particular article is ordered, described, and defined article is ordered, even of a manufacturer, although it is intended to be required by the purchaser for a particular purpose, still, if the thing be supplied, there is no implied warranty that it shall answer the particular purpose intended by the buyer. In such case the purchaser takes upon himself the risk of effecting its purpose. *Rasin v. Conner*, 10 Md. 60; *Rice v. Forsyth*, 41 Md. 389; *Machine Co.*, 141 U. S. 510, 12 S. 46. If the question as to economy of fuel had been in the minds of the parties, either of them, it would have doubtless been incorporated in the contract. But the contract is silent in regard to it, and we are asked to supply the alleged omission. But the court cannot do. As was said by the Supreme Court of the United States, in *Seitz v. Machine Co.*, supra: "To hold that the silence opens the door to parol testimony would be to beg the whole question. In this case, we have seen, the boilers had stipulated heating surface, and gave stipulated horse power; and under the contract given in evidence the defendant cannot set up as a defense the fact, if it be true, that the stipulated power cannot be

ed without an undue consumption of fuel. Hence, it follows that the plaintiffs' first prayer was properly granted, and the defendant's first and second were properly refused.

We think there was no error in granting the defendant's third prayer, as modified. By it the jury were instructed that, if their verdict should be for the plaintiffs, it must be limited to the actual value of the boilers, less the amount paid by the defendant, and must not be based on the agreement to pay a stipulated price for the boilers contemplated by the contract. To this prayer the court added the following, viz.: "But the jury are not precluded from considering the same as part of the evidence in the case,"—which is the modification complained of by the defendant. The theory of the plaintiff's action is that, having performed their part of the contract, and there being nothing left to be done by the defendant except to pay the contract price, they were not bound to sue on the contract, but were at liberty to sue on the common counts for the balance due. *Ridgeley v. Crandall*, 4 Md. 435. *Appleman v. Michael*, 43 Md. 273. The contract was offered in evidence without objection, and, being properly before them, the jury had a right to consider it, as the court told them, as part of the evidence in the case. And it would seem that the court below might have properly gone further, and could have instructed the jury, as was held in *Appleman v. Michael*, supra, that the proper measure of damages in a case like this is the rate of compensation fixed by the contract. Finding no reversible error, the judgment appealed from will be affirmed. Judgment affirmed.

MAYOR, ETC., OF BALTIMORE v. FEAR. (Court of Appeals of Maryland. Jan. 8, 1896.)

OPENING STREET—ASSESSMENT OF BENEFITS— DEDICATION.

The owner of land opened a street through it, which he graded, paved, and curbed, and he sold and leased lots bounding on the street, and built and leased houses fronting thereon. The gas company ran its pipes through the street to light these houses; city gas lamps were erected; and various vehicles drove over the street to accommodate the residents of the houses bounding thereon. In every deed or lease made by such owner he inserted a clause to the effect that the reference to the street was intended solely for the purpose of description, and was not intended to be a dedication of it for the public use or as a public highway. *Held*, that there was no dedication of the street.

Appeal from Baltimore city court.

Proceeding by the mayor and city council of Baltimore against Boston Fear to open a street. From a judgment assessing damages in favor of said Fear, the mayor and city council appeal. Affirmed.

The property owner asked that the court instruct the jury: (1) "That in assessing the benefits to his property, that the only

matter of inquiry for them is the amount of the increase, if any, in the actual market value of the property assessed and belonging to said Fear by reason of the condemnation and opening of Myrtle (now Walbrook) avenue, and their verdict, as to the amount of said benefits, shall be limited to the said increase of the market value of his property by reason of the city acquiring said street; and that the burden of the proof rests on the mayor and city council to establish to the satisfaction of the jury the extent of the increase in the market value of said property, if any." And (2) "that in assessing the damages to which the said Fear is entitled for condemning and opening Myrtle (now Walbrook) avenue, between Pulaski street and Fulton avenue, they shall consider and allow him the market value of the property so taken by the mayor and city council to be used for said street, belonging to said Fear." The court granted these two prayers, granting the first with the following proviso: "But the jury are not limited to the future and prospective benefits which may result from formal condemnation, and are at liberty to consider the extent, if any, to which the market value of the property has been already enhanced by the actual location of said avenue, in anticipation of its requirement by the city."

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, and BOYD, JJ.

Wm. S. Bryan, Jr., for appellant. R. B. Tippet & Bro., for appellee.

ROBERTS, J. This case was tried before the Baltimore city court on appeal from the finding of the commissioners for opening streets in said city, and this appeal arises on the action of the lower court in granting certain instructions of the appellee, and in refusing certain of those of the appellant. There is but one question in the record for us to consider, and that relates to the alleged dedication of that portion of Myrtle avenue (now Walbrook avenue) which extends from Fulton avenue to Pulaski street. The facts are few and simple. The appellee was the owner of a tract of land through which Myrtle avenue was partly opened by him, and certain improvements in the matter of grading, paving, and curbing were made by him. This work, begun in 1891, was continued to 1894, and up to within a short time of the commencement of the condemnation proceedings by the city. Some of the lots bounding on said street the appellee sold and leased under certain deeds, the first of which he executed about the time that he commenced to open said street, and continued to make such conveyances to April, 1895. Before proceeding to develop his land, the appellee got from the city commissioner the grade of Myrtle avenue, that he might be enabled to get the same on a level with any

street the city should bring in contact with it. The appellee has built and leased houses fronting on this street, and the gas company has run its pipes through the street, to light the houses bounding thereon, and the street has city gas lamps to light it, and milk wagons, coal carts, and doctors' carriages, and other vehicles drive over it for the accommodation of the residents of the houses bounding thereon. In every deed or lease made by the appellee he has caused to be inserted the following covenant: "The mention and reference to Myrtle avenue in the above description is intended solely and only for the purpose of description of the described property, and is not intended in any wise to be a dedication of said street for the public use or as a public highway." The taxes for the bed of Myrtle avenue have been continuously paid by the appellee up to the date of condemnation by the appellant.

Save the testimony of experts as to the value of the land, the foregoing constitutes all the material testimony in the record. There is but one exception in the record, which is taken by the appellant to the granting of the appellee's first prayer, as amended by the court, and the granting of the appellee's second prayer, and to the refusal by the court to grant the appellant's first, second, and third prayers.

The argument before the court and upon the brief of the appellant relates solely to the refusal of the court to grant its three prayers. But, independently of this fact, we are very clearly of the opinion that the principles of law announced in the first and second prayers of the appellee are entirely free of objection, and that the court's amendment to the first prayer gave to the appellant a fair and liberal construction of its rights, and certainly all that it was, under the circumstances, entitled to receive.

The court correctly refused the appellant's first prayer, and for a manifest reason. This prayer asks the court to instruct the jury that "from the statements of the property holder, Boston Fear, made on the stand, which the city accepts, the bed of Myrtle avenue, here being condemned, has been dedicated to public use, and that, therefore, the said Boston Fear is only entitled to nominal damages therefor." This court has so frequently declared the principles of law which ought to prevail in cases of dedication, and that we do not deem it necessary at this time to enter upon any extended discussion of the general doctrines relating to this subject. We will, however, refer to a few of the decisions of this court in which the question of intention has been discussed, for the reason that the intention of the appellee, as applied to the use of the bed of Myrtle avenue, is the only matter of consequence on this appeal. The late Mr. Justice Irving, delivering the opinion of this court in the case of Glenn v. Mayor, etc., 67 Md. 400, 10 Atl. 70, said: "This court has re-

peatedly held that whether a dedication of a street or road was effected in any particular case depends entirely upon the intention of the parties in each particular case, and that the methods of ascertaining the intention must be fairly considering all the circumstances surrounding the transaction and the matter. Mayor, etc., v. White, 62 Md. 311, 23 Atl. 270; McCormick v. Mayor, etc., 45 Md. 511, 12 Atl. 270; ley v. Mayor, etc., 33 Md. 270, 280." In the case of Pitts v. Mayor, etc., 332, 21 Atl. 52, the late Mr. Justice delivering the opinion of this court said: "It has been decided by this court in a number of cases that, in order to make a dedication, an intent on the part of the owner to dedicate his land to the public use is absolutely essential; and such intention is clearly proved by the facts and circumstances of the particular case in which the dedication exists." To the same effect are the cases of Mayor, etc., v. White, 62 Md. 311, 23 Atl. 270; McCormick v. Mayor, etc., 45 Md. 511, 12 Atl. 270; Hawley v. Mayor, etc., 33 Md. 270, 280. a long line of authorities of other jurisdictions. While the use of land is frequently dedicated for the benefit of the public by deed, such acquisition must not rest upon a mere and fragmentary proof, but must be based upon substantial facts. Applying the foregoing principles to the testimony in this case, there can nowhere be found in the record any proof to sustain the appellant's contention as stated in its first prayer. There is no proof in the record which establishes the fact that Myrtle avenue was used for the public use, one save such as attended upon the ordinary and conveniences of the persons who bought or leased land from the appellee fronting on said avenue. It is a well-recognized principle in the law, applicable to the subject, that, when there is a dedication of land to the public, it must be for the benefit of the public, and not for a particular portion of it.

It is contended by the appellant that the clause inserted by the appellee in the conveyances executed by him, and the lots abutting on Myrtle avenue, did not have the effect of indicating on the part of the appellee an intention not to dedicate the conveyances were executed and delivered, and each contained the clause before stated; and, whatever may have been the intention of the appellee in inserting said clause to be inserted in said conveyances, it is very clear that he was making his "protest in his breast," but so far as said conveyances could be concerned to accomplish his purpose, proclaiming that the mention and reference to Myrtle avenue were intended solely and exclusively for the purpose of description, and not otherwise to be a dedication of said street for the public use. If the testimony in the record of this appeal could be construed to mean a dedication of the bed of Myrtle avenue, there would be few cases in which the appellant would be required to p-

nominal damages for the bed of any; a most convenient method of acquiring property, but one not to be commended. what we have said in the discussion of appellant's first prayer, we have practically and substantially disposed of the second and third prayers of the appellant, and further comment is unnecessary.

In conclusion, think that the jury was properly instructed, and, for the reasons assigned, affirm the rulings below. Rulings affirmed, with costs

GETTY et al. v. LONG.

Report of Appeals of Maryland. Jan. 9, 1896.)
DECEASED'S ESTATE — UNADMINISTERED ASSETS—
BALANCE IN BANK.

A bank account was, after the depositor's death, continued in his name by his administrators, who occasionally made deposits thereon of money derived from the estate. Held, in an action by the administrators of such administrator against the administrator d. b. n. of his intestate, to recover the balance standing to the credit of such account at the administrator's death, that if such balance was a part of the assets of the estate of the original decedent, and the deceased administrator did not distribute same nor finally settle the estate, then it was an unadministered asset of the original decedent, and plaintiff could not recover.

The fact that the account, on the death of the administrator, stood on the books of the bank in the name of his intestate, was prima facie evidence that it belonged to the latter's estate.

Appeal from circuit court, Allegheny county.

Argument by John H. C. Getty and Mary C. Getty, administrators of David Koontz, against George T. Long. From a judgment in favor of defendant, plaintiffs appeal. Affirmed. Heard before ROBINSON, C. J., and McREARY, FOWLER, and BRISCOE, JJ.

C. Devecmon and J. W. S. Cochrane, appellants. De W. H. Reynolds, B. A. Hammond, and D. Jas. Blackiston, for appellee.

BRISCOE, J. This is an action at law, brought by the appellants, as administrators of David Koontz, against the appellee, to recover certain moneys alleged to be owing due to the estate of David, and collected by the appellee, the administrator d. b. n. of David Koontz. The principal question involved in this appeal was before this court in a former appeal (Koontz v. Koontz, 79 Md. 357, 32 Atl. 1054). It was then said that the proof in regard to the claim was meager and unsatisfactory, and, in passing upon this item in a multifarious bill in which we were not to be understood as preventing the administrators of David from bringing a separate suit, if they shall see fit, for the purpose of proving that the money belonged to David, and not to Salem's estate. And the questions now raised are exceptions to the rulings of the court

upon the prayers. It appears that all of the plaintiffs' prayers were granted or conceded except the eighth, and the exception to the rejection of this has been abandoned in this court. The defendant's two prayers were granted, and the correctness of the court's rulings thereon form the basis of this appeal.

It appears from the record that David Koontz was appointed some time in the year 1886 administrator of the estate of his brother Salem. At the time of Salem's death, he kept an account in the Second National Bank of Cumberland, which was continued by David in the name of "Salem Koontz," and from time to time deposits of money derived from the estate made in the bank. David died on or about the 10th of February, 1892, having passed three administration accounts, the last of which was dated May 13, 1890, and in which he appears to have distributed all of the funds of the estate which had come to his hands, and settled with the distributees in accordance with these accounts, as stated in the orphans' court, but passed no final account. There was, however, left standing to the credit of the Salem Koontz bank account, at the time of the death of David, the sum of \$2,782.98, and also an uncollected mortgage of \$1,500, due to Salem Koontz's estate. Both of these sums were afterwards collected by the appellee as administrator d. b. n. of Salem Koontz; and the amount \$2,782.98, found to the credit of Salem's estate in bank, is the fund here in controversy.

By the granting of the defendant's first prayer, the jury were instructed, in effect, that if they found from the evidence that David Koontz, at the time of his death, left standing to the credit of Salem's account in the bank a balance of \$2,782.98 (the money sued for in this case), and that said balance was the moneys of Salem and a part of the assets of the estate of Salem, and not the moneys of David, and that David, as administrator, did not make distribution of the same to the creditors and distributees of Salem Koontz, and made no final settlement of the estate, but died leaving the money in the hands of the bank, then the credit balance in said bank was an unadministered asset of the estate of Salem, and the plaintiff could not recover. And, by the second prayer, they were told that the fact the money was standing on the books of the bank in the name of Salem Koontz was prima facie evidence that the moneys belonged to the estate of Salem, and if said entry or account was incorrect, and was allowed to remain by David at the time of his death, through his error or mistake, the burden of showing such mistake was upon the plaintiff. And it is insisted that there was error in granting the defendant's first prayer, because there was no evidence that, before the appellee received the money from the bank, he had procured an order of the orphans' court requir-

ing the bank to pay over this money to him as administrator d. b. n. under article 98, § 72, of the Code. It will, however, be observed that the defendant here is sued, not as administrator d. b. n., but personally; and, if the money was an unadministered asset, then the plaintiffs had no title to it, and could not recover, even if the money was wrongfully in the hands of the defendant. The bank paid over the money without requiring the order, and we cannot perceive how it could affect the rights of the appellants whether such an order had been passed or not. Clearly, the money in this case was an unadministered asset, under the facts of the defendant's first prayer. *Baker v. Bowle*, 74 Md. 476, 22 Atl. 133; *Stewart v. Insurance Co.*, 53 Md. 571. We find no error in the defendant's second prayer. It was claimed that the money standing to the credit of Salem's estate belonged to David. If the money had been deposited by David in his lifetime to Salem's estate by mistake, the burden was upon the plaintiff to prove the mistake. *Koontz v. Koontz*, 79 Md. 362, 32 Atl. 1054. The first and second prayers of the defendant were properly granted, and, in connection with the plaintiffs' prayers, contained the correct propositions of law bearing upon the case. The judgment below being for the defendant, and there being no error in the rulings of the court, we shall affirm the judgment. Judgment affirmed.

METROPOLITAN SAV. BANK OF BALTIMORE et al. v. MURPHY et al.

(Court of Appeals of Maryland. Jan. 8, 1896.)

TESTAMENTARY PAPER—BANK ACCOUNT.

Decedent became a depositor in a savings bank in 1873, and in 1885 he directed that the balance on this account be transferred to a new and different account, which was opened in the names of himself and wife, and made subject to the order of either; the balance at the death of either to belong to the survivor. *Held*, that the two accounts did not constitute in fact but one continuing account, but that the latter account was a separate one, which, having been opened after Act 1884, c. 293, requiring certain prerequisites in the execution of wills of personality, could not be regarded as a testamentary paper.

Appeal from orphans' court, Baltimore county.

Petition by Metropolitan Savings Bank of Baltimore, Bernard C. Reed, executor of Ann Murphy, and Bernard C. Reed, legatee, for the probate of a certain paper as the will of Michael Murphy, deceased, and the revocation of letters of administration granted to James Murphy and John Murphy. From an order refusing probate of said alleged will, petitioners appeal. Affirmed.

Argued before BRYAN, McSHERRY, BRISCOE, BOYD, and ROBERTS, JJ.

H. M. Benzinger, Jas. S. Calwell, Alfred J. Shriner, and M. W. Offutt, for appellants. Jas. J. Lindsay and John T. Ensor & Son, for appellees.

ROBERTS, J. The appeal in this case was taken from an order of the orphans' court of Baltimore county refusing probate of a certain instrument claimed to be the last will and testament of Michael Murphy, deceased. There is no controversy as to the facts in the record, which can be briefly stated as follows: Michael Murphy became a depositor in the Metropolitan Savings Bank of Baltimore city on July 8, 1873, and from that time thereafter made deposit there of various sums of money. On the 5th of January, 1885, after he had at intervals drawn from said bank different sums of money, he directed, by a written instrument, to be maintained to his credit with said bank, a balance of \$1,841.45. This balance was, in the direction, transferred to a new and different account in said bank, which was opened in the names of Michael Murphy and Ann Murphy (his wife), and at the request of Michael, which was agreed to by said Ann. There was written at the head of this account of said Murphy and wife, in the bank book, the sum 7,437, with the appellant, the following: "I, Michael, do hereby agree that this account is opened to the by-laws printed on the first page of this book, subject to the order of either; the balance, at the death of either, to belong to the survivor." The wife survived her husband, and at the time of his death, which occurred March 7, 1888, the balance on the account in said bank to the credit of the joint account of Michael Murphy and wife, amounted, with the accretions of interest, to the sum of \$7,437. This sum the appellant, in pursuance of the terms of its contract with Michael Murphy, paid over to the survivor, Ann Murphy. The only question which we are now called upon to decide is, had the bank authority by law to make such payment? It is claimed by the appellees that the bank acted without authority in making such payment, and that the converse of the proposition is maintained, that the executor and residuary legatee of Michael Murphy, now deceased. It is contended by the appellant bank that the two accounts in said bank, that in the name of Michael Murphy and that in the joint names of himself and wife, constituted in fact but one and the same continuing account, and, both having been opened with said bank prior to the passage of the act of 1884 (chapter 293) requiring certain formal prerequisites in the execution of wills of personality, they are entitled to be probated and construed as testamentary instruments, and that the balance in said bank to the credit of the husband and wife at the time of his death passed, under the terms of the alleged will, to the wife as the survivor. It is claimed upon the part of the appellant bank when the individual account in said bank in the name of said Michael was closed, that he no longer had any connection with or interest in the joint account in the names of Michael Murphy and wife, and became therefrom disconnected with this controversy. We are inclined in this view, and think that the proper construction to be placed upon the

counts in their supposed relationship is that the closing of the one and the opening of the other left them separate and distinct. And, if this be so, there is but one consequence which follows, and it is this: the joint account in the names of the husband and wife ceased to possess a single testamentary attribute, as the entry at the head of the joint account was not, nor was the account itself, written or opened until after the act of 1884 (chapter 293) had gone into effect. So that we entertain no doubt about the legal effect of these accounts as testamentary papers. We are clearly of the opinion that the testamentary character claimed by the appellants as adhering to the first and second accounts by reason of their being one and the same continuing paper is without force and unavailing. It is too plain for controversy that the accounts are separate and distinct, and are no just sense testamentary. We do not, however, concur in the view taken at bar of the case of *Dougherty v. Moore*, 71 Md. 248, 18 Atl. 35, as concluding the question raised by this appeal. The facts of that case differ very materially from the case presented in the record of this case. At the death of the husband the bank paid over to the wife the balance of the account, and in doing so carried out in good faith the letter of its contract in *strictissimo verbo*. This is not a case where the husband retained possession and control of the account in bank, and continued to draw therefrom such sums as his wants might indicate, as was the case in *Dougherty v. Moore*, supra, and in many other cases. Nor is the language controlling the ultimate disposition of the joint account in his case in any respect similar to that of *Dougherty v. Moore*. The bank's instructions, in opening the account, were that said account should be subject to the order of either husband or wife, and at the death of either the balance should belong to the survivor. It is neither the object of the law nor the duty of the court to seek by narrow and technical construction the means of invalidating a contract clearly expressive of the intention of the contracting parties, and we think nothing could be clearer than the object and intention of the parties to the contract in the language employed by them in opening the joint account.

While we have not been able to recognize the accounts in evidence as testamentary papers, we entertain no doubt as to the legal effect and meaning of the entry at the head of the joint account. It is quite true that the title to the deposits referred to in the first account was originally vested solely in the husband, Michael, and it was his privilege to make such disposition of the same as he thought proper. He had the indisputable right to enter into any contract with the appellant that would accomplish his purpose in securing to his wife the protection which these savings deposits might give to her. After opening said joint account, the husband

never drew one farthing from the bank on that account, which from March 5, 1885, to the date of his death, March 2, 1888, remained undisturbed, save by the addition of some interest items, which were made by the officers of the bank. The property in controversy consisted of deposits in the appellant bank, which, by the direction, authority, and request of the said Michael, assented to by the appellant, was entered in the books of said bank to the credit of himself and wife, with the understanding and contract with the bank indorsed thereon, as hereinbefore stated. The parties were *sui juris*, capable of contracting, and, having actually contracted, the law exacts fulfillment, which the appellant has done. And we do not think, after it has fully executed its part of the contract, it ought now to be required to pay to the appellees the money which it promised to pay, and had already paid to the appellants' testatrix, unless some legal requirement can be established demanding its payment to the appellees. We have given the most careful consideration to the various cases which have been passed upon by this court bearing any analogy to the facts of this case, but we have found no authority controverting the conclusions at which we have arrived. This transaction partakes somewhat of the nature of an equitable assignment, looking to the interest of the parties, rather than to matter of form; and the question of the survivorship depended solely upon mere contingency. But, looking at this controversy from whatever point we may, we think the appellant paid rightly to Ann Murphy, the balance standing to the joint credit of herself and husband at the time of his death. We will, for the reasons assigned, affirm the order of the court below. Order affirmed, with costs, and petition dismissed.

MOORE v. LAND TITLE & TRUST CO. et al.

(Court of Appeals of Maryland. Jan. 8, 1896.)
ASSIGNMENT FOR CREDITORS — FOREIGN ASSIGNOR
— BOND OF ASSIGNEE.

Code, art. 16, § 205, requires every trustee to whom property is conveyed for the benefit of creditors to file with the clerk of the court in which the deed is recorded a bond for the faithful performance of the trust, and provides that, until such bond is filed and approved, no title shall pass to any trustee. *Held* that, it not being necessary to record an assignment by a foreign corporation for the benefit of creditors of Maryland, in order that personality in Maryland may pass thereunder, the fact that it was so recorded did not render it necessary for the trustee to file a bond in the latter state.

Appeal from superior court of Baltimore city.

Action by William T. Moore against the Supreme Lodge of the Order of Tont. From an order striking out the judgment for plaintiff and quashing an attachment, made upon the motion of the Land Title & Trust Com-

pany and Francis Shunk Brown, assignees of said order, plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Joseph C. Boyd, for appellant. J. V. L. Findlay and Thomas Mackenzie, for appellees.

BRISCOE, J. On May 18, 1894, the Supreme Lodge of the Order of Tontl, a corporation created under the laws of the state of Pennsylvania, executed a general assignment of all its property, real and personal, to the Land Title & Trust Company and Francis Shunk Brown, of Philadelphia, in trust for the equal benefit of all its creditors. It is agreed by the record that this deed is valid under the law of Pennsylvania governing assignments, and that the trustees named filed an approved bond for the performance of the trust. On the same day that the deed was executed and recorded in Philadelphia a duplicate was filed for record in the clerk's office of the superior court of Baltimore city, but the trustees have filed no bond in this state. On June 1, 1894, the appellant, William T. Moore, sued out of the superior court an attachment against the Order of Tontl, as a nonresident debtor, alleging an indebtedness to the plaintiff of the sum of \$1,000. The writ was laid in the hands of the National Bank of Commerce as garnishee, and on June 22d of the same year a confession of assets was filed, stating that on June 1, 1894, the Supreme Lodge of the Order of Tontl had to its credit on the books of the bank the sum of \$14,231.75. And thereupon a judgment was entered for amount of the plaintiff's claim. Shortly afterwards the appellees moved the court to strike out the judgment and to quash the attachment, and from the order striking out the judgment and quashing the attachment this appeal has been taken.

We have, then, the case of a general assignment for the equal benefit of creditors, executed by a resident of another state and valid under the laws of that state, and valid at common law, which conveys debts and choses in action belonging to the assignor and situate in Maryland. And the appellant contends that this assignment, although recorded in this state, did not operate to convey title to the trustees, so as to defeat his attachment, because the statute of this state (Code, art. 16, § 205), requiring trustees for the benefit of creditors to file an approved bond, was not complied with. Now, there can be no doubt that each state has the right to regulate the transfer of personal property (and here we are dealing with personalty alone), owned by nonresidents but situate within its limits, and it is held that, although a foreign contract or assignment may be valid in the state where made, it will not be enforced in another, if repugnant to the law or policy of the latter state. Railroad Co. v. Glenn, 28

Md. 287; Townsend v. Coxe, 151 Ill. N. E. 689. But the general rule is the validity of a transfer of personal property governed by the law of the domicile of the owner, according to the maxim, "Mortuus quantur personam." And this rule is applicable to voluntary general assignments for the benefit of creditors. Black v. Zach, 10 How. 514; Barth v. Backus, 140 N. Y. N. E. 425. The effect thus given to an assignment of personal property is upon interstate comity. Smith's App. Pa. St. 381. There is quite a conflict of authority in the decisions of the states as to the effect to be given to foreign assignments for the benefit of creditors when they conflict with preferences valid by the law of the state where the assignor is domiciled, but under the law of the forum where the property of the assignor is situated, and where the creditors are creditors of the assignor. This question, however, does not arise in this case, since the assignment here is for the benefit of all the creditors of the assignor and is valid in this respect under the law of Maryland, as well as under the law of Pennsylvania. The question, then, for consideration is whether Code, art. 16, § 205, invalidates an assignment executed in another state by a party there domiciled. The statute provides that every trustee, to whom any real or personal, shall be conveyed for the benefit of creditors, shall file with the clerk of the court in which the deed was recorded a bond, conditioned for the performance of the trust, and no title shall pass to any trustee until such bond is filed and approved. And in the case of Stiefel v. Barton, 73 Md. 410, 21 Atl. 281, this court held that the filing of the bond without its approval by the clerk of the court was a condition precedent to the vesting of title in the trustee. But there we were dealing with assignments executed in this state, and the question here under consideration is not presented in those cases. But the provisions of the statute must be construed in connection with the general rule governing the validity of transfers of personal property governed by the law of the owner's domicile, and, so considered, it is clear that there was no intention on the part of the legislature in passing this law to limit the right of nonresidents to transfer their personal property situate in this state or to change the then existing law.

In many cases statutes providing for the mode in which personal property transferred have been held not applicable to nonresident owners, but construed as only upon residents of the state. In the case of Carson, 12 Md. 54, there was an assignment for the benefit of creditors, made in Maryland by parties owning property in Maryland upon which attachments were subsequently laid here. It was objected that, since the deed was not recorded within 20 days in the county where the assignors resided

invalid under Act 1729, c. 8. The court held that this provision was not intended to apply to a deed made in another state, and that the validity of the transfer was to be tested exclusively by the law of Kentucky, upon the ground that the situs of personal property for such general transfer is the domicile of the owner. And in *Houston v. Nowland*, 7 Gill & J. 480, a deed executed in Delaware, valid under the law of that state, but not recorded according to the law of this state, was held to defeat an attachment in Maryland of choses in action due to the assignor. And in *Railroad Co. v. Glenn*, 28 Md. 287, a Virginia corporation executed an assignment for the benefit of creditors which was void under the law of Maryland but valid under the law of Virginia. This court said that, since the deed was valid in Virginia, it must be held to be valid here, unless repugnant to some law or policy of this state. In disposing of the question whether the deed was so repugnant, the court said: "We are not aware of any law or rule of construction which prohibits the enforcement of a contract, not made in this state, according to the law of the place where it was made, although our citizens, from reasons of state policy, may not be permitted to make a similar contract here." A different rule would be to attempt the enforcement of our local policy upon all other people and recognize no contract not conformable to our peculiar views. Transfers of personal property within our limits, belonging to parties abroad, may be made according to the foreign laws, where our own citizens, in transferring similar property, are required to conform to our laws regulating such transfers. In *Cook v. Van Horn*, 81 Wis. 291, 50 N. W. 893, it was held that "a foreign voluntary assignment, valid in the state where executed, will be sustained in that state as to property of the assignor within the state, on the ground of judicial comity." An attachment of such property in this state by a creditor of the assignor, levied after the assignment, but before the assignee had perfected his title by filing bond required by the law of the state of the domicile, will be held void, since, under the law of that state, title had passed from the assignor. And so in *Barnett v. Kinney*, 147 U. S. 476, 13 Sup. Ct. 403; In re *Paige & Sexsmith Lumber Co.*, 31 Minn. 136, 16 N. W. 700; *Butler v. Wendell*, 57 Mich. 62, 23 N. W. 460; *Chafee v. Bank*, 71 Me. 514; *Ockerman v. Cross*, 54 N. Y. 29. This case is altogether different from that of *White v. Bank*, 80 Md. 1, 30 Atl. 567, as in the latter it was necessary to record the deed of trust in Allegany county, as the grantors owned real estate there, and the provisions of article 16, above cited, were applicable to it. It was also necessary to report the sale to the circuit court of that county, and for that court to take jurisdiction of the case, which was done after the sale was made. In the present case it was not necessary to record the deed of trust to affect the fund in

controversy, and hence the provisions of article 16 are not applicable to it. These provisions require the bond to be filed with the clerk of the court in which the deed or instrument creating the trust is to be recorded. It is therefore manifest, if the deed is not required to be recorded at all in this state, then no bond is to be filed or given in this state. It is clear, then, from what has been said, that the provisions of the Code (article 16, § 205), requiring a trustee for the benefit of creditors to file an approved bond, apply only to assignments of this kind of debts and choses in action executed in this state. The judgment quashing the attachment will be affirmed. Judgment affirmed, with costs.

BAUER et al. v. BAUER et al.

(Court of Appeals of Maryland. Jan. 8, 1896.)

UNDUE INFLUENCE—PARENT AND CHILD—PRESUMPTION.

1. A voluntary conveyance of property by a parent to her child is not presumed to be invalid, unless a confidential relation between them is shown to exist.
2. A voluntary conveyance of her property, made by a capable grantor, in pursuance of a long-cherished purpose, to certain of her children, to the exclusion of others, will not be set aside, except upon clear proof of undue influence.

Appeal from circuit court of Baltimore city.

Bill by Lawrence F. Bauer and others against John W. Bauer, administrator, and others, to set aside certain instruments made by Elizabeth Bauer as having been obtained by undue influence. From a decree for complainants, defendants appeal. Reversed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, ROBERTS, BRISCOE, and BOYD, JJ.

Thomas S. Baer and J. W. Morrison, for appellants. M. N. Packard and C. C. Rhodes, for appellees.

BRISCOE, J. This appeal is taken from a decree of the circuit court of Baltimore city vacating a deed to the defendants of a house on Baltimore street, dated the 10th of November, 1891, and a bill of sale to two of the defendants of certain personal property, dated the 19th of December, 1891. The bill was dismissed as to a deed to two of the defendants of three small houses on Lemon street, dated the 12th of May, 1891, and from this part of the decree no appeal has been taken. The bill is filed by a brother and sister against a brother and two sisters, and charges that the grantor, the mother of the parties, was incompetent to make a valid deed or contract, and that the conveyances were obtained by fraud and undue influence exercised by the defendants. All of these allegations are specifically denied by the answers. The undisputed facts show that the grantor in the deeds was an old woman, 74 years of age, and suffering from a cancer,

which had been pronounced incurable by her physicians, and from which she died on the 11th of January, 1892. She was unmarried at the time of her death, and left seven children and several grandchildren surviving her, all of whom, except the defendants, had left her house shortly after becoming of age, and only two of whom, a son and daughter, are parties plaintiff to this suit. She conducted a store and a scouring establishment, and the property had been acquired by the joint labor of herself and the defendants. She gave to her two daughters, who were unmarried, the three houses on Lemon street, estimated to be worth \$1,200, and the furniture and store fixtures, worth \$150. The Baltimore street house, which she had purchased in 1868 for \$3,500, she gave to the three defendants equally. There were no exceptions to the large mass of evidence in the record, although much of it has no material bearing upon the case.

It is insisted on the part of the appellees that the relations existing between the grantor and grantees, at the time of the execution of the deeds, were of such a character as requires the application of the equitable doctrine applied to gifts between persons standing in a confidential and fiduciary relation to each other. It is well-settled law that a gift or voluntary conveyance between parties standing in the confidential relation of child to parent is prima facie void, and can only be upheld upon proof that it was the free, voluntary, and unbiased act of the person making it. *Whitridge v. Whitridge*, 76 Md. 54, 24 Atl. 645. This is so, because a child is presumed to be under the control of parental influence as long as the dominion of the parent lasts, and while that dominion exists it lies on the parent, maintaining the gift, to disprove the exercise of parental influence by proof that the child had independent advice or in some other way. But a voluntary conveyance of property from a parent to a child rests upon a different principle, and is not prima facie void. It turns, says Mr. Pomeroy, in his work upon Equity Jurisprudence, upon the exercise of actual undue influence, and not upon any presumption of invalidity. A gift from parent to child is certainly not presumed to be invalid. 2 Pom. Eq. Jur. § 1399. If, however, the confidential relation is shown by competent proof to exist, then the burden is imposed upon the grantee to show that the transaction was a righteous one. In *Eakle v. Reynolds*, 54 Md. 307, it was said that a court cannot be too vigilant and cautious in considering the proof, and in determining whether the gift was the free, voluntary, and intelligent act of the donor; yet the relation must be such as to imply dominion or control over the property or person of the donor, and not such a relation which one might naturally expect to arise from kinship and mutual affection. We have carefully considered the proof, and find nothing in the record in this

case to justify the contention that the defendants exercised such dominion over the mother as to bring this case within the rule of law contended for by the appellees. On the contrary, the proof is abundant that there was a woman of great resolution and firmness of character, and maintained complete control over her business affairs and family until the time of her death. What, then, is the proof as to the mental capacity of the grantor to make a valid deed or contract? Conlyn, the family physician who attended her in her last illness; the three justices of the peace who took the acknowledgments of the deeds; her brother, Mr. Ortwine; her daughters, who were witnesses to the deeds; and four other witnesses besides the defendants in the case, who knew her frequently and knew her well,—all testify that she was mentally sound and capable of making a valid deed or contract. As to the testimony as to her mental capacity at the time of the execution of the deeds, it is so very conclusive, we deem it unnecessary to consider it further here.

As to the remaining question, then, whether the deeds were voluntary, and that is, whether the deeds were the free and voluntary act of the grantor, and whether they were procured by fraud or undue influence. Now, according to the testimony, the grantor was a woman of strong will and force of character, and maintained complete control over the defendants in the management of her business to the time of her death. The disposition of her property was not only such as she had determined to make years before, but, after making the disposition, she spoke to persons about it, and gave reasons for so doing. Mr. Ortwine, her brother, who called to see her while before she died, testified that she had told him about the children who remained home with her, and stated that she had conveyed the property to them. In a conversation with Mrs. Sinclair and Mayer she stated that she had deeded her property to three of her children, and as a reason that those children, especially the girls, had given her all their earnings and their time ever since they had reached age; that she had done what she thought right and just; that they would have supported her when she died; and that the other children would support them. And in a conversation with her daughter Mrs. H. one of the plaintiffs in the case, eight months before her death, she had declared her purpose of so disposing of her property. We find nothing in the record, except in the testimony of the plaintiffs and of Mrs. H. and her sister, which tends to sustain the charge of undue influence, and whatever material in their evidence was directly contradicted by other witnesses in the record. The disposition she made of her property was a natural one, under the circumstances of this case, and the reasons she gave for it in her lifetime for so doing were proper.

reasonable. There is no evidence connecting the two female defendants with exercising any undue influence over their mother, or attempting to fraudulently procure the execution of the deeds. And the proof, when taken in connection with other facts in the case, is not sufficient to justify a court in striking down these deeds, as procured by fraud or undue influence exercised by the defendant Lawrence. As was said by this court, in *Eakle v. Reynolds*, 54 Md. 307: "A voluntary gift, made by a capable donor, in pursuance of a long-cherished purpose, to a favorite nephew, negatives the suspicion of fraud and undue influence, and a court ought not to set aside a deed made under such circumstances, except upon proof of the strongest and most conclusive character." And the term "undue influence," as used in this connection, means a deed executed in pursuance of suggestions made by others, and not upon the suggestions of the donor, and in pursuance of well-settled and often-declared purposes. For these reasons the decree below will be reversed, in so far as it vacates, sets aside, and declares null and void the deed, dated the 10th of November, 1891, from Elizabeth Bauer to the defendants Lawrence, Mary L., and Mary C. Bauer, and the bill of sale, dated the 19th of November, 1891, from Elizabeth Bauer to Mary L. and Mary C. Bauer, and the cause remanded, to the end that a decree may be passed in accordance with this opinion. Decree reversed, and cause remanded, with costs.

MATTHEWS v. ADAMS.

(Court of Appeals of Maryland. Jan. 8, 1896.)

PARTNERSHIP ACCOUNTS—SETTLEMENT.

1. The excess of one partner's advances over those of the other constitutes a preferred claim upon the partnership property, or its proceeds.

2. Limitations do not run, as between partners, until an account has been settled, and a balance ascertained.

Appeal from circuit court, Washington county.

Bill by James P. Matthews against Charles W. Adams for an accounting. From a decree for defendant, complainant appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, and BRISCOE, JJ.

Alex. Armstrong and N. B. Scott, for appellant. F. F. McComas, for appellee.

BRISCOE, J. The appellant and appellee were owners and partners in the publication of a weekly newspaper called the "Herald and Torchlight," at Hagerstown, Md. There were no written articles of partnership, but at the time of the purchase of the property and business, for \$7,025, each partner contributed the sum of \$1,512.50, in cash, and raised the residue by a mortgage on the

property purchased. The profits and loss in the business they were to share equally. Subsequently, the mortgage becoming due, the appellee paid from his individual funds the sum of \$1,000 to the indebtedness of the firm, and the residue (\$3,000) was secured by a new mortgage on the property. Shortly after the purchase of the paper, in 1885, the appellant being in the employment of the United States government, as special examiner of the pension office, it was agreed that a local editor should be employed to represent him in the management of the paper, and whose salary was to be charged against the appellant's share of the profits. On the — day of December, 1889, the appellee was appointed doorkeeper of the United States house of representatives, and, both partners being then absent from the business, it was further agreed that the management and conduct of the paper were to be placed in the hands of a Mr. Biggs, of Hagerstown, and this was accordingly done. The business, as thus conducted, not being successful, —the expenditures exceeding the receipts,—the plant, good will, and establishment of the paper were sold, by agreement, on the 18th of September, 1891, for the sum of \$6,500, Messrs. Matthews & Adams reserving all accounts and credits that were due to the firm on the day of sale. And on the 3d of March, 1892, the appellant filed this bill of complaint for a dissolution of the partnership, a receiver, an accounting, and an injunction. The case was submitted on bill, answer, and exhibits, and a decree was passed appointing Messrs. Armstrong and McComas as receivers. And the questions here for consideration arise upon exceptions to the correctness of the auditor's accounts distributing the funds collected by the receivers. The first account, upon the report of the receivers, filed on the 20th of January, 1894, charged them with the sum of \$2,121.34, and, after an allowance for commissions and expenses, distributed the residue to the payment of the firm's indebtedness, including the claim of the appellee for the \$1,000 advanced the firm beyond his share of capital, and paid on the original mortgage debt for the purchase money; and, there being a balance of \$441, it was distributed equally to the partners. To this account exceptions were filed, but the account was ratified and confirmed, except as to the allowance of the appellee's claim. And this appeal is from the order ratifying auditor's account No. 1, and the auditor's restated account, which allowed the appellee's claim, subject to a credit of \$245.68 which had been collected by him on an account due the firm, and not paid over to the receivers. The exception to the distribution of the residue of the partnership funds after the payment of the appellee's claim and the partnership creditors, until the rights of the partners were adjusted, was sustained by the court, and there was no appeal therefrom.

First, then, as to the allowance of the ap-

pellee's claim: The proof is clear and uncontradicted that this money had been paid by Mr. Adams, and at a time when it was necessary to be paid in order to preserve the property, and prevent its sale under the mortgage. And it is equally clear that it was money paid by him in excess of his share of the capital, not derived from partnership profits, and to pay a debt due by the firm. In the case of *Pierce v. Tiernan*, 10 Gill & J. 253, it was distinctly held that the excess of one partner's advances over those of the other constitutes a preferred claim upon the partnership property or its proceeds, and must be paid before any surplus can be ascertained which is to be divided among partners. So advances or loans to the partnership by one partner are not like capital, but like borrowing from a third person, and interest is allowed thereon. *Holloway v. Turner*, 61 Md. 219; 2 Bates, Partn. 785; 1 Lindl. Partn. 922; *Baker v. Mayo*, 129 Mass. 517; *Hill v. Beach*, 12 N. J. Eq. 31; *Uhler v. Semple*, 20 N. J. Eq. 288. So far as the statute of limitations relied upon by the appellant is concerned, we need only say that it cannot avail him here. The statute does not begin to run until an account has been settled between the partners, and a balance ascertained, when a right to sue arises. *Holloway v. Turner*, 61 Md. 223. We find no error in the allowance of the claim of Mr. Small for clerical services rendered in making out books for the receivers. For a long period during the continuance of the partnership, no books had been kept by the firm, and the receivers found it impossible to adjust the accounts without capable and experienced clerical assistance.

Having disposed of all the questions raised on this appeal, the orders appealed from will be affirmed, and the cause remanded, to the end that the matter of the accounting between the partners may be had. Orders affirmed, and cause remanded, with costs to appellee.

KOPP v. HERRMAN.

(Court of Appeals of Maryland. Jan. 8, 1896.)

SALE OF INFANT'S PROPERTY — ADVERSE POSSESSION—NINETY-NINE YEAR LEASE.

1. Testator left leasehold property to his wife for life, with the remainder to his children, charging it, as well as other property, with the payment of legacies to the children, and appointed his wife executrix. *Held*, that the executrix's assent to this legacy vested the life estate in her, with remainder to the children.

2. A grantee in a deed of minor's property, made under order of court, who enters on the property in good faith, acquires adverse possession.

3. The statute of 21 Jac. I., prescribing limitations to entries on real estate, is applicable in Maryland to cases of leases for 99 years, renewable forever.

Appeal from circuit court of Baltimore city.

Suit by Louisa Herrman, administratrix, d. b. n. c. t. a. of Peter Herrman, deceased, against Daniel Kopp. From a decree of the circuit court, defendant appeals. Reverse.

Argued before BRYAN, McSHERRY, FOWLER, BRISCOE, and ROBERTSON.

L. Hochheimer, for appellant. S. J. Conner and J. F. Gontrum, for appellee.

BRYAN, J. Peter Herrman died in the year 1860. By his last will and testament he bequeathed to his son, Conrad, and his daughter, Elizabeth, \$500 each, to be paid to them by his executrix or her successors when they should respectively reach the age of 21 years; and he declared that these bequests should (as it was expressed) be reserved out of the rents and profits accruing from his leasehold and fee simple property. He devised and bequeathed to his wife all the rest and residue of his personal and real estate, for life, if she should remain unmarried, but not otherwise. In the event of her marriage, he devised and bequeathed certain real and leasehold property to his two children. He had, however, a leasehold interest for 99 years, renewable forever, in a lot of ground on Caroline street in the city of Baltimore, of which he made no limitation over in case of his wife's marriage. He devised and bequeathed to his two children, after the death of his wife, all the real and personal property given to her by the will, expressed purpose not to interfere with the property made for them in the event of her marriage, and he appointed his wife executrix. He married Andrew Korn shortly after the death of the testator. In the year 1861 he passed an administration account, in which she made distribution of all the personal estate of the testator, retaining to herself a lot of ground on Caroline street, in which she had a leasehold estate. Before its passage, Mrs. Korn had been appointed guardian to her two children, who were infants. In December, 1861, she and her husband conveyed the leasehold interest on Caroline street to Henry Bachman, in the deed that she conveyed the fee simple interest therein in her own right, and she acted as guardian of her two children in the order of the orphans' court, passing the petition of her husband and her children to their guardian. The title of Bachman came vested in Daniel Kopp in 1878, by regular mesne conveyances; he having purchased the lot for full value, without notice of an outstanding claim in any one of the records. On February 1, 1872 (being after the death of Andrew Korn), her surviving husband rendered an account of her guardianship of her two children, showing that they had been on the lot for 10 years. One of the items allowed to the guardian among the payments and disbursements was stated as follows: "And for a lot of ground on the east side of Caroline street, near Wilk, bequeathed to Catharine for life, and during her life."

disposed of under the order of the honorable, the orphans' court for Baltimore city, and of which lot the proceeds of sale were expended by said Catharine for and in behalf of herself, and for the benefit and behoof of said wards, and none of the said proceeds came in the hands of said Korn, this accountant, as husband of said Catharine, \$700.00." This account was examined and passed by order of the orphans' court. On the following day, each of the wards executed and delivered to Korn a release in the usual form, which was duly acknowledged and recorded. These releases acknowledged full satisfaction and payment of their claims against their guardian, and each of them contained an acknowledgment of "a correct and satisfactory account of, and full satisfaction for, all claims or demands which the ward might have against the guardian for or on account of a certain house and lot on the east side of Caroline street, contained in the inventory of the testator's estate, and retained by the guardian." The principal question presented by this record is whether Kopp has a good title to the property purchased by him.

Louisa Herrman, the widow of Conrad Herrman, one of the above-mentioned wards, has been appointed administratrix d. b. n. c. t. a. of Peter Herrman, the father. She contends that the title to the leasehold was never validly divested out of the executrix of the testator, and that she now holds it as administratrix d. b. n. c. t. a. She is complainant in a bill in equity praying certain equitable relief against Daniel Kopp, which is necessary to enable her to maintain an action of ejectment which she is prosecuting against him. In the view which we have taken of this case, it is unnecessary to refer specifically to the nature of this equitable claim. By the will, Catharine Korn took a life estate in this leasehold, with remainder to her two children. Every legatee, whether of chattels real or personal, must obtain the executor's assent to the legacy before his title can be complete and perfect. Williams, Ex'rs (8th Am. Ed.) top p. 1475. The executor's assent is required even in the case of a legacy to himself. "If a term of years or other chattel be bequeathed to A. for life, with remainder to B., and the executor assents to the interest of A., such interest will inure to vest that of B., and e converso; for the particular estate and the remainder constitute but one estate." Williams, Ex'rs, 1479. "In accordance with the general principle governing the vesting of legacies, it has been decided in *Cole's Lessee v. Cole*, 1 Har. & J. 572, that if an executor assents to the bequest of a leasehold estate, and gives up possession, he cannot thereafter maintain an ejectment for it. In this case he assent of the executrix vested the title in herself for life, and in the children in remainder. The legal title was absolutely fixed by such assent. This leasehold was charged in conjunction with other property,

real and personal, with the payment of the legacies to the two children. The passage of the account did not exempt the executrix or her bondsmen from the consequences of a devastavit; nor did it prevent the enforcement in equity of a due proportion of the charge against the leasehold for the payment of the pecuniary legacies. The mother's life estate expired by her death, in 1866; and the remainder-men would then have become entitled to the leasehold if it had not been sold, and would thus have held the property, and also the charge upon it. The charge would have been extinguished by the union of the title and the lien in the same person. *Mitchell v. Mitchell*, 2 Gill, 236; *Glenn v. Spry*, 5 Md. 110. These considerations show, we think, that there is no title whatever in the administratrix d. b. n. of Peter Herrman.

As it may prevent future litigation, it seems proper that we should go further, and determine whether any other person mentioned in these proceedings has shown a title to this leasehold. In 1864 the property was sold, and the proceeds expended for the benefit of the mother and her wards, and this disposition of the property was by the order and sanction of the orphans' court. Art. 98, § 165, of the Code authorizes the court, if it deems it advantageous to the ward, to allow the guardian to sell part of the ward's personal estate for his maintenance and education. With a full knowledge of all these proceedings, the wards approve of them, and execute releases. It has been said that they were not of competent age when they executed these releases. This statement, however, has not been satisfactorily proved. But, if they were at the time of the execution of the releases under the disability of nonage, when they reached the age of 21 years their right of action accrued to set aside the releases, and impeach the guardian's account, if any cause existed for such proceeding. And from that time the statute of limitations began to run against them. *Green v. Johnson*, 3 Gill & J. 389. Kopp claims by regular mesne conveyances, under a deed executed in 1864. Assuming, for the sake of the argument, that this deed was void, the entry of the grantee under it was made bona fide, and therefore he acquired adverse possession. He could not, by any possible interpretation of the law, be considered as having acquired less than color of title. "The courts have concurred, it is believed, without an exception, in defining 'color of title' to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title. The inquiry with them has been whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith." *Wright v. Mattison*, 18 How. 58. In *Hoye v. Swan's*

Lessee, 5 Md. 248, it was said that "It appears to be immaterial whether the title be valid or not, provided the entry and claim be bona fide under that title." And it was considered in the same case to be well settled that when one entered under color of title, by deed or other written document, he acquired actual possession to the extent of the boundaries set forth in the writing, even although the title conveyed to him should be good for nothing. There is, then, uninterrupted adverse possession by Kopp, and those whose title he holds, for about 28 years before the institution of this suit. The statute of 21 Jac. I., prescribing limitations to entries upon real estate, is applied in this state to cases of leases for 99 years, renewable forever, which have many of the features of real estate. After 20 years' adverse possession, Kopp's title would be perfect against all persons except those who are within the disabilities mentioned in the second section of the statute. This section saves the rights of all persons who were under the age of 21 years at the time when their title first accrued, provided they bring their suits within 10 years next after reaching full age. The title of these children of Peter Herrman (if they have any) accrued at the death of their mother, in 1886. If they had not been infants at that time, it would have been barred in 1886. But the statute allowed them 10 years after they arrived at full age to bring suit. By the computation most favorable to them, one of them reached the age of 21 years more than 20 years ago, and the other more than 19 years ago. We see nothing in the record to countervail the title of Daniel Kopp.

The court below passed a decree in favor of the complainant below, who is now appellee. As we have not been able to take any view of this case which gives any rights against the appellant, we will, without considering in detail the charges of the bill of complaint, reverse the decree below, with costs in both courts, and dismiss the bill of complaint. Decree reversed, with costs above and below, and bill dismissed.

HAMILTON et al. v. CARROLL et al.,
County Com'rs.

(Court of Appeals of Maryland. Jan. 9, 1896.)

TITLE OF ACT—CHANGE OF COUNTY SEAT—SPECIAL LEGISLATION.

1. The title, "An act to provide for the removal of the county seat of C. county from P. to L. or C., if the legal and qualified voters of said county shall so determine, and to provide for the erection of a courthouse and jail at such place as shall be so determined on, and the procuring of a site or sites for the same, and to authorize the county commissioners of said county to borrow money and issue bonds for the payment therefor," sufficiently covers an act requiring the question whether the county seat shall be located at L. or C. to be submitted to the

voters, declaring the manner of conducting election and the means of raising money necessary public buildings, and then providing for the sale of the buildings at P.

2. Since no general law exists for removal of county seats, the legislature must enact a special law in that regard without in violation of Const. art. 3, § 33, forbidding special cases provided for by general laws.

3. The question of the removal of a county seat is one of local concern, which the legislature may refer to the voters of the county.

4. A court of equity has no jurisdiction to interfere in a direct or a collateral proceeding to hear and determine the validity of a county election.

Appeal from circuit court, Charles county.

Bill by Francis P. Hamilton, Davison Gunier, and others against George V. Carroll and others, county commissioners of Charles county. From a decree for appellants, complainants appeal. Affirmed.

Argued before ROBINSON, C. J., BRYAN, BRISCOE, McSHERRY, LER, ROBERTS, PAGE, and BOYD.

W. Pinkney Whyte and Francis I. Wilmer for appellants. L. A. Wilmer, A. J. Stone, and J. E. Stone, for appellees.

ROBINSON, C. J. By Act 1894, the question whether the county seat of Charles county should be located at Point or Laplata was submitted to the voters of that county. At the special election held in pursuance of this act, the majority of the votes cast, as ascertained by the judges, were cast in favor of Point as the county seat. The act further authorized the county commissioners to issue bonds not to exceed \$20,000, for the purpose of building courthouse and jail at the new county seat. This bill is filed by the county taxpayers of said county to restrain county commissioners from issuing bonds. Their claim to the interference of a court of equity is based on two grounds: First, that the act of 1894 is unconstitutional, and, not therefore, a valid exercise of legislative power; secondly, because the act was passed in a fraudulent manner in which the specification was conducted, whereby the will of the majority of the voters was not fairly and lawfully ascertained.

If the act in question is unconstitutional, the commissioners, it is clear, have no authority to issue the bonds for the purposes set forth in the act; and the county taxpayers, as taxpayers, have the right to enjoin the court to enjoin the commissioners from issuing said bonds. This we decided in Case, 31 Md. 375, and it is no longer a question. The act, it is said, is unconstitutional, because the subject of the act is not described in its title, as required by the constitution, which declares that "every act enacted by the legislature shall contain one subject and that shall be described in its title." Section 29, art. 3. Now, what is the subject-matter of this act? In its title, it provides that the question

he county seat of Charles county shall be located at Chapel Point or Laplata shall be submitted to the voters of the county. Then it provides the mode and manner in which the election shall be conducted, and then the means by which the money shall be raised or the erection of the necessary public buildings, and for the sale of the present courthouse and jail lots and the buildings at Port Tobacco. So the whole matter with which the act deals is the location of the county seat, the erection of the public buildings at the county seat, as located by a majority of the voters, and the sale of the lots, materials, etc., at Port Tobacco, the then county seat. And the question is whether this subject-matter with which the act deals is properly described in the title. Now, what is the title? It is: "An act to provide for the removal of the county seat of Charles county from Port Tobacco to Laplata or Chapel Point, if the legal and qualified voters of said county shall so determine, and to provide for the erection of a courthouse and jail at such place as shall be so determined, and the procuring of a site or sites for the same, and to authorize the county commissioners of said county to borrow money and issue bonds for the payment therefor." At first blush, it would seem, at least, that the subject-matter of the act was not only described, but fully and fairly set forth in the title; that is to say, the location of the county seat, the erection of the public buildings at the county seat as thus located, and the means necessary for the payment of the cost said buildings. But the title, it is said, provides for the removal of the county seat from Port Tobacco to Laplata or Chapel Point, if the legal and qualified voters shall so determine; whereas, the question submitted by the act itself is whether the county seat shall be located at Laplata or Chapel Point. In other words, it does not in terms submit to the voters the direct question whether the county seat shall be removed from Port Tobacco. This is, at best, a very nice distinction, and one which, it is plain, never occurred either to the legislature or to the voters to whom the question was submitted. The act does, in terms, provide that the question whether the county seat shall be located at Laplata or Chapel Point shall be submitted to the voters of the county; and then it provides that, if a majority of the votes cast shall be in favor of Laplata, then thenceforth Laplata shall be the county seat, and if a majority shall be in favor of Chapel Point, then it shall be the county seat. And the act further provides for the purchase of site and sites for the erection thereon of a courthouse and jail at whichever the county seat may be thus located. Now, as there can be but one county seat, it follows that, when the voters cast their ballots for the location of a county seat at either Laplata or Chapel Point, they necessarily voted that it should any longer be located at Port Tobacco.

So, by every fair rule of construction, the act itself provides for the removal of the county seat from Port Tobacco to Laplata or Chapel Point, as a majority of the voters shall determine. And, this being so, there is no force in the objection that the subject of the act is not described in the title. On the contrary, the whole subject-matter of the act—the location of the new county seat, and the erection of the public buildings at the place thus located—is set forth in the title. We have had occasion in so many cases heretofore to consider the object and purposes and mischiefs intended to be remedied by the clause of the constitution now before us, that it is only necessary to refer to these cases in which the subject has been fully discussed. And while full force and effect should be given to this clause, courts ought to be careful not to embarrass and defeat legislation by refined and subtle distinctions not within the spirit of the clause itself or the mischiefs to be remedied by it. There is no variance whatever between the title and the act itself by which any one could probably have been misled. The destruction of the courthouse at Port Tobacco by fire made, it seems, that place no longer desirable as the county seat; and the only question was whether the new county seat should be located at Laplata or Chapel Point. It was so dealt with by the legislature, and so understood by the people of the county. And all this contention about the subject-matter of the act not being described in the title to the act is a mere afterthought, and was never heard of until after the result of the election was declared to be in favor of Laplata.

As to the objection that the act is a special law, and within the prohibition of section 33, art. 3, of the constitution, which declares that "the general assembly shall pass no special law for any case for which provision has been made by a general law," it is sufficient to say that no general law has been passed by the general assembly providing for the removal or location of county seats; and, there being no general law on the subject, a special law was absolutely necessary.

Nor is there any force in the objection that the act of 1894 is a delegation of legislative power to the people. The question submitted to the voters of Charles county was in regard to the location of the county seat, and, being a matter of merely local concern, it was a question which the legislature had the right to submit to the determination of the people directly interested in it. In *Bradshaw v. Lankford*, 73 Md. 428, 21 Atl. 66, we said: "It seems to be well settled that questions of local concern—whether, for instance, a county seat once located shall be removed elsewhere, or whether the county shall subscribe to a particular improvement; these and other like questions of local legislation—may be referred to the voters of the county for decision."

CHAPPELL v. CHAPPELL
(Court of Appeals of Maryland. Jan.
DIVORCE—DISMISSAL OF BILL—CONDITIONAL
PEALABLE ORDERS.

1. A petition for alimony denied charges of the bill, and alleged that had only \$800 a year; that the husband's income of \$12,000 a year; that two sons pending against her for divorce, requiring money to be taken in Europe and in five states. Held that, on granting plaintiff to dismiss, it was proper to impose that he pay the costs of the suit and fees of \$250.

2. Complainant cannot appeal from making the payment of costs and a condition of the granting of his motion miss the bill.

3. An appeal will not lie from a court of law.

4. Complainant cannot appeal from order directing that, unless he dismisses he shall pay alimony and a counsel fee

Three appeals, in one record, from
court, Baltimore county, in equity.

Action by Thomas C. Chappell
Mary Ball Chappell for divorce. A
was made allowing complainant to
his bill on paying the costs and a cou
and another order was made that c
ant pay alimony and counsel fee u
dismissed his bill. From such orders
opinion on the first, complainant
Appeals dismissed.

Argued before BRYAN, McSHERR
COE, ROBERTS, and BOYD, JJ.

David G. McIntosh, for appellant
I. Duncan, David Stewart, and H.
Stewart, for appellee.

BRYAN, J. Thomas C. Chappell
bill for divorce against his wife. There
been no final decree in the cause,
complainant has nevertheless prayed
appeals. We will proceed to consider
orders of the court from which these
were taken, and the facts upon which
were founded.

The bill alleges that the defendant was sane at the time the marriage ceremony was performed, and it charges her with conduct of a most outrageous and vicious character, and desertion. The prayer of the bill is for a divorce a vinculo, for a nullity of marriage, and for general damages. The charges in the bill are set forth in great minuteness of detail, and in a vindictive and vituperative to a remarkable degree. Some of the statements are wholly irrelevant, and were evidently introduced into the bill merely for the purpose of embarrassing the defendant, and wounding her feelings. The defendant, in her answer, absolutely and positively denies every charge made against her. The bill was filed on the 13th day of March, 1895. The defendant alleged to be a nonresident, and an affidavit of publication was prayed against her. Publication was made. The defendant appeared on the 3d day of April, which was

ne when process for her appearance would have been returnable, if any such had been sued. She filed a petition in which she demanded the charges made against her, and prayer for alimony and an allowance for counsel fees. The court passed an order nisi granting the prayer of the petition unless the complainant should show cause to the contrary. She showed cause on the 16th of April. On the 25th of April, Chappell filed a petition to dismiss his bill of complaint. On the 8th of May the defendant filed an answer and a cross bill, incorporating both together, having previously obtained leave of the court. On the 11th of June the court filed an opinion stating that leave would be granted to the complainant to dismiss his bill of complaint, provided he should first pay \$250, as counsel fees, to the defendant's counsel, and also the costs of the suit, without prejudice, however, the defendant's right to institute such proceedings against him as she might be advised. And on the 15th of June an order of court was signed to this effect. The complainant appealed from the opinion and order, filing them "decretal orders."

The right of a complainant, under ordinary circumstances, to dismiss his bill, will not be denied. When, however, the dismissal would prejudice interests which have been acquired as a consequence of the institution of the suit, the right is subject to a just and reasonable qualification. The law does not leave a woman defenseless in a contest with her husband on the subject of a divorce. If her means are inadequate to the expenses of the litigation, the court, in its discretion, may compel the husband to pay them, and also a reasonable sum for alimony during the pendency of the suit. In this case, as was natural, the defendant came promptly forward to meet and repel the reproachful charges made against her by her husband. To do so with effect, she required the aid of able counsel. It was necessary for them to make preparation for the coming contest, and for they are entitled to compensation. We will see whether the husband ought to be charged with the payment of it. In the petition for alimony and counsel fees, the defendant alleges that her husband's charges against her are absolutely false and preposterous, and that the allegations of conduct on her part, intended to support these charges, are also false. She also alleges that, owing to her husband's fault, she has been living apart from him since September 25, 1893; that she is boarding, and is not living in the manse; she would be justified in living, considering the fortune of her husband; that she is not property of her own, excepting about \$100 a year; that she is in debt, and that she is wholly destitute of the means of living lawfully during the pendency of the suit, and in defraying the costs and expenses attending her defense; that her husband is a rich man, without children or other persons legally dependent upon him; that she believes

him to be worth about \$150,000, and to have an income of about \$12,000 a year. Chappell, in his answer showing cause against the prayer of the petition, alleges that in September, 1893, he examined the defendant's book of account, and that it contained a schedule of her stocks, bonds, and securities, and an account of her annual income, and that the book showed that her annual income accruing from investments for the 12 months immediately preceding September, 1893, was \$1,376, and that he believes that she is possessed of stocks, bonds, and other securities amounting to at least \$20,000, and that she is tenant in common with her mother, brother, sister, and others of very valuable realty in New Hampshire. He does not deny the allegation that he is a rich man, and that he is worth about \$150,000. He does deny that he has an income of about \$12,000 a year. It was admitted that, by an antenuptial contract between Chappell and his wife, each had released all right and interest in the estate of the other. It is very apparent that there is a vast disparity between the ability of these parties to sustain the expense of this litigation. Chappell does not deny that he is worth about \$150,000. He says that he believes that she is worth \$20,000, and also has an interest in valuable real estate. He seems to found this belief principally upon an examination of an account book made in September, 1893, which contained a schedule of stocks, bonds, and other securities belonging to the defendant. The book is not produced, or called for; neither are the securities specified or described, nor were they alleged to belong to the defendant at the time of the institution of the suit, or after that time. It must be confessed that this is rather a vague and uncertain method of proving the contents of a written document. It cannot be regarded as showing sufficient cause, against the distinct and positive averments of the petition. The bill of complaint narrates occurrences which are alleged to have occurred in New York, New Hampshire, Massachusetts, Maryland, Pennsylvania, England, and on a voyage across the Atlantic Ocean. The expense of taking testimony on these matters will be very considerable, and will weigh heavily upon a person of moderate means. The labor imposed upon counsel in preparing and conducting such a cause would be very great, and would deserve a liberal compensation. It is but just and fair that the wife's means of defense should be equal to the means of prosecution possessed by the husband. As this result cannot be obtained from her limited resources, we think that a wise exercise of the court's discretion would require the husband to pay all the expenses of the suit, including the wife's counsel fees. And we think that this requirement ought to be enforced while the subject-matter of the suit, and the parties, are under the jurisdiction of the court. We do not wish to be understood as intimating that a dismissal of the

bill would excuse the complainant from his obligation to pay what the court orders to be paid, but it would interpose embarrassments and inconveniences which do not now exist. The rights which the defendant has under the order of the court originated from the filing of the bill, and they would be greatly prejudiced if he were dismissed from the jurisdiction without making satisfaction of them by payment. Her petition alleges "that her husband has already filed a bill for divorce in the circuit court of Baltimore city, which he afterwards dismissed, and in the circuit court of the United States in Boston, which is still pending, and that the petitioner is in absolute need of means to compensate her attorneys in this long, varied, complicated litigation." Chappell's answer does not deny this statement. The record does not show us any excuse for such repeated vexation. So far as we can see, it is inspired by a spirit of animosity and oppression which merits severe rebuke. It would be cruel to permit the expense of these suits to be thrown upon a helpless woman.

We have thought it best to express our views on the questions which have been discussed, because, in the future progress of this cause, the knowledge of our opinion may diminish the necessity for litigation. But we do not think that these appeals are properly before us. It is very clear that the appeal from the opinion of the court is improperly taken. *Hagthorp v. Hook*, 1 Gill & J. 309; *Phillips v. Pearson*, 27 Md. 242; and other cases. The effective action of a court is by its decree, order, or judgment, and not by its opinion. Neither would an appeal lie from the order passed in pursuance of the opinion. It is not final in its character. It does not terminate the litigation in the cause. It does not definitely determine the question in controversy. It simply grants leave to the complainant to dismiss his bill on conditions which he was at liberty to accept or reject. Even if it could be considered an order refusing permission to dismiss his bill (as it is not), it would not be the subject of appeal. It has been long settled that an appeal will not lie from an order refusing to quash an attachment. *Baldwin v. Wright*, 3 Gill, 241; *Mitchell v. Chesnut*, 31 Md. 521. After the order is passed, the suit is left still in progress, and capable of being further prosecuted. The rule of this court on this subject has been frequently declared, as follows: "No appeal can be prosecuted to this court until a decision has been had in the court below which is so far final as to settle and conclude the rights of the party involved in the action, or denying to the party the means of further prosecuting or defending the suit. When the proceedings below shall be terminated, an appeal will then lie, and all the errors of the court below in the progress of the cause will be proper subjects for complaint of the party, and for the correction of this court." *Welch v. Davis*, 7 Gill, 385; *Boteler v. State*,

7 Gill & J. 109; *Hazlehurst v. M* Md. 67. We think that these appeals to be dismissed.

The answer and cross bill of the defendant demurs to many portions of the complaint as irrelevant and scandalous, and denies the charges of cruel treatment, excessively vicious conduct, abandonment, desertion. It charges that the complainant has been guilty of adultery, cruelty, and desertion of her, excessively vicious conduct towards her, and that she has been obliged to leave him on account of his conduct. Then gives a detailed statement of the course of brutality, cruelty, and desertion of a shocking kind, which it alleges were practiced towards her. The prayer of the cross bill was for a divorce a mensa et thoro, alimony, and for a reasonable support and maintenance during the pendency of the suit, and for the payment of counsel and the necessary costs and expenses of the suit. After the complainant had appealed as above stated, the defendant obtained leave to withdraw her cross bill, but it does not appear that she ever withdrew it. On the 26th of April, the court passed an order finally ratifying and confirming the nisi order for alimony, counsel fees, and expenses of suit, which had been passed on the 3d day of April, 1895. The complainant should on or before the 1st of August dismiss his bill of complaint, pay defendant's costs and the costs of the appeal in accordance with the court's order of June 11th. On August 12th the defendant appealed from this order, having previously paid the costs of the suit on both sides. He entered another appeal which had the same effect on the 22d of August. We think that what we have already said shows that an appeal will not lie from an order. After the passage of a decree in a cause, all the previous interlocutory orders are open for revision by the court. We shall dismiss all these appeals dismissed, with costs.

Appeal of ROBINSON.

(Supreme Judicial Court of Maine.
1895.)

TENANTS BY ENTIRETY—HUSBAND AND WIFE—CONSTRUCTION OF WILL.

1. The rule of the common law, that a devise or grant to husband and wife creates a tenancy by the entirety, no longer obtains in this state, since St. 1844, c. 117.
2. Tenancy by the entirety had its origin in the marital relation, and was founded on a legal fiction of the absolute oneness of husband and wife. Modern legislation has destroyed this theoretical unity, and secured to each a distinct and separate right to acquire property to her sole use and benefit, and to the control of her husband.
3. By the residuary clause in his will the testator gave his daughter and her husband the residue and remainder of his estate in shares and proportions, and so to the

he heirs and assigns forever." The husband died before the testator, leaving a minor son and wife surviving. *Held*, that the daughter does not take the whole as tenant in the entirety, but takes only one-half of the residuary estate, and that the other half should be distributed among the heirs of the testator.

(Official.)

Appeal from probate court, Androscoggin county.

Olive O. Robinson appeals from a decree distributing the estate of Charles P. McKenney. Exceptions overruled.

S. & J. A. Morrill, for appellant.

WHITEHOUSE, J. This is an appeal from the decree of a probate court.

The executor of the will of Charles P. McKenney filed a petition under the provisions Rev. St. c. 65, § 27, as amended by chapter of the Laws of 1891, asking for an order distribution which would protect him in carrying out the residue of the estate in his hands. This involved a construction of the following residuary clause in the will:

The residue and remainder of all my estate of which I may die seised and possessed, both real and personal, not herein otherwise disposed of, I give, bequeath, and devise the same to my son-in-law, Judyer Robinson, and my daughter, Olive H. Robinson, the wife of the said Judyer Robinson, in equal shares and proportions, and so to their respective heirs and assigns forever."

Judyer Robinson died before the death of the testator, leaving a minor son and a wife, who is the appellant, and the same person as Olive H. Robinson in the will.

The decree of the judge of probate reserved one-half of the residuary estate to be divided to the appellant, and the other half to be distributed among the heirs of the testator, and this decree was affirmed by the justice presiding in the supreme court of probate. The case comes to this court on exceptions to that ruling.

It is the opinion of the court that the ruling was correct, and that the exceptions must be overruled.

It is contended by the learned counsel for the appellant that the residuary clause created a tenancy by the entirety, and that Olive Robinson is entitled to the entire residuary estate by right of survivorship. It is not controverted that the language employed by the testator must be construed as creating a tenancy in common, if Judyer Robinson and Olive O. Robinson had not been husband and wife. *Stetson v. Eastman*, 84 Me. 366, 24 Me. 868. But it is argued that the rule of common law by which a devise or grant to husband and wife constituted them tenants by the entirety, the survivor taking the whole, has never been changed in this state by the abolition of joint tenancies or the legislation enlarging the rights of married women respecting the ownership of property. It is accordingly contended that if the words,

"in equal shares and proportions," found in the residuary clause, were advisedly employed for the purpose of making certain the intention of the testator to create a tenancy in common, this intention, however clearly expressed, cannot be allowed to prevail against the early rule of the common law that husband and wife, being regarded as one person in law, are not competent to take, either as joint tenants or as tenants in common, under any form of grant or devise in fee made to them during coverture.

We are unable to concur in this view. The rule of the common law undoubtedly existed as claimed by the appellant. It is thus stated in 2 Bl. Comm. 181: "If an estate in fee be given to a man and his wife, they are neither properly joint tenants nor tenants in common; for, husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, per tout et non per my. The consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor." And it is true that prior to the act of 1844, c. 117, and subsequent legislation in this state securing to the wife the enjoyment of her separate estate, this common-law rule was recognized by our court. *Greenlaw v. Greenlaw*, 13 Me. 186; *Harding v. Springer*, 14 Me. 407. But it is worthy of remark that no recognition of it or reference to it can be found in the cases reported in this state since the act of 1844, entitled "An act to secure to married women their rights in property."

A tenancy by entirety is *sui generis*. The right of survivorship gives it an apparent resemblance to joint tenancy, but, as already seen, it differs from a joint tenancy in important particulars. All the authorities agree that it had its origin in the marital relation, and was founded upon the legal fiction of the absolute oneness of husband and wife. At the common law the legal existence of the wife was merged in that of her husband. Her legal identity was suspended, or held in abeyance, during the existence of the marriage relation. Substantially all her property was vested in the husband during coverture, and her legal position was little better than that of a menial to her husband. Being but one person, in the eye of the law, it was considered that they could not consistently have separate and conflicting property rights. Hence the rule that property conveyed to them during coverture should be held as an estate by entirety, with the right of survivorship.

But the universal tendency of modern legislation has been to abrogate this theoretical unity of husband and wife; to recognize and maintain the legal identity of the wife, and secure to her a distinct and separate right to the acquisition and enjoyment of property. By the law of this state, "a married woman of any age may own in her own right

real and personal estate acquired by descent, gift or purchase; and may manage, sell, convey and devise the same by will without the joinder or assent of her husband." Since the act of 1844, above named, a husband, by marriage, acquires no right to any property of his wife. "She may receive the wages of her personal labor, not performed for her own family, maintain an action therefor in her own name and hold them in her own right against her husband or any other person." She is liable for her debts and torts, and her property may be taken on execution therefor, as if she were sole. She may prosecute and defend suits at law or in equity in her own name without the joinder of her husband, for the preservation and protection of her property and personal rights, as if unmarried. Rev. St. c. 61.

It is manifest that these statutes have wrought great modifications and radical changes in the relative property rights of husband and wife. In contemplation of law, they are no longer one person, and their interests in property are no longer identical, but separate and independent. Under these statutes the wife is invested with greater privileges, and weighted with greater responsibilities and liabilities, than before. The rule of the common law creating estates by entirety is irreconcilable with both the letter and the spirit of these statutes. It never rested upon a rational or substantial groundwork. It had its origin in feudal institutions and social conditions which were superseded centuries ago by the more enlightened principles of a progressive civilization. It is now repugnant to the American idea of the enjoyment and devolution of property, and to the true theory of the marriage relation. "The reason of the law," says Lord Coke, "is the life of the law, and cessante ratione lex ipsa cessat." The fictitious basis of this rule having been removed, the rule itself must fail. To declare that there is no authority in the court to effectuate a clearly-expressed and unmistakable intention of a grantor or testator, against such an antiquated and exploded dogma, would be a poor tribute to the creative power of the law, and the original conceptions of justice in modern courts. The common law would ill deserve its familiar panegyric as the "perfection of human reason," if it did not expand with the progress of society, and develop with new ideas of right and justice. "Considering the influence of manners upon law," says Chancellor Kent, "and the force of opinion which is silently and almost insensibly conducting the course of business and the practice of our courts, it is impossible that the fabric of our jurisprudence should not exhibit deep traces of the progress of society, as well as of the footsteps of time."

These views are sanctioned by approved text-writers and courts of the highest respectability in England as well as in this country.

In his Treatise on Estates, Mr. makes the confident assertion, basing his own cultivated reason, rather than reported cases at that time, that "in fact, and agreeable to natural reason, from artificial deductions, the husband and wife are distinct and individual persons accordingly, when lands are granted to them as tenants in common, thereby treating them without any respect to their social relation; they will hold by moieties, as other tenants and individual persons would do." Est. 132. This is cited as authority for the following statement in 4 Kent, Com. 467: "It is said, however, to be now understood that husband and wife may, by proper words, be made tenants in common to them during coverture."

In his note to 2 Bl. Comm. 18, Sharswood says: "But when an estate is conveyed to a man and woman who are married together, and who afterwards marry, as they took originally by the rule of the law, they will continue to hold by moieties after the marriage. There is nothing, therefore, in the relations of husband and wife which prevents them from being tenants in common. There are great opinions in the position that husband and wife, by express words, be made tenants in common." So, in 1 Washb. Real Prop. 20, the author says, "It is always competent, however, to make husband and wife tenants in common by proper words in the deed, by which they take, indicating their intention."

In Clark v. Clark, 56 N. H. 105, it is held that a statute in that state enlarging the rights of married women practically destroyed the tenancies by entirety between husband and wife; and the legal unity of husband and wife, as respects the holding of property, was destroyed, making of contracts by the wife, voidable at her option, and not void, as formerly.

In Cooper v. Cooper, 76 Ill. 57, it is held that under the married woman's law in that state,—an act having a social purpose similar to our own above cited,—reason can be perceived, and none is needed, why a married woman should hold property thus acquired in fee, and not as tenant in common with her husband, as she might with any other person.

In Hoffman v. Stigers, 28 Iowa, 100, the court say: "If no contrary intent is expressed in the conveyance to them, or the instrument under which they hold, the husband and wife take as tenants in common, not in entirety. At common law the husband and wife could not take so completely and essentially one as tenants in common, and could not take by moieties. * * * This doctrine always stood upon what was more than the merest fiction, and by our legislation, has measurably given way to theories and doctrines more in accordance with the true and actual relations of husband and wife, the rule itself must be abandoned. See, also, Wilson v. Fleming, 13

Hettlesey v. Fuller, 11 Conn. 337; In re Ixion (Byram v. Tull) 42 Ch. Div. 306; Warrington v. Warrington, 2 Hare, 54.

Under the residuary clause in the case at bar, the appellant took only a moiety of the sidue of the estate. As Judyer Robinson died before the testator, the devise and bequest to him lapsed, and the moiety of the sidue, which he would have taken if he had survived, descended to the heirs of the testator.

Exceptions overruled.

HIGGINS v. HAMOR.

Supreme Judicial Court of Maine. May 16, 1895.)

LAYING OUT TOWN WAY—SUFFICIENCY OF RECORD.

1. However faulty the record of county commissioners' proceedings in laying out a town way, if it can be reasonably inferred from the record (1) that a petition was presented to the municipal officers by one or more inhabitants of the town, or by one or more owners of cultivated land therein, asking for the laying out of the way; (2) that the municipal officers neglected or refused to lay it out; and (3) that some of the petitioners, within one year thereafter, presented to the county commissioners, at a regular session, a petition, stating the above facts, and alleging that the neglect or refusal of the municipal officers was unreasonable, the record is a sufficient basis for the procedure of the commissioners, as against collateral attack.

2. Held that, from the record in this case, the above jurisdictional facts can be reasonably inferred.

Official.)

Report from supreme judicial court, Hancock county.

Action by Herbert P. Higgins against Mildred L. Hamor. Case was withdrawn from jury and reported to the supreme court. Judgment for defendant.

This was an action of trespass quare clausum for building a sidewalk over the plaintiff's land, alleged to be outside the limits of the street.

It was admitted that the plaintiff is the owner of the land over which the sidewalk was built, and that the defendant, as road commissioner, built the sidewalk.

It was admitted that, at the date of the alleged trespass, the defendant was a duly elected and qualified road commissioner, and was acting as such, within the scope of his authority, and within the location of the way laid out by the county commissioners; it was denied that such location is valid and any justification for the defendant in the premises.

Defendant offered a record of the county commissioners locating the way, which was admitted by the court, subject to all legal objections.

Whereupon the case was withdrawn from jury and reported to the law court with stipulation that, if the records introduced

show the existence of a way sufficient to justify the defendant in making a sidewalk within the limits described therein, judgment should be entered for the defendant; otherwise, the action is to stand for trial upon the other defenses set up in the defendant's brief statement.

Record of County Commissioners.

"State of Maine, Hancock: At the Court of County Commissioners Begun and Held at Ellsworth, within and for the County of Hancock, on the Fourth Tuesday of January, it being the Twenty-Seventh Day of Said Month, A. D. 1890.

"Present: William L. Guptill, Esquire, chairman; John Hopkins, Esquire, associate; Newell Coolidge, Esquire, associate; H. B. Saunders, clerk.

"Isaac B. Desisle et als. Pet. for Road in Eden, at Bar Harbor.

"Respectfully represent Isaac B. Desisle and seven others, inhabitants of the town of Eden, that a town way, beginning at or near a balm of Gilead, nearly in front and easterly from the "Grand Central," and running northerly to the southern line of Tobias Roberts' land, near his cottage in said town, would be of great public convenience for the use of said town. Wherefore your petitioners pray that the same may be duly laid out as by the statute is provided.

"Dated at Eden this twenty-sixth day of July, A. D. 1879."

"This petition was entered at the April term, 1879, when and where it was considered by the commissioners that the petitioners were responsible, and that they ought to be heard touching the matter set forth in their petition, and therefore order: That the commissioners meet at Isaac B. Desisle's on Tuesday, the twenty-third day of September next, at nine of the clock in the forenoon, and thence proceed to view the route mentioned in said petition, immediately after which view a hearing of the parties and witnesses will be had at some convenient place in the vicinity, and such other measures taken in the premises as the commissioners shall judge proper. And it is further ordered that notice of the time, place, and purpose of the commissioners' meeting aforesaid be given to all persons and corporations interested, by serving an attested copy of this petition and this order thereon upon the clerk of the town of Eden, and by posting up attested copies as aforesaid in three public places in said town thirty days, at least, before the time appointed for said view, and also by publishing the petition and this order thereon three weeks, successively, in the Ellsworth American, a public newspaper published in Ellsworth, in the county of Hancock, the first publication to be thirty days, at least, before the time of said view, that they may then and there attend and be heard if they think fit."

The petition was then continued to the October term, 1879, when and where the commissioners appeared, and presented in court their report in the words following, to wit:

"State of Maine, Hancock—ss.: Whereas, Isaac B. Desisle and seven others, inhabitants of the town of Eden, by their petition made to the court of county commissioners at their regular sessions holden at Ellsworth, within and for said county, on the first Tuesday of July (April adjourned term), A. D. 1879, represent: 'That a town way, beginning at or near a balm of Gilead nearly in front and easterly of the "Grand Central," and running northerly to the southern line of Tobias Roberts' land, near his cottage at Bar Harbor, in the town of Eden, would be of great public convenience; that the selectmen of said town after notice and hearing of parties have unreasonably refused to lay out such way. Wherefore your petitioners, considering themselves aggrieved by such refusal, pray that your honors would, agreeably to law in such cases made and provided, view the route, and locate said road if, in your judgment, the public convenience and necessity require it, and as in duty bound will ever pray.

"Dated at Bar Harbor, in the town of Eden, this fourth day of August, A. D. 1879."

"And whereas, at the April adjourned term of said court, A. D. 1879, it was considered by the commissioners that the petitioners were responsible, and that they ought to be heard touching the matter set forth in their petition, and therefore ordered 'that the commissioners meet at Isaac B. Desisle's on Tuesday, the twenty-third day of September next, at nine o'clock in the forenoon, and thence proceed to view the route mentioned in said petition, immediately after which view a hearing of the parties and witnesses will be had at some convenient place in the vicinity, and such measures taken in the premises as the commissioners shall judge proper.

"And it is further ordered that notice of the time, place, and purpose of the commissioners' meeting aforesaid be given to all persons and corporations interested, by serving an attested copy of the petition and this order thereon upon the clerk of the town of Eden, and by posting up attested copies as aforesaid in three public places in said town thirty days, at least, before the time appointed for said view, and also by publishing the petition and this order thereon three weeks, successively, in the Ellsworth American, a public newspaper published in Ellsworth, in the county of Hancock, the first publication to be thirty days before the time of said view, that they may then and there attend and be heard if they think fit.'

"In accordance with the foregoing order the undersigned met at the time and place and for the purpose above specified, and (it appearing that notice had been given, agreeably to said order, by serving an attested

copy of the petition and order of court upon the clerk of the town of Eden, and by posting up attested copies of the petition in three public places in said town thirty days, at least, before the time appointed for said view, and also by publishing an attested copy of the petition and order thereon successively, in the Ellsworth American, a public newspaper published in Ellsworth, in the county of Hancock, the first publication to be thirty days, at least, before the time appointed for said view) proceeded to view the route set forth in said petition, and a hearing of the parties and witnesses was had at a convenient place in the vicinity, and, after due consideration, on being had, do adjudge that a town way, as aforesaid, will be of common convenience and necessity,—

"Beginning at a balm of Gilead nearly in front and easterly from the Grand Central Hotel, thence running north, 9 degrees east, 19½ rods, to northwest corner of Sproul's store; thence north, 7 degrees east, 40 rods, to a stake near the northwest corner of Tobias Roberts' dwelling house. To be easterly line of said road, and to be three rods wide."

"Ellsworth, Oct. 22nd, 1879."

"Which report, being seen by the court, and due deliberation thereon being had, was accepted by the court; and it was ordered by the court that the original petition on which the foregoing proceedings were founded be continued to the next regular session of this court, to wit, the January term, 1880. And now, at this term, the court orders that the proceedings on the original petition be closed.

"Attest: H. B. Saunders, Clerk."

W. P. Foster, C. H. Wood, and A. B. Deasy, for plaintiff. L. B. Deasy and J. T. Deasy, for defendant.

EMERY, J. The county commissioners of Hancock county undertook to lay out a town way or street in the town of Eden, and had authority to do this, if (1) the petition was presented to the municipal officers of Eden by one or more of the inhabitants of the town, or by one or more of the owners of the cultivated lands therein, asking them to lay out the way; (2) the municipal officers of Eden selected or refused to lay it out; and (3) the petitioners, or some of them, within thirty days thereafter, presented to the county commissioners, at a regular session, a petition setting forth the above facts, and that the refusal of the municipal officers was unreasonable. Rev. St. c. 18, §§ 14-19.

The record of the county commissioners is confused and faulty; but we think it can reasonably be inferred, from what appears, (1) that Isaac B. Desisle and seven other inhabitants of the town of Eden, on the first day of July, 1879, petitioned the officers of Eden to lay out the way

the municipal officers neglected or refused; (3) that the same Isaac B. Desisle and seven others, the original petitioners, on the 4th day of August, 1879, presented to the county commissioners, at an adjourned session of their regular April, 1879, session, a petition stating that they were inhabitants of the town of Eden, that they had petitioned the municipal officers of Eden to lay out the way, and that the municipal officers had unreasonably neglected and refused to do so. From this point onward the sufficiency of the proceedings to resist collateral attack is not questioned.

No appeal was taken by any person. No one has ever sought to have the proceedings and judgment of the commissioners quashed by writ of certiorari. It is common knowledge that the way was opened, and has become one of the principal streets of Bar Harbor.

Although this record and judgment of the county commissioners might, perhaps, have given way, if attacked by direct process along the lines of their faults, we think they have sufficient foundation and substance, after these years, to withstand a collateral attack. *White v. Commissioners*, 70 Me. 317.

Judgment for defendant.

LIBBY et al. v. CLARK et al.

(Supreme Judicial Court of Maine. May 18, 1885.)

EQUITABLE MORTGAGE—REDEMPTION—ADVANCES.

1. Where a deed absolute in form is held for security only, the fact may be proved by parol.

2. So long as the instrument is one of security, the borrower has a right to redeem upon payment of the loan.

3. A mortgagee, after foreclosure, took possession of the premises, and allowed the mortgagors, with the aid of their son, to manage the property until it should work itself clear, by the payment of regular installments upon the principal and interest. This arrangement continued until the full pay was tendered the mortgagee, the funds for which were obtained by the son on another mortgage of the same property, he having procured the title thereto by a deed from the mortgagee. Prior to this last-named deed the mortgagors had contributed towards the payment of the regular installments, but had ceased doing so, and the son continued making them until he procured the deed to himself. Upon a bill by the heirs to redeem, in which the validity of the last mortgage was admitted and affirmed, *held* that, if the son had had no interest in the property,—no equity,—he would take nothing under his deed as against the mortgagors, and the original mortgage in equity would have been discharged by the payment of the mortgage in full; but inasmuch as he had an interest in the property, arising from the payments made by him, he had an equity that worked a consideration for the deed to him, in whatever form it might be; and that, although absolute in form, he held the deed as security only for his advances and expenses on account of the property.

4. *Held* that, upon payment of such advances and expenses, redemption may be had. (Official.)

Report from supreme judicial court, Cumberland county.

v.33A.no.14—42

Bill in equity by Mary E. Libby and others against George D. Clark and another to redeem. Decree for plaintiffs, with directions.

F. C. Payson, H. R. Virgin, and H. M. Davis, for plaintiffs. B. D. and H. M. Verrill, for defendants.

HASKELL, J. The Portland Savings Bank held a mortgage from Mary Ann and Elliot F. Clark on certain real estate on Grove street, in Portland, to secure the sum of \$10,900, that fell due in March, 1875. Foreclosure was commenced in April, 1877, and redemption expired in April, 1878. Meantime the mortgagors deposited, in sums of \$50 each, \$300, and the same was entered on an existing account, entitled "Bank Book of Mrs. Mary Ann Clark, Deposited by Elliot F. Clark on Account of Mortgage of Grove Street Property." June 18, 1878, after the time for redemption had elapsed, \$35 more were deposited upon the same account. In the following October, the bank, George D. Clark, one of defendants, and his parents, Mary Ann and Elliot F. Clark, consummated an arrangement whereby the balance on the bank book (\$610.37) was applied to the payment of interest on the mortgage notes, and the bank and George signed the following writing:

"Memorandum of agreement between the Portland Savings Bank and George D. Clark in reference to the property on the corner of Portland and Grove streets, Portland, belonging to the bank, formerly under mortgage to the bank from E. F. Clark and wife.

"George D. Clark pays one thousand dollars in cash for lot numbered twelve on plan recently made by Edward C. Jordan, and to be recorded in the Cumberland registry of deeds, and pays taxes for 1878 on the whole property. Said Elliot F. Clark and wife receipt for the money on deposit in the bank. George D. Clark is to hold possession of the remaining property so long as he shall pay the bank seventy-five dollars a month from the date hereof, and shall keep the premises insured at his own expense for at least ten thousand dollars in the name of the bank. The bank pays all taxes after this date except as above."

At the bottom was added in pencil, by the treasurer of the bank:

"That provided George D. Clark shall pay the principal sum with interest accrued at six per cent. to date, and interest on same, he shall have a quitclaim deed of the property, and fix price on separate lots, and moving small houses on street."

At the same time, Mary Ann and Elliot F. Clark signed and delivered to the bank: "Portland, October 23, 1878. Received six hundred and ten and thirty-seven one-hundredths dollars, being amount in full amount is to be applied to pay for property on Grove street."

The treasurer of the bank to.

prior to the above agreement, "Mr. Elliot F. Clark came to the office in company with a man I had known as a boy, but not by name, and said he was satisfied he should be unable to redeem the property himself, or to do anything at all in that direction, and he had made arrangements with his son George D. Clark to redeem the property or purchase it for him; that George was to carry it for his wife and himself, and that George had always helped him, and he had received no help from any other members of the family, and wished him to receive what benefit accrued; that Elliot F. Clark should collect the rents and deposit them on the bank book, and Mr. George D. Clark was to make up the balance of seventy-five dollars a month, which was to be paid under this agreement." Thereupon the board of managers of the bank, on the day before the above memorandum was signed, voted "that the treasurer be authorized to quitclaim the lot of land forty feet by one hundred feet, with the two-story wooden building thereon, to George D. Clark, situated on Grove street; provided Elliot F. Clark and his wife shall turn over to the bank the sum of \$595.50, now standing on bank book in name of Mary A. Clark, and shall pay the taxes for 1878, and that said Clark shall have and enjoy possession of the property formerly belonging to Mary Ann Clark and Elliot F. Clark so long as he shall pay the sum of seventy-five dollars per month, out of which the bank shall pay the taxes hereafter accruing."

In execution of the agreements above stated, George D. Clark entered into possession of the property, and made his father agent to collect the rents, and deposit them in the bank, while he, from other sources, provided the balance called for by the agreement. This continued until the father died, in 1880, when the bank made a new arrangement with George for redeeming the property, of the following tenor:

"You are hereby appointed agent of this bank to collect the rents and have in sole charge the property on the corner of Grove and Portland streets, being all the property this bank now owns, formerly the property of Elliot F. Clark and wife. This agency shall exist for three years, provided you shall pay sixty dollars every month and keep the buildings insured in the name of the bank for \$8,000.00 and make all necessary repairs without charge to this bank. Should you or your heirs, executors, or administrators effect sale of this property, all sums received for such sale over and above the sums advanced by this bank on the property, with six per cent. interest, shall be paid to you; and any partial sale or sales of parts of the property shall be credited on account until the cost of the property, with interest as above, shall be satisfied, when this bank will quitclaim to you or your heirs, executors, administrators, or assigns, the remaining parcels of land."

This arrangement substantially continued

until 1891, the mother meant died, when the bank conveyed the property by warranty deed, to George, on a pressed consideration of \$7,150.50. At the same time mortgaged the property to the Union Mutual Life Insurance Company to secure a loan of \$8,000, and then George claimed to hold the equity in the property. The plaintiffs, however, contend that the estate as security merely, and that they are entitled to redeem from him. The bank of the insurance company mortgaged, they affirm as valid, inasmuch as the loan secured thereby was applied to the payment of debt against the property; and that the purpose of this bill.

The record title shows a fee in the property to Clark. The insurance company is the mortgagee, and takes a valid mortgage. But, while Clark's title appears absolute, it may be shown to be a mortgage security only, if such be the rule in the case. *Rowell v. Jewett*, 6 Me. 361; *Stinchfield v. Milliken*, 71 Me. 566; *Small, Id.* 552; *Reed v. Reed*, 3 Me. 381; *Jameson v. Emerson*, 82 Me. 381.

The memory, sometimes moldy, of the interest, sees the more clearly a mortgage on; but the logical inference from the facts always shows true.

In 1875 the mortgage fell due. The interest fell in arrears, and foreclosing began. Meantime rents were paid to the bank on account of mortgage on the property. After redemption the mortgage mortgagors took their son George into possession, with the hope of saving the property, and their home, and it was saved by his aid and the application of the mortgagor's deposit to the mortgage. The time should be given; that the bank was to pay \$1,000 for lot No. 1, and \$75 a month. That he might do this, the bank gave him possession of the property so long as he paid the \$75 a month. He kept the premises insured, he made repairs; possession; and when he should have paid "the principal sum, with interest, and interest on same," he should have paid the deed of the property. Why should the possession be given to George until he should have paid "the principal sum, with interest, and interest on same"? Could it be the intention of the bank that he should have paid in a large part of the principal sum, with interest, and interest on same, pay more, his right of redemption should cease, and that he should lose what he paid voluntarily, without any other part of his part to do so? He did not pay \$75 a month, or any other sum, was permitted to do so until "the principal sum, with interest," should be paid. Is that but redemption? "So long as the instrument is one of security, the mortgagee has a right to redeem upon the loan." *Linnell v. Lyford*, 73

But it is said that the arrangement was with George, the parents' rights having been absolutely foreclosed. Let us see. The value of the property was greater than the mortgage debt. After supposed foreclosure, if the parents were to have no interest, why should they pay upon the mortgage debt \$610.37 of their own money then in the bank? The treasurer says: "That money was not our property until a settlement was made with them." Why should George, after taking a deed from the bank of lot 12, take a warranty deed of the same lot from the parents? Why, in two days after the agreement with the bank, wherein George was to pay taxes for 1878, should he take a note from his father and mother for these very taxes? Why should he take a mortgage of this very property from his father to secure this note? And why, in 1884, should he write: "Brother Gus, I do wish you would look round and see if Charles Woodman or some one else will buy all of that property. I do want to get out of it, and I meant to; so now, I had rather let some one else have it besides the savings bank. The property owes about ten thousand dollars. Of course, we want to get more for it, but, if I can't, it will go for the bill what it owes. I am tired of lugging it, and am going to get out of it just as soon as I can. Please see if you can't find some one that will buy it. I do wish we could get fifteen thousand dollars for it, but it will go just as soon as I can get rid of it. I am afraid, if they take it, I can't get my money out of it." Is it not for the plain reason that he engaged "to redeem the property," and to "carry it for his father and mother," as the treasurer of the bank says the father told him was the arrangement when he first brought George to the bank?

The upshot of the transaction amounted to this: The bank, as mortgagee, took possession, and allowed the mortgagors, with the aid of their son, to manage their property until it should work itself clear, if \$75 a month and insurance, afterwards reduced to \$60, should be paid upon "the principal sum, with interest." This arrangement continued until full pay was tendered the bank. Its mortgage was then redeemed, partly by the money of George, and partly by the money of the mortgagors, and the bank's apparent fee was conveyed to George. If George had had no interest in the property,—no equity,—the conveyance to him from the bank would have given him no real title as against the mortgagors, and the mortgage, an equity, would have been discharged; but, inasmuch as he had an interest in the property on account of the payments that he had made to the bank, he had an equity that would work a consideration for the conveyance to him, in whatever form it might be.

Now, the bank, apparently holding a foreclosed mortgage, conveyed the property to George, who thereby apparently took a fee,

but really only a security for his advances. It was in his power, however, to destroy the equity by conveyance to a bona fide purchaser. This he did by giving a mortgage to the insurance company for a loan with which to redeem the bank mortgage, retaining an equity of redemption to secure himself for advances and expenses on account of the property. Upon the payment of these, redemption may be had.

The plaintiffs and defendants are all children and heirs of the mortgagors, and have inherited equal shares in the premises now held by the defendant George D. Clark. Upon payment to him for advances and expenditures, including interest, the property should be divided equally among the parties to this suit.

Let a master take an account, and the equity of redeeming the insurance company mortgage be sold, and the proceeds be applied—First, to the payment of costs of this suit; second, to any claim found due George D. Clark; and, third, let the balance be divided equally among all the parties to this cause, share and share alike.

Decree accordingly.

GOODRICH et al. v. CITY OF WATERVILLE.

(Supreme Judicial Court of Maine. May 21, 1895.)

CITY PHYSICIAN — CARE OF PAUPERS — DUTY OF OVERSEERS OF POOR—CONTRACT WITH CITY OFFICIAL.

1. All persons acting under the employment of town or city officers must take notice at their peril of the extent of the authority of such officers.

2. When a town or city has already provided for the medical treatment of its sick paupers by the election of a town or city physician, and he is ready and willing and competent to attend a sick pauper, so that no necessity exists for employing any other, it is undoubtedly the duty of the overseers of the poor to call him when one of the paupers under their care is sick and in need of medical treatment.

3. In such a case the overseers have no authority to employ any other; and, if others are employed, they are chargeable with notice that they will have no right to call upon the town or city to compensate them for their services.

4. It is provided by statute (Rev. St. c. 3, § 36) that "no member of a city government shall be interested, directly or indirectly, in any contract entered into by such government while he is a member thereof." Held that, one of the plaintiffs being a member of the city council, no action can be maintained to recover for medical services rendered by his firm to a pauper of his city.

5. It is a contract in which a member of the city government is directly interested, and for that reason is void by the statute.

(Official.)

Agreed case from supreme judicial court, Kennebec county.

This was an action wherein the plaintiffs, M. S. Goodrich and Fred E. Withee, copartners in the business of physicians and surgeons in Waterville, seek to recover for professional services and medicine an amount of

\$41.50, the same having been furnished to a woman pauper of said Waterville. The principal part of the services and medicine were furnished to the pauper by Dr. Withee, he having been first employed to attend the pauper while Dr. Goodrich was away out of the city; but during their employment Dr. Goodrich called upon her once or twice, and knew that he and Dr. Withee were rendering her medical attendance on account of the city, at the request of the overseers.

It is admitted that the services were rendered at the request of the overseers of the poor. It is also admitted that at the same time the city had a city physician who might have been called to treat the patient, but that for some reason the overseers called the plaintiffs, and he was not called, as he might have been if the overseers had seen fit to call him.

It is also admitted that Dr. Goodrich was at the time a member of the common council of the city of Waterville.

It was agreed that the plaintiffs were to recover the full amount of the bill, unless the fact that Dr. Goodrich was a member of the city government at the time these services were rendered bars the recovery under the statute, or unless the overseers of the poor exceeded their authority in employing the plaintiffs when the city had a regularly elected city physician. Plaintiffs nonsuit.

W. T. Haines, for plaintiffs. F. W. Clair, for defendant.

WALTON, J. This is an action to recover for medical attendance upon a pauper. Payment is resisted upon the ground that the plaintiffs were not legally employed.

It appears that at the time when the services sued for were rendered the city had a regularly and legally elected city physician, who was being paid a salary for medical attendance upon all its paupers, and who might have been called to treat the pauper; but that, for some unexplained reason, the overseers of the poor did not see fit to call him, and employed the plaintiffs. It also appears that at the time of the employment of the plaintiffs one of them was a member of the city council. And it is claimed that under these circumstances the employment of the plaintiffs was unauthorized and illegal.

We think the defense must be sustained. It is true that overseers of the poor may, when necessary, provide for the medical treatment of the paupers under their care. But when a town or a city has already provided for the medical treatment of its sick paupers by the election of a town or city physician, and he is ready and willing and competent to attend a sick pauper, so that no necessity exists for employing any other, it is undoubtedly the duty of the overseers of the poor to call him when one of the paupers under their care is sick and in need of medical treatment. And in such a case we think

they have no authority to employ any and, if others are employed, that they are chargeable with notice that they will have the right to call upon the town or city to compensate them for their services. All persons acting under the employment of town officers must take notice at their peril of the extent of the authority of such officers.

And, again, it has been wisely enacted "no member of a city government shall be interested, directly or indirectly, in any contract entered into by such government in which he is a member thereof." Rev. St. c. 1. And the statute cited declares that all contracts shall be void. If the employment of the plaintiffs did not create such a contract, then, of course, their action is not maintainable, for such a contract is the cause of action, and the only cause of action, direct or indirect. If it did create such a contract, one in which a member of the city government was directly interested, and for that reason one which the statute cited declares shall be void; and, being thus made void, of course no action can be maintained upon it. We think this also is a valid ground of defense. The statute makes no distinction regard to the character of the contract. It may be to build a city hall, or open a street, or construct a bridge, or take charge of a pauper. All are alike illegal and void under the statute makes no distinction.

Plaintiffs nonsuit.

SAWYER v. PERRY et al.

(Supreme Judicial Court of Maine. March Term, 1895.)

DEATH BY WRONGFUL ACT—ACTION—WRIT OF HABEAS CORPUS—MANNER OF DEATH.

1. The remedies provided by St. 1894, entitled "An act to give a right of action for injuries causing death," are limited to cases where the person injured dies immediately. *Held*, that the legislature intended by this act to extend the means of redress to a class of cases where none existed before, and not to give a new remedy for a single injury,—one for the benefit of the decedent's estate, and another for the benefit of his widow and children or next of kin.

2. In an action to recover damages for wrongful causing the death of a person, the declaration averred that the decedent lived a short time, and, in its original form, was a common-law action based on the alleged negligence of the defendant. The writ was granted by an allegation that the action was brought for the benefit of the widow of the decedent. *Held*, that the amendment changed the character of the action, and was therefore demurrable.

3. In its original form, the damages recoverable, will belong to the estate of the deceased. In its amended form, they belong to the widow; and the amendment changes the rule by which the damages are to be assessed.

4. While other courts, and some writers on text-books, have used indiscriminately the terms "instantaneous" and "immediate," they in this class of cases, mean precisely the same thing. An instantaneous death is an instantaneous death, but an immediate death is not necessarily and in all cases an instantaneous death. (Official.)

Exceptions from supreme judicial court, Essex county.

Action by Sarah A. Sawyer, administratrix of Ralph S. Sawyer, deceased, against James C. Perry and others. To the sustaining of a demurrer to the amended declaration, plaintiff excepts. Overruled.

The declaration, as amended, was based on Laws 1891, c. 124, permitting a recovery for death by wrongful act in the names of personal representatives of the deceased person, and providing that the amount recovered shall be for the exclusive benefit of the decedent's widow and children.

True P. Pierce, for plaintiff. A. A. Strout, A. Hight, and J. W. Symonds, for defendants.

WALTON, J. This is an action to recover damages for negligently causing the death of a person. The declaration alleges that Ralph S. Sawyer, while at work in the decedent's lime quarry, was killed by a stone which was negligently allowed to fall upon him.

The declaration avers that the decedent received his injuries about an hour; and that, in its original form, was simply a common-law action, based on the alleged negligence of the defendants. But by leave of court the writ has been amended by inserting an allegation that the action is sought for the benefit of the widow of the deceased. This was an important amendment. It changed the character of the action. In its original form, the damages, if any had been recovered, would have belonged to the estate of the deceased. In its present form, the damages, if any are recovered, will belong to the widow of the deceased, and the amendment changes the way by which the damages are to be assessed. The amendment, therefore, was important, and not a mere matter of form.

So this amended declaration the defendants demurred. The object of the demurrer appears to have been to obtain a construction of the statute of 1891, c. 124, entitled "An act to give a right of action for injuries resulting in death."

The question argued is whether the remedy provided by this statute (Act 1891, c. 124) must not be limited to cases where the persons injured die immediately. It is the opinion of the court that they must. A similar statute has been so construed, and the reason is perceived why this statute should not receive the same construction. In *State v. Maine Cent. R. Co.*, 60 Me. 114, the court held that a statute giving a right of action by indictment against railroad corporations for negligently causing the death of a person, and declaring that the amount recovered should be for the benefit of the widow and children of the decedent, must be limited in its application to cases of immediate death; and this decision was af-

firmed in *State v. Grand Trunk Ry. Co.*, 61 Me. 114.

The court could not believe that the legislature intended to give two remedies for a single injury. It had become settled law in this state that if a person was injured through the negligence of another person, or a corporation, and afterwards died of his injuries, redress could be obtained by his personal representative. But it had been held in Massachusetts (and the law was assumed to be the same in this state) that, if the person injured died immediately, no redress could be had. And it was believed that it was the intention of the legislature to remedy this defect,—not to give a new right of action where ample means of redress already existed, but to supplement the existing law, and give a new right of action in a class of cases where no means of redress before existed. And it was believed that full effect would be given to the legislative intention by limiting the new right of action to cases where the persons injured died immediately.

So, in this case, we cannot believe that the legislature intended by the act of 1891, c. 124, to give two actions for a single injury,—one for the benefit of the decedent's estate, and another for the benefit of his widow and children or next of kin. We think the legislative intention was to extend means of redress to a class of cases where none before existed. This class of cases was still large. There still existed a large class of cases in which redress for injuries resulting in immediate death could not be had. And we cannot resist the conviction that it was the intention of the legislature to provide means of redress for this class of cases, and not to duplicate the wrongdoer's liability, and subject him to two actions for a single injury. Previous statutes of a similar character having been so interpreted, we cannot resist the conviction that the legislature expected and intended that this statute should receive the same interpretation. Our conclusion, therefore, is that the act of 1891, c. 124, applies only to cases in which the persons injured die immediately.

We do not say that the death must be instantaneous. We have never so held. Very few injuries cause instantaneous death. "Instantaneous" means done or occurring in an instant, or without any perceptible duration of time, as the passage of electricity appears to be instantaneous. It is so defined in Webster's International Dictionary. And, when we say that the death must be immediate, we do not mean to say that it must follow the injury within a period of time too brief to be perceptible. If an injury severs some of the principal blood vessels, and causes the person injured to bleed to death, we think his death may be regarded as immediate, though not instantaneous. If a blow upon the head produces unconsciousness, and renders the person injured incap-

ble of intelligent thought or speech or action, and he so remains for several minutes, and then dies, we think his death may very properly be considered as immediate, though not instantaneous. Such a discrimination may be regarded by some as excessively exact or nice, and therefore hypercritical. But in stating legal propositions it is impossible to be too exact; and while other courts, and some writers of text-books, have used indiscriminately the words "instantaneous" and "immediate," and the adverbs "instantaneously" and "immediately," we have not regarded them, in this class of cases, as meaning precisely the same thing, and have preferred to use the words "immediate" and "immediately," as being more comprehensive and elastic in their meaning, than the words "instantaneous" and "instantaneously," and better calculated to convey the idea which we wish to express. Of course, an instantaneous death is an immediate death, but we have not supposed that an immediate death is necessarily, and in all cases, an instantaneous death.

Read in the light of history,—that is, taking into account the then existing state of the law in this state, and the defects supposed to exist, and the presumed desire to remedy these defects, and not to change or alter the law in particulars where no change was needed,—our conclusion is that the statute of 1891, c. 124, entitled "An act to give a right of action for injuries causing death," was intended by the legislature to apply to cases where the persons injured die immediately. It not being averred in the plaintiff's declaration that her husband died immediately, but, on the contrary, it being therein averred that he survived about an hour, we think the declaration describes only a common-law right of action, in which the damages, if any are recovered, must be for the benefit of the decedent's estate generally, and not for the exclusive benefit of his widow, and that, in its amended form (declaring that the action was brought for the exclusive benefit of the widow of the deceased), it was demurrable, and that the demurrer was rightfully sustained. Consequently, the exceptions must be overruled. But, as stipulated in the bill of exceptions, the plaintiff may again amend her writ, by restoring it to its original form, without the payment of costs, and the defendants may plead anew. Exceptions overruled.

BROWN v. FOSTER.

(Supreme Judicial Court of Maine. May 29, 1895.)

MUNICIPAL CORPORATIONS — CITY CLERK — ELECTION BY COUNCIL — POWERS OF MAYOR.

1. The mayor of the city of Waterville is not entitled by the city charter (Priv. & Sp. Laws 1887, c. 195) to vote with the aldermen and councilmen in joint convention in the election of a city clerk and city treasurer, besides

having the casting vote in such election in case of a tie.

2. The argument in favor of the pretended prerogative on the part of the mayor rests upon an introductory clause in the city charter, which declares that "the mayor, board of aldermen and common council shall constitute the city council"; it being further provided, in a subsequent section of the charter, that certain subordinate city officers "shall be elected by joint convention of the city council." Held, that these general terms describing the mayor as part of the city council are specifically and particularly defined in other and subsequent sections and clauses, by which it is made clear that only in the use of certain special powers such as being a presiding officer, making appointments and exercising the veto power, etc., is he a part of the city council.

3. Also, that the section of the city charter which makes him the presiding officer over the board of aldermen and joint conventions of the city council expressly provides that he shall have, not a casting vote, but "only" a casting vote.

4. The city charter uses the phrase "city council" in several instances in such a manner as to include the two boards, but excluding the mayor; thus recognizing the wise parliamentary principle which restricts the functions of a presiding officer to holding a balance of power between equally divided votes of deliberative bodies in order to facilitate, but not block, the business,—for breaking, but not making, a tie.

(Official.)

Exceptions from supreme judicial court, Kennebec county.

Petition by Frank E. Brown against Dana P. Foster for mandamus to compel the surrender of books, papers, and records appertaining to the office of city clerk of the city of Waterville. To the issuance of the writ respondent excepts. Overruled.

S. S. Brown, for petitioner. Reuben Foster, Dana P. Foster, and W. C. Philbrook, for respondent.

PETERS, O. J. The only question sought to be settled by this proceeding of mandamus is whether the mayor of the city of Waterville is entitled by the provisions of the charter of that city (Priv. & Sp. Laws 1887, c. 195) to vote with the aldermen and councilmen in joint convention in the election of subordinate city officers (in the present case, in the election of a city clerk), besides having the casting vote in such election in case of a tie.

The case comes to us upon exceptions to the ruling of the justice of this court who tried the action, and who decided that the mayor had no such right as was claimed and exercised by him, the learned justice making at the time the following oral observations in support of his conclusion:

"It appears that eleven members of the city council in joint convention voted for the petitioner for city clerk, and ten for the respondent. Thereupon the mayor claimed the right to vote, and did vote, for the respondent, who now claims that no person received a majority of all the votes, and hence there was no election for city clerk.

"In determining the mayor's right to vote under these circumstances, recourse must

first be had to the city charter of Waterville. It is provided in section two of this act of incorporation that the 'mayor, board of aldermen and common council shall constitute the city council.'

"Section three provides that the mayor 'shall preside in the board of aldermen and joint meetings of the two boards, but shall have only a casting vote.' It is further provided in the same section that the 'city council may elect the mayor to any city office and allow him a reasonable compensation for service rendered in such office'; while by section seventeen the aldermen and common council are declared to be ineligible to any office of profit or emolument the salary of which is payable by the city.

"Section six provides that 'all officers of the police and health departments shall be appointed by nomination by the mayor and confirmed by the aldermen. * * * All other subordinate officers shall be elected by joint convention of the city council.'

"These provisions of the charter must be construed with reference to the general policy of our law respecting municipal government, and in the light of the familiar rules of construction that, as the different parts of a law reflect light upon each other, it should be so expounded, if practicable, as to avoid any contradiction or inconsistency, and give some effect to every part of it.

"The provision that the mayor 'shall preside in the board of aldermen and joint meetings of the two boards, but shall have only a casting vote,' is found in precisely the same language in every city charter in the state from its early history to the present time; and, with the exception of the express mention of the mayor as one of those constituting the 'city council' of Waterville, all the other provisions relating to the point under consideration are essentially the same in all other charters as in the Waterville charter. It has been the obvious policy of the state to provide in their charters for annual city elections, and to give effect to the free voice of the people, and insure the orderly continuance of the city governments, by facilitating rather than obstructing the annual elections of officers; and it is understood to have been the uniform practice, under all these charters, for the mayor to exercise the right in joint convention to give only a casting vote for the purpose of breaking a tie, and not for the purpose of making one. Such a practical interpretation, which has been accepted as correct for nearly three-fourths of a century, is entitled to respectful consideration in the decision of such a question.

"This view of the construction to be given the right to give 'only a casting vote' is strengthened by section thirty-four of chapter three of the Revised Statutes, which declares that, in the 'election of any city officers by ballot in the * * * convention of

the aldermen and common council in which the mayor has a right to give a casting vote if two or more candidates have each half of the ballots cast, he shall determine and declare which of them is elected.' Here is a plain implication that the term 'casting vote,' as used in this connection, is restricted to a vote thrown by the mayor as a presiding officer when the votes cast by the members are equally divided. It seems clear that, if it had been the purpose of the legislature to make such an important distinction between the Waterville charter and all others as the respondent contends for, more explicit and unequivocal language would have been used than any found in this act. The mere mention of the mayor in connection with the aldermen and common council as of those constituting the city council is not sufficient to show such intention.

"It is plain, also, that no distinction was intended between the 'joint meetings of the two boards,' in which the mayor has 'only a casting vote,' and the 'joint convention of the city council,' for the election of officers; for it has not been suggested that 'joint meetings of the two boards' are held for the transaction of any business worthy of mention, other than the election of subordinate officers.

"For these reasons it seems to be my duty to grant the petition and order the writ of mandamus to issue."

In the views expressed in this statement we fully concur.

The force of the argument in favor of this pretended prerogative of the mayor rests in an introductory clause in the city charter, which declares that "the mayor, board of aldermen and common council shall constitute the city council"; it being further provided in a subsequent section of the charter that certain subordinate city officers "shall be elected by joint convention of the city council."

But while the first clause, in very general terms, describes the mayor as a part of the city council, the meaning of that declaration is found in other and subsequent clauses and sections, which define with particularity just what part of the city council he shall be considered to be. Such subsequent provisions of the charter declare exactly what the powers of the mayor shall be, and in what manner the same shall be exercised. Nor does the clause in section 2, which embraces aldermen and common councilmen within the composition of the city council, as well as it does the mayor, attempt to define or limit their powers or duties, but those also are left to be enumerated afterwards.

The charter confers various special powers on the mayor, among which is the power of appointment in many instances. He is so far a part of the city government that no legislative act can be passed by the other branches without his approval, unless by a

vote of two-thirds of the members in each of such other branches of the government. It is in this sense, and to the extent of such powers as are specially committed to him, and no further, that he is a part of the city council. No other construction of the charter as a whole will make a consistent and sensible instrument of it.

In another respect may the mayor, in a general, if not a strict and technical, sense, be denominated some part of the city council, and that is because he presides over the meetings of the aldermen, and over "the joint convention of the city council." But the section granting him that privilege expressly provides that in the business of such meetings he shall have, not a casting vote, but "only" a casting vote. This is a wise recognition of the parliamentary principle which allows a presiding officer the authority of holding a balance of power between equally divided votes of a deliberative body, in order to facilitate, but not to block, legislation; or, as the justice presiding in this case expressed it, for breaking, but not for making, a tie vote.

It will be seen on an examination of the charter in question that the phrase "city council" is employed in several instances as evidently including the two boards, and excluding the mayor. This idea pulsates throughout most of the provisions of the charter.

Exceptions overruled.

REDINGTON v. BARTLETT.

(Supreme Judicial Court of Maine. May 29, 1895.)

MUNICIPAL CORPORATIONS — CITY TREASURER — ELECTION BY COUNCIL — POWERS OF MAYOR.

Principle in preceding case (Brown v. Foster, 33 Atl. 662) applied.
(Official.)

Appeal from supreme judicial court, Kennebec county.

Petition in equity by Charles H. Redington against Martin F. Bartlett to contest an election of respondent to the office of city treasurer of the city of Waterville. From a decree for plaintiff, defendant appeals. Appeal dismissed, and decree affirmed.

The decision in this case rests upon the construction of the Waterville charter (Priv. & Sp. Laws 1887, c. 195), as to the right of the mayor to vote with the aldermen and councilmen in joint convention in the election of a city treasurer, besides having the casting vote in such elections in case of a tie, and is controlled by Brown v. Foster, 33 Atl. 662.

O. F. Johnson, for plaintiff. W. C. Philbrook, for defendant.

PER CURIAM. Appeal dismissed. Decree below affirmed.

TAYLOR et al. v. BROWN et al.
(Supreme Judicial Court of Maine. May 29, 1895.)

WILL—ESTATE IN FEE—LIFE ESTATE—IN TRUST.

1. A testator gave by will to his widow and personal estate, and in the same clause his will added these words: "And, at my decease, what remains I wish to be equally divided between * * * children of my wife."

Held, that an estate in fee passed to the widow in the property named; and if the testator intended a devise to his widow for life, and then a devise over to the children of his wife's sister, he failed to use appropriate language to effectuate such an intention.

2. Where a testator makes an absolute gift, and then expresses a wish as to how the property may be disposed of after his death, he may dispose of a portion of it before he dies. Held, that the title to the property, once given away, cannot be regained by the hand that gave it away; and that, although the language of recommendation or request may be, a trust will not be implied. A construction of the words will be refused, if inconsistent with, or parts and provisions of the same will.

Copeland v. Barron, 72 Me. 206, affirmed.
(Official.)

Report from supreme judicial court, Kennebec county.

Bill by Randall L. Taylor and others against Jacob J. Brown and others. On bill and answers, and reported to the law court, to determine the title to the property named in the first clause in the will of Josiah A. Judkins, late of Farmington. A construction of the first clause in the will, as to the devise and bequest to Sila J. Judkins, wife of the testator. The bill was brought by the plaintiff as executor of the will, which is an heir and legatee under the will, and by all the other heirs and legatees, the defendants, who are named in the first clause of the will, and children of the testator's wife. Decree for defendants.

J. S. Wright, for plaintiffs. J. C. E. for defendants.

PETERS, C. J. Josiah A. Judkins died his will, containing this clause: "I devise, and bequeath to my beloved wife, Sila Judkins, my home lot and building thereon, situated at West Farmington, the depot, and known as the 'Davis' lot, and also all my household goods, bed, bedding, and two hundred dollars in cash, and, at her decease, what remains I wish to be equally divided between Jacob J. and Nellie Washburn, children of my wife's sister."

There can be no doubt that a title to the estate in fee passed to the devisee in the property named. The question is whether that fee was so far limited to the life of the devisee that there was a devise of the undivided estate as remained after the death of the devisee.

We think it clear that this case falls

category of a long list of cases where it has been held that if the testator intended a devise to one person for life, and then a devise over to another, he or she has failed to use appropriate terms to effectuate such an intention. The trouble in many cases is that the testator seeks to accomplish two or more consistent purposes in one bequest. In the present case the testator makes an absolute gift, and then expresses a wish as to how the donee may dispose of a portion of the estate before her death. The title of property once given away cannot be regained by the hand that gave it. This principle will be found reported and variously illustrated by the doctrine declared in *Copeland v. Barron*, 72 Me. 206, and the cases there cited and examined. Later cases in this state are also to the same effect. The rule here applied sometimes operates harshly, no doubt, in defeating the real intention of testators; but it is a safer rule than one which for want of strictness would be attended in its application with all sorts and shades of doubt and uncertainty.

The rule is the same in equity as at law. However strong the language of recommendation or request may be, a trust will not be implied if such a construction of the words will be repugnant to, or inconsistent with, other parts of the same will, as by cutting down an absolute estate, first clearly given, to an estate for life. Mr. Perry (Perry, *Trusts*, 4th Ed., § 114) quotes, in his very able discussion of this principle, the statement of the rule as given by Lord Cottenham, in these words: "Though recommendation may in some cases amount to a direction and create a trust, yet, that being a flexible term, if such a construction of it be consistent with any positive provision in the will, it is to be considered as a recommendation, and nothing more." "The flexible term," says Mr. Perry, "must give way to the inflexible, if the two cannot stand together as they are expressed."

The parties may have fees of counsel for a reasonable amount, according to the condition of the estate, to be determined by the justice who makes the final decree. Decree according to the opinion.

WARREN et al. v. WESTBROOK MANUF'G CO. et al.

Supreme Judicial Court of Maine. June 1, 1895.)

RIPIARIAN PROPRIETORS—EQUITY JURISDICTION—PARTITION OF WATERS.

1. Equity has jurisdiction to make partition of the use of water between opposite riparian proprietors when necessary to secure an equal use or enjoyment in their rights.

2. In the last decision of the court upon the rights of the parties to the use of the waters of the Presumpscot river for mill purposes (29 Atl. 27, 86 Me. 32), it appeared that there were two channels, eastern and western, around an island, flowing past the riparian parties at Saccarappa

Upper Falls. The court there decided, upon the issues then raised, (1) that a riparian ownership of three out of four shores of two channels upon the same river does not itself establish a right to use three-fourths of all the water of the whole river; and (2) that, where no statute, contract, or prescriptive right is invoked, the court will not undertake to wholly or partially apportion the waters of the river between the two channels, but will leave the parties to accommodate themselves to the division made by nature.

3. In this proceeding other facts appear and further allegations are made, under which the plaintiffs claim, among other things, that the increased use of the waters by the defendant renders the whole power insufficient for the mills of all the riparian owners; that, unless they can be assured of the steady and regular use of their full, rightful proportion of the water power, they cannot profitably operate their mills, and cannot venture to undertake further operations, by reason of the cloud thus thrown over their rights.

Held, that the controversy here relates solely to the use of the flow of the water for the propulsion of machinery, and that the court can and should make such division of the use of the flow of water between the opposite riparian proprietors as will secure to each a use or enjoyment equal to his right.

4. Also, *held*, that the bill should be further amended in statement to present all claims of right in any part of the falls and waters arising from riparian ownership, contract, prescription, or any other source.

5. The prayer for relief should be amended to include a division of the use of the water in each channel and the whole river, and any other action of the court necessary to finally and completely adjust this controversy.

See 29 Atl. 927, 86 Me. 32; 1 Atl. 246, 77 Me. 437.

(Official.)

Report from supreme judicial court, Cumberland county.

Bill in equity by Susan O. Warren and others against the Westbrook Manufacturing Company and others for partition of waters. Defendants interposed separate demurrers to the bill. Sustained, with directions.

Hanno W. Gage, Charles A. Strout, Warren & Brandeis, and Warrens & Mason, for plaintiffs. J. W. Symonds, D. W. Snow, and C. S. Cook, for defendants.

EMERY, J. This controversy is over the use for mill purposes of the waters of the Presumpscot river, where it flows in two channels, eastern and western, around an island, past the riparian lands of parties at Saccarappa Upper Falls. It is of several years' standing, and has been unsuccessfully brought before the court on two former occasions, at least. It should now be authoritatively and finally adjusted, if within the power of the court, upon the allegations in this or an amended bill. A full statement of the physical, hydrographic facts is given in the case of *Warren v. Manufacturing Co.*, 86 Me. 32, 29 Atl. 927, to which reference is made.

When the controversy first came before the court, in the case of *Manufacturing Co. v. Warren*, 77 Me. 437, 1 Atl. 246, the now defendant alleged that it was entitled to use one-half of the water power of the river at

those falls, and that all the other riparian owners, collectively, were not entitled to more than the other half. It did not seek to have the respective rights of the riparian owners in the water power determined, nor did it seek for any action of the court that would divide the use according to the right. Its demand was for a general injunction upon all the other riparian owners, against their using collectively more than half of the water power of these falls, and this without showing that the damages recoverable at law would not be full compensation for any injury sustained. The court held that, under the allegations, this demand could not be granted.

The controversy again appeared in the case above cited, 86 Me. 32, 29 Atl. 927. In that case the defendants in the first case appeared as plaintiffs. They alleged that they owned lands and mills on both the mainland and island side of the western channel, and also the dam across that channel; that one of them owned land and mills on the island half of the dam across the eastern channel; that the defendant owned land on the mainland side of that channel, and also the mainland half of the dam across the channel. They further alleged that, by virtue of this riparian ownership of three out of the four shores of the two channels, they were entitled to use three-fourths of the sum of the waters of the two channels, or three-fourths of all the water of the whole river. They asked the court to divide the water of the whole river in that proportion, so that they could use three-fourths, and the defendants only one-fourth. They based their claim for the desired judicial action exclusively upon their riparian ownership, above stated, and without invoking any statute, contract, or prescriptive right.

The opinion was wearily long, but the only points decided were (1) that a riparian ownership of three out of four shores of two channels upon the same river does not of itself establish a right to use three-fourths of all the water of the whole river; and (2) that, where no statute, contract, or prescriptive right is invoked, the court will not undertake to wholly or partially apportion the waters of the river between the two channels, but will leave the parties to accommodate themselves to the division made by nature. Early in the opinion the court gave this cautionary notice: "It should be continually borne in mind that we are considering the legal rights and duties based on the situation of the parties, and unmodified by any statutes, grants, contracts, or prescriptions. None of these latter matters are stated in the bill, and their possible modifying effects are not considered here."

This time the plaintiffs allege the various riparian ownerships substantially as before, and they now further allege that a dam (one across each channel) has existed under the successive riparian proprietors, in substan-

tially the same place as the present 100 years. They also allege that, years after the dams were built, of the water of the river has flowed each channel, and that the water would continue to flow through the channels in proportion but for the wrongful act of the defendants; that, prior to the year 1882, the defendants and their predecessors used less than one-half of the water power upon the eastern channel, and less than one-fourth of the whole power of the river; that there was then sufficient power for the mills of all the riparian owners; that, in the year 1882 the defendants greatly increased and increased their mills, and began to use, and have persisted in using, more than their due proportion of the water power to use in the future, more than half of the water power on the eastern channel, and more than their due proportion of the water power of the river. They allege that this increased use by the defendants has made the whole power insufficient for the use of all the riparian owners; that, unless they can be assured of the steady and full use of their full, rightful proportion of the water power, they cannot profitably operate their mills, and cannot venture to undertake further operations, by reason of the water thus thrown over their rights.

With these allegations, the plaintiffs ask the court to determine the right or equitable share of each party in the waters of the eastern channel, and to effect a division between the riparian owners upon the eastern channel such a division of the use of the water as will enable each to profitably use his rightful proportional share.

The defendants demur generally to the bill, and argue that it is a disguised attempt to induce the court to undertake a division of the whole water of the river between the two channels,—an undertaking which the court has once declined. It is evident that it is frankly admitted by the plaintiffs that their decree dividing and regulating the use of the water in either channel may substantially affect the water power in the other channel; and that, to do full justice, the court may find it necessary to deal with the matter of all the water power at the same time.

The controversy demanding our attention is solely over the use of the flow of the water for the propulsion of machinery. The underlying question is whether, in the case now presented, the court should exercise the power to ascertain the share of each party in the use of the common flow of the water; or, in other words, whether the court can and should make such a division of the use of the water between opposite riparian owners as will secure to each a use of the water power equal to his right.

The waters of a river, in flowing from highland sources down to the sea, are a force convertible into mechanical

the amount of this force depends upon the volume and momentum of the flowing water. The momentum depends on the height of the fall, the distance of the fall of the water. To increase this volume and momentum, and make them sufficient and available for propelling machinery, dams are constructed, which accumulate the water of the river in a larger volume and at a higher level than are natural. Where one party owns the whole dam and the land on both sides of the river, he has the right to the entire benefit of all the power of the water as it accumulates at his dam. Where one party owns the land on one side of the river, and another party owns the land on the opposite side (their lands coming together under the river midway between the two banks), and each owns the half of the dam on his land, then neither party is entitled to have the whole power of the accumulated water applied to his machinery. Each party has only an equal right with the other. Each has a right to use one-half of that power; if whatever part of that half he does not use, the other party can freely use. There is no proprietorship in the water, but only a right in its use; and one riparian owner may use so much as the other is willing to let go to waste. / *Pratt v. Lamson*, 2 Allen, 5.

When the power is sufficient, from the volume or head of water, to propel at all times the machinery both parties have set up, there is no occasion for any controversy. When, however, the power has become so reduced, or the machinery so increased, that, for all or part of the time, the whole power of the water will not drive all the machinery, then the parties must in some way make a division of this reduced power, or its usefulness to either will be destroyed. Each competes with the other in a race to first appropriate the limited power to his machinery, the accumulation and head of water will soon be dissipated, the efficient power of the water exhausted, and all hope of its restoration be destroyed.

In this state the opposite mill owners upon our thousands of waterfalls have usually made this division of the use of the water power by mutual agreement. The division has been effected in various ways,—by fixing hours or days for the alternate use of the water, by fixing the number and area of gates to be used at different stages of the water, by fixing watermarks for the cessation of all use until the agreed head of water is again accumulated, and by various other devices. Our judicial reports show a happy scarcity of litigation of this kind, and they testify to an intelligent and well-developed sense of justice and fairness in this important class of our people. On this particular waterfall, however (by reason, perhaps, of its peculiar character), the opposite mill owners cannot agree upon any mode of dividing the now limited water power;

and they disagree, also, as to their proportional rights in that power.

These differences having arisen concerning the use of an ancient and valuable water power, it would be a reproach to our jurisprudence if the court did not possess and exercise the power to authoritatively adjust them. The alternative would be a destructive competition in the use of the water, until it was rendered valueless to the parties and to the community.

It is evident, also, that the power to be exercised by the court should be that of prevention, rather than that of redress. To make the water power of economic value, the right to its use, and the division of its use according to those rights, should be determined in advance. This prior determination is evidently essential to the peaceful and profitable use by the different parties having rights in a common power. To leave them in their uncertainty, to leave one to encroach upon the other, to leave each to use as much as he can, and leave the other to sue at law after the injury, is to leave the whole subject-matter to possible waste and destruction.

These considerations make firm ground for the exercise of the court's preservative and preventive jurisdiction in equity, as prayed for here. There are also abundant authorities. *Bardwell v. Ames*, 22 Pick. 333; *Bailou v. Hopkinton*, 4 Gray, 324; *Lyon v. McLaughlin*, 32 Vt. 423; *Adams v. Manning*, 48 Conn. 477; *Burnham v. Kempton*, 44 N. H. 78; *Lehigh Valley R. Co. v. Society for Establishing Useful Manufactures*, 30 N. J. Eq. 145; *Frey v. Lowden*, 70 Cal. 550, 11 Pac. 838; *Patten Paper Co. v. Kaukauna Water-Power Co.*, 70 Wis. 659, 35 N. W. 737; *Arthur v. Case*, 1 Paige, 447; *Head v. Manufacturing Co.*, 113 U. S. 9, 5 Sup. Ct. 441; *Lockwood Mills v. Lawrence*, 77 Me. 297.

It is suggested that the peculiar physical features of this case are such that the court cannot make a just and practicable division of the use of the water; that, while the court may have the theoretical right, it has not the practical power, to make the desired division. Whether this difficulty really exists can be better determined after the parties have presented their evidence. If the plaintiffs cannot then make clear to the court the practicability of their request, it may be properly denied.

It is urged that, while the prayer of the bill is limited in terms to a division of the use of the water flowing through the eastern channel, the court's action, even if confined within that limited prayer, will necessarily affect the flow in the western channel, and may thereby enable the riparian owners on that channel to secure or retain some water power they otherwise would not have. The chance of such a result should not deter the court from attempting to do justice. Indeed, it may be an additional reason for the court's exercising its power more comprehensively

and completely. As the case is now presented, the two dams make, with the island, practically one dam, and have been maintained as such for 100 years. Each dam has for that time operated to increase the head at the other dam, by presenting an obstacle to the escape of the water around the island when flowed back by the other dam. The desired head of water at each dam has been kept up by both dams. The whole water of the river has been kept back and accumulated by the joint effect of both dams. Each riparian proprietor upon either channel has used his riparian rights as they have been enlarged or diminished, or otherwise modified, by these ancient dams. The owner of each end of the eastern dam may have acquired a prescriptive right in the continued maintenance of the other end. The owners of the dam across each channel may have acquired a similar right in the continued maintenance of the dam across the other channel. In like manner, the long existence and use of these dams may have so affected the flow of the water through the different channels that the natural flow is no longer the rightful flow. *Murchie v. Gates*, 78 Me. 300, 4 Atl. 698.

As the case is now stated, neither party seems to have a naked, natural, unmodified right, such as was considered and defined in the former opinion (86 Me. 32, 29 Atl. 927); nor can the riparian owners upon either channel now successfully insist that they are in a state of nature, and totally independent of the riparian owners upon the other channel as to the flow, or use of the flow, of the water in their own channel. The interests of the riparian proprietors upon both channels now appear to be intertwined, if not amalgamated. Thus intertwined, the interest of each proprietor upon either channel spans the whole river across both channels. Each has an interest in the regulation of the whole flow of all the water, into whichever channel it may turn.

Under such circumstances, it may be that complete justice cannot be done, even between the opposite riparian owners upon the eastern channel, without determining the rights of all the parties upon both channels, and dividing among them the use of the whole flow of the river, according as their rights may finally appear.

In view of the matters suggested, as well as those directly alleged in the bill, and in view of the hitherto unsuccessful attempts of both parties to secure judicial relief from their embarrassments, we think the court should now attempt, after proper amendments, to adjust all the rights of all the parties in the whole water power in both channels, and to divide the use of the water power in each channel, so that each party may enjoy his full right in the premises. If this seems a departure from the conservative course the court has hitherto pursued when asked to exercise its equity powers, as in *Jordan v. Woodward*, 38 Me. 423, *Manufacturing Co. v.*

Warren, 77 Me. 437, 1 Atl. 246, *v. Thurston*, 80 Me. 129, 13 Atl. 246, the exigencies of this particular case justify it.

The demurrers, *stricti juris*, maintained, since by inadvertence, no demurrers have been filed. The plaintiffs have made contradictory statements of the title of the easterly half of the channel. This error, however, cured by amendment. The bill should be further amended in statement of all claims of right in any part of the dam and waters, arising from riparian rights, contract, prescription, or any other action of the court necessary to and completely adjust this controversy.

Demurrers sustained. Bill amended and further proceedings postponed. Amendments not filed within 60 days. Bill dismissed.

HASKELL and STROUT, JJ., of counsel, did not sit.

WARREN et al. v. WESTBROOK MANUF'G CO.

(Supreme Judicial Court of Maine, 1895.)

WATERS—RIPARIAN OWNERS—ISLAND

1. Where the plaintiffs in their petition allege that they are owners of lands and waters on the western side of the western channel of a river, and that a third person, not a party, is the owner of lands and mill race on the eastern side of the eastern channel, and that the defendant is also owner of the west half of the eastern channel; that defendant has kept open, sluices and gates in the dam across the eastern channel, and that the plaintiffs do not allege that the defendant has any right of action solely upon their right of action in the western channel, and that the defendant has violated any legal duty as to the lawful rights.

2. It is not the case of letting a lower riparian owner in upon the rights of a higher riparian owner.

See *Warren v. Manufacturing Co.*, 77 Me. 437, 1 Atl. 246.

(Official.)

Exceptions from supreme judicial court, Cumberland county.

Action by Samuel D. Warren against the Westbrook Manufacturing Company. From the judgment, defendants' exceptions sustained.

H. W. Gage, C. A. Strout, and Brandeis, for plaintiffs, J. W. W. Snow, and C. S. Cook, for defendants.

EMERY, J. This action at law arose out the same general controversy that gave e to the equity cases between some of the ne parties, reported 88 Me. 58, 33 Atl. 665, d in 77 Me. 437, 1 Atl. 246, and in 86 Me. 29 Atl. 927. Reference is made to those ports for descriptions of the situation.

The gist of the plaintiffs' declaration in s action is that they are the owners of ds and mills on both sides of the western nnel of the Presumpscot river, at Sacca- pa Upper Falls, and also owners of the n across that channel; that a third per- i (not a party to this action) is the owner lands and mills on the western or island e of the eastern channel, and is also the ner of the west half of the dam across that nnel; that the defendant has opened and t open sluices and gates in the east half the dam across the eastern channel, where- the plaintiffs' head of water in the west- i channel has been materially reduced. e plaintiffs do not allege any ownership interest in this east half of the eastern n. nor do they allege any riparian rights the eastern channel. They base their ht of action solely upon their riparian hts in the western channel.

They do not charge the defendant with lening or deepening the eastern channel; with removing or lessening any natural truction in that channel; nor with any erference with the natural flow of the ter in either channel. The gravamen of offense as alleged is that the defendant oved or lessened some artificial obstruc- is to the flow of the water in the eastern nnel,—obstructions not on any lands of plaintiffs, but presumably on lands of defendant.

i our former opinion (86 Me. 32, 29 Atl.), we stated that, in the absence of any ifying statute, contract, or prescription, rights and duties of the riparian owners n these two channels were substantially follows: The riparian owners on either nnel were entitled to have flow through r channel so much of the water of the ole river as would naturally flow there, l no more. They could not lawfully wid- or deepen or otherwise improve their nnel in such a way as to lessen the nat- l flow of water in the other channel. y were not bound to erect or keep up dam or other artificial obstruction in ir channel in order to increase or preserve flow of water in the other channel.

i this declaration the act of the defend- in making openings through the east half the eastern dam (an artificial obstruction, sumably on its own property, and admit- ly not on the property of the plaintiffs) is matized as wrongful and injurious; but no t is stated from which the court can infer t the defendant thereby violated any legal y or exceeded its lawful rights. It is a case of letting water down in unnatural ntities upon a lower riparian owner, nor

of flowing water back upon an upper riparian owner.

Exceptions sustained.

HASKELL and STROUT, JJ., having been of counsel, did not sit.

NEAL et al. v. FLINT.

(Supreme Judicial Court of Maine. June 1, 1895.)

SALES—INCOMPLETE CONTRACTS—PAROL EVIDENCE—COLLATERAL AGREEMENT—EVIDENCE.

1. Where the whole agreement in reference to the sale of property is embraced in a written bill of sale, parol evidence is inadmissible to contradict, vary, or modify the contract which the parties have thus reduced to writing.

2. But if the original contract is verbal and entire, and a part only of it is reduced to writing and embraced in such bill of sale, it is competent to show that fact, or that there was a distinct collateral agreement, not inconsistent with the terms of the written stipulations of the parties, and which constituted in part the consideration of the written agreement, or operated as an inducement for entering into it.

3. This is an exception to the general rule which prohibits the introduction of parol evidence to contradict, vary, or modify written contracts.

4. In such case the written contract is deemed to be only partially reduced to writing, and the collateral undertaking or stipulation exists in parol.

Emery and Whitehouse, JJ., dissenting.
(Official.)

Exceptions from supreme judicial court, Hancock county.

Action by Warren P. Neal and another against David B. Flint.

This was an action of assumpsit for non-delivery of goods sold, and an independent and collateral verbal guaranty on the part of the defendant that the goods and chattels so sold and described comprised all and the same that were at Winter Harbor in October, 1890, some seven months before the sale.

Plea was the general issue. The verdict was for the plaintiffs. Defendant excepts. Exceptions overruled.

In 1889 one Roderick Pendleton gave to the defendant, as security for a loan, a mortgage of certain boats, canoes, and appurtenances.

In the fall of 1890, the mortgage still subsisting, the plaintiff Neal, being employed by Pendleton, assisted in storing at Winter Harbor what remained of the boats, etc., some having been disposed of by Pendleton in disregard of the mortgage.

In November, 1890, the defendant began foreclosure, and in February, 1891, the time of redemption having expired, he instructed one Smith, acting as his agent, to take possession of them.

In the spring of 1891, the parties meeting in Boston, the defendant negotiated with the plaintiff Neal to sell him the property, and on May 15th the defendant, in consideration of \$2,500 in notes, gave to the plaintiff Neal a written bill of sale.

On the following day the plaintiff Neal returned to Mr. Flint's house, accompanied by Charles H. Wood, and requested certain alterations to be made in the bill of sale. Some formal changes were agreed to, including the naming of a consideration and the insertion of special covenants of warranty; and a new bill of sale, embodying these changes, was then and there written by Mr. Wood,—being copied from first bill of sale with such changes as Mr. Flint would permit,—signed by Mr. Flint, delivered to and received by the plaintiff Neal.

Bill of Sale.

"Know all men by these presents that I, D. B. Flint, of Boston, in the county of Suffolk and state of Massachusetts, in consideration of one dollar and other valuable consideration paid by Warren P. Neal, of Steuben, Washington county, Maine, and Fred Shaw, of Gouldsboro, Hancock county, Maine, the receipt whereof is hereby acknowledged, do hereby grant, sell, transfer, and deliver unto the said Neal and Shaw the following goods and chattels, namely, all the boats, canoes, sails, oars, paddles, fittings, and fixtures of every kind, more or less, as the same now lie at Winter Harbor, in the care of Charles E. Smith, and which were covered by a mortgage from Roderick Pendleton to me under date June 26, 1889, and recorded in the records of the town of Gouldsboro; also, all boat stages, houses, and fittings as they now are at Bar Harbor; the same being free from all claims of all persons by, through, or under me; said mortgage having been foreclosed by my attorneys for breach of condition, and the said property coming to my possession by due process of law; said Neal and Shaw assuming all liability for rents, wharfage, or charges from the first day of May, 1891; it being understood and agreed that one good boat and one canoe, with all fittings for both, and all in good condition, are reserved. To have and to hold, all and singular, the said goods and chattels, to the said Neal and Shaw and their executors, administrators, and assigns, to their use and behoof forever. And I hereby covenant with the grantees that I am the lawful owner of the said goods and chattels, that they are free from all incumbrances, that I have good right to sell the same as aforesaid, and that I will warrant and defend the same against the lawful claims and demands of all persons claiming by, through, or under me. In witness whereof, I, the said D. B. Flint, have hereunto set my hand and seal this 16th day of May, in the year one thousand eight hundred and ninety-one.

"D. B. Flint. [L. S.]

"Signed, sealed, and delivered in presence of Charles H. Wood."

The plaintiffs immediately after took possession of the property.

But it appeared that between the time they were stored at Winter Harbor, in the fall,

and the time of his taking possession in spring, some of the property had or stolen without the knowledge of the party to the suit.

Thereupon the plaintiffs claimed they had bought, and were entitled to, the boats, etc., that had been stored in the fall and brought this action.

The plaintiffs offered evidence of conversations between Neal and defendant and between Neal, Wood, and the defendant before and at the time of the execution of the second bill of sale.

This testimony was admitted subject to the defendant's objections. The testimony was admitted subject to the defendant's exceptions. It was as follows:

Warren P. Neal, one of the plaintiffs (direct):

"Ques. Now, at the first talk with you did you have any talk referring to what was there? Ans. Yes, sir.

"Ques. At the time of the talk, was there any reference to the ownership of the property? Pendleton's mortgage of them to me? (Objected to. Admitted. Defendant's exceptions.) Ans. Yes, sir.

"Ques. Now, then, won't you kind of tell me what conversation was had there between you in reference to the identification of the property? What was said there between you and Mr. Flint about what property was there at Winter Harbor that you were referring to? (Objected to. Admitted. Defendant's exceptions.) Ans. Well, we talked about what was there in the fall.

"Ques. (By the Court.) What did you talk about what you put in there? Ans. He asked me if I wanted to buy the business. I told him I did, if I could pay for it. Then he asked me if I wanted to make an offer for the business, in cash, and how much. I told him that I would make an offer on what I got. I said, 'If I can have the business, Pendleton has given you a mortgage on it. It makes one thing, and, if I have got just what I put in there, that is an offer.' He says, 'I had rather find out, first, what you want to make you an offer, whether I can make you an offer, whether I can make you an offer or not.'

"Ques. That is all there was said there? Ans. That is about all that was said there.

"Ques. How soon afterwards did you have another conversation with Mr. Flint? Ans. I went again in three or four days, a week, afterwards, to see him. I wanted to see a party that was coming there, and then I was going to let him know what I could do about raising the money. As soon as I found out, I went and told him I could not raise the money, but I could get the notes for him, if he would take the notes. I named the parties. He was going to Winter Harbor in a boat to look after his boats there, and when he got back he would let me know, and when his time down there he would see

and Mr. Shaw, and see what they could and when he got back he would let me w.

Ques. What, if anything, did he state it going to Winter Harbor, and his ob- in going there? (Objected to. Admit- Defendant excepts.) Ans. He told me he was going to Winter Harbor to see at the boats, and see if they were all t, and everything; he hadn't been there e they had foreclosed, and didn't know t they had done, and when he got back would let me know. And I told him I ld like to have him look the boats over. ld him I understood this sloop Eunie had a drifting around, full of ice, etc., and of water, etc. He said that couldn't be, he had paid Mr. Sumner for hauling the out and taking care of her. He said would go down and see, and when he got c he would let me know what kind of e they were in.

Ques. What next did you hear about it? When he got back from Winter Harbor et me know, and I went out to Common- th avenue to see him.

Ques. That was when he had got back a Winter Harbor? Ans. That was when ad got back.

Ques. That was the third conversation? Yes, sir.

Ques. What was it? Ans. I asked him the boats were, and he said just as I them in the fall. I asked him if the cat- s were covered up, and he said they e; that Mr. Smith took the boards off one, laid it on the wharf; that one of the oat's balyards was off. I told him that ot amount to much,—only a dollar or two, way. He said the boats were all right, in the care of Mr. Smith, and 'I will as- you they are all right, so far as he has charge of them.'

Mr. Deasy: This is all subject to our ob- on.

Witness: Then I asked him if he saw my er and Shaw, and he said he did. I t know as I remember just the talk that old me that they made with him, but e was something in relation to this boat ness, about the notes, etc., and then ne d me to make him an offer for this busi- ; that is, provided I could get these s all right. He wanted me to make him offers,—one for the boats as I put them here in the fall, and one for the boats ad a mortgage of, and get what I could

Mr. Pendleton had sold. I told him made a difference; if I could have what t in there, and they were all right and ght, why, I would give him \$2,500 for t I put in in the fall. I said I had a of what I put in, and he said he had a of the same. He didn't show me his, I didn't ask to see it. I told him, if I d have all that he had a mortgage of, I ld give \$2,800. He made the remark he didn't want to put Pendleton to any

trouble, because he had trouble enough. He said, 'It was the worst thing I ever done, when I lent him the thousand dollars.' He says, 'I will take you at your \$2,500 offer.'

"The Court: Now, what was that offer? Ans. That was an offer for what I put in there in the fall, and had a list of.

"The Court: You told him that? Ans. Yes, sir.

"The Court: And that is what he said to you? Ans. Yes, sir.

"Ques. Now, to go back a moment, have you that list you made in October, 1890, of the boats and fittings, with you? Ans. Yes, sir. (Produces list.)

"Ques. This is the list that you took in Oc- tober, 1890? Ans. Yes, sir.

"Ques. Of the Pendleton boats, etc.? Ans. Yes, sir.

"(Said list offered in evidence by counsel for plaintiff. Objected to. Admitted. Defend- ant excepts.)"

Charles H. Wood, called for the plaintiffs:

"Ques. Without asking detailed questions, will you state the circumstances of, and the wording of, a conversation which took place in Boston, 1891, where Mr. Neal and Mr. Flint and you were present, as regards the sale of certain property from Mr. Flint to Mr. Neal? (Objected to as incompetent, ir- relevant, and immaterial. Admitted. Defend- ant excepts.) Ans. I went to Mr. Flint's house with Mr. Neal, at Mr. Neal's request, and a letter which I had received from down East from my brother-in-law, and we made known our business to Mr. Flint, and were taken by him to his office.

"Ques. Was that in his house? Ans. That was in his house, at 360 Commonwealth ave- nue. I told him that I had been asked to come there by Mr. Neal, as well as my brother-in-law, Mr. Shaw, for the purpose of getting a proper bill of sale; that I did not think this writing he had given Mr. Neal hardly covered the ground; and that I would like to have some additions made to it. Then, after we made known our business, I think we went upstairs to an office. I re- member of sitting down to a desk, and I did the writing at the dictation of Mr. Flint. I suggested certain changes that I wanted in the bill of sale. The minor ones he permit- ted me to make. He allowed me to put in Mr. Shaw's name with Mr. Neal's as one of the grantees, and he also allowed me to recite in the bill of sale a consideration, which was not in the paper which he had written without a blank and given to Mr. Neal. I called his attention, after we had got those points adjusted, to the fact that the descrip- tion was not very specific. I suggested that it was only very general, and he shook his head at once, and said he couldn't make any changes of that kind. He said something to this effect,—I don't remember the exact words, but to this effect,—that: 'No,' he says, 'I can't put in any names or any articles.' He says, 'Mr. Neal knows more about that than

I do.' And Mr. Neal spoke up at that point, and says, 'Yes, Mr. Flint, I know what I put in there;' and Mr. Flint answered and says, 'Whatever you put in there last fall is there now.' And he simply refused to make any further additions to the bill of sale. I think he did allow me to put in the covenant which the blank called for, of his title to it by the quitclaim, saying—I think he used the remark—that he would not make any warranty deed of anything. I think he used that remark, and I remember, also, my calling his attention to the fact that this description was somewhat uncertain, as it read in his bill of sale. He says, 'Everything will be all right.' I says: 'Yes, Mr. Flint, so long as you are alive, I have no doubt but what you will carry out your agreement with Mr. Neal; I have no doubt any agreement you have made with Mr. Neal will be carried out. But,' says I, 'life is uncertain, and perhaps, if it should pass into other hands, it might not be carried out as you and Mr. Neal have agreed.' I pressed the matter as much as I thought was becoming, and he refused to make any changes, and it was dropped at that point. I think I interlined in the original bill of sale— If I remember right, I made one bill of sale, which has been shown here, and took Mr. Flint's original writing which he gave to Mr. Neal, and made such interlineations as he permitted me to make. That is about all I can remember of the matter."

The counsel for the defendant requested the following instruction:

"If Mr. Neal, or Mr. Wood on Mr. Neal's behalf, requested Mr. Flint to specify in writing an agreement as to the quantity of the articles, and Mr. Flint refused to do so and expressly stated that he would not warrant anything, and Neal closed the trade, and accepted the bill of sale as written with that statement of Flint's, then Neal is thereby estopped from afterwards setting up any previous verbal warranty as to the quantity."

The presiding justice thereupon said: "Gentlemen, I give you that instruction, but I also say to you that the element in it which is controlling is whether or not the plaintiff accepted it in full satisfaction and compliance with his bargain."

The jury decided the issue in favor of the plaintiffs, and assessed damages in the sum of \$142.78.

To the admission of the foregoing testimony and instruction given to the jury, the defendant took exceptions.

The issue, as submitted to the jury by the presiding justice, appears in the following portions of his charge:

"I now refer to the interview when the bargain is said to have been struck. The question for you is to determine what that bargain was. There was a bargain of sale at that interview. There was no sale, because the sale was not completed until later; but it is admitted by both sides that

a bargain for sale was made. 'It was struck,' in the language of the law, for the plaintiff. Now, what was the gain? The plaintiff Neal says that he took an account of what boats were taken at Winter Harbor in a certain place, or a storing place, that he had shown them, and that he went to Mr. Flint and chased them. He says that Mr. Flint made a proposition from him to purchase the property that he had acquired by mortgage, or to purchase only the property that was stored there in the fall. The defendant Mr. Neal says. He states that he gave the defendant, for all the property to which he took title under the mortgage, the sum of \$2,800, and gave him \$2,500 for all that he had taken in the fall, and that Mr. Flint agreed to give him all that were stored in the fall for \$500. * * *

"Now, gentlemen, when two parties make a verbal agreement or trade that is reduced to writing, and the writing is afterwards made, that writing is controlling in the transaction, and binding upon the parties, and they must be forever estopped by its terms and conditions. This applies in this case, so far as the issue does cover the whole contemplated transaction between the parties. * * *

"So, gentlemen, determine in your minds what the trade was. You must determine whether the parties committed to the whole transaction,—whether they substituted the written instrument for the bargain they had previously made. If they did, the plaintiffs cannot prove that they did not, and the bargain was all that lay at Winter Harbor, and the defendant had distinctly agreed with the plaintiffs to sell them all that was taken at Winter Harbor, representing that at that time the boats were there that were taken at Winter Harbor,—guarantying them to the plaintiffs,—then the plaintiffs can recover. I am bound to say to you that it is not in order to hold a man by what he says to you, but I am bound to say to you that I warrant. If I convince you by a representation as to the quantity of the boats concerning which you have had an opportunity to discover, and my representation to you is of that character which would lead you to believe it and to rely upon it, then you are bound to believe that quality, and you purchase. Then, gentlemen, the jury would be right to say that I meant to warrant, and that I actually did warrant, the article."

"Well, gentlemen, when that bargain was made, the defendant's name was called to the imperfect description of these articles, and he was asked to sign a list which would operate to convey the articles to the plaintiffs, and he did so. Now, what is the significance of that to your minds? If he had not signed that contract before to give a written contract, you will consider whether,

first writing was accepted, and he was asked to put in a second writing, and refused to do it, the plaintiff Neal went away submitting to that agreement,—agreeing to take his rights under that bill of sale,—or whether he went away without agreeing to it and without submitting to it, having done all that he could to get in all that the man had agreed to sell, and had determined to enforce his contract against Mr. Flint, and to have the property that was contained on his list.”

J. A. Peters, Jr., and Charles H. Woodl. for plaintiffs. L. B. Deasy and A. W. King, for defendant.

FOSTER, J. The plaintiffs entered into negotiations with the defendant whereby he was to sell them certain boats, canoes, oars, paddles, furniture, and other fittings, then stored at Winter Harbor. Two or three interviews were had in Boston, the defendant's place of residence, before the bargain was struck.

It became a question of fact at the trial what the contract was,—whether the bill of sale which the defendant gave to the plaintiffs embraced the whole contract between the parties, or whether there was a collateral agreement incidentally connected with the stipulations contained in the bill of sale, and not in conflict therewith.

This was important as bearing upon the question of admissibility of evidence which was admitted, and to the admission of which exceptions were taken by the defendant.

If the whole agreement in reference to the sale of the property was embraced in that bill of sale, then no parol evidence was admissible to contradict, vary, or modify the contract which the parties had thus reduced to writing. But if the original contract was verbal and entire, and a part only of it was reduced to writing and embraced in the bill of sale, it was competent to show that fact, or that there was a distinct collateral agreement, not inconsistent with the terms of the written stipulations of the parties, and which constituted in part the consideration of the written agreement, or operated as an incentive for entering into it. *Bonney v. Merrill*, 57 Me. 368, 373, and cases cited; *Grant v. Frost*, 80 Me. 202, 13 Atl. 881; *Bradstreet v. Rich*, 72 Me. 233, 237, and cases cited; *Browne*, Par. Ev. c. 12, § 50, and cases cited; *Steph. Ev. art. 90; Tayl. c. § 1038*.

The property in relation to which the contract was made had been stored the fall before at Winter Harbor. The plaintiffs claim that the defendant agreed to sell all the articles that were stored in the fall. On the other hand, the defendant contends that the bargain was that he was to sell the plaintiffs what was at Winter Harbor on May 1st, the time when the contract was entered into, with no right to anything that might be missing from the articles stored the fall before.

The bill of sale contains no particular enumeration of the articles sold, the language being, “All the boats, canoes, sails, oars, paddles, fittings, and fixtures, of every kind, more or less, as the same now lie at Winter Harbor,” etc. The plaintiffs' contention at the trial was that there was an oral promise, warranty, or understanding on the part of the defendant to the effect that all the boats, etc., put into the boathouse at Winter Harbor by Neal, one of the plaintiffs, were there at the time of the execution and delivery of the bill of sale.

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tered into, with no right to anything that might be missing from the articles stored the fall before.

If such a promise or agreement was in fact made, were the plaintiffs entitled to the benefit of it, under the rules of evidence? We think they were.

The contract or promise relied on was a collateral agreement incidentally connected with that which had been reduced to writing, and not inconsistent with it. The bill of sale was silent as to quantity. The words “as they now lie” refer to quality or condition, rather than quantity and number. No part of the writing covered this collateral stipulation set up by the plaintiffs. Consequently, evidence of it was admissible, and it was for the jury to determine whether it was proved or not. *Farwell v. Tillson*, 76 Me. 227, 239.

The general rule is that parol evidence cannot be received to contradict or vary the terms of a written contract, and that when an agreement is reduced to writing it must be considered as expressing the ultimate intention of the parties to it; and therefore, in the absence of fraud (*Prentiss v. Russ*, 16 Me. 30), parol evidence is not to be admitted to alter or modify the terms or legal effect of it. The parties having reduced their contract to writing, their rights must be governed by and depend upon its terms as therein expressed, irrespective of parol evidence of what was intended or what took place previous to or at the time of making the contract.

But there are exceptions to this general rule, which permit parol evidence of engagements collateral to or independent of the provisions expressed in the written agreement, and not within its terms, although made at the same time, and affecting the rights of the parties in relation to the subject-matter of the writing. In such it is deemed only partially reduced to writing, and the collateral undertaking or stipulation exists in parol. *Chapin v. Dobson*, 78 N. Y. 74; *Potter v. Hopkins*, 25 Wend. 417; *Lindley v. Lacy*, 17 C. B. (N. S.) 578; *Jeffery v. Walton*, 1 Starkie, 267; *Willis v. Hulbert*, 117 Mass. 151; *Nickerson v. Saunders*, 36 Me. 413; *Goodspeed v. Fuller*, 46 Me. 144; *Bradstreet v. Rich*, supra. In *Dorr v. Fisher*, 1 Cush. 271, 273, Chief Justice Shaw uses this language: “But a warranty is a sepa-

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rate, independent, collateral stipulation, on the part of the vendor, with the vendee, for which the sale is the consideration, for the existence or truth of some fact, relating to the thing sold." *Benj. Sales*, § 610.

Greenleaf thus expresses the exception to the rule. "Nor does the rule apply in cases where the original contract was verbal and entire, and a part only of it was reduced to writing." 1 *Greenl. Ev.* § 284a. And this court, in *Bonney v. Morrill*, 57 Me. 373, states it thus: "There is no rule of evidence which precludes the defendant from asserting and proving by oral testimony any distinct and valid parol contract of the plaintiff, made at the same time and not reduced to writing, which is not in conflict with the written agreement, and which undoubtedly operated as an inducement to the defendant to enter into it."

The exception to the admission of the testimony of Charles H. Wood cannot be sustained, for the reasons already stated: (1) It related to the alleged collateral agreement relied on by the plaintiffs. (2) To a conversation between the defendant and one of the plaintiffs which was first partially drawn out by defendant's counsel upon cross-examination of Neal. By the introduction of a portion of such conversation, although upon cross-examination, the other party had a right to the whole of it, and to prove what in fact the conversation was. *Williams v. Gilman*, 71 Me. 21; *Ice Co. v. Maxcy*, 74 Me. 294; *Mowry v. Smith*, 9 Allen, 67, 68.

The exception in relation to the requested instruction is not insisted upon. It was given as asked for, with qualifications that were proper to prevent the jury from being misled as to the issue involved.

After a careful examination of the evidence, we perceive no reason why the verdict should be disturbed upon the motion for a new trial. While it was more or less conflicting upon the vital points in controversy, it was sufficient upon which to found a verdict.

Exceptions and motion overruled.

WISWELL, J., having been of counsel, did not sit.

EMERY and WHITEHOUSE, JJ. (dissenting). This contract of sale was evidenced by a written instrument which is not a mere bill of parcels or incomplete memorandum, but is a full, formal bill of sale, apparently complete, and containing various stipulations. The opinion seems to hold that oral evidence should be received to add to these written stipulations an oral stipulation of warranty or guaranty concerning the property sold. From this we dissent.

While the cases cited in the opinion sustain

the general proposition that independent collateral stipulations may be shown by oral evidence, in addition to those expressed in writing, they do not, to our minds, establish the particular proposition that an oral warranty or guaranty concerning the property sold is a stipulation independent of and collateral to the contract of sale, and one which may be added by parol to those expressed in the writing.

The very purpose of writing out the terms and stipulations of a contract is to ascertain and to put upon the record what stipulations were made, and what were not in fact finally made. When a warranty or guaranty as to the subject-matter of a sale is made during the negotiation of the sale, it becomes a part, and a material part, of the contract of sale. It is a stipulation that would naturally be expressed in the final terms of the sale are reduced to writing. If it be omitted from the written instrument made and adopted by the parties, as the evidence of their contract, it cannot be held as finally omitted from the contract itself. We think the rule thus established is fully sustained by the great weight of authority. We cite the following cases in reference to the numerous other cases to the same effect: *De Witt v. Berry*, 134 U. S. 536; *Seltz v. Machine Co.*, 151 U. S. 510, 12 Sup. Ct. 46; *Van Winkle v. Granger*, 146 U. S. 42, 13 Sup. Ct. 18; *Granger v. Elsner*, 23 Ill. App. 269; *Rogers v. Johnson*, 41 Kan. 385, 21 Pac. 287; *Johnson v. Boardman*, 65 Cal. 179, 3 Pac. 625; *Boardman v. Allen*, 13 Allen, 361; *Frost v. Blanchard*, 155 Mass. 155; *Galpin v. Atwater*, 29 Conn. 100; *Wilcox v. Cate*, 65 Vt. 473, 26 Atl. 100; *Thomson v. Gortner* (Md.) 21 Atl. 100; *Naumberg v. Young*, 44 N. J. Law, 100. The court, in an elaborate opinion, reviewed these cases, and in vigorous language affirmed the rule that an oral warranty or guaranty cannot be added to a contract expressed in writing. Indeed, our own court has repeatedly acted upon this rule. In *Storer v. Boardman*, 83 Me. 387, 22 Atl. 256, there was a bill of sale, less formal and less complete than the one in this case. The court (page 388, 83 Me., page 256, 22 Atl.) correctly ruled at the trial that the bill of sale did not contain a warranty of sale, and that none could be affixed to it by parol.

In *Osgood v. Davis*, 18 Me. 146, it was held that an oral warranty of title could be added to a written assignment of a share in a tract of land, and a certificate of title. The court cited, as authority, *Ell v. Edmunds*, 12 East, 6, in which it was held that an oral warranty of quantity could be added to the written condition of sale of timber.

To this wholesome rule we think the court should adhere. We deprecate any departure from it.

BURTON v. WILLEN et al.

Court of Chancery of Delaware. March, 1872.)

INJUNCTION—ADEQUATE REMEDY—ACTION ON RECOGNIZANCE BOND—EQUITABLE SET-OFF—FRAUD—INSOLVENCY—EVIDENCE.

1. Equity will not enjoin an action of scire facias on a recognizance bond by the assignee of the beneficiary, on the ground that the share the beneficiary had been paid to her, as the remedy at law is adequate.

2. Where an executor fails to disclose to his decedent's daughter and her husband, who had reason to suppose that the daughter would receive considerable property from her father's estate, that the estate was insolvent, there is a *supplicatio veri*, which will vitiate in equity any agreement by the daughter and husband that a claim by the executor for advances made the daughter while a minor shall be allowed on a claim of the daughter against the executor, disconnected with the estate represented by the executor.

3. An executor who was indebted to the daughter of his decedent on a recognizance bond, connected with the estate which he represented made advancements to the daughter while a minor for her board, clothing, and tuition, she supposing they were made out of her share of her father's estate. The estate of decedent proved insolvent, but the executor, who acted as guardian of the child, without appointment, besides great delay in the settlement of the estate, kept the child in ignorance of its true condition, and being under the impression that she would receive considerable property therefrom. *Held*, that equity would not offset the executor's claim for such advances against his liability on the recognizance bond, and restrain an action thereas against an assignee of the daughter for due, though with notice of the executor's claim, especially where questions of law arise on the face of his account materially affecting the rights of the parties.

4. Fraud, when relied on as ground for equitable relief, must be proven like any other fact.

5. That a person is under execution process, and is threatened with suits by creditors, does not conclusively prove his insolvency.

Bill by Benjamin Burton against George W. Willen and others to restrain the prosecution of an action to enforce complainant's liability on a recognizance bond. Dismissed.

Jacob Moore, for complainant. T. F. Bayl and C. M. Cullen, for defendants.

RIDGELY, Chancellor ad Litem. At the September term, 1855, of the orphans' court for Sussex county, Benjamin Burton, the complainant, accepted parcel No. 5 of the intestate's real estate of his mother, Polly Vessels, who had died in the year 1833, and on the 9th day of September, 1855, entered into recognizance in the said orphans' court, with John H. Burton and Peter R. Burton as his sureties, conditioned for the payment to the other parties entitled of the sum of \$30.73, with interest from the said 20th day of September, 1855. Virginia C. Truitt, daughter of Benjamin C. Burton, one of the defendants, being a granddaughter of the said Polly Vessels, deceased, and one of her heirs at law, was entitled to the sum of \$173.41, with interest from the 20th day of September, 1855, as her part and share of the said recognizance. The said Virginia was the

daughter and only child of David Burton, who died on the 25th day of June, 1855, prior to the time when said recognizance was entered into; and at the time of her father's death she was between 5 and 6 years old, and at the time of said recognizance she was about 6 years and 22 days old. Her mother had died shortly previous to the death of her father. On the 9th day of August, 1870, she intermarried with, and became the wife of, George T. Truitt, a defendant in this suit, and was then an infant under the age of 21 years; but on the 21st day of the same month of August, 1870, she attained her majority. On the 21st day of April, 1871, the said George T. Truitt, the husband of the said Virginia, assigned on the record of said recognizance all his said wife's share and interest therein to George W. Willen, the other defendant, who on the 29th day of September, 1871, commenced in the superior court for Sussex county an action of scire facias wherein the state of Delaware, for the use of George T. Truitt and Virginia C., his wife, in right of said Virginia C., now for the use of George W. Willen, was the plaintiff, and Benjamin Burton, John H. Burton, and Peter R. Burton were the defendants, to recover the part or share of said recognizance to which the said Virginia had been entitled, and which had been assigned by her husband to him as aforesaid. The bill of complaint was filed March 11, 1872, by Benjamin Burton, the complainant, against George W. Willen alone, to restrain him from proceeding any further in his suit of scire facias in the superior court, and to enjoin him from the collection of the share in the said recognizance which had been assigned to him by George T. Truitt. A preliminary injunction had been previously issued on petition filed by Burton against Willen. The answer of Willen was filed June 26, 1872, and further answer filed September 13, 1872, and further additional answer September 26, 1872; and afterwards depositions of witnesses were taken for the complainant and respondent. On January 3, 1876, an order was made by the then chancellor ad litem that the complainant amend his bill so as to make George T. Truitt and Virginia C., his wife, parties in this cause; and on the 19th day of September, 1876, the amended bill, making the new parties defendant, was filed; and on the 9th day of December, 1876, George T. Truitt and Virginia C., his wife, the new parties defendant, filed their joint and several answer.

By an agreement in writing, dated January 6, 1877, and signed by the respective solicitors for the complainant and respondents, it was agreed that all the testimony taken in this cause when Willen alone was respondent, except that of Truitt and wife, should be deemed and considered as evidence between the present parties in this cause; and that the testimony of said Truitt and wife be considered evidence as between Burton

and Willen, the same as before the making of new parties; but that said agreement should not effect any exceptions theretofore filed against witnesses and evidence. The cause was argued on the 1st and 2d days of December, 1881, on bill, answers, depositions, and exhibits.

The prayer of the bill, in substance, is that the defendant Willen be perpetually enjoined from proceeding any further with his said suit of scire facias on said recognizance, and from assigning the said recognizance, or any part thereof, to any other person, and for general relief. The grounds stated in the bill of complaint for the relief prayed for, briefly, are that the complainant, from the time of the death of the father of the said Virginia until her marriage with the said George T. Truitt, supplied the said Virginia with clothing, and paid her board; that he advanced and paid to her at different times various sums of money to pay her traveling expenses to and from school, and to supply her necessary and proper wants; that he sent her to school, and paid for her education; that he furnished her with and paid for such clothing as was proper and becoming to her station in life, and that the articles so furnished and paid for by him, and the money advanced and paid by him for her board, education, and traveling expenses, were proper and necessary and suitable to her station in life; that the said Virginia, after she arrived at years of discretion, but before her majority, repeatedly promised the said complainant that she would, when she arrived at age, pay him for all his expenses and advances made by him for her use and benefit, or would allow him the same in a settlement she would have with him after she became of full age; that after the marriage of the said Virginia, and after she had attained full age, to wit, in the month of November, 1870, the complainant, having drawn off his account against the said Virginia, submitted the same to her and her husband, and went over the same with them, explaining each item of the account, and that the said Virginia and her husband expressed themselves satisfied with the same, and said it was correct, and promised to pay or allow it when they should have a settlement with the complainant; that they both distinctly declared the complainant should never lose anything by reason of the money paid and advanced by him for the said Virginia during her minority; that the said admissions, approvals, and promises to pay were made more than once; and that in the same interview, in a further conversation had between the said complainant and the said George T. Truitt, the said Truitt did further, and in the presence of his wife, promise the complainant that the amount of said account should be allowed, and go especially as a credit and payment to the full amount thereof on and to the said share of his wife in said recognizance. The bill further al-

leges that at the time of the interview between the said complainant and the said Truitt and wife, and at the time of assignment to said Willen, said account of its interest, amounted to as much or more than the said Virginia's share of said recognizance; and that the said complainant did not owe to said George T. Truitt in his wife, or to the said George W. Willen, his assignee, said share of said recognizance, or any part thereof, the same having been wholly paid by the complainant before the assignment. The bill also charges that the said Willen, before the assignment to him, had notice that the complainant had an account against the said Virginia, which was set off and payment of her share of said recognizance, and further charges that the said consideration paid or promised to be paid by the said Willen to said Truitt for said assignment was much less than the share assigned.

The answer of Willen denies all knowledge on his part that the complainant had an account against the said Virginia with clothing and advances, and had made advances of money to her, and had paid for her education, and maintenance, except that, while the said Willen was in the mercantile business, he sold some articles to the complainant at different times, which the complainant represented to be for the use of the said Virginia, but that the value of said articles did not exceed the sum of \$100, and that the aggregate exceed the sum of \$100. He further denies any knowledge on his part before said assignment, that the complainant had any account against the said Virginia for necessities furnished to her, or that the complainant held any account against the said Virginia which was a set-off and payment of her share of said recognizance. He denies the service upon him on the 24th day of November, 1871, three days after the assignment, of written notice from the complainant, and that (the complainant) had paid to the said Virginia both the principal and interest on her share in said recognizance, and that the said complainant would resist the collection of it, on the ground that it had been furnished and satisfied. He also sets forth in answer the consideration he agreed to pay to the said Truitt for the assignment, and states that the same was secured to Truitt, and how paid. The answer of Truitt and wife admits that the complainant during the minority of the said Virginia, did furnish her with clothing, and paid for her board, education, and support; admits that after the marriage of the said Virginia, and after she had arrived at age, the complainant came on her and her husband at the house of P. Burton, and there produced what he called an account against her, and asked them to allow it in settlement and payment of her share of the said recognizance, but that she and her husband positively refused to allow it in settlement of her share of said recognizance, and they stated to the complainant that their business was in the

C. M. Cullen, Esq., for settlement and adjustment, and referred the complainant to him as their attorney. They further state in their answer that the complainant had in his hands, as executor of the said David Burton, father of the said Virginia, money due the said Virginia from her father's estate, more than sufficient to reimburse the complainant for all advances made to her, and for all money paid by him for the education, clothing, support, and maintenance of the said Virginia during her minority; that, while the complainant was making such advances for the said Virginia during her minority, she believed that they were made out of moneys in his hands as executor of her father, which belonged to her under her father's will; and that she never knew of the indebtedness of the complainant to her said recognizance until the interview at the house of John P. Burton.

It may assist us in the proper consideration of this case to notice briefly the condition of the parties at the time of the death of David Burton, and at the time of the assignment to Willen by Truitt of his wife's share in said recognizance, as shown by the evidence and exhibits in the cause. David Burton died in June, 1855, having previously made a will by which he devised and bequeathed all his real and personal property, after the payment of debts, to his only child, Virginia C., and her heirs and assigns, forever, but in case the said Virginia should die before she should arrive at the age of 21 years, or without an heir or heirs lawfully begotten of her body, then all of the said real and personal property should go to his three brothers, Benjamin Burton, John H. Burton, and Peter R. Burton, their heirs and assigns, forever; and he nominated his brother Benjamin Burton as executor. The said David Burton, at the time of his death, was seised of an undivided moiety of a lot of land of about two acres, with a tanyard and a dwelling house thereon, situated in or near Millsboro, in Sussex county, also of a storehouse in said town of Millsboro, and also of a farm, containing about 100 acres of land situated in Indian River hundred, in Sussex county, which, together, were worth at that time about \$3,000, and yielded an annual rent of about \$250 or \$300. The said David Burton, at the time of his death, was also possessed of a considerable personal estate, the value of which, however, is not stated in the evidence. On the 1st day of December, 1877, Benjamin Burton, the complainant in this suit, as the executor of David Burton, passed before John Sorden, then register of wills for Sussex county, a first testamentary account on the estate of the deceased, by which it appears that he then had in his hands, as executor, the sum of \$1,097.81; and on the 1st day of June, 1880, he passed before the said register of wills a second testamentary account, showing an unappropriated balance in his hands, as executor, of the sum of \$2,335.51; and, up to

the time of the commencement of this suit, he had passed no other account on the estate of the said deceased. The complainant, according to the evidence, was also in receipt of the rents from the real estate of which David Burton died seised, from the time of his death until the 1st day of January, 1870, a period of more than 14 years, and had during that time expended but little in repairs to the real estate. The said Virginia was also on the 20th day of September, 1855, entitled, as one of the heirs at law of Polly Vessels, her grandmother, to an interest or share in four several recognizances in the orphans' court for Sussex county; the aggregate amount of her share or interest in the said four recognizances being the sum of \$1,080.46, with interest thereon from the date of said recognizance, viz. September, 1855.

Such was the apparent condition of affairs at the time of the assignment to Willen, and at the time of the commencement of this suit, and the said Virginia was then apparently worth, in real and personal property, more than \$6,000, exclusive of any accumulated interest. It seems, however, that on the 18th day of April, 1874, about three years after the said assignment to Willen, the complainant, as the executor of David Burton, deceased, passed before the register of wills a third testamentary account on the estate of the deceased, by which he showed an overpayment of \$1,097.81; and it was stated and admitted in the argument that since the passage of said third testamentary account, and pending the present litigation, all the real estate of which the said David Burton died seised had been sold by his executors under an order of the orphans' court for Sussex county, for the payment of debts due from said deceased.

I think it clearly established by the evidence that the complainant paid for the board, clothing, maintenance, and education of the said Virginia, if not from the time of the death of her father till her marriage, at least for the greater part of that period. I also think, from the evidence, that the defendant Willen, at the time of the assignment to him, had notice that the complainant was making a claim against the said Virginia for advances of money made by him for her use and benefit during her minority, and that he was making an effort to get such claim allowed by Truitt and wife in payment and settlement of his indebtedness to her on said recognizance. In fact, Willen admits that, while he was in the mercantile business, he at different times sold articles to the complainant which were represented at the time to be for the use and benefit of the said Virginia, not exceeding in the whole, as he says, \$40 in value. C. M. Cullen, in his testimony in behalf of the complainant, says that Willen, before the assignment, knew of the claim made by the complainant, because he (Cullen) had informed him of it. I think this

testimony, with other circumstances proven in the cause, outweighs the denial of notice in Willen's answer. I also think that Willen, the assignee, was a purchaser of Virginia's share of said recognizance bona fide and for a valuable consideration, which is fully set forth in his answer, and also proved by some of the witnesses examined on his behalf. The question for the consideration of the court is whether the complainant is, under all the circumstances of the case, entitled to relief in a court of equity for the money paid, advanced, and expended by him for the said Virginia during her minority, as against her share in the said recognizance, which has been duly assigned to the said Willen as aforesaid, and whether this court shall interpose to stop the suit at law brought by Willen, the assignee, to recover said recognizance. The complainant, in his bill, claims to be relieved from the payment of the recognizance on two grounds: First, that the money so paid, expended, and advanced by him for the use and benefit of the said Virginia during her minority was a payment of the said Virginia's share of said recognizance; and, secondly, that, if not a payment, he is entitled in equity to set it off even as against Willen, the assignee. In regard to the first ground, it need only be said that, if the money advanced by the complainant for the use and benefit of the said Virginia be considered as a payment of her share in the said recognizance, then the complainant has a full, adequate, and complete remedy in the court of law, and has no status on this ground in a court of equity. He certainly could plead payment in the action of scire facias brought against him in the superior court for Sussex county. Authorities on a point so clear as this are scarcely needed, but the case of *Conner v. Pennington*, 1 Del. Ch. 177, may be cited as bearing directly on the point. As in that case, so in this, the complainant had full knowledge of all the payments made by him, if, indeed, they may be so considered, and the proof of them is in his own power; and, if he have any defense at all on the ground of payment, it is full, ample, and complete in the court in which the action of scire facias was brought, and he could in said court avail himself of the benefit thereof.

Let us now consider the right of the complainant, under all the circumstances of the case, to invoke the aid of a court of equity to enable him to set off his claim against the said Virginia's share of the recognizance, which has been assigned to Willen. Much stress was laid by the complainant's solicitor, in his argument, upon what he termed the special agreement made by Truitt and wife with the complainant at the house of John P. Burton about the month of November, 1870, after Truitt's wife had attained her majority, and before the assignment to Willen, to allow the claim of complainant as a payment of or a set-off to the said Virgin-

ia's share in said recognizance. As to what occurred at that interview between the complainant and Truitt and wife, there is a direct and positive conflict in the testimony. Daniel Burton, a son of the complainant who was examined on the part of the complainant, testifies that he was present at said interview between complainant and Truitt and wife; that the complainant gave over the account with Truitt and wife, explaining each item; that Truitt's wife pronounced the account to be correct, and that it should be paid, except, as to the last item of \$51.06, she said that she did not know it, but that she would like to see the account which the complainant promised to show her, and convince her that it was correct, and strike it out; that Dr. Truitt and his wife then both of them said that the account was correct, and should be paid; that the complainant then said to Dr. Truitt and his wife, "I am owing to Virginia a share in a recognizance which I entered into in the orphan's court of Kent county when I was a part of the lands of my mother and grandmother. This share is due to Virginia individually, and cannot come into the estate of her's, David Burton's, estate. The money I have just handed you is against Virginia individually, and I would like this account to be applied in payment of that recognizance." Dr. Truitt replied: "Mr. Burton, I am willing that this account should be applied that way." The complainant then said to Dr. Truitt, "will you go to Dover, and enter this recognizance satisfied on the record?" Dr. Truitt answered: "Mr. Cullen is my attorney, and I will go to Georgetown next Tuesday and instruct him to allow this account in payment of the recognizance, and to strike it from the recognizance on the record." "Then we were leaving Dr. Truitt and wife," said the complainant, "close of this interview, Dr. Truitt handed the account back to the complainant, and requested him to hand it to Mr. Cullen, and he might know the amount, and to tell him he would come up to see him on Thursday, Tuesday, and instruct him to allow this account in payment of the recognizance, and to satisfy it on our record." On the other side, Mrs. Sophia Jane Burton, wife of John P. Burton, and the maternal aunt of said Virginia, who was examined on the part of the defendant, testifies as follows in regard to said interview: "I was not present at said interview in the room at the time of the interview between Benjamin Burton and Dr. George T. Truitt and wife. The interview was had at my house, in Washington, Sussex county, some time in the fall of the year 1870. During said interview I was standing at the door leading from the room in which said interview was had, which door was partly open. I was near enough to the door to hear all that was said, and seen what was done. Benjamin Burton there and Dr. Truitt produced a paper which he said was a copy of the account he had against Virginia, the v-

said George T. Truitt. He read the account over to George T. Truitt and wife, and asked them if it was correct. Truitt told him that he did not know anything about it, whether it was correct or not. Virginia objected to some parts of the account. He (Burton) asked them several times to agree to allow said account to cancel a recognizance due the said Virginia. The said George T. Truitt and Virginia, his wife, both refused to so allow said account, and referred him (Burton) to Charles M. Cullen, Esq.; saying to Burton that the matter had been put in the hands of Mr. Cullen, and that any arrangement he could make with Mr. Cullen would be satisfactory to them, or they would agree to." If these two were the only witnesses on this point, I should be inclined to think the preponderance of the testimony to be in favor of the complainant, as Daniel Burton, the complainant's witness, was in the room during the whole interview, and more likely to be correct than Mrs. Sophia J. Burton, who was not actually present in the room. C. M. Cullen, Esq., however, in his testimony on the part of the defendant, says, among other things: "Mr. Burton then said to me that he had proposed to Dr. Truitt to allow his account as a set-off against his recognizance in the orphans' court, and that Dr. Truitt had refused to make any arrangement, or give his consent thereto, as the matter was in this deponent's hands, as his attorney, and he would be satisfied with any arrangement I might make in the settlement of the business." We thus have Mrs. Sophia Jane Burton directly corroborated in her testimony, and almost in her very words, by the declarations of the complainant to Mr. Cullen; and I cannot therefore consider it proved by the testimony that Truitt and his wife, or either of them, ever consented or agreed to allow the account of the complainant as a payment or set-off of the said Virginia's share of said recognizance. But it was suggested in the argument that the interview of which Mrs. Sophia Jane Burton speaks was at a different time from the one referred to by Daniel Burton in his testimony. Of this there is not the slightest evidence, and here is nothing in the testimony of any of the witnesses to warrant the assumption of two interviews at the house of John P. Burton in the fall of 1870. But, independently of the conflict in the testimony of the witnesses, there is a ground on which, I think, such assent or promise on the part of Truitt and his wife would not in this court be regarded as binding upon either of them. Certainly, no promise or agreement on the part of Truitt and wife to allow the claim of the complainant as a set-off or payment of her share in said recognizance would be operative and binding upon them, unless made with full knowledge of all the circumstances of the case. The complainant had been the executor of David Burton for more than 15 years. During that time he had voluntarily

taken upon himself to act the part of a parent or guardian towards the said Virginia; and yet, with a full knowledge on his part of the condition of the estate of the deceased, and that Virginia would get nothing from her father's estate, neither real nor personal, he, at said interview, failed to disclose this fact to either Truitt or his wife. They had reason to suppose at that time that Virginia would be entitled under her father's will to more than \$2,000 out of the personalty, and to real estate worth about \$3,000; and yet the complainant, with knowledge on his part, suffered them to continue in ignorance of the true condition of David Burton's estate. There was on the part of the complainant a *suppressio veri*, which would, I think, render any promise or agreement on the part of Truitt and his wife at the time of said interview nugatory and inoperative in a court of equity. See 1 White & T. Lead. Cas. Eq. p. 220, and cases there cited in the notes.

That the assignee of a chose in action takes it subject to all the equities which the debtor had against it at the time of the assignment is a principle of law so well established as to require no citation of authorities. But to determine what constitutes an equity subject to which the assignee takes it is not always so clear, and often presents embarrassing questions to the court, the solution of which must depend upon the facts of each particular case. In the case of *Greene v. Darling*, 5 Mason, 201, Fed. Cas. No. 5,765, Judge Story, in a very elaborate and well-considered opinion, in commenting upon the doctrine of equitable set-off, at page 214, 5 Mason, uses the following language: "Where a chose in action is assigned, it may be admitted that the assignee takes it subject to all the equities existing between the original parties as to that very chose in action, so assigned. But that is very different from admitting that he takes subject to all equities subsisting between the parties as to other debts or transactions. There is a wide distinction between the cases. An assignment of a chose in action conveys merely the rights which the assignor then possesses to that thing. But such an assignment does not necessarily draw after it all other equities of an independent nature. Then, again, what is the right of set-off? By our law, it is not a compensation balancing debts pro tanto, as in the civil law, but mere matter of defense. The party is not bound to make use of it. He has his election, and, if he does not assert it, his debt is not extinguished. It is a personal privilege, and not an incident or accompaniment of the debt. If a person assign a debt, he does not thereby assign any equity he may have to set it off against the debtor. Set-offs can only be between the parties to the record, or those for whose benefit the suit is brought. An assignee of a debt may set it off against a debt due by himself to the plaintiff, but certainly not against a debt due from the as-

signor to the plaintiff; nor could the assignor himself, after such assignment, set it off against the plaintiff. The right of set-off, in short, does not depend upon the mutuality of debts in their origin, as an inherent quality attaching itself to such debts, but upon the situation and rights of the parties, between whom it is sought to be enforced; and, whether the suit be at law or in equity, there must be personal debts existing between them, and not merely between either of them and third persons. As has been very properly remarked at the bar, it is a privilege or right attaching to the remedy only, which in some states may be allowed by their laws, and in others denied. But it touches not any obligation of contract or vested right. But it is said that the right of set-off is an equity, which, at all events, the original debtor may assert against the assignor, and also against his assignee of the debt whether he has or has not notice of its existence. If by an equity is meant a mere dictate of natural justice in a general sense, it is not worth while to discuss it, because this court is not called upon to administer a system of mere universal principles. If by an equity is meant a right which a court of equity ought to enforce, it remains to be proved that such an equity exists in the jurisprudence which this court is called upon to administer. The English court of chancery has as yet laid down no such general rule. Where there are mutual debts subsisting, and there is either an implied or express agreement of stoppage pro tanto, or mutual credit, doubtless a court of equity would enforce it against the party himself and against his assignee with notice. That it would enforce it against his assignee without notice is not so clear, and, to say the least of it, would trench upon some of its known doctrines for the protection of bona fide purchasers. There are some American cases in which a doctrine approaching to this extent has been entertained by courts of law; but, upon examination, they will be found to rest either upon the construction of local statutes or upon local jurisprudence." The learned judge, in the same case, after reviewing the decisions of the English court of chancery, says, at page 212, 5 Mason: "The conclusion which seems deducible from the general current of the English decisions (though most of them have arisen in bankruptcy) is that courts of equity will set off distinct debts, where there has been a mutual credit, upon the principles of natural justice, to avoid circuity of suits, following the doctrine of compensation of the civil law to a limited extent." In 2 Story, Eq. Jur. (12th Ed.) pp. 683, 684, § 1435, the author says: "In the first place, it would seem that, independently of the statutes of set-off, courts of equity, in virtue of their general jurisdiction, are accustomed to grant relief in all cases where, although there are mutual and independent debts, yet there is

a mutual credit between the parties, and at the time upon the existence of the debt due by the crediting party to the party claiming the set-off. By mutual credit, in the sense in which the terms are here used, we are to understand a knowledge on both sides of an indebtedness due to one party, and a credit by the other party founded on and trusting to the debt as a means of discharging it."

It can, I think, hardly be pretended that the complainant in the present case is entitled to the relief he seeks on the ground of mutual debts and credit, for it is evident that neither Truitt nor his wife had anything of the indebtedness of the complainant to said Virginia on the date of her death until they were informed by the complainant himself at the interview at the house of John P. Burton in November, 1870. At that time they thought the complainant, as the executor of David Truitt, was indebted to the said Virginia for the debt due her under the will of her father. The complainant supposed that the advance made by the complainant for her use and maintenance during her minority were made out of the moneys coming from her father's estate, and that they did not know of the existence of the debt of recognition until informed thereof by the complainant at said interview. There is no doubt that courts of equity will set off in case of set-off, and claims in the nature of set-off, in all cases where there are peculiar equities between the parties, and the question presents itself whether the complainant in this suit has such an equity as to call for the interposition of a court of equity to allow his claim to be set off, and to arrest the suit at law brought by Willen to recover the share of the estate of his father assigned to him by Truitt. The complainant was a child left an orphan at the tender age of six years, and although entitled, as the law of her grandmother, Polly Vess, provided, to a share in four recognizances in the court for Sussex county, her share in the aggregate, exclusive of interest, was \$1,080.46, and although entitled to real and personal property left by her father after the payment of his debts, yet she had a guardian appointed for her during the whole time of her minority. The complainant was the executor of the last will of the father of this child, who at the time of his death left considerable real and personal property, worth some five or six thousand dollars; and, at the expiration of a year and a half after the death of the said David Truitt, the complainant, as executor, passed the register of wills for Sussex county, and found a testamentary account on the part of the deceased, showing an unapplied balance in his hands of \$2,335.51, and no other account on said estate until 14 years thereafter, being long after the said child had attained her majority, and long after the commencement of the

though frequently called upon to do so by register of wills. The complainant, from the time of the death of the said David Burton until the 1st of January, 1870, a period of nearly 15 years, received all the assets of the real estate left by him at the time of his decease. The complainant, at the time he passed his second testamentary account as executor of David Burton, must have known the true condition of the estate. The years had then elapsed, and within that time he must have ascertained all the debts due from the testator, and all the debts due to him, and whether collectible or not, at least, it was his duty to have done so; and, if he had not within that time informed himself of the condition of the estate, he was negligent in the performance of the trust he had assumed. It will not do to say that by keeping the estate open and unsettled, and continuing in the receipt of the rents of the property, for 15 years, he was benefitting said Virginia, for it is evident that the debts due from the decedent were paid, and the interest of them was accumulated, and that the real estate, for want of repairs and proper attention, was becoming each year less valuable. Besides, this delay in the settlement of the estate of David Burton caused the said Virginia to be kept in ignorance of its true condition, and very naturally created in her mind the belief that she was entitled to considerable property from her deceased father, and may have induced her to be more extravagant in her expenses than she would have been had she known that her father's estate was insolvent, and she would get nothing from him. The complainant was the nearest male relative, and at least, one of the nearest male relatives, of the said Virginia after her father's death. He had been a partner with her father in the tannery business at the time of his death, and he was intrusted with the management of his estate. He had a plain and simple duty to perform towards this orphan, who was left an orphan at such a tender age. That duty was to see that this orphan should have a legally appointed guardian to watch over and protect her interests. Instead of pursuing the plain, simple course prescribed by the law, he chose voluntarily to assume the duties of guardian without being legally invested with the powers and obligations thereof, and without bond or security for the faithful performance of his trust, and with no liability on him to render an account of his trusteeship to any officer of the law. Voluntarily assuming such a relationship, outside of the law, and possessed with full knowledge on his part of the circumstances and financial condition of said Virginia, he, of his own motion, chose to expend upon her during her minority a sum of money, not only largely in excess of her income, but nearly sufficient to exhaust and consume her whole capital. That he was actuated by pure motives of

love and affection towards his orphan niece is, doubtless, true, and it is also true that his niece is morally, if not legally, bound to reimburse him for his expenses upon her. But this court, as has often been remarked, cannot undertake to administer a general system of morals. If the complainant had been appointed the guardian of the said minor in due form of law, he would have had no right to exceed her income without an order of the orphans' court allowing him to do so. If, without such an order, he had voluntarily exceeded her income, and had afterwards, as her guardian, applied to the orphans' court for an order to exceed her income for the sole purpose of reimbursing himself, the court would have hesitated in granting such an order, and would probably have refused the application. That the orphans' court will generally make an order to exceed a minor's income upon the application of the guardian in a proper case, such as for board, clothing, and education, is true; but in doing so the practice of the court is to specify in the order the amount of the capital so to be expended, and such orders are generally for expenses to be incurred, and not to repay the guardian for advances which have been made by him in excess of the income. In 3 Lead. Cas. Eq. p. 267, it is laid down in a note: "Under ordinary circumstances, the court will, however, require the guardian or trustee to apply for direction before making an outlay of the infant's principal for any purpose, and will look with disfavor on an attempt to obtain a subsequent ratification of that which ought not to have been done without a previous authority." *M'Dowell v. Caldwell*, 2 McCord, Eq. 43; *Davis v. Roberts*, 1 Smedes & M. Ch. 543; *Myers v. Wade*, 6 Rand. (Va.) 444; *Davis v. Harkness*, 6 Ill. 173.

Notwithstanding the disfavor with which courts of equity regard all encroachments by the guardian upon the capital of the ward without the previous consent of the court, yet this court is now asked to allow the complainant to exhaust nearly the whole of the capital of the said Virginia so as to reimburse him for expenses incurred in behalf of the minor upon his own voluntary motion, and without ever having been appointed her guardian, and this, too, against the rights of a bona fide assignee, for valuable consideration, though, perhaps, with notice of the complainant's claim. It will be well to pause and consider the consequences of such a doctrine before giving it the sanction of a court of equity. Such a doctrine would be fraught with most dangerous consequences to minors who are under the especial care and protection of courts of equity. It would do away with all appointments of guardians. It would be a virtual repeal of our statutes prescribing the rights, powers, and duties of guardians; and it would break down and destroy all those safeguards which our law has so wisely thrown around infants, for the pro-

tection of their estates. Any one who might be indebted to a minor could, whenever he chose so to do, make advances for articles which he or the minor might think necessary and suitable, to an amount equal to his indebtedness, and thus without law, and without the sanction of any court, exhaust the capital of the minor. The affirmance of such a doctrine would, as was said in the argument at bar, be a premium for lawlessness. It would, doubtless, be a hardship on the complainant for him to be compelled to pay Virginia's share of said recognizance, and to lose the money he had advanced for the use and benefit of the said Virginia during her minority. But it would be a hardship which he had voluntarily brought upon himself by his own acts and conduct. He was fully acquainted with her financial circumstances during her minority. He could have been appointed her guardian, and if her income were not sufficient for her support, maintenance, and education, he could have applied to the orphans' court for an order to exceed her income, which, in a proper case, would have been granted by the court. Such a course would have been in consonance with the laws of our state, and would have protected him in any advance he might have made for the benefit of his ward if within the order of the court. He chose not to pursue the plan which the law directed, but he preferred to take the matter in his own hands, and to act as her guardian without the sanction of law. Besides, he knew that the said Virginia might marry before she became of age, and that by the law, as it then stood, her personal property would become her husband's, and that any chose in action possessed by her might be reduced into possession and become his. He ran these risks when he might have protected himself; and, if thereby he becomes a loser, he has no one to blame but himself.

If the view just presented be correct, this case might rest here; but it may be well to notice, briefly, the account of the complainant, which he asks this court to allow him to set off against Virginia's share of said recognizance, assigned by her husband to Willen. That an infant may lawfully contract for necessities suitable to his circumstances and station in life is a familiar principle of law. It is an exception to the general rule that infants cannot make contracts which are binding upon them, and it is an exception which has been made by the common law solely for the benefit of the infant. This account of the complainant, however, is not for necessities furnished by the complainant himself to the said minor. Every item of the account is either for money paid by the complainant to other parties for board, clothing, and tuition furnished and supplied by them to the said Virginia, or for money advanced by the complainant directly to the said Virginia, for her to purchase clothing or for her traveling expenses. It may be true

that the board, clothing, and tuition said Virginia so paid for by the complainant were necessary for her, and perhaps to her circumstances and station; but the court is left without any satisfactory evidence on this point. It is true that the complainant presents receipts for most of the money expended by him for the said Virginia, and that these receipts are prima facie evidence that the articles and money which the complainant paid come within the class of "necessaries" for which an infant may lawfully contract; but whether the specific articles furnished, for which the complainant paid, and for which the receipts were given, were necessities suitable to the said minor, is not sufficiently clear from the evidence. "In suits at law for necessaries the question whether the articles are necessities for which an infant is bound to pay is one of law for the court. The question whether they were actually necessities suitable to the condition of the infant is one of fact for the jury." 1 Pars. Cont. 119; *Beeler v. Young*, 1 Bibb, 519; *Glover v. Beeler*, 1 McCord, 572; *Bent v. Manning*, 10 Grac. v. Hale, 2 Humph. 27.

It was urged in the argument that the account of the complainant for the said Virginia, after she became of age, was correct; but on this point there is some conflict in the testimony. It is certain, even by the testimony of John P. Burton (the strongest witness for the complainant on this point), that she did not admit the correctness of the last item of the account of \$51.00, stated in the account to have been kept by complainant's wife. The account extended through a period of years, and commenced when Virginia was not quite 6 years old. It was impossible for her to have remembered all the articles furnished to her during that entire period. It was known whether the articles furnished were necessary and suitable to her condition, and whether the account was correct or not.

Again, several items in the account were money advanced directly by the complainant to the said Virginia during her minority. While it is true, as before observed, that an infant may lawfully contract for necessities suitable to his estate and station, it is equally true that an infant cannot borrow money so as to render himself liable to a creditor for money lent, although borrowed for necessities, because the law does not, for his own sake, trust him with the expenditure. 1 Pars. Cont. pp. 211, 212; *Smith v. Gibson, Peake*, Ad. Cas. 52; *v. Boucher*, 1 Salk. 279.

Again, the largest item in this account is that of March 1, 1864, paid John P. Burton \$515. The voucher for this item is for money to be for board and washing for the said Virginia from August 1, 1855, to August 1, 1864, eight years and seven months. John P. Burton was the husband of the maternal aunt of the said Virginia.

hom she lived from the time of her father's death until her marriage to George T. Truitt. It is a familiar principle, announced by several reported decisions in our state, that the law will not imply a contract to pay for board and support between near relatives, and it is so to be noted that this bill of John P. Burton, which the complainant paid, extended through a period of eight years and seven months. My purpose in alluding to these matters appearing on the face of the account is not to express any opinion as to the liability of George T. Truitt and his wife to the complainant on this account in a court of law, but to show that there are questions of law arising on the account itself which may materially affect the rights of the parties, and that the rights of the complainant and the ability of Truitt and his wife on this account should be first ascertained and established in a court of law before the complainant is entitled to call upon this court to set off this open and unascertained account against a clear, fixed, and ascertained indebtedness due from him on said recognizance. As a rule, the court of chancery will not set off unliquidated and unascertained accounts. *Doct v. Ketchum*, 15 Vt. 258.

It appears, among the exhibits filed in this case, that on the 21st of August, 1873, Benjamin Burton, the complainant, commenced in the superior court for Sussex county, by replein attachment, a suit against George T. Truitt and Virginia C., his wife, to recover judgment against them for the moneys advanced by him for the use and benefit of the said Virginia during her minority. On this bill of foreign attachment, the lands devised by David Burton to his daughter, Virginia, and then owned by her, were attached. Subsequently special bail was entered by the defendants, and the attachment dissolved, after which plaintiff's narr. was filed, and the case was pleaded to issue; but nothing further seems to have been done in that suit, and it still sleeps quietly on the records of the superior court.

It only remains briefly to notice one or two other points presented by the solicitor for the complainant in the argument at bar.

It was suggested by him that, if the assignment by Truitt to Willen had been made with a fraudulent intent on the part of Willen to prevent the complainant from collecting his debt against Truitt's wife, the assignment would not avail in equity. This, as a principle of equity jurisprudence, is true; but the proposition lacks evidence to support it.

There is no proof whatever in the cause of any fraud, actual or implied, on the part of Willen. Willen was a bona fide purchaser for a valuable consideration, though perhaps with notice, at the time of the assignment to him, of some claim on the part of the complainant against the said Virginia. It is never presumed, but must always be proved like any other fact in a cause.

Another ground assumed by the complain-

ant's solicitor as a reason why the court should allow the complainant's claim as a set-off in this case was the alleged insolvency of Truitt. Courts of equity will sometimes allow a set-off on account of insolvency, when otherwise they would not interfere. In our own state the superior court, in the exercise of its equity powers, will sometimes allow judgments to be set off against each other in cases of insolvency, and even after an assignment, when made for the purpose of defeating the rights of set-off (*Morris v. Hollis*, 2 Har. [Del.] 4); but in the present case there is no evidence that Truitt was or is insolvent. It is true that Willen, in his answer, states that Truitt, about the time of his assignment, was under execution by one of his creditors, and was threatened with suits by some others of his creditors. It does not follow, however, that because a man may be under execution process, and threatened with suits by some of his creditors, he is therefore insolvent. Indeed, it appears from the evidence that out of the consideration money which Willen was to pay Truitt for the assignment of Truitt's wife's share in the four recognizances, after the payment of all his indebtedness, there remained to Truitt about \$853, which amount was secured to him by the two judgment notes of Willen, and which were afterwards paid by Willen to him. Insolvency, when relied on by a complainant as a ground for relief, must be proved by him, like any other fact; and the only proof on this point in the present case shows Truitt to be solvent.

Residence out of the state was also another ground suggested by the complainant's solicitor for granting the relief asked for in the complainant's bill. The answer to this is that Truitt and his wife were both residents of Sussex county before and at the time of the assignment, and continued such residents until after the commencement of this chancery suit.

In considering this case, I have not thought it necessary to express any opinion as to the admissibility of the testimony of George T. Truitt and his wife, taken by Willen before they were made parties defendants, and to which the complainant, through his solicitor, excepted, nor to decide whether or not the answer of Truitt and his wife was to have the effect of an answer under oath, called for by the complainant's bill, in regard to which there was a difference of opinion between the solicitors of the respective parties. In arriving at my conclusions, I have disregarded entirely the testimony of Truitt and his wife, and I have not given to the answer of Truitt and his wife the effect of an answer under oath, called for by the complainant's bill. I have therefore given to the complainant the benefit of his exceptions on both these points, without, however, expressing any opinion in regard to them. Upon a careful consideration of this whole case, I am of

opinion that the complainant has failed to establish any equity entitling him to the relief sought for in his bill. I therefore think that the injunction heretofore issued in this cause should be dissolved, and the bill dismissed, with costs. Let the decree be entered accordingly.

MILLER v. WESTERN NAT. BANK OF YORK.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

DEMAND BEFORE SUIT—ACTION FOR BANK DEPOSIT.

1. Where one mails to a bank money and checks for deposit, but the bank refuses to acknowledge receipt thereof, and persistently denies such receipt, the relation of depositor and depositee is not created.

2. Where a bank positively and repeatedly denies one's right to make any claim upon it in respect of currency and checks mailed by him to it for deposit, the depositor need not make demand before bringing suit on account of such deposit.

Appeal from court of common pleas, York county.

Action by Jacob A. Miller against the Western National Bank of York. From a judgment for defendant, plaintiff appeals. Reversed.

Niles & Neff, for appellant. Geise, Ziegler & Strawbridge, for appellee.

STERRETT, C. J. In his statement filed, plaintiff bases his claim on substantially the following averments of fact: (1) That on May 24, 1887, he duly remitted by mail to defendant bank, for deposit to his credit, \$745 in currency and \$640 in properly indorsed checks, which currency and checks, together with a letter of same date to the bank and a certain promissory note, were inclosed in a securely sealed and properly addressed envelope, and mailed at Red Lion post office. The following is a copy of said letter: "Red Lion, York County, Pa., May 24, 1887. Western National Bank, York, Pa.—Gent: Inclosed find note. Currency, \$745.00. Checks, \$640.00. Respy., J. A. Miller." (2) That on the following day, May 25, 1887, he received by mail from defendant bank a communication returning his said letter and promissory note, and nothing else. Said communication was written on the returned letter, by the cashier of defendant bank, informing plaintiff that the accompanying promissory note had not been indorsed by him, and requesting him to indorse and return it. The following is a copy of what the cashier thus wrote: "Note not indorsed by you. Indorse and return. Very resp., C. E. Lewis, Cash." (3) That said currency and checks, amounting to \$1,385, were received by the defendant bank on the 24th day of May, 1887; but it failed, neglected, and refused to give plaintiff credit therefor, or for any part thereof, etc. The defendant bank,

in its affidavit of defense, denies that it received said \$745 in currency and checks, or any part thereof, by mail; and also denies that plaintiff mailed on May 24, 1887, or at any other time, by mail to it a letter such as the one contained in his statement; but, on the other hand, it avers: That on May 14, 1887, it mailed a letter to defendant which, when more read thus: "Gent: Inclosed find note. Resp., J. A. Miller." That said note did contain a note which defendant avers plaintiff intended should be discounted for him, and proceeds passed to his credit, said note not being indorsed, defendant avers it wrote at the end of said letter thus: "Not indorsed by you. Indorse and return. Very res., C. E. Lewis, Cashr." That defendant mailed the same to plaintiff. That plaintiff, thus returned to plaintiff by mail about May 14, 1887, did not contain any words and figures, "Currency, \$745.00, Checks, \$640.00," either at the time received by the defendant bank or when it was returned by mail to plaintiff.

It thus appears that the material facts on which plaintiff based his claim, to wit: the amount of said currency and checks, with interest, etc., were expressly denied and denied. The controlling issue before the jury was therefore whether the currency and checks were mailed to plaintiff by defendant bank, as a matter of fact. The burden of proof was on plaintiff, and he accordingly introduced testimony tending to sustain his claim, the most important item of which testimony was the letter of May 24, 1887, advising defendant of the remittance of said currency and checks. Without proving to the satisfaction of the jury that these were mailed to and received by the bank, plaintiff had no case.

It is not our purpose to review the many bearing on the questions in issue. It is sufficient to say that the facts presented questions of fact, which were for the exclusive determination of the jury. The case was submitted to them, and adequate instructions as to the law must be found by them before they could be warranted in rendering a verdict in favor of plaintiff. After commenting on the many reasons relied on by the parties, respectively, the learned trial judge said, among other things: "The facts of this case are small compass. We have the evidence of the plaintiff, accompanied by this letter referring to his letter of May 24, 1887, very largely based upon it, that he avers the amounts stated therein to the bank were deposited; and we have the evidence of the cashier that it was not so received. We have it was unaccompanied by any deposit, that it was received it, and that it did not show its face any reference to any deposit or amount; and then we have these statements to the plaintiff, and his acquiescence in the settlement of his account by the bank."

the bringing of this suit, with the exception of those two letters. As I told you at the beginning, the central fact—the central question—in this case is whether that deposit was made; and that is entirely dependent upon this letter, its genuineness, and its present altered or unaltered condition.” In answering defendant’s second point, referring to the letter, he said: “If the date of the paper when received at the bank as May 14, 1887, and if that date has been changed to May 24, 1887, by the plaintiff, or with his knowledge, procurement, or assent, you have the right to apply the principle that he who tampers with or interferes in any way with an instrument of evidence which is going to use on his behalf must have every presumption against him. The jury is entitled to make every presumption against him. And if the words, ‘Currency, \$745. checks, \$640,’ were not in the letter when received at the bank and returned to the plaintiff, but were inserted afterwards by him, or with his knowledge, procurement, or assent,—I say, if these words were not in the letter when they were received at the bank,—there is an end of this case; for there could be an absolute want of evidence showing that this deposit was made.” Again, in affirming defendant’s third point, he explicitly charged: “That unless the jury are satisfied from the evidence that on the 24th of May the alleged deposit in currency and checks was received by the defendant, as averred by the plaintiff * * * in his statement, the verdict must be for defendant.” Under these and other instructions, quite as favorable to the defendant bank as they could have been, the verdict for plaintiff was rendered, subject to the question of law reserved. The verdict thus rendered necessarily implies a finding by the jury of each and every material fact relied on by the plaintiff, as above stated, including, of course, the main fact that the money and checks, amounting to \$385, were remitted to and received by the defendant bank on or about May 24, 1887, as averred in his statement. For the purposes of this appeal, these facts must be regarded as having been conclusively established by the verdict; and the sole question is whether, in view of the facts thus established, the verdict was warranted in reserving the question, and afterwards entering judgment therefor for the defendant, non obstante verdicto, solely for the reason that no formal demand is made by plaintiff before he brought suit. The relation of depositor and depositor had been admitted, or established by the verdict, cannot be doubted that no action could have been maintained by the depositor until a formal demand had been made by him or waived by the bank. The principle applicable in such cases is too well recognized to require further argument or citation of authority; but, as we have seen, that is not this case. As to the currency and checks in question,—the only items of claim and subjects of controversy

in this case,—the defendant bank has, from first to last, persistently denied that the relation of depositor and depositor between it and plaintiff ever had any existence in fact; and the plaintiff does not base his right to recover on the existence of any such relation, but on the sole ground that, while the bank received the currency and checks transmitted by him, it refused to credit him therewith, or, in any manner, to recognize him as depositor of the same. Why, then, require him to perform the idle ceremony of demanding payment of that which the bank persistently denied, and still denies, he ever deposited, and as to which he himself does not claim that the relation of depositor and depositor was ever created? That relation cannot be created without the meeting of two minds,—one to propose, and the other to accept. In this case, plaintiff offered to deposit the currency and checks with defendant bank, but the latter never accepted the offer, and has always denied that it was ever made. The jury found as a fact that it was made, and that the currency and checks in question, accompanying it, were retained by the bank. In these circumstances, the existence of which has been conclusively established by the verdict, there was, in my opinion, no necessity for any demand before bringing suit. On all occasions, before suit as well as after, the bank positively denied that it had ever undertaken to act as depositor of the checks and currency in question, and actually repudiated plaintiff’s claim thereto. Having done this, the defendant, on the score of consistency, should not be permitted, by way of further defense, to insist that there was no demand for that which it declares it never had. In view of the clearly established and undisputed facts, I would hold, as matter of law, that the plaintiff had a right, without more, to maintain an action for the amount of his claim.

But assuming that this position is either doubtful or untenable, and that it was incumbent on the plaintiff to prove, *inter alia*, that demand was made, or that it was waived by the bank, or that the necessity for demand was obviated or dispensed with by unequivocal acts of the bank, which were tantamount to an express waiver, can there be any doubt that the latter alternative was conclusively established by uncontradicted evidence, to which some reference has been made? We think not. While the duties of depositor and depositor are, as a general rule, reciprocal,—the one to pay on demand, and the other to make such demand, before a right of action accrues,—there are, as in other transactions where previous demand is required, several exceptions to the rule. When, for example, a bank has suspended payment and closed its doors, a demand would be unavailing. The bank by its acts has waived the necessity for a demand. *Cooper v. Mowry*, 16 Mass. 7. “Notice by a bank to its depositor that his claim will not be paid” renders demand unnecessary. *Farmers’ & Mechanics’*

Bank v. Planters' Bank, 10 Gill & J. 422; 2 Am. & Eng. Enc. Law, 102. So, also, sending a depositor an account claiming the money as its own. Bank v. Benoist, 10 Mo. 519. "Discontinuing banking operations, with knowledge thereof by depositor," is equivalent to express waiver of demand. Planters' Bank v. Farmers' & Mechanics' Bank, 8 Gill & J. 449. And, generally, where it is shown that demand, if made, would be disregarded or prove useless, the necessity of making it is obvious, and need not be proved. Heard v. Lodge, 20 Pick. 53; Abels v. Glover, 15 La. Ann. 247; 5 Am. & Eng. Enc. Law, 528b; 1 Morse, Banks (3d Ed.) p. 548, § 322e; Bank v. Bailey, 12 Blatchf. 480, Thomp. Nat. Bank Cas. 260, and Fed. Cas. No. 2,635. In Heard v. Lodge, supra, it was said: "It is a fundamental principle that the necessity for a formal demand is often waived or obviated by the conduct of the other party, or when the state of the case is such as to show that a demand would have been unavailing. It is peculiarly true in a case where the party wholly denies the right of him who seeks performance." "If the bank, by words or conduct, denies the depositor's right to his balance, it becomes presently liable to an action without formal demand, and interest would be recoverable as damages." Bank v. Bailey, Thomp. Nat. Bank Cas. 263, Fed. Cas. No. 2,635. There is no sounder maxim than that upon which all the foregoing and other so-called "exceptions" to the general rule as to demand are founded: "The law compels no one to do vain or useless things." According to the positive and uncontradicted evidence in this case, in connection with the facts conclusively established by the verdict, it would have been an utterly vain and useless thing for the plaintiff to have made a formal demand on defendant bank before bringing suit. The necessity for such demand was clearly obviated by the unequivocal acts and declarations of the bank in positively and repeatedly denying plaintiff's right to make any claim upon it in respect of the currency and indorsed checks in controversy.

If there was any question as to the regularity or validity of the verdict,—whether it was against the weight of the evidence, or contrary to the charge, etc.,—the proper forum for that was the court below. From the fact that defendant's rule for new trial, etc., was discharged, it may be inferred that the verdict was satisfactory to the court. Whether that was so or not is not a matter for our consideration. As an approved verdict, we must accept, as verity, the findings of fact of which it is necessarily predicated.

It follows from what has been said that the question of law reserved: "Whether the plaintiff, not having shown or proved any demand and refusal, before suit brought, for the value of the deposit, is entitled to recover in this suit, if otherwise entitled to recover,"—is irrelevant and immaterial, and judgment for the defendant, non obstante verdicto,

was unwarranted. Both assignments of error are therefore sustained. Judgment reversed, and judgment is now entered on the plaintiff, on the verdict, for \$ amount found by the jury, with interest from date of the verdict.

GUMP v. GOODWIN et al.
(Supreme Court of Pennsylvania.
1896.)

REVIEW ON APPEAL—DUTIES OF TRIAL COURT—SET-OFF—ASSIGNED CLAIM.

1. In cases such as appeal largely to the discretion of the lower court, where oral testimony is frequently heard and passed upon, opinion should always be filed by the court, setting forth, at least briefly, its findings of fact and the grounds of its decision.

2. A claim assigned with the express stipulation that, if it is not allowed as a set-off, it shall be reassigned, should not be used by the assignee as a set-off.

Appeal from court of common pleas, county of Allegheny, Judge.

A judgment was entered upon a writ of *certiorari* in favor of G. M. Gump, for \$100,000, against John T. Abraham Gump, against John T. Gump, and James L. Smith. From an order of the court below, reversing the judgment, charging a rule to show cause why said judgment should not be opened, defendant appealed. Affirmed.

W. A. Hook and A. A. Furman, for appellants. A. F. Silveus and J. B. Dickey, for appellee.

PER CURIAM. In cases such as this, appealing largely to the discretion of the court below, where oral testimony of witnesses is frequently heard and passed upon, opinion should always be filed by the court, setting forth, at least briefly, its findings of fact and the grounds of its decision. We are in a position to properly weigh the testimony or consider its credibility with the facts of the case, as the court below, and therefore have the benefit of such a statement to guide us in determining whether the posing of the case in that court, together with such abuse of discretion as calls for reversal, is interference.

Aided by the able and exhaustive argument of the learned counsel for the appellants, we have carefully examined the voluminous record before us, and are not convinced that the court committed error in refusing to open the judgment and let defendants into a defense. The assignment of error was certainly not sufficient to warrant reformation of an instrument signed by the assignor, fully competent to understand its contents. Without considering the evidence, notice of the prior transfer of the property to the use plaintiff, it is sufficient to say that the assignment of the claim, as a set-off, was with the express stipulation that, if the set-off was not allowed, it should be reassigned. This is not a

transfer of ownership to enable the assignee to set off the claim as a set-off. McGowan v. Long, 79 Pa. St. 472.

We find nothing in the record that would justify us in sustaining any of the assignments of error; nor do we think that either of them requires further notice. Decree affirmed, and appeal dismissed, with costs to be paid by defendants.

ENTERPRISE OIL & GAS CO. v. NATIONAL TRANSIT CO.

Supreme Court of Pennsylvania. Jan. 6, 1896.)

APPEAL IN COMMON — RECOVERY OF PROFITS — PARTNER — INCONSISTENT POSITIONS.

1. Plaintiff, a partnership, owned a certain lease, which it was unable to operate, and which it accordingly assigned by its president, reserving one-eighth of the oil. This one-eighth of the oil obtained by the assignee was accordingly run into the line of defendant pipe-line company, which credited it on its books to plaintiff, but afterwards refused to deliver it to plaintiff on the ground that it belonged to one J., who owned a sixteenth interest in plaintiff firm, who had not joined in the assignment by plaintiff, though he knew thereof. *Held* that plaintiff had but an undivided interest in the oil, and was entitled to but a sixteenth interest in the profits in defendant's custody, which represented the profits of the firm; and hence his claim was reversed as to plaintiff's suit for the value of the

2. One cannot claim profits under a lease made by a firm, as a partner therein, and at the same time repudiate the lease because not joined in or assented to by him.

Appeal from court of common pleas, Butler county; John M. Greer, Judge.

Assignment by the Enterprise Oil & Gas Company, a partnership, against the National Transit Company. From a judgment for defendant, plaintiff appeals. Reversed.

J. D. Strohecker, in the fall of 1889, was the owner of a number of oil and gas leases situate in Beaver and Butler counties. Among these several leases was a lease which he obtained from Keziah Allen on the 1st day of August, 1889. He, with others, conceived the idea of organizing a company (plaintiff in this suit), called the Enterprise Oil & Gas Company. They drew up articles of copartnership, which were signed by a number of them, intending first to make it a limited partnership, but they abandoned the idea of a limited partnership, and never recorded the articles. Mr. Strohecker was the president of the partnership, and, as such, together with others, divided the shares in the partnership into thirty-second shares, and fixed the price of each share at \$100. In the month of October, 1889, Mr. Strohecker turned over all the leases, among them the Keziah Allen lease, in manner following: "Know all men by these presents, that I, C. J. D. Strohecker, do hereby set over and transfer all the within-described leases to the Enterprise Oil and Gas Company, their heirs and assigns, for their own separate use, for

consideration elsewhere written. In witness whereof, I do hereby set my hand and seal, this 22nd day of October, 1889." This assignment vested title to the leases in the Enterprise Oil & Gas Company, and was the only evidence that the members had any interest therein whatever. The Keziah Allen lease was for the period of one year, or so long thereafter as oil or gas was produced in paying quantities. The company did not feel able to operate that lease, and, a short time before it expired unless operated, they authorized the president to assign the same to J. M. Latchaw, reserving one-eighth of the oil. The assignment was in writing, as follows: "Know all men by these presents, that the Enterprise Oil and Gas Company, of Zellenople, do hereby set over, transfer, and assign the western half of these leases to J. M. Latchaw, his heirs and assigns, for the consideration mentioned in articles of agreement. October 17, 1890. Enterprise Oil and Gas Company, C. J. D. Strohecker, President. H. Weckbecker, Secretary. Witness: Fred Zehner, Jr." J. M. Latchaw, the purchaser, formed a company called Latchaw Armor Company, and drilled one well on this lease, and obtained oil. The one-eighth of the oil was run into the lines of the National Transit Company, defendant, in the name and to the credit of the Enterprise Oil & Gas Company, as per agreement; and on the 1st day of October, 1893, the Enterprise Oil & Gas Company had over 1,000 barrels to their credit. Some time prior to the bringing of the suit, the Enterprise Oil & Gas Company called for their oil. Mr. Strohecker was the president of the company, and usually lifted the oil to its credit, and, after paying debts of the company, divided the same to and among the several members. When he called for the company's balance produced from the Keziah Allen lease, the company defendant refused to deliver it, saying that one John T. Johnson had given them notice that he claimed the oil. Johnson was a member of the Enterprise Oil & Gas Company, and participated in its profits and management. Defendant company refused to deliver the oil, and on the 20th day of November, 1893, suit was brought.

Lev. McQuiston and J. C. Vanderlin, for appellant. R. P. Scott, for appellee.

MITCHELL, J. This case was unfortunately tried on a wrong theory throughout. The oil was received by the defendant for account of plaintiff, and so credited on the defendant's books. *Prima facie*, therefore, it belonged to plaintiff; and, though it would be a good defense to show that it was claimed by the real owner, yet such defense involved the burden of proof that the claimant had in fact the better title. This the defendant entirely failed to show. It defended on Johnson's title, or rather permitted him to

do so in its name. Johnson's interest, as agreed by all parties, was an undivided sixteenth. Whether it was a sixteenth in the partnership, or a sixteenth in the leases as a tenant in common,—the issue on which the jury were permitted to find a verdict,—was, for the purposes of this case, entirely immaterial. In either case, as already said, his interest was undivided, and he never had any separate possession either of the land or of the oil. There was not only no evidence that this particular oil was his, but, on the contrary, *prima facie* it was the plaintiff's. It was delivered by its lessee to the defendant, as a carrier for it. The possession of the carrier was its possession, as against all the world but a claimant showing a better title. The utmost that Johnson showed, even on his own claim to be a tenant in common, was that as to one-sixteenth of the oil his title was the same, as good, but no better than that of the other 15 cotenants represented by the plaintiff. The status of the case, even in the most favorable light for Johnson, was the same as if he had been suing his cotenants for his share of the profits of the land.

The rights and remedies of tenants in common among themselves have been the subject of some discussion in this state. At common law, as each was entitled to the joint possession of the whole, there was no liability to account to each other, except upon an express agreement to act as bailiff, or an actual ouster, which would sustain an ejectment for restoration of possession and mesne profits. The act of 4 Anne (chapter 16, § 27) dispensed with the necessity of express appointment as bailiff, and gave an action of account against the cotenant "receiving more than comes to his just share or proportion." And in this state it has been settled, after some variance of opinion, that the action is not necessarily in account render, but, where there has been an express promise, it may be in *assumpsit*. *Gillis v. McKinney*, 6 Watts & S. 78. In *Borrell v. Borrell*, 33 Pa. St. 492, the majority of the court sustained *assumpsit* on an implied obligation to account; but this case was practically overruled in *Kline v. Jacobs*, 68 Pa. St. 57, where the subject was discussed by Sharswood, J., and the rule clearly laid down that there is no implied obligation to account for mere use and occupation by one tenant in common, who has by his title a right of possession of the whole, although it is joint, and that *assumpsit* can only be maintained on an express promise to pay rent or to account. The best summary of the law in our own books will be found in the admirably clear and accurate opinion of Judge Thayer in *Norris v. Gould*, 15 Wkly. Notes Cas. 187. But all of our cases, including even those which have most favored the action in *assumpsit*, such as *Borrell v. Borrell*, *supra*, and *Luck v. Luck*, 113 Pa. St. 256, 6 Atl. 142, have held that, unless on an express promise of a liq-

uidated sum, all the cotenant is account for is a share of the profits. Most, therefore, that Johnson could recover, if this had been a direct action against his cotenants, would have been the excess which they had received over their proper share of fifteen-sixteenths. Johnson was allowed to recover the whole in controversy, on the ground that he was tenant in common of one-sixteenth, but he was entitled to one-sixteenth of the entire profits of the lease, without having given any evidence that any of his cotenants had received more than their due share. The evidence as it stood, there was no defense at all made out, and the jury were directed to find for plaintiff the full amount of the oil.

There is another difficulty in this case. Johnson's title in the present case, in controversy was delivered by him to his lessor, the plaintiff, as rent for the lease. Johnson cannot affirm and deny the lease in the same breath. If he is bound to it, he must take his share, as to the oil, upon a distribution of the rent, deducting all proper charges and expenses. If he is not a party to the lease, he has no right to any share in the rent, and must pay the lessor, as a cotenant who has received his title. Judgment reversed, and a new verdict *de novo* awarded.

JOHNSON et al. v. PRICE et al.
(Supreme Court of Pennsylvania.
1896.)

TENANCY IN COMMON—SUIT FOR ACCOUNT—EQUITY JURISDICTION.

1. Plaintiffs and defendants owned a lease as tenants in common, and were in the business of mining and selling the coal, and in the machinery and appliances bought and paid for the machinery, and drilled the well, and the production was carried on by them for years, the title to the lease being held by defendant in trust for himself and parties. Plaintiffs expended, for the lease, of all, \$14,000, and defendants also expended money in the business. *Held* that, in refusal of defendants to furnish any of their expenditures, plaintiffs were entitled to seek relief in equity by a bill for an account. 2. Act May 6, 1891, providing that one who furnishes labor or material to tenants, and to one of several joint owners, may pay the share of another, did not deprive plaintiffs' right to such remedy.

Appeal from court of common pleas, Luzerne county; John M. Greer, Judge.

Bill by K. K. Johnson and J. M. Greer against E. E. Price and others. *Held* in favor of defendants, plaintiffs appeal reversed.

W. H. Lusk, for appellants. J. D. Lusk and Levi M. Wise, for appellees.

GREEN, J. Upon the facts set out in the bill in equity in this case it would

it to conceive of a more appropriate case or equitable cognizance than this. The plaintiffs and defendants were the owners as tenants in common of an oil lease, and they were partners in the machinery and appliances for developing the oil, and in the business of mining and selling the oil produced from the well. Their respective individual interests, both in the lease and in the machinery and business, are fully and precisely set out in the bill. The necessary machinery and appliances were bought and paid for by the plaintiffs. The well was drilled by the plaintiffs. Oil was obtained in paying quantities, and the work of production was carried on by them for several years. The lease to the lease was held by one of the defendants in trust for himself and all the other parties, plaintiffs and defendants. In the boring of the well and in producing the oil the plaintiffs had expended for the benefit of all the sum of \$14,000. The defendants had not expended moneys in the joint business, to which they would be entitled to credit upon a settlement of the accounts of the business. But the plaintiffs, after repeated efforts to obtain a settlement of accounts, failed to do so because of the refusal of the defendants to furnish any statement of their expenditures, and the plaintiffs were therefore ignorant of the same, and needed recovery in order to ascertain the same. No termination of the rights of the parties as between themselves could be had without a settlement of all the accounts of the business, and for that purpose the present bill was filed.

It is beyond all question that a bill in equity was not only the proper, but the exclusive, remedy for the plaintiffs upon these admitted facts, unless that remedy was taken away by the act of May 6, 1891 (P. L. 41). The defendants demurred to the bill on that specified ground, and thereby admitted the material facts set forth in the bill. The court below sustained the demurrer, and dismissed the bill, and in so doing committed a very serious error. A most cursory examination of the act of 1891 shows that it never was intended to meet a case of this character, that it gave no new or additional remedy to plaintiffs circumstanced as these plaintiffs are, and that it made no change whatever in the law as it stood in reference to the settlement of partnership accounts. The first section of the act simply gives a remedy in assumpsit to any one performing services of labor or furnishing material for the production of oil or gas against any one joint owner, joint tenant, or tenant in common, and authorizes a recovery in such action of the pro rata share due and owing by such joint owner, joint tenant, or tenant in common. The second section provides that, if any one of such joint owners or tenants in common pays the pro rata share due by an-

other of them, he may recover the amount so paid in the same manner as is provided in the first section in the case of the persons furnishing labor or materials. It will be seen at once that no change is made in the law as to the remedies between partners; that the remedy in the first section is limited entirely to claims by strangers to the enterprise, who furnish labor or materials to several parties jointly interested; and that the remedy in the second section is given to one of several joint owners who may pay the share of another. The present case has nothing to do with any of these contingencies. It is not the claim of a stranger, but of parties who are themselves jointly interested with the defendants in a common enterprise belonging to the whole of them. It is not a case of a payment by the plaintiffs of the amount due by any one of their cotenants and an effort to recover the amount so paid, but it is a case of parties whose real relations to each other are those of partners in a joint business, to which all are bound to contribute the several proportions of their respective interests. That there are mutual accounts between the plaintiffs and defendants growing out of their joint relationship is set forth in the bill and admitted by the demurrer, and that upon an adjustment of all the accounts there is a large balance due from the defendants to the plaintiffs is asserted in the bill and admitted by the demurrer. It is almost a work of supererogation to cite the perfectly familiar authorities that, in order to oust the equitable jurisdiction, the remedy or supposed remedy at law must be full, adequate, and complete (*Kirkpatrick v. McDonald*, 11 Pa. St. 387); or that equitable jurisdiction does not depend on the want of a common-law remedy, but may be sustained on the ground that it is the most convenient remedy (*Appeal of Brush Electric Co.*, 114 Pa. St. 574, 7 Atl. 794); or that the extension of the remedy at law to cases originally within the jurisdiction of a court of equity is no bar to a chancery proceeding for the same cause (*Wesley Church v. Moore*, 10 Pa. St. 273); or that equity seeks to prevent unnecessary litigation by disposing in any one proceeding of all the questions which arise affecting many persons (*Appeal of Blerbower*, 107 Pa. St. 14; *Appeal of Harper*, 109 Pa. St. 9, 1 Atl. 791); or that there must not only be a remedy at law, but it must be adequate, and reasonably convenient (*Warner v. McMullin*, 131 Pa. St. 370, 18 Atl. 1056). See, also, *Drake v. Lacoe*, 157 Pa. St. 17, 27 Atl. 588. There are plenty of other reasons why this bill should be sustained, and none why it should be dismissed. The decree of the court below is reversed, the plaintiffs' bill reinstated, and the defendants are directed to answer over to the bill, and the record is remitted to the court below at the cost of the appellees.

PRINGLE v. VESTA COAL CO.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

MINING OPERATIONS—INJURY TO SURFACE—RECOVERY OF DAMAGES.

1. If the owner of coal beneath the surface undertakes to mine and remove it, and damage results to the surface, which is owned by another person, either from negligence in conducting the mining, or from failure to properly and sufficiently support the surface, or from both these causes, the surface owner may recover compensation.

2. Where plaintiff avers that the injuries to the surface resulted both from negligent mining by defendant and the latter's failure to provide proper surface support, he may show that the injuries resulted from both these causes combined, or from either of them separately.

Appeal from court of common pleas, Washington county; McIlvaine, Judge.

Trespass by James Pringle against the Vesta Coal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John D. McKennan and H. M. Dougan, for appellant. Winfield McIlvaine, for appellee.

PER CURIAM. The subjects of complaint in the first three specifications of error are the affirmance of plaintiff's requests for charge recited therein, respectively. The testimony properly before the jury tended to prove the facts of which these three propositions are severally predicated, and, having been submitted to them in a clear, correct, and comprehensive charge, their verdict necessarily implies a finding of said facts substantially as stated. As to the law involved in these propositions, it is scarcely necessary to say that it has been well settled in a line of cases commencing with *Jones v. Wagner*, 66 Pa. St. 429, to which it is our purpose to adhere. In that and other cases following in its wake, it has been uniformly held that, where there has been a separation of the coal from the surface, the owner of the latter, in the absence of agreement to the contrary, has an absolute right to have his surface supported precisely as it was in its natural state. If the owner of the coal undertakes to mine and remove it,—as he has an undoubted right to do,—and damage results to the surface, either (a) from negligence in conducting his mining operations, or (b) from failure to properly and sufficiently support the surface, or (c) from both these causes combined, the surface owner is entitled to recover compensation for such injury as he may show he has sustained. *Jones v. Wagner*, supra; *Horner v. Watson*, 79 Pa. St. 242; *Coleman v. Chadwick*, 80 Pa. St. 81; *Carlin v. Chappel*, 101 Pa. St. 348. In stating his claim plaintiff substantially avers that the injuries of which he complains were the result of two causes,—negligent mining, and defendant's failure to provide proper surface support. It was competent for him to prove on the trial that said injuries resulted from both of these causes combined, or

from either of them separately. A consideration of the testimony shows that to prove all the material averments contained in the statement. It involved questions of fact which were for the exclusive consideration of the jury, and to them it was submitted, with properly guarded and adequate instructions. There was no refusal to affirm either of defendant's propositions for charge recited in the remaining specifications. Judgment affirmed.

KELLY v. MARSHALL et al.

(Supreme Court of Pennsylvania. 1896.)

BROKER'S COMMISSIONS—SALE OF OIL PROPERTY—REVOCATION OF AGENCY.

Plaintiff solicited the privilege of selling a certain oil lease for sale, and at his suggestion the price was three times reduced, and after a month of fruitless effort on his part to sell it, the property was withdrawn by the owner, who considered that its salable value was being injured by its repeated offers in the open market, and would be affected by the same. Plaintiff's commission was suspended, and the development of the property was delayed, and the suspension of operations on an indefinite period pending the negotiations for sale. After the withdrawal of the property to the owner, plaintiff sold it directly for \$50,000 to the person to whom plaintiff had opened negotiations from whom he had obtained an offer of \$100,000. *Held*, that the owner had a right to revoke plaintiff's agency at the time at which he did so, provided such revocation was in good faith, and not merely to relieve the owner from the payment of commissions.

Appeal from court of common pleas, Allegheny county; Ewing, Judge.

Action by John K. Kelly against Marshall and others to recover commissions for the sale of oil property. From a judgment for plaintiff, defendants appeal. Reversed.

S. A. & Chas. M. Johnston and C. S. Terman, for appellants. William S. Geo. B. Gordon, for appellee.

FELL, J. The plaintiff was authorized by the defendants to sell an oil property, on which there were a number of wells completed and one partly drilled. The price was \$70,000. Upon his representation that the price was too high, it was afterwards reduced to \$60,000, then to \$55,000, and finally to \$52,500. The last reduction was made about one month after the plaintiff's agreement, with the understanding that the property was sold that day, it was withdrawn, and his agency ended. He did not succeed in obtaining a higher offer of \$47,500. This was declined by the defendants, and he was then notified that the property was withdrawn, and the negotiations separated and went to the homes, and the defendants resumed the drilling of the unfinished well, operations which had been suspended during the

tions. Eleven days after this the defendants sold the property for \$50,000, the purchaser being the same person with whom the plaintiff had opened negotiations, and from whom he had obtained the offer of \$5,500. Upon the trial of an action brought by the plaintiff to recover commissions, on ground that he had brought the parties together, and that his agency was the efficient cause of the sale, the jury was instructed that, as there had been no time fixed by the original agreement within which a sale should be effected, the plaintiff had a reasonable time within which to procure a purchaser, and that the defendants could not, within that time, revoke his agency, and relieve themselves of liability to pay the commission agreed upon. This instruction was repeated in the answers to the defendants' points, and is the subject of five of the assignments of error. The plaintiff was not a real-estate broker. He did not have charge of the property. His agency was not coupled with an interest, or founded upon a consideration. He had solicited the privilege of offering the property for sale. At his suggestion the price had been three times reduced, and finally, after a month of fruitless effort upon his part, a time limit within which a sale should be effected was fixed. The reason for withdrawing the property was stated to him. The judgment of the owners its salable value was being injured by its repeated offers in a limited market, and was certain to be affected by the result of other enterprises in the locality, and the defendants were delayed in the development of their own property by the suspension of operations on their unfinished well pending the negotiations for sale. The interest was a household, liable to sudden changes in value, and the character of the property was such at that time was of the highest importance in dealing with it, and, presumably, the essence of all contracts in relation to its sale. The remarks of Mitchell, J., in the opinion of the court in *Vincent v. Oil Co.*, 165 Pa. 402, 30 Atl. 991, have direct application to this case: "The nature of the property, oil-producing, made it liable to fluctuate in value, which raises the presumption that it was of the essence of transactions concerning it; and the facts in regard to the wells in the immediate vicinity then going down show that a new development at any time might materially affect its value, and that this was understood by the parties." Under the facts and circumstances, as shown by the testimony, we think it was the right of the defendants to revoke the plaintiff's agency in the manner and at the time which they did so, and that it was not for the jury to fix the limits of time within which it could be done. Whether the revocation of the agency was made in good faith, or was a mere subterfuge to relieve the defendants from the payment of com-

missions, was an open question at the trial, and was for the jury. It may appear that the plaintiff, if not entitled to commissions as such, could still recover compensation for services rendered before the revocation of his agency. *Jackel v. Caldwell*, 156 Pa. St. 266, 26 Atl. 1063; *Vincent v. Oil Co.*, supra. But the case was not tried upon that line. The second, third, fourth, and fifth assignments of error are sustained, and the judgment is reversed, with a venire de novo.

FRAZIER v. BOROUGH OF BUTLER.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

ACTION AGAINST BOROUGH—OBSTRUCTION IN STREET—NOTICE TO COUNCIL—INSTRUCTIONS—REFUSAL OF REQUEST.

1. In an action against a borough for injuries caused by the deposit in the street of earth and rubbish removed in bringing the sidewalk to the level of the street, it was proper to charge that, as the borough the year before had cut down the grade of the street to the depth of several feet, it must have been known to the authorities that the sidewalks would be cut down to a grade to conform to the street, and that it was therefore their duty to see that by such work the street was not rendered dangerous, and unnecessarily obstructed.

2. It was proper to leave to the jury the question whether, under all the circumstances, it was necessary to use the street as a place of deposit, and whether it was reasonably necessary to leave the material there for a day or several days.

3. An instruction that notice to a member of the borough council of the obstruction must be regarded as notice to the council is not an answer to a request to charge that knowledge by such member was notice to the borough.

4. It was proper to charge, in effect, that the jury might infer, if from the character of the obstruction it was conspicuous or noticeable, and if it had been long continued, that the borough had notice of it.

5. Knowledge by a member of the borough council of an obstruction in a street, arising from the fact that the obstruction was caused by a contractor in grading a sidewalk for such member, is not notice to the borough of the obstruction.

Appeal from court of common pleas, Butler county; J. H. Longenecker, Judge.

Action by Alexander Frazier against the borough of Butler for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

W. A. Forquer and T. C. Campbell, for appellant. Ralston & Greer and S. F. Bowser, for appellee.

DEAN, J. Peter Schenk and H. Schreide-man owned two lots fronting 194 feet on Jefferson street in Butler borough. The sidewalks were of boards, for which they desired to substitute permanent stone pavement, and accordingly they let the contract for the preparatory grading to Samuel Kidd. The grading was somewhat heavy, being a cut at one end and a fill at the other. The contractor commenced the work on 16th March,

1892, and continued it until completed. During the progress of the work large piles of earth and rubbish were deposited on the street, which last, between the curbs, was 25 feet wide. A large part of this earth and rubbish was removed each day, but generally there remained each night a pile of that taken out, and this had been the case from the 16th of March, the commencement of the work, until the 24th, a period of eight days; but it was not the same that had been taken out the first day; may have been that deposited on the day before. The evidence seemed to show the contractor did not remove the earth and rubbish as fast as it was deposited on the street, the result being it was continuously incumbered with a pile of it, night and day. After dark on the last-named date, 24th March, the plaintiff was driving, with a companion, along the street, in a buggy, at an ordinary speed, when his wheel struck the pile of rubbish, the buggy was upset, and he was seriously injured. There was no light or watchman to warn travelers of the obstruction. He brought suit for damages, and the jury, under the law announced by the court as applicable to the evidence, awarded him \$800. Judgment being entered on the verdict, defendant appeals, assigning six errors.

The first is to the instruction of the court that as, the year before the borough had cut down the grade of the street to a depth of several feet, it must have been known to the authorities that the sidewalks would be cut down to a grade to conform to the street; and it was therefore their duty to see to it that by such work the street was not rendered dangerous, and unnecessarily obstructed. There was no error in this instruction. The streets and highways of boroughs are under the control and supervision of councils. If by municipal legislation, as here, very considerable changes in grade of the driveway or street were made, rendering necessary considerable change in the sidewalks, care according to the circumstances required close supervision on part of the borough authorities of the conduct of property owners. It was not the case of a property owner merely replacing an old board walk in front of his property with a stone walk, where no other change was necessary, but that of the excavation to the depth of two to five feet for the breadth of the sidewalk of large quantities of earth and rubbish along the driveway of a much-used street only 25 feet wide. Clearly, it was the duty of the borough authorities, under such circumstances, to exercise more watchfulness than under those involving no such danger to the traveling public.

The second assignment is to the instruction on the right of the lot owner to obstruct the street with the rubbish. The plaintiff alleged the piling of earth on the street was wholly unnecessary; that there was ample room on the owners' lots for the deposit of such ma-

terial; but that, if it was necessary to street for this purpose, it was not necessary to leave any portion of it over night. The court left it to the jury to say whether, under all the circumstances, it was necessary to use the street as a place of deposit, and whether it was reasonably necessary to leave the material there for a day or several days, and this there was no error. He had allowed them the temporary obstruction of the public streets for purposes of improvement. A reasonable necessity existed therefor, not unlawful, and the borough was answerable in damages for permitting the obstruction; but whether this obstruction was reasonably necessary was a question for the jury to decide.

The third assignment is to the answer of the court to plaintiff's third point. Peter Schenk, one of the improving lot owners, who, through his contract with Kidd, deposited the rubbish, was a member of the borough councils; therefore plaintiff's third point to the court: "That if Peter Schenk, a member of the town council, had knowledge of this obstruction, it visits upon the municipal authorities." To the court answered as follows: "In the face of any evidence showing that the streets had been committed to the care of regular members of the town council, no member thereof must be taken as having knowledge of the borough. For that purpose, a member must be regarded as having knowledge of the body to which he belonged. It appears how frequently the borough council met, and it would be intolerable to hold that the obstruction must be permitted to continue until the body would be assembled at an official meeting." In fact, this was the answer to the point, and, if the verdict had been the other way, plaintiff might well have complained of the answer as not responsive to his point. The court was asked that, if Peter Schenk had knowledge of the obstruction, that was notice to the borough. This involved first a question of fact, whether he had knowledge. It did not follow, because he had contracted with Kidd for the excavation, he had knowledge that the contractor was leaving any portion of the material on the street, so as to interfere with the safe travel. A careful reading of Schenk's testimony leaves this in doubt. But if he had knowledge of the obstruction, was that notice to the borough? Knowledge and notice are not necessarily the same. Undoubtedly, if any one had given notice to Schenk, or to any man, of the character of the obstruction, or of the fact that it was upon the street by Kidd, so far as the borough was concerned, as one member of councils would be, if a member of the borough, there would have been notice. Whether, as a fact, he had knowledge of the obstruction, the jury was not instructed to find; and, as a matter of law, such knowledge was not imputed to the borough, the court did not decide. So, practically the point was not answered.

was not affirmed. The case in this particular, really went to the jury on the instructions in the general charge as follows: "The law assumes that after a certain time they shall take notice of obstructions of such a character. That depends upon the circumstances of the case, to be sure, and how long the obstruction may remain upon the street, in order to charge the officers of the borough with notice. We refer you to the rule hereinbefore laid down with regard to the degree of diligence which the officers are to exercise according to the extent of the use of the street, and other facts which might bring knowledge home to them, and of which they should take notice." The same instruction, in substance, was given in the answer to defendant's second point, thus: "Though, if you should conclude the particular pile of rubbish on which the plaintiff was injured had not been on the street over a day or two, if you find that others of a similar character had previously, from time to time, occupied substantially the same place, so that the one complained of was but a later one of a series of such obstructions, the municipality may be affected with notice if, considering the extent of travel upon Jefferson street, the demands of the public thereon, and the period of time over which such obstruction extended, and in view of the law already stated as to the duties of borough officers in this behalf, you think they should, in the exercise of reasonable diligence, have known of the obstruction." Considering the whole charge on the question of notice, the case was clearly and correctly submitted to the jury. They were instructed that they might infer, if, from the character of the obstruction, it was conspicuous or noticeable, and if it had been long continued, that the borough had notice of it. But an affirmance of plaintiff's third point would have been error. Knowledge by a member of councils of a nuisance is not of itself notice to the borough. To so hold would make the borough answerable for every individual violation of municipal law and ordinances by all its members. As this borough does not seem to have had a street committee, commissioner of highways, or other officers to whom was specially confided the duty of supervising the streets, that duty must necessarily be considered as resting with the borough council as a body. Express notice given to any one of these in his official capacity of a violation of borough law would be notice to the body of which he was a member; but his knowledge and acts as an individual are not notice to the municipality of which he is an official representative. Assuming each member to have been an agent of the borough in the supervision of its streets, and the knowledge of the agent to have been the knowledge of his principal, that knowledge must come to

him in the course of the transaction of the business of his principal. Here Schenk's knowledge, if he had such knowledge, came to him as an individual lot owner, engaged in the improvement of his lot. This had no relation to his official duty as councilman. He was performing no duty as a member of that body, but was in fact answerable to it for the manner in which he conducted his improvement as a lot owner. The council could have notified him to stop placing earth unnecessarily on the street, and leaving it there; could have had him arrested for the violation of the borough ordinances prohibiting such obstruction, if he persisted; and this because he was not in that particular business a councilman acting in his official capacity, but was acting as an individual lot owner, in violation of the borough law. The case would have been otherwise had he, as councilman, been superintending and directing the excavation of a street or sidewalk for the borough. Under such circumstances knowledge on his part would have been the knowledge of the principal. And while thus officially acting he would not have been personally answerable to third parties, but his principal would have been affected with notice of his acts within the scope of his authority, and would have been alone answerable. But in this case his personal responsibility is wholly unimpaired, because his acts were unofficial. To say that, because Schenk knew of the unsafe method, therefore his principal, the borough, knew, would compel us to go further, and say, as the borough knew its agent, Schenk, was wrongfully obstructing the street, the agent is not answerable to the principal for any injury caused thereby. This would leave every member of councils free to adopt dangerous methods for the improvement of his own property, and at the same time leave the borough answerable to the general public for the damages consequent upon his acts; that is, the borough would become insurers of its officers against responsibility for individual wrongful acts. While the court came dangerously near giving the erroneous instruction asked for, it did not in fact give it, and the jury went to their room controlled by the correct instructions in the general charge, and the answer to defendant's second point. Therefore this assignment of error is not sustained.

The fourth and fifth assignments raise, in effect, the same question as the second, and require no further notice.

The sixth is to the refusal of a prayer for peremptory instruction for defendant. The case was clearly one for the jury, and the court could not, without error, have withdrawn it from them. All the assignments of error are overruled, and the judgment is affirmed.

DOUBLE v. UNION HEAT & LIGHT CO.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

GAS LEASE—CONSTRUCTION—TERMINATION BY LESSEE.

A lease for two years provided for its continuance after that time "as much longer as oil and gas is found in paying quantities," and, further, that, "should any well produce gas in sufficient quantities to justify marketing," the lessor should be paid \$200 per year for such well so long as the gas therefrom was sold. A purchaser of the lease operated a gas well until a month after the termination of the two years, when he disconnected the line, and ceased to produce gas, and so notified the lessor. *Held*, that the mere cessation of the use of the gas from the well did not terminate the lease and relieve such purchaser from any further duty to the lessor, but, to relieve the purchaser from further liability for rent under the lease, he must notify the lessor that the well had ceased to produce gas in paying quantities, and that, therefore, he terminated and surrendered the lease.

Appeal from court of common pleas, Butler county: John M. Greer, Judge.

Action by H. P. Double against the Union Heat & Light Company for rent under a lease for oil and gas purposes. From a judgment for plaintiff, defendant appeals. Affirmed.

S. F. Bowser, for appellant. Ralston & Greer, for appellee.

GREEN, J. The definite term of the lease in question ended by its own limitation on May 4, 1893, being two years from its date, May 4, 1891. After that the lease was to continue "as much longer as oil and gas is found in paying quantities therein." No oil was found, but gas was found in paying quantities, and then the rental clause became operative, to wit: "And, should any well produce gas in sufficient quantities to justify marketing, the lessor shall be paid at the rate of two hundred dollars per year for such well so long as the gas therefrom is sold." The defendant, having purchased the original lease, and taken possession of the premises and well on December 19, 1892, operated the well after that time, and marketed and sold the gas produced until June 1, 1893, when they disconnected the line, ceased to produce gas, and so notified the plaintiff. The defendant offered to pay \$88.89 to the plaintiff, being all that they admitted to be due up to the time they ceased to operate the well. This was declined by the plaintiff, who claimed that as the defendant had entered upon the third year of the lease, and had not terminated the lease by any notice to that effect, and had not surrendered or offered to surrender the lease or the possession of the premises, it was liable to pay for another year, or, at least, until the lease was terminated by the act of the defendant, and a surrender of the lease and the premises had taken place. The learned court below instructed the jury in accordance

with this view of the case, and, as we correctly.

In our judgment, the case is contrary to our decision in *Nesbit v. Godfrey*, 155 Pa. 251, 25 Atl. 621. There the lease was for oil and gas purposes, and was for a term of 21 years, "and so long thereafter as oil or gas shall continue to be found in paying quantities." By another clause in the lease, the lessee was empowered to terminate the lease in the following words: "The lessee is hereby agreed that, at any time after the expiration of the term hereinbefore provided, Godfrey and Clark find it will not be profitable to continue this lease, they are hereby empowered to declare the same null and void, and to be immediately released from all responsibilities herein." The lease was dated on June 12, 1890, and was at a rental of \$75 per year, payable in advance. On June 12, 1891, the lessees notified the lessor that they elected to terminate the lease. The plaintiff claimed that the second year had expired when the notice was given, and that the defendants had entered upon their second year, and therefore she was entitled to another full year's rent. The court gave judgment in her favor, and we affirmed the judgment, on the opinion of the court below. The court below said in the opinion: "The question is whether or not, on June 12, 1891, the defendants had entered upon their second year under the lease. We think the case is ruled by the cases of *v. Williams*, 15 Serg. & R. 136, and *M. Anderson*, 24 Pa. St. 272. There is no substantial difference between the expression used here and in those cases. The well was used not merely by way of computation, but a present interest is to commence from that date." There is no such narrow question of time in this case, and the decision is against the proposition that, if a tenant avails himself of a privilege which he has reserved of terminating the lease by his act, he must do it before he has entered upon another year of his term. In this case the tenant, having the right to terminate the lease by a notice to that effect, gave no notice until several months had elapsed after the production of gas was stopped, and fully a year had elapsed after they took possession and began to operate the well. The appellant's contention that the mere cessation of the use of the gas from the well terminated the lease of its own force, and relieved the defendant from any further duty to the plaintiff, is entirely untenable. If the defendant desired to be relieved from a termination of the lease, and the contingency arrived when they could claim the benefit of such release, it was their plain duty to notify the plaintiff that the well had ceased to produce gas in paying quantities, and that, therefore, they terminated the lease and surrendered it. Not having done so, they would have no knowledge of their intention. He could not re-enter upon the premises to determine the truth of their assertion.

the cessation of the gas, or to relet it to another tenant. He was certainly entitled to notice of the termination of the contract relation, so that he might resume his rights and protect his interests. Instead of that, the lessee continued in possession, never surrendered the lease, or offered to do so, and remained in full possession up to the time of the trial. The assignments of error are not sustained. Judgment affirmed.

STEINER v. MARKS et al.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

FORFEITURE OF LEASE—DELAY IN PAYING RENT.

On the day on which the first quarterly payment under an oil and gas lease became due, late in the evening, the lessee came to the lessor's house to make payment, and was then told that he might as well have left it till the next day, as the lessor would not have objected. Three days before the next payment became due, the lessee offered to make the payment, but was told by the lessor not to mind about it; and when he started to go to his house, a short distance away, to get the money, the lessor drove off, and he did not actually pay till the day after the payment was due. *Held*, that it was a question for the jury whether the lessor did not lead the lessee into the belief that a strict compliance with the provision as to payment would not be demanded.

Appeal from court of common pleas, Butler county; John Stewart, Judge.

Action by John J. Steiner against William J. Marks and another. From a judgment for plaintiff, defendants appeal. Reversed.

Newton Black and Lev. McQuiston, for appellants. Thompson & Son, for appellee.

DEAN, J. On the 12th of April, 1893, Marks and McCandless, two of defendants, Bartley being their employé, by writing under seal, leased from Steiner, plaintiff, for a term of 10 years, the oil and gas under his farm of 87 acres, in Middlesex township, Butler county; the lessees to hold the premises for the term, and as much longer as oil and gas were produced in paying quantities, Steiner, however, to have the enjoyment of the land for farming purposes, subject to the lease. In consideration thereof, Marks and McCandless agreed to deliver to Steiner, in tanks or pipe lines, one-eighth of the oil produced; also, to pay him \$100 annually for each producing gas well, and furnish him gas for his house free. They further covenanted to commence a well within 60 days, or, in default thereof, pay to Steiner a monthly rental of \$7.25; the monthly rental to be deposited to Steiner's credit at his residence, or paid directly to him. A failure to commence the well or pay the monthly rental was to render the lease null and void, only to be renewed by mutual consent. Then, in the last stipulation, it is agreed that the rental shall be paid quarterly in advance. The defendants had leased other land in the

neighborhood, and were actively engaged in successfully drilling wells thereon at the time the 60 days were about up within which they were to commence a well on Steiner's land. Not being ready to begin just at that time, Marks went to Steiner's house, the last day, June 12th, to pay in advance the first quarter's rental. When he arrived there, Steiner had gone to bed, but got up, and received the money; at the same time, said to Marks that to-morrow would have done as well, meaning for the payment of the money. The next quarter was paid September 4th, some days before it was due. The next quarter was payable 12th of December. On the 8th or 9th of that month, Steiner was at McCandless' barn. The latter was ready and willing to pay the quarter due on the 12th, but Steiner evaded the tender by quickly leaving the premises. On the 13th, the day after this quarter was due, Marks called upon Steiner, and tendered him the money, but he declined to receive it, on the ground that it was too late. McCandless testified that a week after, when he urged Steiner to take the money, stating to him that they intended to insist on their rights under the lease, Steiner replied he had a chance to lease at a bigger bonus, and, if they would pay it, he would renew the lease. Thus matters stood until about a month later, when Marks and McCandless went upon the land to put up a drilling rig. Thereupon Steiner brought this action of trespass. Defendants pleaded the general issue, and right of possession under the lease. At the trial, the learned judge of the court below, being of opinion that the neglect of defendants to actually pay or tender the quarterly payment due December 12th on that day worked a forfeiture of the lease, instructed the jury to find for the plaintiff. They accordingly did so, and assessed his damages at \$20. From the judgment entered on the verdict, defendants appeal, assigning for error the peremptory direction of the court, and averring it was for the jury to determine from the evidence whether Steiner, by his declaration and conduct, had led them to believe strict compliance with the terms as to day of payment would not be enforced.

It is unnecessary to take up the assignments of error in their order, for there is but one point upon which the appeal can be sustained. Should the court have submitted the evidence tending to show a waiver of strict compliance by plaintiff to the jury? It is true, if reference be had to the written contract, and the tender of payment on the 13th instead of the 12th, Steiner had a legal right to insist on a forfeiture. In this class of agreements, this court has frequently so held, where the intention of the parties, by their written language, is to end whatever estate or right the lessee has in the oil or gas (the subject of the contract) by default either in operating or making

payment; but we have also held that the party claiming to enforce a forfeiture must exercise his right promptly, and it must not be unconscionable (*Gas Co. v. De Witt*, 130 Pa. St. 235, 18 Atl. 724; *Thompson v. Christie*, 138 Pa. St. 230, 20 Atl. 934; *Lynch v. Gas. Co.*, 165 Pa. St. 518, 30 Atl. 984); that is, the rigidity of the rule, as applicable to the written contract, the parties themselves may, by their declarations and conduct subsequent to the writing, mitigate. *Bisph. Eq.* § 181, states the rule thus: "If parties who have entered into definite and distinct terms, involving certain legal results or legal forfeiture, afterwards, of their own act, enter upon terms which have the effect of leading one of the parties to suppose strict compliance will not be enforced, the party so doing will not be allowed to do so where it would be inequitable."

In view of this rule, note the evidence of defendants. The first quarterly payment was due the 12th of June. Marks, assuming the right of Steiner to declare a forfeiture if there was default, and that he would probably exercise the right, called upon him at 8 o'clock in the evening, accompanied by a witness, Truver, and roused Steiner from his bed, to make payment. This is his testimony as to what occurred: "I says to him, 'I came up to pay this rental.' And he says, 'What brought you here at this time of night?' I said to him, 'I thought you would kick,' or something of that kind, 'if I didn't come.' And he says, 'You ought to have known me better than that; to-morrow would have done as well;' or something like that." Truver testifies that Steiner said to Marks "that he didn't need to be in a hurry, or something like that, 'for to-morrow would have done as well;' that he ought to have known him better than that." Assuming the jury would have believed these two witnesses, what might have been reasonably implied from the conduct and declarations of Steiner? Marks, by the very fact of calling with a witness to make payment at an unseasonable hour, disclosed a consciousness of the peril of default, without even confessing it; but in answer, in his own way, to Steiner's question, candidly says so; in effect, says, "I was afraid, if payment were not made this day, you might declare the lease forfeited." What is Steiner's reply? "You ought to have known me better than that; to-morrow would have done as well." What, in view of the circumstances, was the purport of such language, or, rather, what reasonable interpretation might the jury have put upon it? It seems to us they might have found that Steiner meant, and Marks believed, payment of an installment the day after it was due was soon enough, and that he (Marks) ought to have known him better than to think him capable of claiming a forfeiture as the penalty of a few hours' default. On the 13th of December, the day after it was due, that quarterly payment is

tendered. He declines it, because it is to have been made the day before. Marks said, "To-morrow would do as well;" Steiner says, "To-morrow is too late." He knows Marks ought to have known him better than to suppose he would reclaim his grant in default of a few hours; he now, by a slight default, declares a forfeiture. Marks misled by the default into believing that defendants intended to abandon the lease by a neglect or refusal to pay the 12th, for McCandless testified that on the 8th or 9th, only three days before the 12th, Steiner called on him at his barn, and what occurred: "I says to him, 'That rental is soon be due, John, and I may as well pay it now.' I knew it would be due in a few days, and I told him it would save me the trouble of going over there; and he says, 'Never mind, I'll pay something like that. But I told him to just pay him now. I was cleaning the barn at the time, and I put my hand down in my pants pocket, and found I had on no money, and had no money in them either.' He said to him to wait a little. 'I will go to the house, and get the money.' And he went right up to the house, and he came right out of the barn, and drove right back. The house is a little distance from the barn, and, when I got back, he was gone. Steiner's readiness of McCandless, three days before the 12th, to pay the same quarter at the barn, Steiner's evasion of an opportunity for a tender, while indicating no unwillingness to receive, is significant of an intention, by the first conversation, to lure the defendants into a sense of security, and to impose upon them the very penalty Marks feared. It is not the natural effect of his language, or conduct to lead the defendants, as supposed, to the equity rule, to suppose strict compliance would not be enforced? If so, then, by the same rule, the party so doing would be allowed to enforce a forfeiture, because it would be inequitable.

The learned judge of the court believed it to be his opinion that, from all that appeared to the contrary in the evidence, the defendants were not influenced by these declarations of Steiner; but that was for the jury. If the jury had, in effect, said to Marks, "A default of one day is immaterial; I will not declare the lease forfeited for that;" and then, on the next day's default, and then a tender, would the jury, in view of all the circumstances, determine whether defendants had misled by the plaintiff. Clearly, if McCandless was believed, they had no intention of permitting a forfeiture of the lease, but was ready and attempted to make payment three days before it was due; and if he be believed, Steiner well knew that Marks expected to hold the lease, by a substantial compliance of its terms. We think that was one for the jury, not under the evidence or instructions as framed in defendants' favor, but under instructions indicated in the discussion of the question as to whether

court erred in wholly withdrawing this branch of the case from the jury. It is for them to determine what was said, and what, under the circumstances, was intended and understood by the parties. If they find, as a fact, the declarations of Steiner were calculated to lead, and did lead, defendants into a day's default, then it would be inequitable in Steiner to enforce a forfeiture, and he cannot recover. To this extent, only, are the assignments of error sustained. The judgment is reversed, and a v. f. d. n. awarded.

GRAY v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

ACTION AGAINST RAILROAD COMPANY—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE.

There being on defendant's main track a coal train about to move, deceased stopped on a side track, at the end of two freight cars, until the coal train moved out, when he immediately stepped out on the main track and was struck by a train about 60 feet behind the coal train. There was evidence that the locomotive gave no warning, and it appeared that the space between the side and main tracks was only sufficient to allow the safe passing of trains. *Held*, at the question of contributory negligence on the part of deceased was for the jury.

Appeal from court of common pleas, Cambria county; Martin Bell, Judge.

Action by Bridget T. Gray against the Pennsylvania Railroad Company for the death of her husband, Caleb A. Gray. From judgment for plaintiff, defendant appeals. *Argued*.

Alvin Evans and H. W. Storey, for appellant. W. Horace Rose and M. D. Kittell, for appellee.

DEAN, J. The defendant's road crosses right angles a street (Fourth avenue) in the borough of Hastings, Cambria county. Across the street are two tracks,—one the main track, the other a siding. On the west side of the street is the company's freight warehouse, with the side track close enough to load and unload cars from the platform. The roadway crossing of the railway tracks with the line of the street is by the usual plank between the rails. On the east side of the road crossing is a foot walk. On the 9th of May, 1893, two freight cars stood on the siding at the street crossing, not entirely obstructing the street, but extending from the plank crossing to the east side. On the main track stood a train of coal cars, with a locomotive attached, ready to move. This was the situation on the afternoon of the day in question, when Caleb A. Gray (who operated a flour mill on the north side of the borough) and Andrew Young walked down the road side of the freight warehouse with the intention of crossing the tracks on the street on the south side of the town. On reaching the crossing, partially obstructed by the two

freight cars, they stopped at the end of one of them, and waited until the coal train, which was now moving on the main track, had cleared the crossing, when they attempted to cross to the south side of the tracks. An engine was backing down the main track, following the coal train. Young cleared the crossing, but Gray was struck, when just between the rails of the main track, and killed. There was evidence tending to show that the engine gave no warning of its approach, and that the two freight cars and warehouse obstructed any view of it until the foot traveler was on the main track. This plaintiff, widow of the deceased, brought suit for damages, alleging negligence of defendant in not giving warning of the approach of the engine to the crossing. The defendant denied negligence as alleged, and averred contributory negligence on part of deceased in attempting to cross when the engine could have been seen, if he had looked west on the track before crossing. The court submitted the evidence bearing on both questions to the jury, who found a verdict for plaintiff in sum of \$5,000; and afterwards, judgment being entered on the verdict, defendant appeals, assigning six errors, which may be resolved into one, to wit, that the court should have peremptorily instructed the jury that deceased was guilty of contributory negligence, and therefore could not recover.

This case is on the border line of those in which the respective functions of the court and jury are not altogether clear. In many, it is plain the question of contributory negligence is for the jury. In many others, the contributory negligence of the injured person is so manifest that there is nothing for the jury to pass upon. Then, in by far the smaller number, it is somewhat difficult to determine on which side of the line the case falls. The law, as gathered from our numerous cases on the subject, is so concisely stated by our Brother Mitchell in the very late case of *Ely v. Railway Co.*, 158 Pa. St. 236, 27 Atl. 970, that we repeat it: "The cases, beginning with *Railroad Co. v. Helleman*, 49 Pa. St. 60, and *Railroad Co. v. Beale*, 73 Pa. St. 504, have established, not only the rule that the traveler about to cross a railroad track must stop, look, and listen, as an absolute and unbending rule of law, founded in public policy, for the protection of passengers in railroad trains as much as of travelers on the common highways, but also that such stopping, looking, and listening must not be merely nominal or perfunctory, but substantial, careful, and adapted in good faith for the accomplishment of the end in view. Hence the necessary corollaries of the rule: * * * That the traveler must stop and look, where he can see; and that he will not be allowed to say that he did so, when the circumstances make it plain that the proper exercise of his senses must have shown him the danger. These principles are settled beyond question, but the application of them to the infinite va-

riety of circumstances and evidence in accident cases is not always easy. All that this court can do is to lay down the general rules, and to say that, where the facts are uncontested, or the inference of negligence the only one that can be drawn, the court must pronounce the result as matter of law; but where the facts are in dispute, or the inference from them open to debate, they must go to the jury. This is the result of all the cases. * * * This rule applies to persons walking equally as to persons driving." To the same effect is a still later case, heard at Pittsburgh, opinion by our Brother Williams, —*Davidson v. Railway Co.* (not yet officially reported, but opinion handed down at October term, 1895) 33 Atl. 86. In this case the distinction between cases which must go to the jury and those which should not is stated as clearly as it is possible to state it.

Apply these principles to the evidence tending to establish plaintiff's side of the issue in the case before us. The deceased and his companion, Young, approached the crossing, intending to cross the tracks, as they had the right to do. They came to the side track, on which stood the two freight cars. On the main track stood the coal train, about to move. They stopped on the side track at the end of the freight cars until the freight train in front of them moved out. Unquestionably they did stop, and, so far as they could, look in front of them,—did look, for they waited until the coal train moved out. The presumption is they listened. Immediately, when the last car of the coal train had passed, they stepped out on the main track. Young barely cleared the locomotive, which was following the train about 60 feet behind, and Gray was struck and killed. The deceased did stop, because of the coal train, which he saw. He did not stop for the locomotive, which he could not see. There was evidence tending to establish the fact that the locomotive gave no warning. The exact width of space between the main and side tracks is not given, but from all the evidence the inference is they were only sufficiently distant from each other to allow for safe passage of trains. That there was room for safe observation by a foot traveler outside the projection of the freight car over the side track, and that of a coming locomotive over the main track, does not appear. Whether, under the circumstances, it was the duty of deceased to peep around the end of the freight car, and look, before venturing across the track, the court could not say, as matter of law; for that manner of looking may have been attended with danger. This, however, appears clear: That less than two ordinary steps of a man from safety, behind the box car, put him in front of death from a locomotive following 60 feet in the rear of the coal train. While the evidence was to some extent conflicting,—perhaps the weight of it, showing warning, was given by the locomotive engineer,—still it seems to us, on the

whole evidence, the case was one for the jury, and from the evidence they might find that the deceased stopped, looked so that his vision was not obstructed by the freight cars, listened for warning, but he did not stop, because none was given. Whether the deceased care demanded that he wait long enough to get to the freight car, or that he step out into the space between the rails and look up the main track before stepping on it, were questions for the jury to answer, and not for the court. They were submitted with most careful instructions as to the law, and in the result there was no error. The judgment is affirmed.

WINNER v. GRANER et al.
(Supreme Court of Pennsylvania.
1896.)

IMPROVEMENT OF HIGHWAY—CHANGE OF LOCATION—
INJURY TO ABUTTING OWNER—REMEDY—
AGAINST TOWNSHIP.

The inhabitants of a township petitioned the court for a view to withe the report of the viewers in favor of the proposed change. An owner of abutting land was one of the petitioners, though he claimed for damages before the viewers. Thereafter brought suit against the township officers on the ground that in widening the road it was elevated above his lots 2 1/2 feet, so as to render access therefrom impossible. Held that, this elevation being a natural one, the cutting and filling necessary to the construction of a safe and convenient road at that point, the lot owner could not recover.

Appeal from court of common pleas, Allegheny county; F. H. Collier, Judge.

Trespass by Henry Winner against L. Graner, George Kunz, George M. Reserve, the township of Reserve. From the judgment for plaintiff, defendants appealed.

J. P. Hunter and A. B. Angney, for plaintiffs. Levi Bird Duff, for appellees.

MCCOLLUM, J. Main street is a public road in Reserve township, Allegheny county, and a part of the ground on which it was located was opened to the public by the township of Reserve. Pentecost in accordance with his petition made and recorded in 1886. He did not plow upon it, in order to make it a public road, and to enable purchasers of the lots on it to get from them to the main roads. There was some public use of it, but there is no evidence that the township formally accepted it, or did any work on it as a public road, or that any one was bound to maintain it as such. The township, however, recognizing it as a public road, petitioned the court of quarter sessions for a view to widen it and the township known as "Bessie Avenue." The viewers were appointed, who reported in favor of widening the roads, and their report was duly confirmed, "the roads, when widened, to be of the width of 33 feet." Under the act, and in conformity therewith,

ly constructed a good and convenient road over which the public can safely pass. Between Luella street and Bessie avenue, a distance of 392 feet, it was laid on a slope or rise, and in the construction of it it was necessary to cut and fill, and thus in some degree affect access to, the lots above and below it. The petitioners knew this, or ought to have known it, because they were familiar with the locality. In 1887 the plaintiff purchased lots 62 and 63 on the Pentest plan, and in 1889 he built on lot 63 a house, in which he has since dwelt. These houses were below, and abutted on Main street, and together they gave him a street frontage of 48 feet. In June, 1892, he, with others, petitioned for the view, which resulted in the improvement we have described; and in May, 1894, he brought this suit to recover damages for an injury done to his property by the view. He made no claim for damages before the viewers, and they, regarding the proposed improvement as a positive benefit to the property, awarded him none. The specific matter of which he now complains is that the lower side of the roadbed is so far above the natural surface of the ground on which his property rests that it materially interferes with access to and egress from his lots by way of Main street. The roadbed is within the lines of the road as widened, and no part of it tends to the plaintiff's property line. Its elevation above the natural surface of his property at that line varies from 17 inches to 2 feet 6 inches, and is greatest at the corner of the alley adjoining lot 63. That this elevation was a natural result or consequence of the cutting and filling necessary to the proper construction of a safe and convenient road along the slope does not appear to admit of reasonable doubt. The elevation of the roadbed as we have described it is no later now than it was at the close of the year upon it in 1892. So far as the elevation is concerned, there was no change brought in it prejudicial to the plaintiff by the work done after the order to open and widen was returned. A careful consideration of all the evidence in the case, and the principles governing it, has convinced us that the elevation of which the plaintiff complains is chargeable to a proper exercise by the township of the power it possessed under the order to open and widen the road, and that an action for damages caused by the elevation is not maintainable against the township or its agents. For damages caused by the opening and widening of roads laid out in townships the county is liable, but the damages must be ascertained, and the liability enforced, in accordance with the statutes which give the former and impose the latter. *Gaertner v. Salisbury Tp.*, 132 Pa. St. 636, 1904. The learned counsel for the plaintiff has called our attention to the act of 1889, *Purd. Dig.* 1875, pp. 1, 8; and to the decision of this court in *Re Milford, 4*

Pa. St. 303,—as affording some support to this action, but neither of them has, in our opinion, any application to it. The plaintiff cannot contest in this action the regularity or validity of the proceedings in the court of quarter sessions for which he petitioned, and, if there was a defect in them which would have warranted that court in setting them aside on motion, it afforded him no basis for his suit against the township and its agents. Judgment reversed.

TERRIBERRY v. BROUDE et al.
(Supreme Court of Pennsylvania. Jan. 6, 1896.)

SUIT FOR PRICE OF GOODS—AFFIDAVIT OF DEFENSE—SUFFICIENCY—SET-OFF—BREACH OF AGREEMENT—SECURITY FOR COSTS—NONSUIT.

1. In a suit for the price of goods sold and delivered it is proper, in the copy of account filed with the statement of the claim, to designate the articles sold by special numbers, without describing them in detail, when such designation is fully intelligible.

2. An affidavit of defense alleging a set-off based upon the alleged breach by plaintiff of an agreement to fill orders for goods is insufficient if it merely states that defendants were to be allowed a line of credit upon conditions named, but does not state that the conditions were complied with, nor that the orders which were not filled were not in excess of the credit to be given, and there is no specification of items which go to make up the loss claimed, and nothing stated from which this can be computed.

3. When, under the rules of court, defendants are entitled to a rule for security for costs only upon filing a sufficient affidavit of defense, a judgment of nonsuit for want of security for costs is properly taken off upon a decision that the affidavit of defense filed is insufficient.

Appeal from court of common pleas, Allegheny county.

Action by William M. Terriberry, doing business as William M. Terriberry & Co., against Joseph Broude and M. H. Cuff, doing business as the Broude-Cuff Molding Company. From a judgment for plaintiff, defendants appeal. Affirmed.

T. L. Gaertner, for appellants. Galen C. Hartman, for appellee.

FELL, J. Three questions are presented by this appeal. The first relates to the sufficiency of the statement of claim, the second to the sufficiency of the affidavit of defense, and the third to the regularity of the proceedings after the entry of a rule on the plaintiff, a nonresident, for costs. It is averred in the statement that the defendants are indebted to the plaintiffs in a sum named for goods sold and delivered upon an account, which is attached, and which is a true and correct copy of the plaintiffs' book of original entry. This, with the other averments, makes a clear and concise statement of the cause of action. The copy of account filed shows a charge by plaintiffs, manufacturers of moldings, against the defendants, in which the date of sale, the special number, and the amount of each item in

feet and inches, and the price per foot are set forth. In the account special numbers are used to designate the articles sold. A number takes the place of a name and detailed description as to size, pattern, material, and quality. The reason for this, as a matter of business convenience, is obvious, and is explained by the statement in the affidavit of defense that the orders were made from sample patterns. Such orders and charges are not unusual, and no point has been made that the entries are not intelligible, and are not fully understood. Indeed, no objection to the statement is raised by the affidavit upon any ground. It is not alleged in the affidavit of defense that the goods for the price of which suit is brought were not ordered and received, nor that other goods sent without orders were not used without an offer to return them. The claim for set-off is founded upon the alleged breach of an agreement to fill orders. The statement as to its terms and as to the loss sustained are vague and uncertain in the extreme. The agreement set up is that the defendants were to be allowed a line of credit upon conditions named, but it is not stated that the conditions were complied with, nor that the orders which were not filled were not in excess of the credit to be given. There is no specification of items which go to make up the loss claimed, and nothing stated from which it can be computed. If all the averments were established by proof, there would still be no means of ascertaining the amount.

Under the rules of court, the defendants were entitled to a rule for costs only upon filing a sufficient affidavit of defense. While the rule was entered as a rule of course, its validity depended upon the affidavit. The judgment of non pros. was entered while the rule for judgment for want of a sufficient affidavit of defense was pending. The latter rule questioned the sufficiency of the affidavit, and challenged the right to costs. It would have been more regular, as a matter of practice, if the plaintiff had first moved the court to take off the judgment by default, and both rules could have been heard together. This, in effect, is what was done, but without the formal entry of a rule. One branch of the case depended upon the other; and, when the affidavit was held to be insufficient, the foundation of the rule for costs was gone, and the judgment fell. No substantial right was denied the defendants, and the record presents no ground for reversal. The judgment is affirmed.

REED et al. v. ADAMS.

(Supreme Court of Pennsylvania. Nov. 8, 1895.)

PAROL SALE OF LAND.

A verbal agreement for the sale of land passes no title, unless followed by the making

of payments or improvements thereon, and the taking of possession by the vendee.

Appeal from court of common pleas, Cumberland county; Savidge, Judge.

Ejectment by Samuel S. Reed, Reed, and Lydia Reitz against B. Adams. From a judgment for the plaintiffs appeal. Affirmed.

George Hill, D. W. Cox, J. W. Gill, S. B. Boyer, for plaintiffs. S. P. V. W. H. M. Oram, and C. M. Clemens, for defendant.

McCOLLUM, J. It is agreed that the lot in dispute was in John B. Douthett, who died in November, 1873, testate. His son, William H. Douthett, acting for his father, sold the lot to the defendant. Immediately entered into possession of the lot, and made other valuable improvements upon it. In November, 1883, suit was brought by the heirs of David B. Douthett, claiming to have an equitable title to the lot derived from their father, who acquired the lot in December, 1872, at a sheriff's sale, in pursuance of a judgment against Tobias Koppenhaffer, in order to maintain their suit, it was required for them to show, by competent and credible evidence, that Koppenhaffer had acquired title to the lot when their father's suit was entered; and this they undertook to do. As we think, signally failed to do so. In the first place, they did not show that there was a written agreement between Koppenhaffer and John B. Douthett which invested the title in the latter, with such a title being a legal agreement of sale followed by payment of purchase money and such possession and improvements by the vendee as would give rise to a presumption of title. There is not more than a scintilla of evidence in the case which supports the contention that John B. Douthett signed an agreement of sale of the lot to Koppenhaffer. However, evidence that a writing was made to the latter, but this was made by William H. Douthett, and described as a "forfeiture receipt," which was subsequently surrendered by Koppenhaffer, whom the money it was given for was furnished. The evidence fails to show that William H. Douthett had any written authority from his father to execute any paper in connection with the transaction. The most that can be inferred from the testimony, favorable to the plaintiffs, is that there was a verbal agreement between John B. Douthett and Koppenhaffer for the sale of the lot to the latter, but that it was abandoned by the parties within three years, and perhaps as early as 1875. Koppenhaffer's testimony on this point is clear, nor his recollection as to the abandonment certain or satisfactory. It is clear that no such payments or improvements were made, or possession maintained by him, in pursuance of the agreement, as clothed him with a title to the lot enforceable at law or in equity. He had sold and conveyed the lot to a

are the abandonment of the agreement, Koppenhaffer's only remedy would have been an action for the breach of it. It follows, from these views, that Reed acquired no title or interest in the lot by his sale of it on the Koppenhaffer judgment. The taxes upon the lot were not assessed to or paid by him or his estate, and neither he nor his heirs made any improvements upon it. From 1873 to 1881 Douthy's estate paid the taxes, and after that they were paid by the defendant. An effort was made to show that the Reeds were in possession of the lot after the sale of it on the Koppenhaffer judgment, but the evidence on this point was vague and meager. Harvey Mowrey testified that, in 1873, "old Mrs. Reed and Aaron Reed raised potatoes and one thing or another" upon it. Fridel Heitzman testified that he plowed the lot once for the Reeds, and saw "Aaron and the old woman" plant something there. Susan Rogers testified that she went upon the lot once with Mrs. Reed and Mrs. Reitz, and saw them gather some tomatoes or radishes there. These were the only witnesses who testified in relation to the possession of the Reeds; and none of them, except Mowrey, could tell in what year she saw Mrs. Reed or Aaron upon the lot, or at least 14 years immediately preceding the institution of this suit, the plaintiffs made no claim to the lot, although during the last half of that time the defendant was in possession of it, and made valuable improvements thereon with their knowledge, and without the least intimation from them that they had claimed to have an interest in it. The evidence is positive, clear, and undisputed that the defendant never heard of their claim until his action was brought, and that there was nothing upon the lot or upon the records which suggested that any person had an interest in it which qualified his vendor's title to it. It will be seen, from this reference to the testimony, that the latter was insufficient to support the plaintiffs' contention, and that the learned court below would have been justified in directing the jury to find for the defendant. The plaintiffs cannot, therefore, justly complain of the instructions under which the case was submitted. These instructions were more favorable to them than they were, upon their own showing, entitled to. Did the learned court err in its rulings upon offers of evidence? We think not. The first and second specifications relate to the rulings upon the offers of the receipt of June 3, 1873. For the reasons stated in the objections to these offers, we think the receipt was properly rejected. It was not error to allow the defendant to testify to his purchase of the lot in 1881, and to his possession of and his payments and improvements upon it. Nor do we think there is any error in the refusal of the court to strike out the testimony of Tobias Koppenhaffer in relation to his surrender of his purchase-money receipt, and the refunding of the money for which it was given. We think it clear that William H. Douthy was a compe-

tent witness to testify to the matters to which his attention was called. He had no interest in the decision of the question involved in the case. His father died testate, and he was not entitled to anything under the will. The specifications of error are overruled, and the judgment is affirmed.

WYKE v. WILSON.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

DISTRESS FOR RENT—PROCEDURE.

If one elects to proceed for his rent under the statute conferring the right of distress, a failure to make the appraisal required by the statute renders him a trespasser ab initio.

Appeal from court of common pleas, Allegheny county; Porter, Judge.

Trespass by John W. Wyke against W. A. Wilson. From a judgment for plaintiff, defendant appeals. Affirmed.

Thomson & Thomson, for appellant. J. M. Swearingen, for appellee.

McCOLLUM, J. While the evidence descriptive of the defendant's conduct at the sale was conflicting, it clearly showed that he went there prepared for war. He carried with him a loaded revolver, and his exhibition of it there was, to say the least of it, consistent with a purpose on his part to intimidate the plaintiff and his family. When it is considered that the property he proposed to sell to satisfy his disputed demand for rent was not worth, according to his estimate of its value, more than \$15, and that he could not realize from the sale of it more than \$7, exclusive of costs, it would seem that the methods he adopted to compel the sale were too expensive. This is a view of them that may have occurred to him after the verdict.

All the specifications of error may be considered together, because they really raise but one question, and that is whether, in making the sale, the defendant was a trespasser. We agree with the learned court below that he elected to proceed for his rent under the statute which confers and regulates the exercise of the right of distress, and that, having so elected, he was bound to conform to its provisions in order to validate the sale. That his lease gave him another procedure for collecting the rent, did not qualify or dispense with any of the requisites of the proceeding under the statute. If he failed to comply with the requirements of the latter, he became a trespasser ab initio, and there is nothing in the lease which can relieve him from the consequences of his noncompliance. The property was not distrained as his, but as the property of the tenant, and the proceeding subsequent to the seizure of it should have been conducted precisely as if the lease had not given him another remedy. *Association v. Jones*, 102 Pa.

St. 307. It is conceded that the appraisal required by the statute was not made, and it is settled that the failure to make it was fatal to the proceeding, and rendered the defendant a trespasser ab initio. *Kerr v. Sharp*, 14 Serg. & R. 399; *Quinn v. Wallace*, 6 Whart. 452; and *Brisben v. Wilson*, 60 Pa. St. 452. Judgment affirmed.

W. GREEN & CO., Limited, v. THOMPSON et al.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

MECHANICS' LIENS—MATERIALS FURNISHED—EVIDENCE.

1. Where the plaintiff in a mechanic's lien case has complied with all the provisions of the statute relating to the lien, it is presumed that the materials were furnished or the work was done on the credit of the buildings.

2. Evidence that the lumber charged in the bill of particulars did not go into any of the buildings mentioned in the claim is admissible to rebut this presumption.

3. Evidence that the lumber was charged by plaintiff to the contractor is also admissible for this purpose.

Appeal from court of common pleas, Allegheny county; E. H. Stowe, Judge.

Scire facias by W. Green & Co., Limited, against John Thompson and James M. Nevin, owners, or reputed owners, and John A. Wood, contractor, to enforce a lien for materials. From a judgment for plaintiff, defendants appeal. Reversed.

James M. Nevin and H. L. Castle, for appellants. A. M. Brown and John S. Lambie, for appellee.

McCOILUM, J. The buildings against which the claim in suit was filed were constructed under the contract designated as "Exhibit B," and there is nothing in it to suggest that it is subject to or in any manner qualified by the contract of February 13th, designated as "Exhibit A"; nor is there anything in the latter from which it can be inferred that any provision of it is applicable to the former. The defendants have not printed in their paper book any evidence which tends to show that there was a parol agreement modifying the contract under which the buildings liened were erected, nor is there an intimation in their printed agreement that such an agreement was made. It is useless to inquire whether contract A contains a stipulation against liens, until it is shown that its provisions extend to and govern the construction of contract B. We cannot say, therefore, that the court erred in the ruling complained of in the second specification, and as the defendants admit that the third specification must stand or fall with

the second, the third need not be or considered. Under section 1 of the courts of common pleas of Allegheny county, the defendants were bound by their answer to the plaintiff's claim, to aver the items of the claim and material averment as were not directly and specifically denied by them must be taken as admitted. An examination of the claim and the bill of particulars shows that the only averment of fact in the former which is denied in the latter is that the lumber was furnished on the credit of the buildings referred to. Where the plaintiff in a mechanic's lien case has complied with all the provisions of the statute relating to the lien he is presumed that the materials were furnished or the work was done on the credit of the buildings." *Hommel v. Lewis*, 10 Pa. St. 465; *Noar v. Gill*, 111 Pa. St. 488, 489. This is a rebuttal presumption, but the burden of showing that it is not in accordance with the facts in this case, therefore, in the only issue made by the claim and answer, was on the defendants, and in the absence of that burden they should have been required to show any fact or circumstance tending to negative the presumption. That the lumber charged in the bill of particulars did not go into any of the buildings mentioned in the claim was such a fact or circumstance which the defendants should have been required to prove if they were able to do so. We understand their contention, that the question to which their fourth specification relates was to show that the lumber charged as above stated was not used in the construction of the buildings included in the claim. We think, therefore, that the court erred in rejecting the question.

The statement of the account, under date of September 27, 1893, and designated in the defendants' paper book as "Exhibit A," shows that the lumber was charged by the contractor to the plaintiff. This was a circumstance affording some support to the defendant's claim that the lumber was not so furnished on the credit of the buildings. *Hommel v. Lewis*, supra. That the lumber was not used in the construction of the buildings and that it was charged to the contractor were matters proper to be considered by the jury on the question of fact made by the claim and answer.

We do not discover any error in the ruling complained of in the fifth and sixth specifications; and it does not appear, in the absence of any exception taken, or objection made to the admission of the papers mentioned in it. In accordance with the foregoing view, we sustain the fourth and seventh specifications, reverse the first, second, third, fifth, and sixth. Judgment reversed, and venire facias awarded.

In re CONTESTED ELECTION FOR
JUSTICE OF THE PEACE.

Appeal of REDMAN.

(Supreme Court of Pennsylvania. Jan. 6,
1896.)

ELECTIONS—MARKING OF BALLOT.

Under Act June 10, 1893, a voter cannot mark a cross for a person whose name is printed on the ballot, and also insert in the blank space provided for the same office an additional name, even though it be similar to the other; and it is proper to refuse to count a ballot so marked. Mitchell, J., dissenting.

Appeal from court of common pleas, Allegheny county.

Proceeding to contest the election of Frank Redman as justice of the peace of Braddock borough. From a decree adverse to said Redman, he appeals. Reversed.

William Yost, for appellant. E. J. Small and C. S. Fetterman, for appellee.

STERRETT, C. J. As shown by official returns of last municipal election in Braddock borough, the appellant was elected justice of the peace by a majority of one vote. The petitioners alleged, and succeeded in satisfying the court below, that a certain rejected ballot should have been counted by the election officers. The result was a tie between appellant and his leading competitor, John S. Lowry; and a new election was accordingly ordered. The controlling question is whether the ballot referred to was legal, and rightly rejected by the election officers.

There was only one justice of the peace to be chosen at said election, and, of course, no voter had a right to vote for more than one person for that office. In the petition filed in the court below, the contested ballot is described thus: "Under the title 'Justice of the Peace' ('mark one'), in the left-hand column of said ballot, in the square at the right of the name 'John S. Lowry' printed on said ballot, and inside the lines inclosing the column, is marked a cross (X), and immediately following the cross (X), but in the right-hand column on said ballot, being a column of vacant spaces, and under the title 'Justice of the Peace' ('insert one'), inside the lines inclosing the column, is written the name 'John S. Lowry.' At the head of said column of vacant spaces are printed the words: 'The voter may insert in the column below the name of the person whose name is not printed on the ballot, for whom he desires to vote.'" It is averred in the petition that "election officers received said ballot, and refused to count the same for the said John S. Lowry; * * * and said ballot so rejected was returned to the ballot box, where the same now remains." It is also averred "that said John S. Lowry is the only person of that name resident in the borough

of Braddock, and is the identical person whose name is printed in the left-hand column of said ballot, and whose name is written in the right-hand column of said ballot, and is the person for whom said ballot was intended and was legally cast for the office of justice of the peace of the borough of Braddock." It is further averred that said contested ballot was "cast by a qualified elector of" said borough, "whose name is unknown to your petitioners." In his answer, the respondent, among other things, represents "that, if all the averments of fact contained in the petition were true, nevertheless the petition is insufficient in law, because, under the averments of said petition, the ballot therein mentioned and referred to is illegal, and not cast according to law, and was properly rejected." He further denies, on information and belief, all the material allegations of the petitioners as to the description of the ballot rejected, the intention of the voter, and the identity of the two persons voted for upon said ballot.

We have recently had occasion, in McCowin's Appeal, 165 Pa. St. 223, 80 Atl. 955, to notice some of the provisions of the new ballot law of June 10, 1893. After referring, *inter alia*, to the fourteenth section, relating to the blank-space column of the ballot, and the twenty-second section, prescribing the way in which the voter shall prepare his ballot, etc., and commenting thereon, we said: "Everything necessary or proper to be done by the voter in order to record the free and unconstrained expression of his choice of persons to fill the respective offices is thus provided for; and the manner in which said right of choice shall be exercised is specifically pointed out. If he desires to vote for any of those whose names are printed on the official ballot, he must do so by 'marking' as directed by the act. If he wishes to vote for persons whose names are not already on the ballot, he can do so by 'inserting' their names in the blank spaces prepared therefor; but he has no right to insert anything else in said blank spaces or in any part of the right-hand column. In so far as the mode of voting is thus specifically prescribed by the act, all other modes are, by necessary implication, forbidden. 'Expressio unius est exclusio alterius.'"

The original ballot in question was not produced in the court below, but, assuming the copy attached to the petition to be correct, it shows on its face that the unknown voter, whoever he may have been, disregarded the plain requirement of the law in preparing his ballot, in that he voted, or undertook to vote, by "marking" for a person whose name was printed on the ballot, and also voted or undertook to vote by "inserting" an additional name in the blank space provided exclusively for names not already on the ballot. The presumption is that he knew the blank space was intended only for the insertion of names not printed on the ballot,

and that the person whose name he wrote in the blank space was not the same person whose name, printed in the left-hand column, he marked with a cross (X). If the voter's first act in preparing his ballot was the insertion of the name found in the blank space, he had no right whatever to afterwards attempt to vote by marking for either of the candidates for justice of the peace whose names are printed in the left-hand column. On the other hand, if his first act in preparing his ballot was marking with a cross (X), as appears in the left-hand column, he had no right to afterwards insert the name John S. Lowry in the blank space. It was thus manifestly impossible for the election officers, or any one other than the voter himself, to determine which of the acts—that of "marking" in the left-hand column, or that of "writing" the name John S. Lowry in the blank space—was first in order of time, or whether the voter intended by both acts to vote for two persons, or for only one and the same person, or, in brief, what may have been his purpose in doing what he is admitted to have done in preparing his ballot. When the election officers came to count the votes, it must have been quite evident to them, on inspection of the ballot in question, that the specific mode of voting prescribed by the act had been disregarded by the voter, and hence they were clearly right in refusing to count the vote for any one. It was plainly a vitiated, illegal ballot, made so by the act of the voter himself. If such an utter departure from the positive requirements of the act were sanctioned or encouraged, either by election boards or courts, it would lead to the most serious consequences. Under the new ballot law, it is not enough that the intention of the voter may possibly be ascertained, or his irregular and equivocal acts explained, by evidence dehors his ballot. The purpose of the legislature, in prescribing the form of ballot, and specifically directing how it should be prepared and used by the voter, was to avoid all such inquiries and the consequences likely to result therefrom. It was intended that the ballot, when prepared by the voter, and delivered to the proper election officer, should be per se self-explanatory. There is no good reason why it should not be so.

These views might be further enforced by other suggestions, but further elaboration of the subject is unnecessary. Enough has been said to show that the ballot in question is irregular and illegal, and should have been so held by the court below. This conclusion renders the consideration of other questions unnecessary. The decree of the court of quarter sessions is reversed and set aside; and it is ordered that the petition be dismissed, and that the costs in the court below and here be paid by the petitioners.

MITCHELL, J., dissents.

**CITY OF ALLEGHENY v. P.
NATURAL GAS & PIPEAGE
(Supreme Court of Pennsylvania
1896.)**

**GAS COMPANY—USE OF STREETS—AC-
CONDITION.**

A gas company was by ordinance the privilege of laying pipes in the city, subject to the conditions of a ordinance fixing the conditions g which corporations could lay pipes, ing any such corporation to file wit troller a certified copy of a resol board of directors accepting all suc and agreeing to comply with them. filed with the comptroller a resoluti rectors agreeing to comply with the dinance, "excepting so far as any of said ordinance may be held or legal or unreasonable by the cou that the councils never having conse qualification of the acceptance, an pany having enjoyed the privileges nance under its acceptance, it coul to comply with certain conditions nance on the ground that after it they were decided to be illegal.

Appeal from court of common gheny county.

Assumpsit by the city of Allegh the People's Natural Gas & Pipea ny. From a judgment for plain ant appeals. Affirmed.

On February 12, 1886, the city o enacted a general ordinance reg manner and fixing the terms and on corporations for laying pipes in and highways for the supply of to consumers. The defendant, t Natural Gas & Pipeage Company tion under the natural gas act 1885, applied for permission to la in said streets and highways; an ary 19, 1886, the city, by ordinan it that privilege, subject to the conditions of the said general Among the said terms and cond the following: "(1) That any availing itself of the rights unde nance shall pay to the city ann (3) cents for each foot of pipe l corporation within the city. (fore any street or highway shall under said ordinance by any co shall file with the comptroller a c of a resolution of its board of d der seal of the corporation, accep terms, conditions and provisions dinance and agreeing to compl same." The defendant subsequ with the comptroller its accepta terms and conditions, in the follo "Resolved by the board of direc People's Natural Gas and Pipeag that said company hereby accept conditions, and provisions of the general ordinance of the city of and agrees to comply therewith so far as any of the terms of sai may be held or adjudged illega able by the courts."

V. B. Rodgers and J. A. Langfit, for appellant. George Elphinstone, for appellee.

MITCHELL, J. Conceding that no author- has been shown in the city of Allegheny impose a tax, eo nomine, on the pipes of the appellant company laid in its streets, the question would still be open of the reasonableness of the ordinance in question as an exercise of the police power in the imposition of a license fee for supervision, and liabilities and inconveniences arising therefrom, the principles of our recent decisions in regard to telegraph poles. Allentown v. Telegraph Co., 148 Pa. St. 117, 23 Atl. 1070; Chester City v. W. U. Tel. Co., 154 Pa. St. 25, 25 Atl. 1134; Philadelphia v. American Tel. Co., 167 Pa. St. 406. But this question was not argued, and need not be considered now, as the court below rightly held that this case was to be determined on agreement of the parties. The act of May, 1885, §§ 11, 13 (Pub. Laws, pp. 34, 35), required the consent of councils, and the ordinance made an acceptance of its provisions by the company a condition precedent to the opening of its streets. The company did not get consent by an apparent acceptance, and then repudiate part of the terms, under cover of a reservation. The acceptance which was required as a condition to the consent was an unqualified acceptance of all the terms, conditions and provisions of the ordinance, and nothing less than that could satisfy the condition. The company made a nominal and apparent acceptance with the comptroller, and, having obtained and exercised the privileges, cannot now escape the obligations. It did not obtain the consent of councils to its qualified acceptance, or get anything from them which can now be set up as a compromise or waiver of the city's claim under the ordinance. If the terms prescribed were not acceptable to the company, not such as it conceived itself bound in law to submit to, it had its remedy in the courts, by the assertion of its rights under the statute; but, having got its privilege by apparently agreeing to the terms, it cannot now refuse to perform them. On this point the decision of this court in Federal St. R. Co. v. Allegheny, 31 Pittsb. Leg. J. 259, is very analogous, and authoritative. Judgment affirmed.

judgment entered in the latter's favor against Bailey & Boler in a replevin case founded on a distraint for rent. From an order making absolute a rule on them to show cause why said Musgrave should not be subrogated, H. A. Dickson and others appeal. Reversed.

W. I. Craig, for appellants. J. M. Stoner and J. Charles Dicken, for appellee.

FELL, J. This proceeding is founded upon a petition by Samuel Musgrave, one of the sureties on a replevin bond, for subrogation to the rights of the plaintiff in the judgment. An answer was filed by the appellant, the plaintiff, in which he averred that the judgment had not been fully paid, and in which he stated other supposed equitable grounds in denial of the right claimed. A separate answer was filed by the defendants, in which they alleged that they had transferred their property and business to the cosurety, J. C. Dicken, to secure him and Samuel Musgrave from any loss they might sustain by reason of the bond, and that from the management of their business an amount had been realized by Dicken more than sufficient to cover the payment made by Musgrave. It was agreed by both sureties that the amount due the defendants from the management of the business should be credited by Musgrave on account of the money which he had paid. The issues thus raised were referred to a commissioner. The terms of the reference do not appear from the record, but it is stated, in the appellee's history of the case, that the commissioner was "to take testimony and find the facts in issue by the petition and answers." The commissioner, having taken and considered the testimony, reported that the defendants, after the allowance of all proper credits, were indebted to the petitioner in the sum of \$872.70, and to this amount subrogation was ordered by the court. A large part of the testimony has not been brought up with the record. From an examination of what appears we see no reason to doubt the correctness of the conclusion reached, either as to the obligation to account, or as to the amount due. The issue raised by the answer of the plaintiff seems to have been wholly ignored. Whether any testimony was taken under this issue we are not informed. None appears with the record. Its omission would be ground for the affirmance of the order if there was a finding and report by the commissioner. Neither has been made. In the whole proceeding, as it is presented, no reference is made to this issue, from the time it is raised by petition and answer until it is finally disposed of by the order making absolute the rule to show cause why subrogation should not be allowed. Its importance may have been an afterthought, but the issue is one which cannot now be disregarded. It is distinctly raised, and is the subject of an exception to the report of the commissioner and of a specifica-

DICKSON v. BAILEY et al.
Supreme Court of Pennsylvania. Jan. 6,
1896.)

SUBROGATION OF SURETY.

Unless a surety pays the debt in full, he is not entitled to subrogation to any part of the assets of the creditor.

Appeal from court of common pleas, Allegheny county.

Petition by Samuel Musgrave for subrogation to the rights of H. A. Dickson under a

tion of error. Subrogation rests upon purely equitable grounds, and it will not be enforced against superior equities. Unless the surety pays the debt in full, he is not entitled to subrogation; and until this is done the creditor will be left in full possession and control of the debt and the remedies for its enforcement. *Dering v. Earl of Winchelsea*, 1 White & T. Lead. Cas. Eq. 120; *Kyner v. Kyner*, 6 Watts, 221; *Bank v. Potius*, 10 Watts, 148; *Hoover v. Epler*, 52 Pa. St. 522; *Allegheny Nat. Bank's Appeal* (Pa. Sup.) 7 Atl. 788. The settlement of the account between the sureties and the defendants fixed the amount of the liability of the latter, and the extent of the right to indemnity, but it did not affect the right of subrogation, which will never be allowed to the prejudice and injury of the creditor. The judgment is reversed, and the record is remitted to the court of common pleas, in order that there may be a finding upon the issue raised by the answer of the appellant.

ROBERTSON et al. v. YOUGHIOGHENY RIVER COAL CO.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

MINING—SURFACE OWNER—RIGHT OF SUPPORT.

Where the mineral estate in land is severed from the surface by a conveyance, the owner of the former is bound to leave enough of the mineral in place to support the surface, unless the owner of the latter has released his right to support.

Appeal from court of common pleas, Allegheny county; J. F. Slagle, Judge.

Action by Andrew Robertson and Thomas Robertson against the Youghiogheny River Coal Company to recover damages on account of the mining of coal beneath plaintiff's land in such a way as to withdraw the right of support. From a judgment for plaintiffs, defendant appeals. Affirmed.

Petty & Friend, for appellant. J. S. Ferguson, for appellees.

WILLIAMS, J. Our legal responsibilities grow out of the relations we sustain to each other. If it were possible for us to live in a state of absolute independence of all other persons, it would be possible for us to do as we pleased with our own without considering the natural consequences of our conduct as they might affect others. But such a state of independence cannot exist in civilized society. Our interests are so bound up with the interests of those about us that it is to the advantage of all that we should each recognize the relations we occupy towards each other, and the obligations that spring therefrom. The maxim, "*Sic utere tuo ut alienum non lædas*," expresses this general conviction in the form of a rule of civil conduct. It is in fact "the golden rule" applied to our business transactions, or to

such of them as are within the realm of law. The cases in which it has been applied by the courts are too numerous to state here, and embrace a wide range of subjects. It was held applicable to the cases of successive strata in the earth in *Jones v. Wagner*, 66 Pa. St. 429, and appears to be the first case in which the relations of the owner of the subjacent estate came before this court for consideration. It was held in that case that where the mineral estate is severed from the surface by a conveyance, the lower estate passes to the surface subject to the servitude imposed upon it for the support of the surface. The surface owes to the lower estate an easement or servitude for access. The estates owe to each other and to the surface an easement for support. The owner of the mine must leave enough of the mineral in place to answer the purposes of support of the surface, unless the owner of the surface has released his right to support. This right has been recognized and applied in many cases, among which are *Horne v. Horner*, 10 Pa. St. 242; *Coleman v. Chadwick*, 10 Pa. St. 81; *Carlin v. Chappel*, 101 Pa. St. 14; *Williams v. Hay*, 120 Pa. St. 485, 14 Atl. 14. This right to support may be released by words in a deed of conveyance (*St. Phillips*, 94 Pa. St. 15); but such release does not necessarily import it (*Williams v. Hay*, supra). The grant of a mineral estate, and the right to mine, is a grant of the right to penetrate the earth in search of the mineral, and, when found, to quarry and move the mineral in a proper manner, subject to the necessary repairs and process do not afford a cause of action against the owner of the surface. If his surface is drained, or his well destroyed, as the result of the excavation made to remove the coal, he has no right to recover. *Bainb. Mines*, 483; 15 Am. & Eng. L. & Q. 2d. p. 588; *Turner v. Reynolds*, 23 Pa. St. 1. But a sale of all the coal under the surface of a tract of land is not in terms or by necessary implication a release of the right to support any more than the sale of the surface of a building two or more stories high would be a release of the floor so as to destroy its visible servitude to the remainder of the building. The release must be, in each case, by express words or by necessary implication. It is thought that this has been qualified in the late case of *Sanderson*, 113 Pa. St. 126, 6 Atl. 4. We do not so understand it. The question presented in that case was whether, a sale of owners of land lying along a stream, the owner of the upper tract may recover upon his land when the drainage of the stream must necessarily pollute the stream, and render it unfit for use by the lower tract. It was held that the lower tract owed a servitude for purposes of drainage to the upper tract, because of its position; and that

owner of the upper tract was bound to exercise of diligence in his effort so to and develop his own land as not to interfere that of his neighbor, still, notwithstanding; the exercise of reasonable care and prevention, injury was unavoidable, such injury would not sustain an action for damages. Within the lines thus stated, Coal Co. Sanderson, is an authority. Under some circumstances a refusal to apply it might work a practical confiscation of the upper estate for the benefit of the lower, notwithstanding the natural servitude under which the lower is placed by its position. On the other hand, to insist upon its application under all circumstances might result in a practical confiscation of the lower for the benefit of the upper. For myself, I would permit a general rule of this sort to work confiscation in either case, but leave to a court of equity the adjustment of the terms and conditions on which each could use his own so as to inflict the least practicable injury on the other. This court, however, is not disposed at present to modify the rule of Sanderson's Case as it is stated above. That rule has no application to this case. Here it is the owner of the lower or servient tenement who invokes it to defeat a recovery by the owner of the surface, which is the higher and dominant. The rule stated in *Hess v. Wagner*, supra, is that which controls this case. The surface is entitled to support, unless its right thereto has been already released by the owner. The several assignments of error do not require a separate treatment. They are overruled, and the assignment appealed from is affirmed.

BRYMER et al. v. BUTLER WATER CO.
Supreme Court of Pennsylvania. Jan. 6, 1896.)

BUTLER COMPANY—FURNISHING POLLUTED WATER—INJUNCTION.

Where the water furnished by a water company incorporated under the act of 1874 for the use of the inhabitants of a borough is early unfit for domestic use or for use by domestic animals, and is so destructive to pipes and boiler flues as to be unsafe for use for steam purposes, it is proper to enjoin the company from collecting water rents for other purposes than extinguishing of fires and the flushing of mains and sewers.

Appeal from court of common pleas, Butler county; John M. Greer, Judge.

Filed by Andrew Brymer and others against Butler Water Company. From a decree granting plaintiffs, defendant appeals. Affirmed.

James B. Neale, John M. Thompson, W. C. Thompson, Leo. McQuiston, and T. C. Appell, for appellants. Andrew G. Williams, Clarence Walker, W. A. Forquer, S. Bowser, and R. P. Scott, for appellees.

WILLIAMS, J. This bill was filed under provisions of the corporation act of 1874.

It alleges the incorporation of the company defendant in pursuance of the provisions of that act as a water company; the fact that it has been engaged in furnishing a supply of water to the borough of Butler for about 17 years; and that the water furnished during the dry weather of 1893 and 1894 was muddy, and unfit for domestic use, and that the water then being furnished was "impure, filthy, and absolutely unfit for domestic or other purposes." The answer denies that the waters of the Connoquenessing creek, from which the supply for Butler borough has been taken, are either muddy or impure, as they ought to be allowed to flow, but admits that certain persons have for some months been pumping large quantities of salt water from an oil well or wells out upon the surface of the ground, which has found its way into the stream, and rendered its waters, especially when the stream is low, impure, and unfit for domestic use; and asserts that it has instituted proceedings in equity to restrain such persons from polluting the stream and destroying the water supply. The case was fully heard in the court below. The learned judge had before him, in the first place, the question of the quantity and quality of the water furnished by the defendant company. If the quantity was found to be inadequate, or the quality so poor as to be unfit for use, he was next to consider whether the trouble could be remedied by a reasonable expenditure of money and effort on the part of the company. If he found this fact also in favor of the plaintiffs it became his duty to make such order as would quicken the diligence of the water company, and protect the public served by it. After hearing the evidence, the learned judge found as a fact that, except during the very dry weather in the summers of 1893 and 1894, the supply had been reasonably sufficient in quantity, and reasonably pure in quality. He found that by a better system of storage the waters of the Connoquenessing could be made to furnish an ample supply, and that by securing the waters of a tributary called "Bonnybrook" the supply at command would be several times as great as the population of Butler would require. He also found that the water had been for some months so charged with salt and other minerals from the oil wells as to be absolutely unfit for domestic purposes or for steam, and he enjoined the defendant from collecting water rents except for the flushing of closets and sewers and for fire purposes. He at the same time made a peremptory order on the company requiring it "to secure and provide forthwith a sufficient supply of reasonably pure water to the inhabitants of Butler borough and patrons of the said defendant company." The decree and the findings on which it rests are now assigned as error, and it has been necessary for us to examine the evidence at length in order to determine whether it will support the several findings complained of. This examination

has satisfied us that with what has been done to reach the waters of the Bonnybrook the supply must be ample, but that the water has been destroyed for domestic and for steam purposes by the owners and lessees of land along the stream in the effort to obtain petroleum oil from an underlying stratum of sand rock known as the "one hundred foot sand." We are also satisfied that it will be wholly out of the question for the defendant to obey the order requiring it to furnish pure water to its patrons if the pollution of the stream by the owners and lessees of land in the basin of the Connoquenessing is a subject over which a court of equity has no control. This question is involved in *Com. v. Russell*, 33 Atl. 709, which was argued together with this case, and it will be considered to some extent in the opinion to be filed therein. We shall confine ourselves in this case to the two questions that are peculiar to it.

First, does the evidence justify the injunction against the collection of water rents for domestic and for steam purposes? We think the conclusion reached by the learned judge, that the water was utterly unfit for domestic use, that domestic animals would not use it, and that it was so destructive to the pipes in which it was conveyed and to the flues of boilers in which it was converted into steam as to be unsafe for use for steam purposes, has evidence on which it can fairly rest, and that it supports the restraining order. It is inequitable that a corporation chartered to serve a "public use," and actually undertaking to serve the public with one of the necessities of life, should be allowed to collect the price of a supply of good water from those to whom it delivers an article that cannot be used, or be made fit for use by any process within their knowledge or reach. The relations between the defendant and its customers rest on contract, and, if the commodity bargained for is not delivered, it is elementary law that the price is not recoverable. Nor was the learned judge mistaken in the measure of the duty imposed by law on the defendant. It is not bound to provide water that is chemically pure, but water that is ordinarily and reasonably pure. The water for the supply of a city must be taken from some lake or stream or watershed that is accessible, that has not been destroyed, and that can furnish a sufficient quantity to meet the demand. After having secured such a source of supply, the company is bound to exercise diligence in the effort to preserve it from pollution, and to deliver it to the public in no worse condition than that in which it is taken from the source of supply. Practically it is unimportant whether the water becomes unfit for use because of the neglect or in spite of the vigilance of the company. The question to be considered as between the seller and buyer is, what is the fact? Is the water fit for use? The same question is also to be investigated by the court on behalf of the public. Is the

company meeting the objects of its creation and discharging its duty to the fairly serving the public uses to which it is required to minister? If this question be answered in the negative, then the remedy is to order the company to render service, and to suspend its right to collect rents until water is furnished that is used with reasonable safety to its patrons. If it shall be determined that the defendant and the public are alike remedied, that the pollution of the stream may be without check or regulation by the company just so long as it may suit the defendant to pump salt water into it, the result is the practical confiscation of the earnings of the water company, and of the water supply for 10,000 people, for the benefit of a few persons. In this event the company may be compelled, by its own necessity, to elect whether it will continue its business or seek some new and independent source of supply. This is a question which, if the necessity arises, the company must settle for itself. The court cannot elect for it. Whether it shall reach the Allegheny river, 18 miles, to the Allegheny river, or whether it shall purchase water, at a price perhaps probably twice as great as that of its capital stock, is a question which the court has absolutely nothing to do with. The court may say: "The water you deliver is unfit for use. You shall not collect for that which has no value." But it cannot point out a possible supply at some distant point, and say, "You must let go of your present source of supply, and remove to the source which we point out." This disposition raises the second question raised by this case, which distinguishes between the discretion vested in the court by the act of incorporation and the business discretion of the owner of the plant of the water company. The court may select the source of supply, may require the company to mine a system of collection and distribution, and to adopt a mode of storage, and control general business details. The court may also require the efficiency of the system, and the quantity and quality of the water furnished, to be made such order as may be necessary for the protection of the public.

We cannot resist the impression that the learned judge took a somewhat uncharitable view of the conduct of the water company. The pressing evil from which the public suffers was the destruction of the water supply by the oil operators. The defendant could only correct the action of the court below, which it did, and by the result of which it necessarily abided. Its own investment in its business, and, in a practical sense, its franchises, were all at stake. It had much to make, but much to lose, by testifying against itself, and we can readily understand how it could do so without the assistance of the court, and how the company might feel that it was doing nothing they could do to save themselves from heavy loss. Any

pendent may well have seemed to them a needless expenditure of money so long as the pumps were pouring out a continuous stream of water loaded with salt and other injurious minerals into the source of supply. But if it be assumed that the officers of the company intended no disrespect or insubordination, but did in good faith all or more than the court should have required of them, still the fact remains that the water had been polluted, and was clearly unfit for use; that they were unable to remedy this condition, to furnish what their patrons had a right to expect and demand. They had no equitable right, therefore, to collect pay for what they did not and could not supply. So much of the decree as directed the company to furnish reasonably pure water is a mere declaration of the defendant's legal duty; so much of it as enjoins the collection of rents for water that cannot be used is an appropriate method for compelling the discharge of that duty, and for the protection of the public meantime. The decree must be affirmed, at the costs of the appellant.

COMMONWEALTH ex rel. ATTORNEY
GENERAL et al. v. RUSSELL et al.
Supreme Court of Pennsylvania. Jan. 6,
1896.)

WATER SUPPLY—POLLUTION—PROTECTION OF
PUBLIC.

When the stream from which a water company organized to supply a borough with water obtains its supply is rendered unfit for domestic uses and for steam by the discharge therein of water drawn off from oil wells in the process of extracting the oil, it is proper to make the state a party to a suit by the water company to restrain such pollution, and then to determine whether the public interest, apart from the private interest of the water company, requires not make such relief proper and necessary.

Appeal from court of common pleas, Butler county; John M. Greer, Judge.

Bill by the Butler Water Company against J. Russell and others to restrain them from polluting a certain stream. On motion the commonwealth was added as a party plaintiff with the consent of the attorney general. From a decree dismissing the bill, plaintiffs appeal. Reversed.

John M. Thompson, W. C. Thompson, Lev. Quiston, and T. O. Campbell, for appellants. Clarence Walker, H. McSweeney, and Junkin & Galbreath, for appellees.

WILLIAMS, J. This case presents a public question of very grave consequence, which does not seem to have been passed upon in the form in which it is now encountered.

A brief statement of the facts by which the raised will conduce to a reader's apprehension of it. The Butler Water Company is a corporation organized under the general corporation act of 1874 to supply the borough

of Butler with water. It has been carrying on its business for about 17 years. The borough of Butler contains at this time a population of about 10,000, and is steadily and rapidly increasing. The water supply is obtained from the Connoquenessing creek, which has been, until recently, a stream of reasonably pure water, and is capable of furnishing a sufficient supply. This it has done heretofore, except during the excessively dry weather of the summers of 1893 and 1894, when the water became low and muddy. To remedy this difficulty, the water company has secured and brought to its pump station the water of a tributary called "Bonnybrook." The supply now at command is, in the opinion of the learned judge of the court below, more than sufficient in quantity, and in its native state is reasonably pure in quality. But the basin which is drained by the Connoquenessing, or some portion of it, was thought to be underlaid with oil. The drill was started, and some oil was discovered in a stratum known as the "one hundred foot sand." The defendants have within a year or so begun to bore wells down to this sand rock. The oil found by them is diffused through the rock mixed with water. The mixture is pumped into large tanks, where the oil rises to the surface, while the water, which is about 95 to 98 per cent. of the whole, is drawn off at the bottom, and allowed to run out upon the surface of the ground. These wells yield not far from 12 to 20 barrels of oil and from 800 to 1,200 barrels of water per day each. From their several wells the defendants are pouring about 5,000 barrels of salt water into the stream above the dam of the water company every day; and it would seem that as much or more is turned upon the ground from the wells of other operators who commenced operations since the defendants' wells, or some of them, were finished. The water of the stream has become so strongly impregnated with salt and other mineral substances in consequence of these operations that the learned judge found the fact to be that the water has become wholly unfit for domestic uses or for steam, and could be utilized only for flushing sewers or extinguishing fires. The results are a discontinuance of the use of the water by the public, a loss of revenue to the company, an order made by the learned judge requiring the company to furnish pure water, and an injunction against the collection of any water rents for water furnished for domestic or for steam purposes until pure water is furnished. The defendants have thus destroyed the business and the franchises of the company and the water supply of a town of 10,000 inhabitants. A remedy for the private injury thus sustained by the water company may be looked for in an action at law in the name of the injured party. The remedy for the loss sustained by the public is in a court of equity

in the name of the commonwealth, and at the relation of the attorney general. The object of the first is damages. The object of the second is the assertion and maintenance of the public right. But the interests of the water company and those of the public, though not identical, are closely related. The furnishing of water to the public is, like the furnishing of light and heat for domestic purposes, a "public use" (Mills, Em. Dom. par. 18), the importance of which is recognized by the legislative department of the government in granting to the corporations organized to supply or provide for this public use authority to exercise, as the representatives of the commonwealth, the right of eminent domain. By reason of this public interest in the business of the company, the state assumes a visitatorial control over it, inquires into the quantity and quality of the water furnished by it, and makes such orders as may be necessary to secure for the public a wholesome and an adequate supply. The business of the oil and coal operator is a private use. Such business has a certain relation to the general volume of business being carried on in the region, but it is not to be distinguished from the production or manufacture of other commodities in common use, and that enter into the commerce of the country. Such operations may be begun or relinquished, increased or diminished, at the will of the operator, without public interference or control; but the supply of water, light, and heat is necessary to the health and comfort of densely populated districts, and is not left to the absolute control of the companies undertaking to provide it. The state, in the exercise of its police power, asserts its right to inquire into the efficiency and good faith with which "the public use" is served, and to correct, through the courts, any defects or abuse in the conduct of the business of gathering or distributing the supply, or of securing a quality of the commodity furnished that is suitable for use. Now, we have in this case a somewhat startling state of things. The learned judge has found, in substance, that, but for the recent introduction of salt water into the stream, the Connoquenessing and its tributary, the Bonnybrook, would afford an ample supply of water for the borough of Butler of a reasonably pure quality. In the case of *Brymer v. Water Co.*, 33 Atl. 707, he has directed the company in the most peremptory manner to provide reasonably pure water, and in sufficient quantity for the public use, and enjoined against the collection of water rents until this order is obeyed. In this case, in which the water company asks the court to protect the stream on which it is dependent from contamination, the relief prayed for was refused. "Your business," says the court below, "is a public one, and you must furnish wholesome water to the borough of Butler." When the company seeks the aid

of the court to protect the water so that it may be able to furnish sufficient, the answer is: "Your business is a private one. Your grievance is for a personal inconvenience and for a personal injury. You are therefore within the rule in *Coal Co. v. Sanderson*, 115 Atl. 126, 6 Atl. 453, and you are remedied."

In *Sanderson's Case* the coal company, by opening a coal mine on its own land, introduced a stream of water used by Sanderson for domestic purposes. His grievance was for a "personal inconvenience and a personal injury," suffered as the result of the interference of the mine by one whose land was up the stream than his own. It was held that, as between two property owners, the lower holds subject to the easement of the position of his property imposes, and he cannot be heard to complain of the untoward consequences of the development of the higher owner of his own property in that manner, and without malice or negligence. So far as the business of the water company may be regarded as a private business, the deduction of the learned judge from *Coal Co. v. Sanderson*, was a legitimate one. The real question raised, however, by this case was that which was suggested by the character of the business in which the company was engaged, the duties which that business imposed, and the obligations to the public which necessarily resulted. Do these considerations afford any relief to any extent against a rigid application of the doctrine of *Coal Co. v. Sanderson* to the plaintiff in this case? The question does not seem to have been considered in the court below. It is raised by the pleadings and the evidence, and it is a question considered and decided. The most important question, however, and that to which we referred at the outset as new, may be stated thus: Is the city as helpless to protect its water supply on which it depends for its health as *Sanderson* was held to be? Does a great city stand on the same ground, with respect to its water supply for its multitudes of inhabitants, as *Sanderson* under consideration, as a single owner must stand, under *Coal Co. v. Sanderson*? This question was wholly unconsidered in the court below, because the learned judge denied the commonwealth, which he invoked in behalf of the public, the right to be heard.

The fourth finding of law declared that the state was "a party in name only," and that neither "the records nor the evidence established any real plaintiff or complainant against the water company." Notwithstanding the name of the commonwealth had been used in the record as a plaintiff at the instance of the attorney general, and notwithstanding the conclusive evidence of the destruction of the water supply for all domestic purposes in the borough of Butler had been dependent for many years, the case was disposed of on the narrow ground covered by the rule in

Case. The error of the learned judge is in this treatment of the case. By this we must not be understood as holding that the law applied by the learned judge is not applicable so far as the "mere personal inconvenience" or injury of the water company is concerned, but that the "public use" served the company, and the public need of an adequate water supply affecting the health and comfort of thousands of citizens, have not been considered at all. We cannot now take time to discuss and determine these questions, for there are additional findings, both of fact and law, that should be made before this can be intelligently done. Among other subjects to be examined and passed upon are these: What was the situation of the valley or basin in the Connoquenessing when the water company appropriated the stream for the supply of the Butler borough? Was it at that time a developed oil field or not? At what date did the pumping of salt water into the stream begin? What is the value of the daily or monthly output of oil by the defendants from their wells? What would be the approximate cost of conducting the salt water, either by surface drain or by pipes, to some point below the plaintiff's dam? Can the salt water be relieved of its salt by subsidence or filtration? Can the operator before turning it into the stream, and, if so, at what expense? Can the water of the stream be so cleansed by the company, and at what expense? Can the plaintiff command a sufficient supply of water going above the defendants' wells for it, and could it then obtain pure water? If not, what would be the probable cost of such change in the plant of the water company? When the case has thus been fully heard on the facts, the questions we have suggested can be considered, and it will be practicable to say whether a great city stands on no higher ground, when the health and comfort of many thousands of its citizens are at stake, than Sanderson, when his private waterworks and fish pond were rendered useless by mine war; whether, in other words, the commonwealth, in the exercise of its police power, may not limit and restrict the individual in the exercise of admitted rights, when the welfare of the public requires it; or whether it is indeed true that the ownership of a few acres of land, or a leasehold interest therein, gives to the holder an unqualified right to destroy the water supply of a city in the effort to develop some subterranean value in his land. If this unqualified right resides in the owner of the land, then it is not easy to see how the water company is in default for failing to do what is thus determined it has no power to do, viz. to protect the stream from pollution by the landowners within its basin. There would be, upon this view of the law, to be no remedy provided for the public or the water company. The latter must lose its plant, its business, and, for all practical purposes, its fran-

chises. The former must suffer the pollution and the actual deprivation of its water supply. The court can require the company to be diligent in its effort to procure for the municipality a sufficient supply of pure water if it can be had from sources reasonably accessible to its plant, and it can restrain the collection of rents if such water is not furnished. It cannot, however, require the company to relocate its plant, or to seek a new supply to reach which would involve an expense greater than its entire capital stock. The location of the plant and the selection of the water supply is for the company to determine. The sufficiency and character of the supply may be investigated by the court, and the company required to meet fairly the public use it has undertaken to serve or cease to collect charges therefor. The owner of the oil well, however, is thought to be independent both of the water company whose plant he destroys and of the public whose water supply he pollutes. The mere fact that the plant is owned by a corporation was rightly held by the court below to furnish no room for a distinction between Sanderson's Case and this. Corporations hold their titles, as individuals do, under the commonwealth, and subject to the same incidents as other owners. This is well settled. Among the more recent cases on this subject is Appeal of Pittsburgh Junction R. Co., 122 Pa. St. 511, 6 Atl. 564. But in all these cases, so far as I am familiar with them, the private right of the corporation was invaded. The public interest was not affected, and therefore not considered. The question of the status of the public is now clearly raised. It should be fully considered and decided. More than 150 years ago the necessities of civilized society had led to the general adoption of the definition of liberty which was formulated by Blackstone. It was seen that civil liberty required that other interests than those of the individual should be reckoned with, and that each person must be held to have surrendered such of his natural rights upon coming into society as could not be asserted consistently with a due respect for the rights of others and for the public good. For myself I can see no reason why our duty towards others ought not to place limits upon our rights of property similar to those which it has put upon our natural rights of person. "Sic utere tuo non alienum lædas" expresses a moral obligation that grows out of the mere fact of membership of civil society. In many instances it has been applied as a measure of civil obligation, enforceable at law among those whose interests are conflicting. Whether it is capable of general application, and whether it is applicable when the interests of the public and those of an individual are irreconcilable, is an open field, for inquiry into which this case leads. The decree is reversed, and the record remitted for further proceedings in accordance with this opinion.

WEBER v. METROPOLITAN LIFE INS. CO.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)

Appeal from court of common pleas, Allegheny county; Thomas Ewing, Judge.

Action by Isadora Weber against the Metropolitan Life Insurance Company on a policy of life insurance. From a judgment for plaintiff, defendant appeals. Affirmed.

W. K. Jennings, for appellant. A. H. Mercer, for appellee.

PER CURIAM. The six justices before whom this case was heard being equally divided in opinion, it is ordered that the judgment of the court of common pleas stand affirmed.

H. J. ROGERS & CO. v. DUNN.

(Supreme Court of Pennsylvania. Nov. 8, 1895.)

Appeal from court of common pleas, Allegheny county; Thomas Ewing, Judge.

Action by H. J. Rogers & Co., a corporation, against W. J. Dunn, on a check drawn by defendant. From a judgment for plaintiff, defendant appeals. Affirmed.

L. K. & S. G. Porter, for appellant. Carroll P. Davis, for appellee.

PER CURIAM. We find no error in this record. The binding instructions to find for the plaintiffs were fully warranted by the testimony, and hence the judgment on the verdict should not be disturbed. Judgment affirmed.

SCOTT et al. v. ALLEGHENY VAL. RY. CO.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

PROXIMATE CAUSE—ACTION AGAINST CARRIER—FIRE.

While a car containing binding twine was in the freight yard of a railway company ready for unloading, a fire broke out in a building 23 feet away, situated on property, on the other side of an alley, not belonging to the company. The car was then moved promptly, but in the meantime, and within 20 minutes of the breaking out of the fire, the twine caught fire from sparks entering through the car door, which had been left open about 10 inches. Held, that the leaving open of the door was not the proximate cause of the loss. Sterrett, C. J., dissenting.

Appeal from court of common pleas. Allegheny county; Ewing, Judge.

Action by I. W. Scott & Co. against the Allegheny Valley Railway Company for the partial destruction of a shipment. From a judgment for defendant, plaintiffs appeal. Affirmed.

S. A. & Chas. M. Johnston and O. S. Fetterman, for appellant. William Scott and Geo. B. Gordon, for appellees.

DEAN, J. On May 1, 1893, the Pearson Cordage Company of Boston shipped to plaintiffs, in Pittsburg, by rail, a car load

of binding twine and rope. On the 10th of May 1893, following the shipment, the twine reached destination over defendant's tracks and connecting road. This road had a freight yard in the city, on one side of which runs Mulberry street (or alley), 20 feet wide. From cars standing on tracks in this yard, goods are directly delivered into the city. This car was run on a track 3 feet from Mulberry alley about 9 o'clock in the morning, to be ready for unloading early in the morning. About 3 o'clock in the morning a fire broke out in a large warehouse across the alley from where the twine was standing. The fire was communicated to the car, partially destroying both it and the twine. The whole would have been burned had not, immediately after the fire broke out, run the car out of reach of the heat and sparks of the burning building. The evidence showed that the car door at the side was open for about 10 inches at the time the fire broke out, and probably through the opening sparks from the burning building entered the car and lading. The facts were admitted that the fire originated on property other than that of defendant, and that defendant had no control over the fire. The lading contained this condition: "No person or party in possession of all or any part of the property herein described, shall be liable for any loss thereon or damage thereto by causes beyond its control, or by fire, from any cause whatsoever." The court, on the evidence, directed the jury to find specially on these questions: "(1) Was defendant guilty of negligence in not exercising reasonable care, and promptness in removing the twine in question after the fire broke out? (2) Was the twine damaged by reason of which negligence the twine was burned? (3) Was defendant guilty of any negligence in leaving open the car door, whereby the twine was injured? (4) Would it not have been damaged if the car door had been shut at the time of the fire? The court reserved the right to enter judgment for defendant if the jury answered either or both questions affirmatively on the first question the jury answered "Yes." To the second, "Yes." The plaintiffs asked, as to which there was no dispute, assessed by the jury at \$1,435.30. The court was of opinion that the cause of the loss was one over which defendant had no control, and which it was not bound to guard against, and on the authority of Railway Co. v. Pipe Lines, 160 Pa. St. 359, 23 Atl. 271, reversed judgment for defendant notwithstanding the verdict. Plaintiffs appeal, assigned error the judgment on the point reserved.

Assuming the general rule as to the liability of carriers to be that they are liable for goods against all but perils from fire, accident, and that fire, except when caused by lightning, is not inevitable, yet

er relieves himself from the stringency of a common-law rule by his contract with a shipper; that is, under the legal condition of such contracts, he does not incur liability against fire, unless, by reason of his negligence, the fire was the proximate cause of the destruction of the goods. When a fire broke out, the degree of care rose, according to the peril. The exigency then required, not only action and effort, but prompt action and extraordinary effort. Under such circumstances, ordinary care would not have been negligence, and such negligence, as might have been held to be the proximate cause of the destruction of the goods, the defendant knew, as all know, that fires frequently occur in large cities; that, its being within the city, the freight cars in might be endangered by such fires. It attempted to guard against the peril by payment of watchmen to notice fire and sound the alarm; then had the means at hand for quick removal of the cars entered; and, although the fire broke out within 20 feet of the yard, so prompt was the action of the company that the only destruction of property was a portion of one car and contents; and the verdict of the jury establishes the fact that the company exercised care, diligence, and promptness in removing this car as soon as possible after the fire broke out. But, upon the submission, the jury has gone further and found as a fact that leaving the door open a few inches, whereby sparks entered, was negligence, without which negligence the goods would not have been injured. It seems clear to us that, on these findings, in view of the undisputed fact that the defendant is not answerable. The liability for a quick removal of the cars from that freight yard on sudden peril from fire was one which defendant could foresee and thereby was bound to provide for. It had done its full duty in this respect, and any other or further duty imposed upon it is as far as relates to damage from this fire. As is held in *Morrison v. Davis*, 20 Pa. St. 171, common carriers "are answerable for the ordinary and proximate consequences of their negligence, and not for those that are remote and extraordinary; this liability includes all those consequences which may have arisen from the neglect to make provision for those damages which require ordinary skill and foresight to be anticipated." If, while in transit, the car door being open, sparks had entered from passing locomotives and destroyed the property, the neglect to keep the door closed would doubtless have been the proximate cause of the damage. The originating cause would have been in control of defendant, and the omission to keep the door closed, leaving an open way for the inevitable motive sparks to reach the goods. The exemption under such circumstances would be that defendant had full knowledge of the ordinary risks incident to so conducting its business, and these facts would have brought it clearly within the rule laid down in *Hoag v. Railroad Co.*, 85 Pa. St. 293: "In determining what is proximate, the true rule is that the injury must be the natural and probable consequence of the negligence,—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act."

edge of the ordinary risks incident to so conducting its business, and these facts would have brought it clearly within the rule laid down in *Hoag v. Railroad Co.*, 85 Pa. St. 293: "In determining what is proximate, the true rule is that the injury must be the natural and probable consequence of the negligence,—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act."

But the facts here are entirely different from those supposed. The freight yard of a common carrier in a large city was a necessity to the transaction of its business as a carrier. Its laden cars must stand at some point within it for the convenience of both itself and the public. The delivery from the car to the cart or wagon of the consignee was a necessity. For purpose of such delivery, it stood at this point. That a fire might break out somewhere in a large city could be anticipated and provided against by having on hand watchmen to detect fire, and sufficient motive power to quickly move the cars to a place of safety; but that a building on a street opposite this particular car should catch fire but a few hours before the car was to be unloaded, and that, in less than 20 minutes, before, by the utmost promptness and exertion, the car could be moved, sparks should pass through an aperture 10 inches wide in the car, and communicate fire to the goods, is now seen to have been possible, but, even after the event, so remotely possible that certainly no jury or court can say it might or ought to have been foreseen. To say so would be, in effect, to hold that common carriers of freight destined to large cities must transport such freight in tightly-closed, fire-proof cars, for that is the only precaution which could, under the circumstances here proven, have given protection against destruction by fire. We deem the fact of the open door as unimportant, because, as against all that could be reasonably foreseen, or was within control of defendant, the goods were safe on an uninclosed car. The defendant had no reason to apprehend fire in that particular building, or that it would immediately be of such fierceness as to communicate itself to the car before the latter could be removed. Therefore, by what particular channel or means the fire immediately reached the combustible car and cargo has no weight in determining the proximate cause. The proximate, dominant cause of this damage was a possible fire, in a particular building near where this car stood, over which building defendant had no control, and for which it was not answerable. "But things or results which are only possible cannot be spoken of as either probable or natural, for the latter are those things or events which are likely to happen, and which for that reason should

be foreseen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or regularity as to become a matter of definite inference." *Railway Co. v. Trich*, supra. That fires would often occur in the city, was highly probable. That the conflagration might extend and reach this freight yard, though in a less degree was also probable. For these probabilities ample provision was made. But that a building 23 feet off would take fire, and within 20 minutes would set the car on fire, was only remotely possible, and therefore defendant was guilty of no negligence in not guarding against it. As to the argument that the question of proximate cause was for the jury, as a general proposition this is correct; but where, as here, there are no disputed facts, it is for the court. *Hoag v. Railroad Co.*, supra; *Railroad Co. v. Kerr*, 62 Pa. St. 353. The judgment is affirmed.

STERRETT, C. J., dissents.

SIMPSON et al. v. HOPKINS, Collector.
(Court of Appeals of Maryland. Jan. 31, 1896.)

CONSTITUTIONAL LAW—TAXATION—CORPORATE
BONDS—EXEMPTIONS.

1. Code, art. 81, § 88, taxing corporate bonds secured by mortgage on property within the state, while the debt of an individual so secured is exempt, does not violate Declaration of Rights, art. 15, requiring uniformity of taxation.

2. That mortgage debts of homestead and building associations are exempted does not render the act unconstitutional, as an arbitrary discrimination.

3. Nor does the exemption of bonds of a foreign corporation secured by mortgage on lands in the state render the section unconstitutional.

4. Nor does the exemption of bonds of a corporation which do not bear interest render it unconstitutional.

5. Nor does such section violate Const. U. S. Amend. 14, providing that no state shall deny to any person within its jurisdiction the equal protection of the laws.

6. Under Code, art. 81, § 2, providing for the taxation of all bonds made by any corporation, belonging to residents of this state, and section 4, exempting mortgages on property wholly within the state, bonds secured by mortgage on property partly within and partly without the state are taxable.

Appeal from Baltimore city court.

Action by Lewis N. Hopkins, collector of state and city taxes, against Camilla Simpson and another. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Argued before BRYAN, McSHERRY, FOWLER, ROBERTS, and BRISCOE, JJ.

J. I. Donaldson and Bernard Carter, for appellants. Thomas G. Hayes and James P. Gorter, for appellee.

BRISCOE, J. The appellee, collector of state and city taxes of Baltimore city, brought suit against the appellants to recover taxes

for three years alleged to be due on bonds of the Consolidated Gas Company of Baltimore City, owned by the appellants. It is admitted that these bonds are secured by a mortgage upon the property of the company, which is wholly within this state, and that the company is a Maryland corporation. The facts are undisputed, and submit to an agreement of facts in the record. It is contended by the appellee that the question is liable to taxation under the provisions of article 81, § 88, of the Code, as follows: "All bonds and certificates of debt bearing interest, issued by any corporation or other corporation of this state, secured by mortgage of property within this state, shall be subject to assessment and taxation to the owner or owners thereof in the same manner as like bonds and certificates of debt bearing interest and secured by mortgage of property, partly in this state and partly in some other state or states, shall be subject under the laws of this state. It shall be the duty of the county commissioners of the several counties, and the mayor and court of Baltimore city, to assess and tax such bonds and certificates of debt to the owners thereof resident in their several counties or in the city of Baltimore, respectively." And section 4 of the same article of the Code makes certain exemptions from taxation, providing that the preceding sections shall not apply to valuation and assessment, shall not apply to mortgages upon property wholly within this state, nor to the mortgage debts secured by, nor to such portions of the shares of corporations and building associations as are represented by mortgages upon real estate held property within this state, whether real or leasehold estate so mortgaged is subject to taxation under the laws of this state. Nor to such mortgages when the real estate so mortgaged is subject to taxation under the laws of this state. The appellants contend that the bonds in question are not liable to taxation, for reasons which we will consider in their regular order.

First, because section 88 of article 81 of the Code of Public General Laws is unconstitutional and void, by reason of its being a discrimination against a special kind of property, which is forbidden by article 15 of the Declaration of Rights. It appears that under the statute the bonds of a corporation, secured by mortgage, are subject to taxation in the hands of the holders, while the debt of an individual so secured by mortgage, is exempt. The question, then, is whether, in this case, the taxation of corporate bonds secured by mortgage is such a discrimination between the same kinds of property as to be against the rule requiring uniformity of taxation, and is unconstitutional, under article 15 of the Declaration of Rights. Now, it has been a repeated decision of this court that whether secured by mortgage or not, property in the hands of the creditor, liable to taxation, and that such debt, when secured

age, may be assessed to the mortgagee, the mortgaged property may also be assessed for taxation to the mortgagor. *United Electric Power & Light Co. v. State*, 79 Md. 22, 28 Atl. 768; *Allen v. Commissioners*, 122 Md. 296, 22 Atl. 398; *Mayor, etc., v. Canby*, 63 Md. 227; *Rice's Case*, 50 Md. 319. There can be no question, then, as to the power of the state to tax a debt of a corporation secured by mortgage. And it has also been held that article 15 of the declaration of independence constitutes no bar to the right of the legislature to exempt certain kinds of property from taxation, when that exemption is not an arbitrary discrimination in favor of a particular class. In *Buchanan v. Commissioners*, 47 Md. 293, referring to the act of 1848, c. 483, which exempted mortgage debts from taxation, this court said: "But it is very evident it was not the intention to exempt taxes upon every kind of debt. Exemption is made as to the character of the debt liable to taxation. The authority of the legislature to make such discrimination, and to exempt any species of property from taxation, according to its views of public policy, cannot be questioned. Its power to do so has been exercised from the earliest times of the government." *Wells v. Commissioners*, 77 Md. 139, 26 Atl. 357; *Bank of America v. New York City*, 2 Black, 631. In the recent case of *State v. Applegarth*, 81 Md. 93, 31 Atl. 961, the greatest diversity of taxes was imposed upon the different classes upon whom the taxes were imposed. We cannot, then, assent to the proposition that the taxation of the bonds of a corporation, secured on mortgage, while the debt of an individual, so secured, is exempt, is an arbitrary discrimination against corporations, or the holders of corporate securities. An individual's true worth, for the purposes of taxation, consists of his real and personal property; but, in the case of a corporation, "its franchise, its borrowing power, its earning capacity, its real worth, are not represented merely by its visible property and shares of stock. The taxable value of a corporation is its bonded indebtedness, measured with its stock." In support of this, see *Miller, in State Railroad Tax Cases*, 92 Md. 605, said: "It is therefore obvious that when you have ascertained the current cash value of the whole bonded debt, and the current cash value of the entire number of shares, you have, by the action of those who own them, all others, can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for all these are all represented by the value of its bonded debt, and of the shares of its capital stock." It is quite apparent, then, that this exemption of the mortgage debt of an individual, and taxation of the mortgage bonds of a corporation, in the hands of the respective owners, is not an arbitrary and unreasonable discrimination between the same classes of property. And, unless the discrimination is arbitrary, then the wisdom of the exemp-

tion is within the discretion of the legislature, and is not subject to control by the courts.

But it is also contended on the part of the appellants that there is no uniformity in the taxation of the mortgage debts of corporations, under article 81 of the Code, because shares of homestead and building associations, represented by mortgages on land, are exempt, and because the language of section 88 applies only to bonds and certificates of debt, bearing interest, secured by mortgage of property wholly within this state. As to homestead associations, we need only say that the character of these associations, which are not intended to be money-making corporations, is such that this exemption cannot be considered as arbitrary. So far as the alleged exemption of the bonds of foreign corporations, secured by mortgages upon property wholly within this state, is concerned, it is only necessary to say that, should it be conceded that this class of bonds is exempt, there can be no question that the state can relinquish its right to tax the bonds of foreign corporations without affecting its power to tax the bonds of its own corporations, owned by its citizens. Nor can the alleged exemption of the bonds of a corporation which do not bear interest be regarded as arbitrary discrimination. The difference between a security that produces interest, and one that does not, and the reasons for the taxation of the one and the exemption of the other, are both clear and obvious. "The true test of a taxable value is the producing value to the owner."

The second contention of the appellants is that the alleged discrimination in the taxation of the bonds is unconstitutional, under the fourteenth amendment of the constitution of the United States. Now, it has been shown that the discrimination in this case is not arbitrary or hostile, but is based upon sound reasons of public policy. In the case of *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 237, 10 Sup. Ct. 533, the supreme court said that the provision in the fourteenth amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways; that it was not intended to compel the state to adopt an iron rule of equal taxation; that, if that were its proper construction, it would supersede all those constitutional provisions and laws of some of the states whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material. And to the same effect are the cases of *Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250, and *Jennings v. Coal Co.*, 147 U. S. 147, 13 Sup. Ct. 282. It follows, then, as section 88 of article 81 of the Code is not in conflict with the provisions of the fourteenth amendment of the constitution of the United States, that this contention of the appellants cannot be maintained.

We come, then to the appellants' third and last objection, and that is "that inasmuch as section 88 of article 81 says that such mortgage bonds as those in question in this case shall be assessed and taxed in the same manner as like bonds are under the laws of the state, where secured by mortgage of property partly within and partly without the state, and neither the Code nor the subsequent acts of the assembly contain a provision for the assessment and taxation of the last-mentioned mortgages, therefore section 88 of article 81 is a nullity." Now, while there is no provision, in terms, for the taxation of bonds secured by mortgage upon property partly within and partly without the state, yet there can be no doubt that such bonds are liable to taxation, under the provisions of article 81, § 2, of the Code, which provides for the taxation of "all bonds made or issued by any territory or corporation belonging to residents of this state, all investments in private securities of every kind and description, belonging to residents of this state, and all other property of every kind, nature and description within this state." It is true that section 4 of article 81, which contains the exemption, declares that none of the provisions of section 2 shall apply to mortgages upon property wholly within this state, nor to the mortgage debt secured thereby; but the exemption was limited to the mortgage, and the debt secured thereby, wholly in the state, and a mortgage debt upon property only partly within the state is not within the terms of the exemption. And if such mortgage debt is taxable, then the language of section 88, by which the tax upon the bonds in question is imposed, cannot be regarded as a nullity because there is no provision elsewhere in the law relating expressly to the taxation of the bonds of corporations secured by mortgage upon property partly within and partly without the state. Obviously, these bonds are within the terms of section 2, and it is equally clear that they are not within the terms of the exemption employed in section 4. There was no error, then, in the rejection of the appellants' prayers, nor in the admission of the testimony in the appellants' bill of exception, and for the reasons heretofore given the judgment will be affirmed. Judgment affirmed, with costs.

SHAW et al. v. DEVECMON et al.

(Court of Appeals of Maryland. Jan. 9, 1896.)

PURCHASE BY TRUSTEE.

Where one managing property for the benefit of a widow and her children buys in an outstanding title, he cannot charge the cost thereof to the latter, on the ground that the purchase was for their benefit, unless they consented to the purchase.

Appeal from circuit court, Allegany county.

Proceeding by Althea Devecmon et al. against Alexander Shaw and C. Devries, executors of John S. Coombs, deceased, and others. From the decision, said executors and others appealed.

Argued before ROBINSON, C. J., SHERRY, FOWLER, and BRISCOE.

David W. Sloan, D. Jas. Blackiss, Benj. A. Richmond, for appellants. Devecmon, for appellees.

ROBINSON, C. J. Upon the facts of this case (31 Atl. 709) this case was remanded for the purpose of obtaining additional proof to show that Mr. Coombs bought the Green title in the Harker farm for the benefit of the Devecmon heirs, and that he paid the purchase money, \$816, with their knowledge and consent. The only additional proof is the testimony of J. Semmes Devecmon, and his testimony is that he bought the property for the benefit of the Devecmon heirs, and that Mr. Coombs, his uncle, is not very certain, nor is it conclusive one way or the other. Taken as a whole, however, we agree with the court below that the testimony is not satisfactory to establish the fact that Coombs bought the property for the benefit of the Devecmon heirs, or that he paid the purchase money with their knowledge and acquiescence. It does show that Coombs bought the Green title in the Harker farm made by Mr. Gordon, trustee, and charged the purchase money, \$816, to the Devecmons. They were his nephews and nieces, and he was their guardian, and receiving the profits of these two tracts of land, and his father had bought many years ago at a tax sale. But, though he charged the purchase money on his books to the Devecmons, he took the title to the property in his own name. If he did in fact purchase the property for the Devecmon heirs, we would understand why he should have taken the title in his own name. He had charged the purchase money, and the Devecmons to have been taken in their names, besides, after having bought the Green title, he knew the Devecmons had a title, and to a title, at least, under the tax sale, accordingly he buys the interest of the seven Devecmon heirs, from whom it would seem that he bought the Green title, not for their benefit, but with a view to acquiring the absolute title to the property, that is to say, both the Green title and the Devecmon title. And thus the matter stands at the time of Mr. Coombs' death, the owner of the Green title under the trustee's sale, and the owner of five-eighths of the Devecmon title to the Harker farm, by purchase from the Devecmons. This is as it may be. The proof does not show that Coombs bought the Green title by the

ty or with the consent of the Devecmons, and we must therefore affirm the decree. Decree affirmed.

KUYKENDALL et al. v. DEVECMON et al.
(Court of Appeals of Maryland. Jan. 9, 1896.)

PURCHASE BY TRUSTEE.

One having in charge, for a widow and children, property to which they had a tax title, bought in the original record title in his own name, intending the purchase for the benefit of such tax-title owners. *Held*, that the fact that the record title vested in him, because the widow and children did not consent to the purchase, did not affect the tax title in the latter.

Appeal from circuit court. Allegany county.

Proceeding by Althea Devecmon and others against Alexander Shaw and Christian Devries, executors of John S. Coombs, deceased. From an order ratifying the distribution of certain proceeds of sale, and overruling exceptions thereto filed by David W. Kuykendall, A. C. Kuykendall, and Wilhelmina J. Coombs, said exceptants appeal. Affirmed.

Argued before ROBINSON, C. J., and McHERRY, FOWLER, and BRISCOE, JJ.

David W. Sloan, D. James Blackiston, and Benj. A. Richmond, for appellants. J. S. Devecmon, for appellees.

ROBINSON C. J. This is an appeal from the order of the court below ratifying the special auditor's alternative report filed March 16, 1895, and overruling exceptions thereto filed by the appellants. The fund distributed was the proceeds from the sale of the "Harker farm" and "Sugar Camp," or Sugar Hill Tract," as it was sometimes called. In the distribution, the auditor allowed Mrs. Devecmon one-tenth of the proceeds in lieu of her dower, and to Mrs. Grove and Mrs. McIlhaney, two of the Devecmon heirs, he allowed, each, one-seventh, and the remaining five-sevenths he audited to Mrs. Kuykendall, the daughter and devisee of Mrs. Coombs, less one-tenth to Mrs. Coombs in lieu of her dower. Mr. Coombs had bought the interests of five of the seven Devecmon heirs in the Harker farm but had not bought the interests of Mrs. Grove or Mrs. McIlhaney, the other two heirs. The appellants now claim that Mr. Coombs was the owner of the entire interest in the Harker farm, and that the entire proceeds of sale ought to have been audited to Mrs. Kuykendall, his daughter, less the allowance to Mrs. Coombs for dower; and this claim is based solely upon the assumption that, in the former appeal of Shaw v. Devecmon, 31 Atl. 30, this court had decided that the entire title to the Harker farm and "to Sugar Hill" belonged to Coombs, and descended to his

heirs at law. This, however, we did not decide. We did say that Coombs bought the Green title at the sale made by Mr. Gordon, trustee, and took the deed in his own name, and that the proof did not show that he bought the property for the benefit of the Devecmon heirs, and paid the purchase money for the same by their authority or with their knowledge and consent, and we did say that the title thus acquired by Coombs descended to his heirs at law; but we did not say, or mean to say, that in purchasing the Green title at the trustee's sale, Coombs acquired a title as against the Devecmon heirs to the entire property. Coombs bought, at the trustee's sale, whatever interest Green had in the property, but he did not buy the interest of the Devecmons, if any interest they had. Their father had bought these two tracts of land at a tax sale, more than 30 years prior to the trustee's sale; and the interest thus acquired by the father descended to his heirs at law, and this interest was not sold by Mr. Gordon, trustee. Whether the title acquired by Coombs under the trustee's sale was a title superior to the title of the Devecmons under the tax sale is a question in regard to which we express no opinion, for the reason that it was not before us in that case. The only question in that case was whether Coombs was to be allowed the \$816 paid for the Green title, in his accounting with the Devecmon heirs for the rents and profits of the property collected by him prior to the sale by Mr. Gordon, trustee. Now, in the case before us, the Harker farm and the Sugar Hill tract having been sold under proceedings for partition, in which it was alleged that the property was held and owned by Mrs. Grove and Mrs. McIlhaney, two of the Devecmon heirs, and the remaining five-sevenths were owned by John S. Coombs at the time of his death, the auditor properly distributed the proceeds of sale among the parties thus entitled. When the property was sold under the partition proceedings, it was sold as the property of Mrs. Grove and Mrs. McIlhaney, the owners of two-sevenths, and as the property of Mrs. Kuykendall, the devisee of Mr. Coombs, as the owner of the remaining five-sevenths; and the appellants at that time admitted that Mrs. Grove and Mrs. McIlhaney were each the owners of one-seventh in the property, and it was not until the decision in the former appeal in the matter of accounting for the rents, that this claim for the entire proceeds of sale was made by the appellants. As we have said, this claim is based upon an entire misapprehension of the decision in that case. The whole matter is fully considered and discussed in the opinion filed by the judge below, and without saying more we rest the affirmance of the order from which this appeal is taken upon the opinion filed by him. Order affirmed.

WITZ et al. v. TREGALLAS.

(Court of Appeals of Maryland. Jan. 9, 1896.)

AWARD OF ARBITRATORS—VALIDITY—DISPUTE BETWEEN PARTNERS—DISTRIBUTION OF ASSETS.

1. A court of equity may require an accounting and distribution of the assets of a firm between the partners in the proportion fixed by an award made under a submission by the partners.

2. An award will not be set aside merely because one of the arbitrators failed to set his name upon the agreement for arbitration, in token of his acceptance of the position of arbitrator, as provided by such agreement.

3. Where the submission provides that the majority decision shall be the unanimous decision of the arbitrators, the award will not be set aside because it was signed by two of the arbitrators in the absence of a third, who declined to act.

4. Upon the submission to arbitration of differences between partners as to the distribution of the assets of the firm after dissolution, the arbitrators may properly pass upon the question whether the loss of certain money, by the defalcation of an employé after the dissolution, resulted from the negligence of the liquidating partners.

5. The burden of proof is on the person attempting to show that the award was not coextensive with the submission.

6. An award by arbitrators, appointed to determine the respective rights of the partners in the assets of the firm, is sufficiently certain if it gives the proportion coming to each, without actually naming the amounts of the shares.

7. To avoid an award on the ground of a mistake of law by the arbitrators, the mistake must appear on the face of the award.

Appeal from circuit court of Baltimore city.

Bill by Samuel R. Tregallas against Levi Witz, Isaac Witz, and W. T. Biedler for an accounting. From a decree in favor of complainant, defendants Witz appeal. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, ROBERTS, and BOYD, JJ.

W. Pinkney Whyte and Charles Marshall, for appellants. William A. Fisher and John C. Rose, for appellee.

BOYD, J. On the 1st day of January, 1881, Isaac Witz, Levi Witz, William T. Biedler, and Samuel R. Tregallas entered into articles of copartnership by which it was agreed what each partner was to contribute to the capital, what interest thereon was to be paid, what share of merchandise on hand each was to receive in the event of dissolution of the firm, and that the copartnership should continue for the term of three years. It was further agreed that, after paying all expenses and losses, the appellee was to receive one-tenth of the profits, and that the remainder should be divided equally between the other three, but if the appellee furnished additional capital, from \$2,000 to \$15,000, within six months from the expiration of each year, his profits should be increased at the rate of 1 per cent. per thousand. A supplemental agreement was entered into by which the copartnership was continued until December 31, 1886, on the terms mentioned in the original agreement,

excepting with reference to the dividends, which was changed so that Witz and W. T. Biedler were each to receive 31¼ per cent., S. R. Tregallas 27½ per cent., and Isaac Witz 12½ per cent. In December 31, 1887, another change was made by which it was agreed that, for the term from January 1, 1888, Isaac Witz was to receive 10 per cent. of the net profits, \$40,000, as his special and full interest, and then the profits were to be divided as follows: To Levi Witz and W. T. Biedler each, 36¼ per cent., and to S. R. Tregallas 27½ per cent. The partnership continued until December 31, 1889, when it was dissolved, and the assets were turned over to the appellants and W. T. Biedler, the retiring partners, who proceeded to realize on them. After a large part of them had been collected and distributed, differences arose between the members of the firm. On February 18, 1893, an agreement was entered into "to submit said differences to arbitration." It was therein stated that the arbitration of Devries was satisfactory, as was that of the arbitrator, to three of the partners, and that Tregallas desired two, he was authorized to name one, and in case he did, and the other did not agree upon a conclusion, they could name an associate, and "the majority decision shall be the unanimous decision." The arbitrators were required to write their names upon the agreement, as evidence of their acceptance. It was further provided that either party could present his views, in writing, and offer such evidence as he deemed reasonable and visible. Mr. Tregallas exercised his right to name an arbitrator, and selected Samuel R. Tregallas. Messrs. Devries and Supplee accepted the appointment, and entered upon their duties. Being unable to agree, the arbitrator selected Daniel E. Conklin as their associate. Messrs. Supplee and Conklin signed the award, which Mr. Devries declined to sign, by which it was determined that the assets of the late firm of Witz, Biedler, and Tregallas should be divided between the retiring partners in the proportions of 32.41 per cent. to Levi Witz, 27.34 per cent. to Isaac Witz, 24.06 per cent. to W. T. Biedler, and 16.19 per cent. to S. R. Tregallas; and that the following provisions were also made in said agreement: "Each of the partners who has contributed more than his share, as above determined, to the assets thus far distributed, shall receive the same, and in the future all assets received shall be distributed in the proportions above set forth. The Bridener debt, made before the dissolution of the firm, and any and all other items charged off, shall be charged to the retiring partners on their accounts in the proportion as above declared. All items of liquidation shall also be divided equally to each partner in the proportions above set forth. The three liquidating partners, Levi Witz, Isaac Witz, and William T. Biedler, shall repay to the firm the sum

1, the amount of the defalcation of the keeper, Bridener, made after the dissolution of the firm." The award was accepted by Messrs. Biedler and Tregallas, but not by Messrs. Witz, who declined to abide by it. Mr. Tregallas filed the bill in this case against the other three members of the firm, alleging (1) that the defendants should be required to account with him for all the assets which they had received, as liquidating partners of the late copartnership, including the sum of \$4,636.61, specially mentioned in the award; (2) that there might be an accounting and a distribution of the assets in the manner prescribed by said award; and (3) for general relief. William T. Biedler answered the allegations of the bill, but the Messrs. Witz filed an answer, in which they set up a number of objections to the enforcement of the award. The court below passed a decree referring the case to one of its auditors and masters to state an account in accordance with the terms of the award. From this decree this appeal was taken by the Messrs. Witz.

Before considering the main reasons relied upon by the appellants for setting aside the award, it may be well for us to pass upon what might be termed the preliminary and technical questions that have been urged in court. It is said that there is no jurisdiction in a court of equity, in this state, to enforce an award. The learned counsel for the appellants did not rely, for this reason, upon any decision in Maryland sustaining that portion, but rather upon the absence of all precedents in this state to justify a court of equity intervening to enforce the specific performance of such an award. That it may be conceded, it is not conclusive against the right to do so when a proper case is presented. If we assume that this award is valid, we can see no reason why a court of equity cannot require an accounting and a distribution of the assets of the firm between the partners on the terms established by the award. The defendants were bound to accede to the plaintiff, and the arbitrators having determined the proportion of assets which each partner was to receive, such accounting should be in accordance with the award. It is conceded, in the answer of the appellants, that "an accounting under the supervision of this court is necessary in order to ascertain the respective rights of copartners." Whether the distribution be made in the proportions fixed by the award, or otherwise, it is evident that a court of equity must take charge of the settlement, to do full and substantial justice between the partners, as they cannot agree among themselves. It might well be questioned whether this is, strictly speaking, a bill for the enforcement of a specific performance of an award,—whether it is not simply a bill to settle the affairs of the copartnership, and the award for the purpose of determining the proportions the partners are to re-

ceive, and such other matters as it disposes of. But there is no longer any doubt about the right of a court of equity to exercise this power, when the thing ordered by the award to be done is such as a court of equity would specifically enforce, if it had been agreed upon by the parties themselves. *Morse*, Arb. 603; *Russ. Arb.* 563, and cases cited by them.

It is also contended that the award is void because Mr. Conklin failed to sign his name on the agreement. It is true that there is a provision that "the said arbitrators shall write their name or names on this article of agreement, as evidence of accepting the same," but there is no doubt that Mr. Conklin was duly selected by the other two, and that, in point of fact, he did accept, with the knowledge and consent of the partners. He ought to have signed his name, but his omission to do so did not and could not possibly prejudice or injure the appellants. His signature was not the only evidence of his acceptance of the appointment, and to set aside an award for such an omission would be far more technical than is required or justified either by authority or reason. The testimony of Mr. Conklin shows that his failure to sign his name was entirely an oversight, and not because there was any question of his acceptance.

It is further alleged that the three arbitrators did not act together, and that it was in effect simply an award of the two who signed it, without their making a proper effort to have all three pass upon and agree to the matters submitted to them. The evidence shows that Messrs. Devries and Supplee had a number of meetings, during a period of time covering about two months, and heard considerable evidence and argument. Being unable to agree, they finally selected Mr. Conklin. After his appointment, all three met at different times, and the partners were requested to come before them. All, except Mr. Isaac Witz, appeared, and were interrogated by (or, at least, in the presence of) the three arbitrators. Mr. Levi Witz informed them it would not be necessary to have his brother present, as he could answer all questions for him. They were represented by the same counsel in the written statement that was submitted on their behalf. The record discloses the fact that Messrs. Supplee and Conklin differed materially with Mr. Devries as to the settlement, and this finally resulted in the announcement by Mr. Devries of his withdrawal. He thought the settlement should be made on a different theory from that adopted by the other two. He, having been called on behalf of the defendants, testified that Messrs. Supplee and Conklin told him they were ready to make the award, but he requested a postponement until the following Monday or Tuesday, to which they assented, and they again met at the time agreed upon. They still differed, and he then told them he would withdraw

from the arbitration, and "did so." He further said that, on that occasion, "the gentlemen stated that they were prepared to make an award, and I presume, from the papers they had, that the award might have been made up, but I declined to look at them to see what they contained." Between the two meetings above spoken of, Mr. Devries had seen Mr. Witz and his counsel, and told them he had determined to withdraw unless his associates would either continue to recognize the articles of partnership in the distribution of the assets, or submit to a rewriting of the books. The counsel for the Messrs. Witz told him he had a perfect right to withdraw. When the three met, on the Monday or Tuesday previously spoken of, finding that his associates did not agree to either of the two propositions made by him, he carried out his determination, announced his intention to withdraw, and did so. Mr. Supplee testified that a meeting was held at the bank of which Mr. Devries was president, "and a full discussion entered into of all the points submitted to us. This was a prolonged meeting, and the questions were viewed from every possible standpoint. Mr. Devries remarked, at this meeting, that 'I have heard all I wish to hear of argument, or further discussion, or expert testimony,' and a date was then fixed for a final meeting, and it was agreed at that meeting a conclusion should be reached." The final meeting was held as above stated, and, after some discussion, Mr. Devries said, "Well, gentlemen, if this is your decision, I withdraw from the arbitration." To this Mr. Supplee replied, "Mr. Devries, you cannot now withdraw from the arbitration, after having stayed in all this time, and we, by agreement, are now ready to vote." To this he answered, "But I do withdraw, nevertheless; but you gentlemen are perfectly competent to bring in your report without me, in accordance with the articles submitted to us, as you are a majority of the board." After that, as Mr. Conklin was going away, he and Mr. Supplee prepared and signed the award that is filed in the case, but, at the request of the former, the latter took it to Mr. Devries, who declined to sign it. The two arbitrators who constituted the majority were under no legal obligation to present the award to Mr. Devries, he having already withdrawn because he could not agree with the majority, and that act of courtesy of submitting it to him certainly cannot invalidate it. It was agreed in the submission "that the majority decision shall be the unanimous decision," and hence two had the power to make the award if the three could not agree, and no one of them could defeat it by his withdrawal. All the testimony that the majority deemed relevant and proper was fairly and fully considered by the three, and the award cannot be set aside because it was signed by the two, in the absence of the third, who had declined to act.

So far as the objection that the for Messrs. Tregallas and Biedler one occasion called before Messrs. and Supplee, a sufficient answer is that it occurred before Mr. Conklin appointed. But it would be carrying niceties to an extreme to say it would have invalidated the award if it appeared before the three, in the absence of the other counsel, without alleging that some injury was or might have been done. Mr. Arnold was present as a countant to sustain the claim of the Witz, and Mr. Supplee suggested might be well to have Mr. Rose, co-counsel for Messrs. Tregallas and Biedler, present, he could explain some matters that Mr. Arnold did not seem to be able to explain to the satisfaction of the arbitrators. To this Mr. Devries consented, and we see that act of the arbitrators that would have been fatal to the award.

This brings us to the consideration of the questions whether the arbitrators exceeded their powers by passing on matters not submitted to them, or failed to consider matters that were so submitted. The first clause of submission begin, "Desiring a speedy, equitable, and just settlement of our partnership differences, we, the members of the late firm of Witz & Co., agree to submit said differences to arbitration; further agree to submit all papers, documents pertaining to the partnership of said Witz, Biedler & Co., to the arbitrators for the said arbitration." What the differences were are not disclosed on the face of the agreement, and we must therefore resort to extrinsic evidence to ascertain them. The large preponderance of testimony is that the differences existing were those submitted on by the arbitrators in the award. If there could be any question about this, it would seem to be conclusively settled by the written arguments submitted by the counsel for the respective parties. The counsel for the appellants was taken up in his effort to sustain the award on the face of the agreement, which the assets should be distributed to while Messrs. Biedler and Tregallas were not bound by another principle which was stated by the arbitrators. He then discussed the Bridener defalcation before the dissolution and under a separate head the defalcation during the liquidation, and concluding giving his views in brief as to the propriety of the liquidation. Thus we see the questions passed on by the arbitrators were those argued before them. There was nothing on the face of the award to suggest that any matters were passed upon which had not been submitted, unless, possibly, the Bridener defalcation after the dissolution of the firm. But when we understand what that was, and find that it was submitted before the arbitrators by the representative of all the parties, we can see no reason

arbitrators could not properly pass up it in the settlement of the partnership. It was contended by the appellants that the liquidating partners had been diligent as to this fund and that, inasmuch as they mingled it with the money of the firm (of which Mr. Tregallas was not a member) to which Bridener had access, they were responsible. It was a question which properly arose in connection with the distribution of the assets of the late firm having been received by the defendants as part of the fund. We therefore cannot say it was included in the submission. We have been able to discover, from the evidence, wherein the arbitrators failed to pass upon the question which had been submitted to them. It is true that there were some matters of detail as to the distribution, etc., argued before them which are not mentioned in the award, but they are necessarily embraced in what was determined. In reaching a conclusion as to what proportions the assets the former partners were respectively entitled to, the arbitrators probably took into consideration all the evidence submitted to them, and the theories presented by the respective parties, including the questions as to how far the course of dealing between the partners changed the rights of the articles of partnership in reference to interest on the capital invested, the accounts of the partners with the firm, and other relevant matters. The burden of proof was on the appellants to show that the award was not coextensive with the submission (Morse, Arb. 363), and they have utterly failed to satisfy us of this, or that the arbitrators exceeded their powers.

Then, again, it is contended that the award was not certain and final, and that an account should have been taken, and the sum paid by each partner ascertained. The differences between the partners that were to be arbitrated were not as to the amounts received by them, or what the assets of the firm were, but as to the proportions they were respectively entitled to receive. A considerable part of the assets of the firm had not been collected. It was not possible to determine definitely how much could be collected, or when the collections could be made. The liquidating partners were still collecting when the arbitration was going on, and even after the award was made. It was, therefore, impossible to name in dollars and cents the amount each partner was entitled to, and the only method that could be adopted was to determine the proportion of the assets that each partner was to receive, which was done by the award. That being done, the rest is simply an arithmetical calculation, which did not require arbitrators to make, and which they were not asked to do.

"If the arbitrators give the rule for calculating the amount of money to be paid, without stating the results of such calculations, the award is sufficiently certain, ac-

ording to the general rule, 'Id certum est quod certum reddi potest.'" Russ. Arb. 297; Morse, Arb. 422; Strong v. Strong, 9 Cush. 566. And what we have said in reference to the receipts is applicable to the losses charged off or to be charged off, and to the expenses of liquidation. The proportions being established, the rest is simple, and wholly ministerial, not calling for the exercise of any judgment on the part of the arbitrators. If, under the circumstances, they had attempted to name the sum due to or by each partner, the award might possibly have been liable to impeachment, as being beyond the submission.

It was also contended that the arbitrators were mistaken, both as to the law and the facts. There is nothing on the face of the award to indicate that any mistake of law was made, as there should be to avoid an award on that ground. Goldsmith v. Tilly, 1 Har. & J. 361; Heult v. State, 6 Har. & J. 95; Malcolm v. Hall, 9 Gill, 177. But it was conceded before the arbitrators that the business of the firm had not been conducted according to the articles of copartnership, and the counsel for all the parties contended that the departure from the terms of those articles, with the knowledge and acquiescence of all the parties, had been such as to alter them as effectually as if such alteration had been agreed to in writing. As was said by the counsel for the appellants in his argument before the arbitrators: "Such a practice of conducting business will not only be effectual to change or annul an express provision of the partnership agreement inconsistent with the custom, but will also be effectual to add new provisions to the agreement." The general principle contended for in that argument is undoubtedly correct; and, if it were not, it is difficult to see how the appellants can question it in this proceeding, as they and all the other parties undoubtedly submitted that question of law to the arbitrators, and hence their decision was final, there being no error of law apparent on the face of the award. 1 Am. & Eng. Enc. Law, 675, 676; Morse, Arb. 293, 304. It is evident that there had been modifications of the articles of partnership, and the arbitrators were called on to determine what they were. It is well settled, in this state, as well as elsewhere, that the decisions of arbitrators on questions of fact are generally final and conclusive, when there is no imputation on their conduct. Cromwell v. Owings, 6 Har. & J. 10; State v. Stewart, 12 Gill & J. 456; Ebert v. Ebert, 5 Md. 353; Morse, Arb. 316. Courts of equity may sometimes grant relief for palpable errors in awards, such as an apparent mistake in calculation, or something of that kind; but, where the facts that have been submitted are such as may be determined differently by fair-minded and honest people, the conclusions of those selected for the purpose are final, and not subject to

review by some other tribunal. The fact that the accountants produced by the appellants may think the arbitrators erred does not authorize us to interfere with the award. The parties selected the arbitrators, not the accountants, to pass on these questions, about which the partners themselves, as well as accountants, differed. It was said, in 5 Md. 359: "A more liberal and reasonable interpretation is now adopted by the courts than formerly existed as to awards. Every reasonable intentment will be made in their favor, and a construction given to them that will support them, if possible, without violating the rules adopted for the construction of instruments. It will be intended that the arbitrators have not exceeded their powers; and all matters have been decided by the arbitrators, unless the contrary shall appear on the face of the award; that it is certain, final, and legal." Applying those principles to this case, we have no hesitancy in sustaining this award, and must confirm the decree of the court below. Decree affirmed, and cause remanded, with costs to the appellee.

CHEW v. GLENN et al.

(Court of Appeals of Maryland. Jan. 9, 1896.)

PLEADING—NUMBERING PARAGRAPHS—MOTION—BILL—MULTIFARIOUSNESS—DEMURRER.

1. The proper method in which to take advantage of failure to number paragraphs of a bill in equity, as required by the Code (Pub. Gen. Laws, art. 16, §§ 131-133) is by motion in the nature of a *re ceptiatur*, and not by demurrer.

2. A bill which alleges that the subject-matter of the controversy arose out of senior defendant's failure to pay complainant his share of the profits arising from the negotiation of certain mortgage loans on real estate, and that part of the lands from which complainant was entitled to derive profits had vested in junior defendant, whose relation to the property was that of a trustee, entirely subsidiary to senior defendant, states a cause of action, and is not multifarious.

Appeal from circuit court, Prince George county, in equity.

Bill by Richard B. B. Chew against John Glenn and John Glenn, Jr., to recover undivided profits alleged to be due by reason of the negotiation of certain mortgages and sales thereunder. From a decree dismissing the bill, complainant appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BRISCOE, and ROBERTS, JJ.

R. B. B. Chew, in pro. per. George G. Carey, for appellees.

ROBERTS, J. This appeal is taken from an order of the circuit court of Prince George county, in equity, dismissing the bill of complaint of the appellant. The facts are that, on January 23, 1895, the appellant filed in the court below his bill of complaint against the appellees, in which he alleges: That about

15 years ago he negotiated loans on mortgages of real estate situate in said county and entered into an agreement with John Glenn and Edmund G. Kelly, copartners in the city of Baltimore as John Glenn & Co., and doing business as real-estate agents. This agreement was, in substance, that the appellant would examine the title to such property as he might offer to said Glenn & Co. and furnish certificates of title to the said firm would supply the funds requisite for the consummation of said loans, and if, upon examination by the said firm, or one of them, it was found satisfactory, then one-half of the commission,—to wit, 2 per cent. of the amount of the said loans,—and \$25 for each certificate of title, were to be paid to the appellant; and it was further agreed that in the event of foreclosure proceedings in any case where money was thus loaned, the appellant would, as counsel, represent the said firm at Upper Marlboro, the county seat of said county, in such proceedings, and receive commissions for making sale of the foreclosed property should be divided equally between said Glenn & Co. and the appellant. That, in pursuance of said agreement, the appellant from time to time offered to said Glenn & Co. various properties, and they accepted the same, and invested thereon large sums of money, and divided with him the commissions for such loans, and paid to him the certificates of abstracts of titles for the same. That said loans were, in certain instances named, permitted to remain in force for long periods, and in consequence of depreciation which affected all real estate values in said county, it became necessary to foreclose certain mortgage loans, whereupon the appellant had negotiated for Glenn & Co. properties which were sold, and the commissions on such sales were received by John Glenn, who has failed and refused to account to the appellant for his share of such commissions, notwithstanding he had performed his part of said contract. The appellant then proceeds to enumerate in detail the alleged instances in which the appellees, John Glenn and John Glenn, Jr., conspired with the appellant in much the same manner as hereinbefore stated. It will not, therefore, be necessary, for the purposes of this opinion, to set out in this opinion any further statement of the facts contained in this bill, except in so far as John Glenn, Jr., is connected with them. It appears that, in 1892, 20 acres of the Gwyn property were sold, and at the instance of John Glenn, Jr., trustee, the appellant filed excepted the ratification of the sale. It is alleged that the Gwyn property had become vested in John Glenn, Jr., as trustee, through the means of certain equity proceedings, and that this property was a part of the land involved in the controversy arising out of the agreement, and from which the appellant was entitled to derive certain profits. That said Glenn, Jr.'s, relation to the property

only subsidiary to that of Glenn, Sr. Appellee John Glenn interposed a demurrer to the bill in the record of this appeal, assigned as grounds therefor (1) that the plaintiff has not stated in his bill such a case as entitles him to any relief in equity against this defendant; (2) that said bill is multifarious; (3) that said bill is in places unintelligible, and that it is not divided into paragraphs throughout, and does not, therefore, conform with rules 13-15 of the general rules for the regulation of the pleading and practice of the courts of equity, as embodied in article 16, §§ 131-133, of the Code of Public General Laws of the State of Maryland. In considering these grounds, we will take them in their inverse order, as a more convenient method of treatment. It is undoubtedly true, to a certain extent, that in some respects the bill is at times difficult to comprehend, but with careful scrutiny its meaning can be ascertained. We do not, however, concur in the criticism that the manner in which the paragraphs are numbered constitutes ground of demurrer. While the rules regulating pleading and practice in courts of equity should be so construed as to exact a reasonable compliance with their requirements, as conforming to a better practice in assisting the profession in making intelligent consideration to equity proceedings, by securing clearness and brevity of statement, where the pleadings are often lengthy, and by no means always lucid and free from doubtful construction, yet we do not feel justified in sustaining this demurrer on the ground that where, as in this case, the paragraphs of the bill are in two instances numbered, and more than one subject-matter has been injected into a single paragraph, we think the proper method of taking advantage of a defect of this nature is by motion in the nature of a *receptulatur*, and not by demurrer.

The second ground of demurrer, that the bill is multifarious, is not, we think, well founded. When is a bill to be considered multifarious? To give an answer to this inquiry, universally applicable, is, upon the authorities, utterly impossible. Each case must be governed by its own circumstances, and as these are very diversified, the court must exercise a sound discretion on the subject. *Gaines v. Chew*, 2 How. 619. The court, in *Wales v. Newbould*, 9 Mich. 45, pertinently said: "When a bill is multifarious, it is so for the reason either because of a misjoinder of parties, complainants or defendants, or a misjoinder of distinct and separate matters of equitable cognizance between the same parties of so dissimilar a character as to render it unfit that they should be litigated in the same suit." Applying these principles to the case at bar, we find but little difficulty in declaring the bill exempt from the charge of being multifarious. The subject-matter of the controversy arose out of the alleged failure of

John Glenn & Co. to carry out in good faith their undertaking to pay the appellant his share of the profits arising out of their agreement with him for the negotiation of certain mortgage loans on real estate in Prince George county, and his share of the commissions on sales under said mortgages, etc. The relation of John Glenn, Jr., to this proceeding is this: While he was not summoned and has not appeared, nor has he demurred to the bill, yet, at the hearing in this court, the solicitors for the respective parties stated that both Glenn, Sr., and Jr., should be considered parties to the cause, and be treated as such by this court. His connection with the property referred to in the agreement between the appellant and John Glenn & Co. has been sufficiently explained as to require no further consideration. In what we have said in disposing of the second and third assignments under the demurrer, we have sufficiently indicated our views in the first and general cause of demurrer. In conclusion, we are of opinion that the appellant is entitled to relief, and the demurrer must accordingly be overruled, and the decree below on the demurrer, dismissing the bill, be reversed. Decree reversed, with costs, and cause remanded for further proceedings.

OLIVET v. WHITWORTH et al.

(Court of Appeals of Maryland. Jan. 9, 1896.)

CONSTRUCTION OF INSTRUMENT—EXECUTION OF POWER.

1. The punctuation of an instrument may be considered, in order to solve an ambiguity which was not created by the punctuation.

2. Deceased, a short time before her marriage, with the consent of her intended husband, made a deed of trust by which she directed part of her property, held by her guardian, to be paid over to the trustee named in the deed, upon her arrival at the age of 21, to be held in trust for her for life, and to be delivered after her death to such person as deceased might, "by last will and testament, or by instrument in the nature of a will executed in the presence of two witnesses, limit, nominate and appoint." Deceased died in less than a year after her marriage, leaving a holographic will, valid by the law of her domicile. *Held*, that the requirement of two witnesses was intended to apply only to an "instrument in the nature of a will," and not to such a valid will and testament.

Appeal from circuit court of Baltimore city.

Proceeding to determine the distribution of the trust estate of Aimée Page Pleasants (now Olivet). From a decree in favor of John Whitworth and others, Alfred Etienne Olivet appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, and BOYD, JJ.

R. M. McSherry, Edgar H. Gans, and B. H. Haman, for appellant. C. Ross Mace and Wm. S. Thomas, for appellees.

BOYD, J. From the record in this case, we find that William Charles Whitworth

and his wife, Sophia Matilda Whitworth, died in September, 1873, in London, England, leaving surviving them five children. The youngest of these, Sophia Matilda, who was about two years of age when her parents died, was taken charge of by an uncle, who shortly after placed her in an orphan asylum in London. Not long afterwards, Mrs. Ann P. Pleasants, an American lady, who was traveling abroad, adopted her. She assumed the name of Aimée Page Pleasants, and lived with Mrs. Pleasants until the death of the latter, who left her a very handsome estate by her last will and testament, in which she appointed George H. Fisher and Ludovic C. Cleeman, of Philadelphia, Pa., executors and trustees of her estate, and guardian of this child, who was then about 16 years of age. Mr. Cleeman brought her to this country, where she resided for several years, and then returned to Geneva, Switzerland, where she subsequently engaged herself to be married to Mr. Olivet. They were married in June, 1892, in the city of Washington, D. C. On the 8th day of that month, Miss Pleasants executed, in the city of Baltimore, a deed of trust to the Safe-Deposit & Trust Company of Baltimore, with the knowledge and approbation of Mr. Olivet (as was evidenced by his uniting in the instrument), by which she directed \$50,000 of her property (which was still held by Mr. Cleeman, as guardian and trustee under the will of Mrs. Pleasants) to be paid over and delivered to the Safe-Deposit & Trust Company of Baltimore upon her arrival at the age of 21 years, and, as soon as it was freed from the trust created by the will of Mrs. Pleasants, to be held by said company in trust for her during her life, and after providing for her receipt of the income from the property so held in trust, and for changes of the investments, etc., made the following provision: "And from and after the death of the said Aimée Page Pleasants to convey, assign and deliver the same to such person or persons, as the said Aimée may by last will and testament, or by instrument in the nature of a will executed in the presence of two witnesses, limit, nominate and appoint, her coverture notwithstanding. And, finally, in case she shall die without executing a will or instrument of writing in the nature of a will as aforesaid, to convey and assign the same to the heirs at law and next of kin of the said Aimée Page Pleasants, exclusive of any marital rights." On the 9th day of January, 1893,* she made a holographic will at Geneva, by which she made her husband her sole legatee of everything, in case she should die without posterity; and on the 12th day of February, 1893, she made a holographic codicil, by which she confirmed her will, and, after making pecuniary legacies amounting to 25,000 francs, stated: "I desire that all my fortune, as well that placed in the Safe-Deposit and Trust Company, Baltimore, Maryland, U. S. of America, as the rest thereof,

be handed over at my death to my husband, Alfred Olivet, my sole legatee." It is satisfactorily proven that the will and codicil were made according to the forms required by the laws of the places where they were executed; and therefore, under section 33 of article 93 of the Code of Public General Laws of this state, they are valid, and sufficient to pass the title to her property in the hands of the Safe-Deposit & Trust Company of Baltimore. Moreover, provided the power reserved in the deed of trust above quoted was legally executed. The question, therefore, to be determined by us, is whether that power reserved in her will to be "executed in the presence of two witnesses"; the appellees, as heirs of kin, contending that it did, while the appellant claims that this clause only amounts to an "instrument in the nature of a will."

In considering this question, it is proper to constantly bear in mind the fact that the power of disposition was not given by a testament, but was reserved in the deed of trust executed by the testatrix herself. Had she not executed the deed, her right to dispose of the property in question by this will and codicil would have been in doubt, and free from doubt. The question presented is so narrow that, if punctuation is entirely disregarded, the language used is capable of being interpreted to meet the view of either side. As was well said in argument, if it be read aloud, different meanings may be given it by the tone of the voice, or the intonation of the several clauses. If the words "or by instrument in the nature of a will" be used parenthetically, then the phrase "executed in the presence of two witnesses" would apply to "last will and testament," as well as to "instrument in the nature of a will," while if we pause after reading, "last will and testament," and then read, "or by instrument in the nature of a will executed in the presence of two witnesses," as one unbroken sentence, a proper grammatical construction would confine the limitation to the instrument in the nature of a will." The constructions used being so nearly poised as to leave their meaning thus affected, it is manifestly proper to so construe them as to give effect to the will, rather than to make it inoperative so far as this property is concerned, and can be done without running counter to the natural meaning, their grammatical construction, or to controlling legal authorities. Punctuation alone is not necessarily decisive must be conceded, as it is well known that draftsmen of legal instruments frequently ignore all the rules on that subject taught by grammarians and rhetoricians attach no importance. The most learned and accurate lawyers oftentimes pay but little attention to it, in their preparation of legal documents. This may be because the copyist or the amanuensis to whom the paper is dictated has not followed the directions or intonations of the testator, or it may be because it is known that in such cases are few that are determined by punctuation, or for other reasons. But when

ambiguity which may be wholly or partially involved by it, provided the punctuation itself not created the ambiguity, it can be considered. *Weatherly v. Mister*, 39 Md. 629; *Black v. Herring*, 79 Md. 149, 28 Atl. 1063. It can never be permitted to overturn what seems the plain meaning of the whole instrument. If we make any use of it in this case, it must inure to the advantage of the appellant. There is in the original deed, which was brought before us by agreement, a comma after "last will and testament," and also after the word "witnesses." So that, if we follow the punctuation, the phrase, "executed in the presence of two witnesses," does not properly apply to "last will and testament." Though punctuation alone is not a safe standard by which to interpret a writing, yet, where there is an ambiguity, it may shed light on the meaning of the language to be interpreted, and in this case we must ignore it, if we adopt the construction contended for on behalf of the appellees. If Miss Pleasants intended to reserve the right to dispose of this property either by a duly-executed will, or by an instrument in the nature of a will, provided she executed the latter in the presence of two witnesses, the draftsman of the deed must use language that was so punctuated as to be capable of that meaning. Therefore, without relying on the position of these commas as at all conclusive, in our search for the intention of the donor of this power, we can at least borrow from them such light as they are permitted under the law to give.

In determining whether the mode of execution prescribed by the deed is applicable to "last will and testament," as well as to an instrument in the nature of a will," we will consider those terms for the purpose of ascertaining whether they are synonymous, or literally the same. To say that they are "of the same nature," as argued by the appellees, is but to do little more than to repeat the language used in the power, as one is a "will," and the other an "instrument in the nature of a will." But are they such equivalent terms as to make the mode prescribed for executing the one necessarily applicable to the other? It is true that both are testamentary powers, taking effect only after the death of the maker; and there are undoubtedly cases in which instruments have been called wills, yet have not had testamentary forms. For example, in *Carey v. Dennis*, 13 Md. 1, the deed was not intended to constitute any binding obligation on the obligor, or to confer any benefit on the obligees, or to have any effect until after the death of the obligor, were held to be evidences of debt, but in the nature of testamentary papers. The court quoted in *Justice Buller*, in *Habergham v. Vincent*, 12 Ves. Jr. 231, that "those cases have established that an instrument in any form, whether deed poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will."

But a will must be made by one having capacity to make it, and must be executed in one of the modes fixed by law; and many papers that were, prior to 1884, held, in this state, to be wills, for the purpose of passing personal property, would not now be valid, as the act of the assembly passed in that year required all wills executed in this state to be attested and subscribed in the presence of the testator by two or more credible witnesses, while an "instrument in the nature of a will," if executed in pursuance of a valid power, may be made by one not having testamentary capacity, and in a different form from that prescribed by the laws governing the execution of wills, and yet have the effect of a will. The two instruments may accomplish the same results, but may not be in the same form. It is the mode of execution, and not the effect of these instruments, we are now considering.

In *Schley v. McCeney*, 36 Md. 275, Judge Alvey quoted from *Chance on Powers*, where it is said: "Where a party directs a power to be executed by will, simply, it may be a reasonable presumption that he means such a will as would be requisite to dispose of the like species of property, but when he prescribes certain formalities the presumption ceases. It seems fair, then, to conclude that all which he means is a testamentary act, attended with the formalities prescribed by himself." In that case the distinction was clearly recognized when the court said: "Here there are two modes prescribed,—the one to be by will duly executed according to the law, which fairly means the general law regulating the execution of wills, the disability of coverture of the donee being, in this respect, dispensed with; the other, by a testamentary paper in the nature of a will, to be executed in the presence of two witnesses, without anything more." In *Southby v. Stonehouse*, 2 Ves. Sr. 610, Lord Chancellor Hardwicke said that a writing in the nature of a will, by a feme covert, in virtue of the power reserved to her in two deeds of settlement, was not a proper will, although it had the effect of a will to three intents: The words have the same liberal construction; it is ambulatory until the testator's death, whom appointee must survive; and can only take effect from the testator's death. See, also, 2 *Perry*, Trusts, 511b. When a donor gives the donee power to dispose of property by will, there is no necessity to prescribe the ceremonies and formalities by which it is to be executed, for the law has already done that; but, when the power is to be exercised by an "instrument in the nature of a will," then he should determine the mode of its execution, and, having done so, it must be complied with.

In this case, if the grantor had only reserved the power of disposing of this property by her "last will and testament," the formalities by which that could be done were settled by law. If she had then executed her will in this state, it was required to be

attested and subscribed in her presence by two or more credible witnesses, or else, in the language of the statute, "be utterly void and of none effect." Or she could, under section 319 of article 93 of our Code, execute it out of the state, "according to the forms required by the law of the place where the same was made, or by the law of the place where such person was residing when the same was made." But in order to dispose of the property by some instrument that was to take effect after her death, though not technically a will, if she saw proper to do so, she reserved the additional power of disposition by "an instrument in the nature of a will." There is, then, a manifest distinction between a "will" and an "instrument in the nature of a will," especially as to the manner in which they may be executed, although the latter may operate as a will; and, to avoid an attempted execution of a power being declared invalid by reason of a defective execution of a will, it may be a wise precaution for the donor, who desires to give the donee power of disposition of the property to take effect at the latter's death, to supplement the power of disposition by "will" by "an instrument in the nature of a will." It is perfectly certain that the two instruments are not necessarily the same, and therefore it does not follow that, because Miss Pleasants fixed the mode of execution of an "instrument in the nature of a will," her will should necessarily be executed in the same way. Hence we do not think our interpretation of this deed can be aided by the contention of the appellees on that question, or that such contention can be maintained. So, when we come to determine whether the expression, "executed in the presence of two witnesses," is applicable to both, we are met with the fact that the punctuation, so far as it can be considered, points to the contrary, and the further fact that it is at least usual for the one instrument to be executed in the manner prescribed by law, and the other as determined by the creator of the power. If it be said that the donor has prescribed the method by which her will should be executed, if that instrument be adopted, and that if that be followed nothing more is required, then such an instrument would not be a technical will, if executed in Maryland, because our statute requires it to be attested and subscribed in the presence of the testator, and does not require it to be executed in the presence of witnesses. If it be conceded that a will executed in accordance with the requirements of the present Maryland laws applicable to wills made in this state would be a good execution of the power, then it must be admitted that there are alternative modes of executing the power provided for in the deed. It is true that both might be done, but, if the contention of the appellees be correct, it must follow that Miss Pleasants undertook to say how a will should be

executed. But when we remember she reserving to herself certain powers, and especially when we see from the evidence she was not 21 years of age, it is difficult to convince ourselves that she intended to say she could not dispose of her property by a will executed as prescribed by law, and that there must be superadded to those requirements a provision that she execute it in the presence of two witnesses. We can very safely assume, we think, that she was satisfied to let the law determine how her will should be executed. There is no intention manifested in the deed, contrary on the face of the instrument, to deem it to be much more in accord with the wishes of the party reserving a power of this kind, to construe it in her favor, as far as it can be done consistently with the authorities and binding decisions on the subject. The policy of our law has undergone marked changes in relation to the rights of married women, and the reasons for surrounding their acts with "the fetters of circumscribing powers of this kind," shown by some of the early cases, do not hold with equal force at this day. As was said by Judge Tuck in *Cooke v. Hubbard*, 11 Md. 505: "It cannot be maintained as a general proposition, universally true, that these settlements are intended to protect the wife's weakness against her husband's power, and her maintenance against his profligacy, * * * for many of them are made where the utmost confidence is reposed in the husband. * * * We are not to suppose that husbands will be constantly endeavoring to wrest their wives' property from them, and devote it to their own uses." It is undoubtedly true that money and wealth are too often the moving causes that lead to matrimonial alliances, but courts should not be too ready to believe, that settlements of this kind, prefaced by the statement "whereas a marriage is about to be solemnized between the parties hereto, of the first and second parts" (Miss Pleasants and Olivet), was intended by them, or effectuated by them, to indicate any want of confidence in the one by the other.

But in 1 Sugd. Powers (8th Ed.) 271 (7th Ed.) 271,—that learned author states this rule: "But where only one power is given, and it is authorized to be executed by different instruments, although the different modes required to execute it are not the same after each instrument, they will be construed both." The principal case relied on for this statement is *Dormer v. Thurland*, 2 F. & R. 506. There a power was given to A. that if he should die before his wife, without a will, to be executed "by his last will, or any other instrument purporting to be his last will, under his hand and seal, attested by three credible witnesses." A. executed his will according to the statute of frauds, but it was not sealed. Lord Chancellor King held

as a good exercise of the power, but the judges of the king's bench decided that it ought to have been sealed, but filed no opinion. The punctuation differs in that case from the one now before us, and the phrase, "any writing purporting to be his last will," as punctuated, is inserted parenthetically. In *Earl of Darlington v. Pulteney*, 1 P. 260, Lord Mansfield said that the case of *Dormer v. Thurland* goes a great way, and "Lord King was of opinion that it was a good execution of the power, because by it, and I own I should incline to that opinion." The case of *Ross v. Ewer*, 3 Atk. 156, was also relied on by Mr. Sugden. In that case a power belonging to the wife was, by settlement before marriage, vested in trustees, and they were to transfer one "moiety unto such persons or persons, and to and for such uses, intents and purposes, and in such manner as said Ann should, in and by her last will or testament in writing, or other writing, under her hand and seal, to be attested by two or more credible witnesses." Lord Mansfield held that the words, "under her hand and seal, to be attested by two or more credible witnesses," were referable to the will as well as to the other writing. He added that the words might be construed in either sense, but thought they would be much more strained than by his interpretation of them. His reasoning is not satisfactory, and he incorrectly stated, in relating to *Dormer v. Thurland*, that Lord Mansfield held that the seal to a will in that case could not be dispensed with. A report of the case shows that Lord King was of opinion otherwise, although he was afterwards reversed by the court of king's bench. But in this case, as well as the general rule stated by Mr. Sugden, undoubtedly goes further than is consistent with other authorities, beyond the contention of the appellees in this case; for the words "other writing," in *Ross v. Ewer*, and "different instrument," in *Sugden*, are broad enough to include acts *inter vivos* as well as wills and other testamentary papers. In *Doe v. Morgan*, 7 Term 303, where the power was to appoint "by will, or will, signed in the presence of three witnesses," Chief Justice Kenyon thought that appointment by deed would have been valid, though not executed in the presence of three witnesses. In *Moreton v. Lees*, cited by Mr. Sugden, the power was "by any deed, or deeds, writing or writings, to be by him signed, sealed, and executed, or by his will or testament in writing, to be by him signed, sealed, published, and declared in the presence of three or more credible witnesses." It was held that an execution by deed was valid, although not attested by three witnesses. Other cases might be cited but it was conceded by the appellees, and by the court below, that the rule should be restricted in its application to instruments of the same nature. In 1 Chance, Powers,

311, it is said: "It is impossible to lay down any general rule on the point. It is a mere question of construction, and every case of doubt must very much depend on its own circumstances, as the nature of the property and of the instrument, and the usage in like cases, etc. Sir E. Sugden's rule * * * [being the one above quoted] cannot be considered accurate." It is undoubtedly true that to follow, or be governed by, an arbitrary rule of that character, would, in a great measure, interfere with the proper construction of such instruments by the courts, while it is their duty to endeavor to ascertain the intent of the donor, and the meaning of the language used. "The intent of the donor of the power is the great principle which governs in such cases; * * * and we must ascertain that intent from the language used in the deed of settlement creating the estate and confirming the power." *Nevin v. Gillespie*, 56 Md. 327. The only American case that has been cited in argument on this question is that of *Shearman v. Hicks*, 14 Grat. 96. The power under consideration in that case is not exactly in the same language as the one before us, and, without adopting it, we prefer to base our decision on the reasons herein given by us. Although the case of *Schley v. McCeney*, *supra*, cannot be said to be exactly in point, yet it shows the tendency to construe such powers liberally, so as to sustain their execution. The power was to a married woman, and, although her will was not executed with all the formalities required at that time of those laboring under the disability of coverture, yet the court construed the power, "by will duly executed according to the mode now prescribed for the execution of wills, or in the mode which may be prescribed at the time of the execution of her will," to mean duly executed according to the general laws regulating the execution of wills, the disability of the coverture of the donee being dispensed with. Judge Alvey quoted from 4 Kent, Comm. 331, that "when there are several modes of executing a power, and no directions are given, the donee may select his mode; and the courts seldom require any formalities in the execution of the power, beyond those required by the strict letter of the power."

When a party has executed a deed of this character, and has reserved a power such as that before us, to be exercised by a "will," or an "instrument in the nature of a will," we think it should be construed to mean a will executed in accordance with law, unless there be other formalities prescribed in unambiguous language. Under the existing laws of this state, as well as those of her residence, Mrs. Olivet's coverture did not prohibit or interfere with her making a will as she could have done if she had been a feme sole. If any further protection or safeguards be needed or desired, other than what

the law prescribes, let them be unequivocally expressed. That is a safer rule than the one adopted by Mr. Sugden. Whatever doubt there may exist as to the interpretation of such powers should, under such circumstances as those in this case, be solved in favor of a valid execution of the power, when possible. In *Cooke v. Husbands*, supra, it was said, in speaking of a feme covert, when her powers were not such as they are now: "If the parties making the settlement intend to tie up the property in the wife's hands, they may use apt and proper limitations. * * * Therefore * * * a feme covert may act in reference to her separate estate as a feme sole, when the settlement contains no limitations on the subject, on the principle that the *jus disponendi* accompanies the property, unless restrained in terms, or by the manifest intention of the instrument." Without deeming it necessary to discuss the authorities cited on the question, or to decide how far the subsequent acts of Mrs. Olivet in making her will, etc., can be properly considered in our effort to ascertain her intention when she made the deed, it is gratifying to us to find from the record that our construction of this instrument is in accord with what she evidently thought it meant. If she had intended to restrict her right to dispose of the property by will to one executed in the presence of two witnesses, it is not reasonable to suppose she would have forgotten that important provision in so short a time, or that she would have so carefully placed this will and codicil in the custody of the notary for safe-keeping. There is not the slightest intimation that her husband exerted his powers, or attempted in any way to influence her in the step she took. Making a codicil by which she deprived him of part—although a small part—of her estate, which would have gone to him under her will, indicates that she was untrammelled by any improper influence, and was left to her own volition. Her disposition of her property, with the exception of the few legacies to others, to her husband, to whom she was devotedly attached, was more to be expected than to leave it to her brothers and sisters, from whom she had been separated since she was three years of age. The punctuation, the language employed in the deed, its grammatical construction, the circumstances under which it was executed, the subsequent acts of Mrs. Olivet, and the reasonableness of her conduct, all tend to show that her intention was to prescribe two modes of executing the power reserved,—the one to be by such a will as would be requisite to dispose of this property, and the other by an instrument in the nature of a will, to be executed in the presence of two witnesses. It follows from what we have said that the holographic will, including the codicil, of Mrs. Olivet, was a valid execution of the power contained in the deed of trust, and

that the decree of the court below reversed. Decree reversed, and costs mandated; the costs to be paid out of fund.

FARMERS' MUT. FIRE INS. CO. v. HILL v. SCHAEFFER.

(Court of Appeals of Maryland. Jan. 1898.)
FIRE INSURANCE—INCREASE OF RISK—PREMISES—QUESTION FOR JURY.

1. Where a fire policy provides for a certainment of the increase of risk due to the location of any engine on the premises, and requires the insured to pay additional premium for any increase of risk found, the location of an engine on the premises the day before a fire, not prevent recovery, where the insured, prior to its occurrence, notified the company, and he frequently used an engine on his premises, and offered to pay the additional premium, the company failed to act on the notice.

2. Where a policy provides that, if an engine be used on the premises, the company appoint a committee to ascertain the amount of increased risk, for which the insured is to pay an additional premium note, whether the engine increased the risk, whether the increased risk caused the loss, and whether the period between the giving of notice of the use of the engine by the insured and the day of the fire was a reasonable time within which the company should have appointed the committee, are questions for the jury.

Appeal from circuit court, Carroll county. Action by Charles Schaeffer against Farmers' Mutual Fire Insurance Company of Dug Hill, Carroll county, Md., on a fire policy. From a judgment for plaintiff. Defendant appeals. Affirmed.

Argued before ROBINSON, C. J., and AN, McSHERRY, FOWLER, BRISCOE, and BOYD, JJ.

Jas. A. C. Bond, Chas. T. Reifsnider, J. M. Reifsnider, for appellant. John Brooks, H. M. Clabaugh, and John W. Everts, for appellee.

BRYAN, J. This is the second case in this case. The opinion delivered in the first appeal was decided will be found in Md. 563, 31 Atl. 317. The appellant brought an action to recover the loss which was sustained by the destruction by fire of a mill and shed which belonged to the appellant. It was not controverted that the appellee's property had been insured by the appellee (defendant below), and it was admitted that he had sustained a loss by fire to the amount of \$1,500. The liability of the insurance company depended on the effect of the rights of the parties which resulted from the presence of a portable steam engine on the premises of the insured. The evidence showed that, on the day of the fire, this engine occupied a position between 50 and 60 feet from the bark mill of the plaintiff which was burned, and that it was used for the purpose of grinding bark, and that the plaintiff had about 18 months before the fire, had

habit of hiring such engines, and having a brought to his bark mill, and using a for this purpose, at intervals of a month or weeks. The only conditions of insurance referring to steam engines are the sixth and the seventeenth. It was decided he former appeal that the sixteenth condition had no application to this case. The nineteenth is as follows: "That in the event an engine being stationed on the premises, in close proximity to the buildings insured by this company, then, in that event, president of the company shall appoint a committee of three discreet men, who shall members of this company, who shall proceed forthwith to said property, to make a fair and impartial examination, in order to ascertain the amount of increased risk on account of said engine; and if they shall find that the risk is increased thereby, then they shall take an additional premium note for the increase, upon which the assured shall pay 10 per centum at the time of the execution, and said note to be subject to the same assessments as other notes of said company, to meet losses by fire happening to property insured by this company." The evidence in the record relating to the engine varies from that presented to us on the former appeal. It is then stated that, 10 days before the fire occurred, the plaintiff gave the general agent of the insurance company notice that he was not using the steam engine on his premises. The evidence in this record is to the effect that the engine was brought there on the 10th of February, the day before the fire. The plaintiff testified as follows in regard to notice to the general agent: "He had a conversation with Mr. Joseph Shaeffer on the 10th day of February, 1892, the day after his fire, in which he told him that he did not want any trouble if he met with a loss accident; told him, on the same day, that he used an engine about once a month to grind bark at his bark mill. On the first day Shaeffer said that 'he did not know,' and, on the next day, 'he [said witness] was a manufacturer.' Witness told Shaeffer on same day that he wanted a permit, and wanted to be made safe, and was willing to do anything to be made safe in case of an accident or loss, and was willing to pay anything, and did not want any trouble if he met with a loss." Opposing this testimony to be found true by the jury, the question is whether the plaintiff's right of recovery is defeated. It will be seen that stationing "an engine in close proximity to the buildings insured" is not made a cause of forfeiture of the policy. It gives the insurance company the right to make a fair and impartial examination for the purpose of ascertaining whether the risk of loss by fire is increased, and the right to require an additional premium note in case such increase is found to exist. Now, according to his testimony, the plaintiff gave the insurance company a full opportunity to exercise

its rights. He informed its general agent that he was in the habit of using an engine, and that he was willing to do anything to be made safe, and to pay anything, and that he did not want any trouble if he met with a loss. There was a proffer to pay what was necessary to protect his rights under the policy. It was no fault of his that his offer was not accepted. He might reasonably infer, from the remarks of the general agent that "he did not know," and that "he [the plaintiff] was a manufacturer," that the insurance company did not intend to exact an additional premium. At all events, they did not exact one, when they had a full opportunity to do so. To be sure, the engine was not on the plaintiff's premises at the time of the notice. But the general agent was informed that it was frequently and habitually used there. This conversation took place 10 days before the fire. Under the circumstances which we have detailed, we think that it would be unjust to the plaintiff to make an objection to the use of the engine, for the first time, after the loss by fire had occurred, and then to insist upon his failure to give a note for an additional premium as a cause of forfeiture.

The plaintiff's second prayer fairly left to the jury the essential questions in the case. They were required to find whether the plaintiff gave to the general agent of the insurance company the notice above mentioned, and whether, after such notice, a sufficient time elapsed before the fire to enable the president of the insurance company to ascertain, through the appropriate committee, the amount of increased risk, if any, caused by the engine, and also to enable the plaintiff to give an additional premium note for the same, if it was found to exist. If these facts were found, the prayer asserted, in effect, that the policy of insurance was not vacated, even if the risk were increased by the use of the engine, and if the fire were caused, in whole or in part, by such use. We think that the court properly granted this prayer. The jury found the facts in favor of the plaintiff, and their finding settled the material questions in the case. Judgment affirmed.

PETERBOROUGH SAV. BANK v.
HARTSHORN et al.

(Supreme Court of New Hampshire. Hillsboro.
March 11, 1892.)

CONTRACT—TESTAMENTARY SALE—ASSIGNMENT—
EQUITY—ASSIGNEE FOR CREDITORS.

1. A provision in a deed stating that the grantee is to have all the grantor's personal estate at his death, after payment of all past debts and charges, if sustained by a valuable consideration, is not against public policy, and will be enforced.

2. One who will become the owner of a bank deposit at the death of the depositor may give a valid order against his interest therein to secure an indebtedness; and, on the depositor's death, such order will be enforced in equity,

whether sufficient to operate as a legal assignment or not.

3. Where all parties in interest have interpleaded in a court of equity, the rights of each will be determined and protected, regardless of whether he was properly made a plaintiff or defendant.

4. An assignee for creditors takes only the rights and interests of his assignor.

Bill of interpleader by the Peterborough Savings Bank against W. H. Barnes, administrator of the estate of Daniel Pratt, David E. Proctor, assignee in insolvency of the estate of John W. Keyes, and Ellen M. Hartshorn. Facts agreed: The bank holds a deposit in the name of Pratt, which it offers to bring into court, or to pay as the court may decree. In 1871 Pratt gave Keyes a deed of certain land, containing the following words after the description: "And said John W. Keyes is to have, for the above consideration, all my personal estate, at my decease, after the payment of my just debts and personal charges." The deed was subscribed in the grantor's presence by three credible witnesses. If it can take effect as a will, it is to be considered as duly proved and allowed. Keyes mortgaged to Pratt the same land, with a condition for Pratt's support, which condition has been duly performed. February 19, 1884, Keyes gave Hartshorn his promissory note for \$394.39, payable on demand, with interest annually. June 13, 1884, he gave her a mortgage upon the above-mentioned land to secure said note; and December 4, 1889, being then insolvent, he gave her an order upon the bank to pay to her or order \$600 "at the decease of Daniel Pratt, who has money deposited in said Peterborough Savings Bank which comes into my possession at his decease." Hartshorn shortly afterwards notified the bank of the order, and of her claim. Pratt died January 12, 1890. Keyes made an assignment in insolvency March 12, 1890, and Proctor is his assignee. Hartshorn proved her claim upon the note, but subsequently applied for leave to withdraw her proof, upon the ground that she had made a mistake in not disclosing her security, and also that she had supposed she must prove her claim, whether secured or not. Such leave was granted, after notice and hearing. There are no claims against Pratt's estate, except the claim of Proctor, as assignee of Keyes, under the above-stated clause of the deed.

F. G. Clarke, for the bank. George B. French, for Hartshorn. David Cross, for Proctor and Barnes.

BLODGETT, J. The contract between Pratt and Keyes as to the personal property was made bona fide, for a valuable consideration, did not contravene public policy, might be performed within a year, and was valid.

Whatever may have been its operation as to title and ownership, it gave Keyes an equitable right and interest in the property, at least, and that was sufficient to enable him specifically to enforce the contract against Pratt's administrator. The administrator transferred a portion of his right to the bank, to secure the payment of his debt to her, as he might properly do, — 2 Story, Eq. Jur. (12th Ed.) § 1040c. In *worth v. Scott*, 41 N. H. 456, 460, where the plaintiff brought by him against the administrator a specific performance, she would have been a necessary party, as plaintiff or defendant, in either case her right would be affected. A decree providing that so much of the deposit, not exceeding \$600, be paid to her, might be necessary to satisfy her claim. It might be done in that proceeding in equity. In this. It is immaterial that the plaintiff, rather than Keyes, and Hartshorn is made a defendant, rather than as a plaintiff. *Cox v. Leviston*, 63 N. H. 287. All the parties in interest have been pleaded, and the rights of all can be ascertained and determined. "When jurisdiction has once rightfully attached, it is made effectual for the purpose of complete relief." *Eastman v. Savings Bank*, 421.

It is also immaterial whether the contract operated as a legal assignment or not, so long as enough that it gave Hartshorn an equitable right to the money. 2 Story, Eq. Jur. (12th Ed.) § 1040c. Being good as against Pratt, it is, in the absence of fraud, equitable against his assignee. Assignees in insolvency take only such rights and interests as the bankrupt had and could himself assert at the time of bankruptcy; they are affected with all the equities that affect a bankrupt himself, if he was insolvent at those interests. *Kittredge v. V. V.*, 509, 532. Her rights against the bank are the same as against the other creditors to the extent of her interest, she is entitled to be subrogated to the rights of both; and it would be mere useless circuitry to decree that the money of which she is certainly the owner should pass to her through the hands of the administrator. It is therefore decreed that the plaintiff pay to the defendant Hartshorn, from the deposit on its books in the name of Daniel Pratt, a sum of \$600; that the remainder of the deposit be paid to the defendant administrator, and that whatever balance may remain in the hands after the payment of debts and expenses of administration be paid to the defendant assignee.

SMITH, J., did not sit. The other side prevailed.

PERRY v. DWELLING HOUSE INS. CO.

Supreme Court of New Hampshire. Coos.
July 20, 1892.)

PLACE OF CONTRACT—RIGHTS OF PARTY UNDER POLICY AND STATUTE—WAIVER OF PROOF OF LOSS—PARTY PLAINTIFF.

Plaintiff made application to agents of defendant in New Hampshire for insurance, and heard nothing from it until the agents delivered him a policy executed by defendant, and paid the premium. Held, that the contract of insurance was made at the time and place of delivery of the policy, and the rights of the parties thereunder were governed by the laws of New Hampshire.

Laws 1879, c. 13, § 1, having made Gen. Laws, c. 172, a part of every contract of insurance, all agreements and stipulations in an application or policy which contravene the provisions of said Gen. Laws, c. 172, are void, and the rights of the parties are governed by the provisions of the same.

Under Gen. Laws, c. 172, providing that any representation of the title or interest of the insured in the property insured should avoid the policy unless material or fraudulent, and that any company issuing a policy on an application prepared by a third person should be affected by his knowledge of any facts as though stated in the application, the existence of a mortgage on insured property, which was stated by the agents taking the application, but not therein, will not avoid the policy.

The statements or conduct of an adjuster of an insurance company may operate as a waiver of the making of formal proof of loss at the time fixed in the policy, though contrary to the terms of the policy.

An action on an insurance policy is proper though in the name of the insured property, though the policy is assigned to a mortgagee to the extent of her interest.

Action by George E. Perry against the Dwelling House Insurance Company. Defendant moves to set aside a general verdict in favor of the plaintiff, returned, by direction of the court, on special findings. Judgment on the motion denied.

Complaint by George E. Perry against the Dwelling House Insurance Company, upon a policy of insurance. Trial by jury. Verdict in favor of the plaintiff. The home office of the defendant was in Boston, Mass. George M. Stevens & Son, insurance agents at Lancaster, Mass., prepared the application and sent it to the defendant's home office, from which it subsequently received the policy, delivered it to the plaintiff, and collected the premium. The application disclosed a mortgage on the property of Mary Simpson, and the policy was issued for the payment of the loss, if any, to the mortgagee. There was a second mortgage, in favor of James Berry, which was not noted in the application or in the policy; but there was evidence that the plaintiff, when he made the application, informed Stevens & Son that Berry had a mortgage on the property and had told him to pay no attention to it, and the defendant made no claim that the plaintiff failed to have the existence of the Berry mortgage noted in the application or the policy by reason of fraud. Stevens & Son called out the application. The holder of the Berry mortgage testified that she did not

propose to claim any of the insurance money. The policy provided that the company should not be liable to pay more than the actual cash value of the interest of the assured, after deducting the amount of incumbrances, unless it was made specifically payable, in whole or in part, to a mortgagee or incumbrancer, and, in the latter case, the amount of the incumbrance should not be deducted. It further provided that it should be absolutely void if there was any lien whatever except as stated in writing therein. It also provided that a claimant should forthwith give written notice of a loss, and within 30 days furnish proofs thereof, and specified what such proofs should contain. There was also a provision that no act or omission of the defendant, its officers, or agents, should be a waiver of strict compliance with the terms and conditions of the policy, or an extension of time for compliance, unless in express terms and in writing, signed by the president or secretary. The plaintiff notified Stevens & Son of the loss on the day after it occurred, and they at once notified the defendant. Some days later, one Melchert, the defendant's superintendent of agencies and adjuster, called on the plaintiff, by the defendant's direction, to investigate the loss. The plaintiff gave Melchert a list of the articles of personal property lost, so far as he could remember them, with the value of each article, according to his judgment. There was no serious controversy between them about items of loss or damage. The plaintiff testified that Melchert said he would carry the list to the defendant, and presumed that everything would be all right, but could not say certainly, as he was nothing but an agent; that Melchert said nothing about proofs of loss; and that he himself had no understanding about further proofs. Melchert gave a somewhat different account of this conversation. When the 30 days had nearly or quite expired, the plaintiff learned, through Stevens & Son, that the defendant claimed no proofs of loss had been furnished, and he made and sent to the defendant, a few days after the expiration of the 30 days, a proof of loss, to which no objection was made at the trial, except that it was made too late, and that it was made upon a blank of another company, and purported to be addressed to that company, although it described the policy in suit. The remaining evidence, so far as material to an understanding of the decision, is stated in the opinion of the court.

Several special questions were submitted to the jury. To the question whether Stevens & Son prepared and forwarded the application, delivered the policy, and collected the premium, by authority of the defendant and as its agents, the answer was that they did. To the question where the contract of insurance was completed, whether in Massachusetts or in New Hampshire, the answer

was that it was completed in New Hampshire. To the question whether the plaintiff informed Stevens & Son of the Berry mortgage, at the time of the application, the answer was that he did. To the question whether the defendant, within the 30 days after the loss, made such representations to the plaintiff, or so conducted in respect to proofs of loss, that the plaintiff understood therefrom, and had good reason to understand, that no proofs of loss, other than such as he furnished to the defendant within said 30 days, would be required of him, unless the defendant should notify him that it desired other or further proofs, the answer was in the affirmative, as also to the question whether the plaintiff relied upon such representations and conduct, and in consequence thereof omitted to furnish the formal proof of his loss within 30 days after it occurred. With respect to the last two questions, the court instructed the jury as follows: "The defendant is a corporation, and, as you know, a corporation can only act through its officers and agents. When I say in the question, 'Did the defendant, within the thirty days after the fire, make such representations to the plaintiff?' I mean, did the corporation, through its authorized officers or agents, make such representations and so conduct in respect to proofs of loss, that it gave the plaintiff to understand that no further or other proofs would be required of him than those which he furnished at that time. You will remember that, shortly after the fire, Mr. Melchert, the superintendent of agencies and adjuster of this corporation, went to the plaintiff's place of residence, and had a conversation with him and his wife in regard to the loss. I am not going to rehearse it; but, according to your recollection of the evidence and your finding of the facts, what was said between Mr. Melchert and the plaintiff? Did Mr. Melchert give the plaintiff to understand, from what was said, and the way the business was done, that the list which the plaintiff furnished to him at that time, and the information which he gave him, were all that would be required of him, unless he heard further from the defendant? You heard what Mr. Melchert said in relation to reporting to the corporation at Boston, and you have heard what has been said with reference to what was done by the corporation, through its officers, subsequent to that interview. You have heard all the evidence bearing upon this question and are prepared to answer it. What is the balance of evidence, as it lies in your minds? From what you have heard upon the stand, did the defendant, through its authorized officers and agents, give the plaintiff to understand that no further proofs of his loss would be required of him, beyond what he had furnished, unless the defendant let him know in some way that it desired further or other proofs? If you find that they did, then the

next question will be, did the upon such representations, a quence of them, omit to furnish proofs which the policy required it may be interesting for you way in which these questions upon the case. If the defendant representations to the plaintiff to understand that the information furnished was satisfactory, unless the information was called for liberty, as we sometimes say, on those representations. If it now to withdraw them, and to strict compliance with the letter of the contract, you will see that would do a great wrong to the plaintiff if you answer this question in the affirmative. If you answer it in the negative, of course, such wrong would not be done to the defendant excepted to this part of the instruction. The jury further found, in answering the questions, that the proof was furnished in a reasonable time after the loss, and that the defendant was informed that the defendant was required to furnish formal proof, and that the defendant understood it was intended by the policy that the proof of his loss under the policy should be furnished within 30 days after the loss.

At the close of the plaintiff's case, the defendant moved for a nonsuit, on the ground that there were two mortgages, when the policy provided for only one; because no written receipt for the loss was given; because the loss was not furnished within 30 days after the loss; and because the proof subsequently furnished was not sufficient to support the claim for the defendant; that the plaintiff is not entitled to recover for Simpson's interest; because the policy provided that the plaintiff is not entitled to recover for any other buildings, represented by the mortgage. The motion was denied, and the defendant excepted. At the close of the plaintiff's case, the defendant moved for a nonsuit, on the same grounds on which it moved for a nonsuit, and also on the ground that there was no waiver of proof in the terms of the policy. The motion was denied, and the defendant excepted. The defendant also excepted to the instructions, on the ground that there was competent evidence bearing on the question, that the plaintiff was entitled to recover, and directed the jury to return a general verdict for the plaintiff for the amount of damages to which he was entitled under the policy, which was \$10,000. The defendant moved to set aside the verdict, on the ground of errors in the foregoing ruling.

Drew & Jordan, W. P. Bucklin & Bingham, for plaintiff; Fletcher and Ossian Ray, for defendant.

CARPENTER, J. On the question of the agency, the defendant's previous dealing with Stevens & Son was

ce. *Kent v. Tyson*, 20 N. H. 121; *v. Foster*, 23 N. H. 348, 353; *Prescott v. n*, 9 Bing. 19. It is established by the fact that Stevens & Son, in preparing and sending the application, in delivering the policy to the plaintiff, and in receiving the premium, were the defendant's agents. The defendant approved the application, executed the policy, and sent it to Stevens & Son, with instructions, express or implied, to deliver it to the plaintiff and collect the premium. There was no evidence that, prior to the delivery, the plaintiff had notice, by mail or otherwise, that his application for insurance was accepted. Upon these facts, the contract was made and concluded by the defendant and acceptance of the policy, not by the plaintiff's delivery, but because, until that time, the plaintiff had no notice of the existence of his application. Prior to that time the plaintiff was at liberty to revoke the application, and the defendant to withdraw its acceptance and countermand its instructions for the delivery of the policy. A contract does not become a contract until the maker or his agent is notified of its acceptance. *Beckwith v. Cheever*, 21 N. H. 41; *Stevens v. Insurance Co.*, 60 N. H. 65, 70; *Stevens v. Dodds*, 2 Ch. Div. 463.

The court determined that Stevens & Son were the defendant's agents, there was no evidence tending to show that the contract was made in Massachusetts. It is, therefore, not necessary to consider whether the contract was made in instructing the jury, or in the instructions requested, on the question whether the contract was completed in that state or in New Hampshire. The contract, by construction, and effect of the contract and the rights of the parties under it, are to be determined by the laws of this state. "Chapter one hundred and seventy of the General Laws shall be a part of the contract of insurance to which said policy is applicable; and said chapter and title shall be plainly printed in every such policy. No waiver of any part of said policy or of this act shall be set up by the insured, and any stipulation of the contract inconsistent with this act shall be void." Laws of 1885, c. 13, § 1. Chapter 172, as amended, provides, among other things, that "no policy of insurance shall be avoided by reason of mistake or misrepresentation, unless it appears to have been intentionally and fraudulently made"; that "all statements of description or value in an application or policy of insurance, are representations and not warranties; erroneous descriptions or statements of value or title by the insured do not prevent his recovering on his policy, unless the jury find that the difference between the actual value as described and as it really existed amounted to the loss or materially increased the risk; * * * nor shall any misrepresentation of the title or interest of the insured in the whole or a part of the property insured, real or personal, unless material

or fraudulent, prevent his recovering on his policy to the extent of his insurable interest"; and that, "if any company shall issue any policy, upon an application prepared by a third person assuming to act as their agent or otherwise, they shall be affected by his knowledge of any facts relating to the property insured as if they were stated in the application." Gen. Laws, c. 172, §§ 2, 3; Laws 1885, c. 73, § 1.

By the statute, the plaintiff's agreement that his statements in the application "shall be deemed and taken to be promissory warranties," and that the defendant "shall not be bound by any act done or statement made by or to any agent or other person, which is not contained in the application," is made invalid. It has no legal effect. The jury found that the plaintiff, at the time of the application, informed Stevens & Son of the Berry mortgage. The defendant is chargeable under the statute, and would be if there were no statute, with its agents' knowledge of its existence, as if the fact were stated in the application. The statute is in this respect merely declaratory of the common law. *Marshall v. Insurance Co.*, 27 N. H. 157; *Campbell v. Insurance Co.*, 37 N. H. 35; *Clark v. Insurance Co.*, 40 N. H. 333; *Patten v. Insurance Co.*, 40 N. H. 375, 381-383; *Leach v. Insurance Co.*, 58 N. H. 245; *Eastman v. Association*, 65 N. H. 176, 18 Atl. 745. But the issue submitted to the jury, whether the plaintiff, at the time of the application, informed Stevens & Son of the mortgage, was immaterial. Had the jury found the other way on that question, the result would be the same. "The defendant made no claim that the plaintiff failed to have the existence of the Berry mortgage noted in the application and policy by reason of fraud." In other words, it conceded that the omission was an innocent mistake. Under the statute, a policy is not avoided by such an error in the applicant's statement of his title. *Tuck v. Insurance Co.*, 56 N. H. 326, 331; *Leach v. Insurance Co.*, 58 N. H. 245.

There was competent evidence tending to show that the defendant waived the proofs of loss required by the policy, and the question was properly submitted to the jury. The instructions given them were correct. To permit the defendant to avail itself of the plaintiff's omission to make the proofs of loss, which it had induced him to abstain from furnishing, would do him a great wrong, and it was not improper so to inform the jury.

Although the policy was payable, in case of loss, to the mortgagee, Mary Simpson, to the extent of her mortgage debt, the action was properly brought in the name of the plaintiff. *Folsom v. Insurance Co.*, 59 N. H. 54; *Hall v. Association*, 64 N. H. 405, 13 Atl. 648. Judgment on the verdict.

CHASE, J., did not sit. The others concurred.

STATE (ROBERSON, Prosecutor) v. MAYOR, ETC., OF CITY OF BAYONNE.

(Supreme Court of New Jersey. Jan. 7, 1896.)

QUO WARRANTO—TRIAL OF TITLE TO OFFICE—RES JUDICATA—CERTIORARI—QUESTIONS DETERMINED.

1. Quo warranto is the only direct and adequate remedy for the trial and determination of a title to a public office, and the judgment in such an action is the only one which affords complete and substantial relief. The review, by certiorari, of the proceedings of an election or appointment to a public office, can determine nothing which would be of any efficacy as a bar, or have any other effect in a subsequent information in the nature of quo warranto, nor could the question arising upon such review, although judicially determined, be regarded as res adjudicata in the subsequent information.

2. Collateral questions regarding the legality of an election to office may be raised and determined by certiorari, in testing the validity of laws, or the ordinances and resolutions of municipal bodies; yet, when the purpose of the writ is, obviously, to test the right to a public office, and the proceeding of the municipal body brought up by the writ consists only of the resolution or other action electing a person to such office, the writ will be dismissed, because an information in the nature of a quo warranto is the only proceeding by which the title of the person so elected and claiming the office can be attacked.

3. An incumbent cannot proceed by information in the nature of quo warranto against one who has not been in possession and user of the office. The incumbent must await the attack of his adversary, and if the claimant otherwise succeeds in obtaining possession and user of the office, under the election or appointment of a municipal body having general power to elect, the only remedy of the previous incumbent is by quo warranto to test the title of the person so gaining the possession of the office.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Horace Roberson, against the mayor and council of the city of Bayonne, to obtain possession of an office. Writ dismissed.

Argued June term, 1895, before VAN SYCKEL, MAGIE, and LIPPINCOTT, JJ.

Gilbert Collins, for prosecutor. Thomas F. Noonan, for defendants.

LIPPINCOTT, J. On July 7, 1891, William D. Salter was elected, by the board of councilmen of the city of Bayonne, treasurer of that city, under and by virtue of the provisions of an act of the legislature, entitled "An act to authorize the election of a city treasurer in cities of the second class for a longer term than two years," approved March 17, 1891 (P. L. 1891, p. 166). This act provided that the term of office of such treasurer as might be "elected" should be five years. Mr. Salter qualified and entered upon the duties of his office, and continued in office until June 5, 1894. At a meeting held on this date he tendered his resignation, to take effect upon the qualification of his successor. At the same meeting his resignation was accepted, and the board of councilmen elected Horace Roberson, the prosecutor, as such treasurer, who, after qualification, entered upon the du-

ties of the office, and has ever since performed them.

He contends that his term of office continues over the unexpired term of Salter, which would end according to the provisions of the charter on the first Monday of May, 1896, and according to the act of 1891 on July 7, 1896. On April 29, 1895, the membership of the board of councilmen changed, at a meeting held on that date, and elected John C. Bouten treasurer of the city. The board of councilmen contend that, under certain sections of the city charter of the city of Bayonne (P. L. 1872, p. 699, § 35), the treasurer of the city holds at the pleasure of the councilmen. This (section 35) provides that the treasurer shall hold at the pleasure of the councilmen, who shall from time to time elect a treasurer. They also further contend that the statute of 1891, to which no amendment has been made, fixing the term of office of the treasurer for five years, as well as the statute of 1889 (P. L. 1889, p. 171), which fixed the term of office of the treasurer for two years, are both inapplicable to the city of Bayonne, or, if applicable in terms, are special laws, and unconstitutional. The defendant, Bouten, has qualified as treasurer of the city, and the prosecutor continues to hold the office, and perform its duties, and sues out this writ of certiorari to review the legality of the proceedings of the board of councilmen in the election or appointment of Bouten, to such office. It is conceded that the board has power to elect or appoint a treasurer, under the city charter, or other statutes inapplicable, is vested in the board of councilmen of the city. The prosecutor contends that, under the act of 1891, he still remains treasurer of the city, and entitled to hold the office until at least the first Monday of May, 1896. The defendants contend that the charter is the valid statute authorizing the appointment or election of a treasurer, and that Bouten has been, in accordance with the charter, elected or appointed to such office, and is qualified for the same, and is entitled to hold the office, and to the performance of its duties, and to receive its emoluments. The defendants also contend that the force and effect of a review of their proceedings, and the judgment thereon, if of any force and effect, are to determine, not only the legality of their proceedings, but also the title of the person to this office, and also, as necessarily incident to the determination of the title of the person to the same office. Several questions arise in relation to the construction and constitutionality of the statutes relating to this subject have been presented, but the cause must be determined without the consideration of these matters.

It is obvious that the title to this office is the subject of dispute between these parties. The question whether Roberson or Bouten is entitled to the office is the only question which has been presented. The prosecutor seeks a determination that these proceedings of the board of councilmen constitute no title in Bouten.

ce, and therefore they should be set aside illegal. His election and the legality of election are both attacked by the prosecutor. The defendant seeks a determination of the prosecutor illegally holds the office, virtue of statutes which are invalid and unconstitutional, or, if valid, then inapplicable, that his term has expired, and thus there is a vacancy, which they are authorized to fill, and thus the election of Bouten should be upheld, and their proceedings affirmed. This is a proceeding, under whatever guise or name it appears, to test the title to this public office. The title to the office "is the avowed real subject of controversy," and quo warranto is the exclusive remedy. I do not think it has ever been held, in this state, that, where there existed the question of title to public office between two parties, it could be determined by certiorari. It has universally been held the other way. The general principle has been so universally established that quo warranto is the only action by which the title to a public office can be looked into and determined as to need no citation of authorities to support it, and the cases are so numerous that principles governing the jurisdiction cannot now be drawn in question, and they are applicable as well to public offices of this character as to offices filled by a popular election. Proceedings for the election of public officers can be reviewed by certiorari, and their validity and result tested in this way, then the extensive branch of the jurisdiction by quo warranto has been swept aside, and the adequate remedy provided by such an action is lost. Quo warranto is the only direct adequate remedy for the trial and determination of a title to a public office, and the judgment in such an action is the only one which affords substantial and complete relief. A review by certiorari determines nothing, especially, which would be of any efficacy as to, or have any other effect in, a subsequent proceeding in the nature of quo warranto nor could the determination of questions arising therein be regarded as res adjudicata. Past statutes have amplified the use of the writ of certiorari in the nature of quo warranto in relation to the title of such offices as this one, but have made the remedy fully effective, not only in determining the title to an office, but also by the judgment actually installing the person in whose favor the right is determined. A relator can file his information without leave of the court. Supp. Revision, p. 819. The title of the relator, as well as that of the respondent, can be determined, and the order of judgment of the court can be enforced by appropriate process. P. L. 1895, p. 82, § 344. Apparently, there has been some slight confusion in the application of the general principle in this state, but its expression has been without any variance. An examination of the cases will show that the application has been such that it cannot now be conceded that certiorari is a remedy of any

appropriateness whatever. In the case of *State v. Board of Chosen Freeholders*, 35 N. J. Law, 217, the board refused to accept the official bond of a party who, according to the determination of the county canvassers, had been elected to the office of collector of the county, on the ground that he had not been legally elected; but it was held by the court that his election could only be called in question on a direct proceeding by quo warranto. The case of *Bradshaw v. City Council*, 39 N. J. Law, 417, is cited as a case which supports the view that certiorari is an appropriate proceeding to test the validity of the proceedings of a municipal body in electing a public officer to fill the place of one already in possession. This contention, having regard to the language of the court in the opinion, would appear to be well founded; and if the case had been followed, the court now would be absolutely bound by it. It does not seem to have been followed in a single instance where, subsequently, the same question under similar circumstances was involved; and it must be noticed that the learned justice, in his opinion, stated, as the reason for holding the rule he did, that the prosecutor sued not for the purpose of testing the title. It may be remarked that the litigation in that case had assumed such shape that both parties rested the case upon the legality of the proceedings of the council, and were willing to abide the decision on that question alone. In the case of *Fitzgerald v. New Brunswick*, 47 N. J. Law, 488, 1 Atl. 496, the writ was directed, not only to the resolutions of the council appointing the police officers to fill the places made vacant by removal, but also to the resolutions declaring the offices vacant. The questions discussed were the legality, under the statute, of the resolutions vacating the offices and removing the incumbents. The power of the council to vacate the offices or remove the incumbents under the statutes appertaining to the subject-matter was the only question determined. For the purpose in this case for which the writ of certiorari was used by the court, it was undoubtedly an appropriate remedy. It is quite distinguishable from the *Bradshaw Case*. The resolution of the council reviewed was an omnibus one, removing the whole police force of New Brunswick from office, and the subsequent proceedings appointing another police force were not discussed or given any force in the opinion of the court. In this case, in the court of errors and appeals (48 N. J. Law, 457, 8 Atl. 729), the chief justice, in delivering the opinion of the court, declared that the action of the common council in removing the police force was in contravention of the prohibition of the statute of 1885; that no policeman in any city of this state could be removed, except for misconduct, on cause shown, and after trial; and that the statute did prohibit the act of removal was too plain for discussion. The

question whether the writ of certiorari was the appropriate remedy was not discussed in the opinion.

The resolution removed by certiorari into this court in the case of *Loper v. City of Millville*, 53 N. J. Law, 362, 21 Atl. 568, was one of the mayor and council of the city of Millville removing Loper, the prosecutor, from the office of constable of the First ward of that city. By the twenty-fifth section of the charter of that city the powers and duties of the local police were conferred upon constables, and, consequently, in this official character, the court determined that the constable was within the protection of the statute which prohibited the removal of police officers of a city except for cause and after trial. Supp. Revision, p. 515. The whole attention of the court was directed to the resolution of removal, and, finding it was not based upon any charges against the officer, and that there was no trial before the removal, set the resolution aside; and, as being applicable to the case then under discussion, Mr. Justice Knapp said that "the principle clearly deducible from the cases is that certiorari is an appropriate remedy to remove, out of the way of a prosecutor in possession of, and therefore presumptively entitled to, an office, any order, resolution, or other action adverse to the rights, which may be unlawfully used to disturb him in the possession and enjoyment of such office or its emoluments." The enunciation of this principle, as applied to the resolution under review, was undoubtedly a correct statement of the law. It did not appear by the resolution that any other claimant to the office existed, and the writ was dismissed because the prosecutor, upon his own showing, was wrongfully in office, and therefore could not complain of injustice or illegality in the resolution for his removal. The learned justice, in his opinion, is careful to say: "But when title to office is the avowed or real subject of controversy, then quo warranto is the exclusive legal remedy." In the cases of *Van Alst v. Jersey City*, 49 N. J. Law, 156, 6 Atl. 883; *Leeds v. Atlantic City*, 52 N. J. Law, 332, 19 Atl. 780; *Markley v. Borough of Cape May Point*, 55 N. J. Law, 104, 25 Atl. 259; and *Corwin v. Markley*, 55 N. J. Law, 107, 25 Atl. 260,—the question was not raised. In these cases the questions arose over resolutions vacating certain offices, to review which, it was conceded, certiorari was the appropriate writ.

The case of *Haines v. Freeholders*, 47 N. J. Law, 454, 1 Atl. 515, is directly in point, and, so far as a direct authority is needed, must control the disposition of the case now under discussion. Haines was in possession, by proper appointment, of the office of steward of the almshouse of Camden county, under a resolution fixing the term for three years. During his possession, with more than a year of his term unexpired, the board

of chosen freeholders rescinded the resolution fixing the term of Haines, and ordered to elect one Adams to the office. The writ of certiorari was directed to the proceedings of the board. After the case of *Bradshaw v. City Council*, Justice Scudder, in delivering the opinion of the court, says: "The effort is, not only to vacate the rescinding resolution which was passed to shorten the term of office, but also to prevent the election of Charles F. Adams as successor. Under the authority of the opinion, Adams is directly interested in the proceeding, and should be made a party. It were admissible thus to question the validity of his election and his right to the office and franchise by certiorari, but this cannot be done." It was further held that the title to hold offices under the ordinances, or resolutions cannot be determined in these proceedings, and that one of the claimants is not made a party, and that, where the purpose of the writ is to forestall the opinion of the court, quo warranto information should be used, and to act directly on the title to the office, a claimant to office who is not made a party should be dismissed. A case in point as the case last cited is that of *Simon v. City of Hoboken*, 52 N. J. Law, 104, 25 Atl. 259. Simon was city physician of Hoboken, and in possession of the office, with a right to hold the office, and his successor should be lawfully appointed. Helfer was appointed and confirmed by the mayor and council as successor to Simon. Simon sued out a writ of certiorari to the proceedings for the election and confirmation of Helfer, and a writ of prohibition to prevent his appointment on the ground that he was not entitled to receive the requisite number of votes in the council to make his confirmation valid. *P. L. 1889, p. 328.* The interest of Helfer was clear, that, as the incumbent, he had the right to hold the office, and his successor should be lawfully appointed. The court decided the case upon the ground that Helfer had not obtained the requisite number of votes in the council of the office; and Mr. Justice Dunnington, in his opinion of the court, says: "If Helfer (Helfer) was not then in office, the writ of certiorari, as in *Bradshaw v. City Council*, 39 N. J. Law, 104, 25 Atl. 259, seems to hold a doctrine which is not in accordance with the principle of certiorari, unlawful proceedings to prevent the election of his successor. But the law is otherwise in *Haines v. Freeholders*, 47 N. J. Law, 454, 1 Atl. 515, discountenances this doctrine, and lays down the principle that the writ of certiorari has no ground of suit until he is in possession of the office, then he must resort to quo warranto. The court will not permit him to sue out a writ of certiorari, to which his real party is not a legal party, the very question which can be effectually decided only by quo warranto in the nature of quo warranto."

deem ourselves bound, as also we are inclined, to follow this later decision in the present case, where the point at issue is, simply, Helfer's title to a public municipal office."

The writ in this case now in hand is directed to the proceedings of the mayor and council of the city of Bayonne electing Bouten to the office of treasurer, and the sole purpose sought in this review is to have that election declared illegal. There is, as there can be, no other purpose than to have determined the right and title of Bouten to the municipal office. With the sole exception of the case of Bradshaw v. City Council, whenever this result has been attempted by the use of certiorari, it has met with a negative response from the court. The effect would be to judicially determine a claimant's right to a public office in a suit in which he cannot legally be made a party; and, besides, the judgment, if he could be made a party to the writ, could not be ouster, in case he had obtained possession and was adjudged not to be entitled. If his election was adjudged illegal, the prosecutor in such case could not, by any judgment upon this writ, be reinstated, and if he was not in possession, and his election was held to be legal, no judgment upon this writ would be at all effective in his behalf. It would be only upon an information in the nature of quo warranto that the questions arising between the claimants could be adjudged, and their rights effectively enforced. The prosecutor, being still in the possession of the office, cannot prosecute an information against Bouten. Before this can be done there must be a user as well as a claim. *Rex v. Whitwell*, 5 Term R. 84; *Updegraff v. Crans*, 47 Pa. St. 103; *Haines v. Freeholders*, 47 N. J. Law, 454, 1 Atl. 515. If Bouten should succeed in obtaining possession of the office of treasurer, and make user of it, then the prosecutor will be driven to a quo warranto to determine the title of Bouten. The prosecutor cannot anticipate, by disputing the title of Bouten to the office, until he succeeds in the user of it. *Id.* The conclusion is that the writ of certiorari in this case has for its sole object an attack upon the proceedings of the mayor and council by which Bouten was elected to the office of treasurer of the city of Bayonne, and upon a review of these proceedings it is sought to try and determine his title to that office, and therefore the writ must be dismissed, with costs.

STATE (STITES, Prosecutor) v. BOARD OF CHOSEN FREEHOLDERS OF CUMBERLAND COUNTY et al.

(Supreme Court of New Jersey. Jan. 7, 1896.)

CERTIORARI—WHEN LIES—TRIAL OF TITLE TO OFFICE.

A writ of certiorari is not an appropriate remedy to review the proceedings of the board

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of chosen freeholders, electing a county physician, under an act entitled "A supplement to an act entitled 'An act respecting county physicians,' approved April 21, 1876," which supplement was approved April 5, 1878 (Supp. Revision, p. 795), even though the act be unconstitutional in its provisions, when the purpose of the writ is to obtain a determination of the title of the incumbent. In such a case an information in the nature of quo warranto is the only proceeding to try and determine the title to the office.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Ellsmore Stites, against the board of chosen freeholders of the county of Cumberland and John R. C. Thompson, to review the election of a county physician. Dismissed.

Argued June term, 1895, before VAN SYCKEL, MAGIE, and LIPPINCOTT, JJ.

J. J. Crandall and J. L. Van Syckel, for prosecutor. J. Boyd Nixon, for defendants. Thos. W. Trenchard, for defendant Thompson.

LIPPINCOTT, J. This writ was sued out by the prosecutor to review the resolution and proceedings of the board of chosen freeholders of the county of Cumberland electing and appointing John R. C. Thompson to the office of county physician of that county. It appears, by the return to this writ of certiorari made by the clerk of the board of chosen freeholders, that on May 11, 1892, Mr. Thompson was elected county physician of Cumberland county, and his salary, for his services in such office, was fixed at the same sum as for the previous year. It does not appear, by the return, or otherwise, what the salary of the county physician was, nor how he was paid for his services. Neither does it appear in any form to this court, except as gathered from the argument, what the interest or grievance of the prosecutor is, in seeking a review of the proceedings certified under this writ.

The purpose of the writ of certiorari is to have a review of the proceedings of the board, and a determination of this court that they were illegal, and thus deprive Thompson of the office to which he has been elected. That no other purpose exists is obvious from the writ, the return, and arguments of counsel presented. It is to nullify his election and declare the office vacant. One of the reasons alleged for a reversal of the action of the board of chosen freeholders is that the act entitled "An act to amend an act entitled 'A supplement to an act respecting county physicians,' approved April twenty-first, eighteen hundred and seventy-six, which supplement was approved April fifth, eighteen hundred and seventy-eight," approved April 28, 1885 (P. L. 1885, p. 299; Supp. Revision, p. 796), is unconstitutional. Upon examination, it will be seen, at once, that this act can have no effect whatever upon the question of the legality of the proceedings of the board of chosen freehold-

ers in electing a county physician. The act simply provides that, when the board of chosen freeholders of any county shall have appointed a county physician under the act to which this act is a supplement, no coroner shall be entitled to receive any fees for viewing the body of any deceased person unless such view shall have been made upon the written order of the county physician, pursuant to the provisions of said act, and such written order must be attached to the bill of such coroner for such service before such bill shall be audited and paid: provided that, if the county physician's attendance cannot be obtained within six hours after written notice given to the county physician, by the coroner, of the discovery of the death of such deceased person, the coroner may proceed as if the supplement had not been passed. This act also provides what manner of service on the county physician shall be deemed sufficient. It is apparent, at a glance, that under this writ the court cannot review any dispute which has arisen between the county physician and the coroner, as to their respective duties or the emoluments of their respective offices. This writ only removes the proceedings of the board of chosen freeholders electing a county physician, and upon these proceedings this statute has no bearing whatever; and it is not necessary, in passing upon the questions presented, to determine whether this act be valid or not.

The other objection to these proceedings, removed into this court, is that the board of chosen freeholders of the county of Cumberland are not authorized to elect a county physician. It is contended by the prosecutor that the power of the board to appoint a county physician is only conferred by the provisions of an act entitled "A supplement to an act entitled 'An act respecting county physicians,'" approved April 21, 1876, which supplement was approved April 5, 1878 (P. L. 1878, p. 342; Supp. Revision, p. 795). The act of April 21, 1876 (Revision, p. 817), respecting county physicians, authorized, in the first section thereof, any board of chosen freeholders of any county of this state, whenever said board should deem it best to do so, to elect a county physician, and provided for the payment to him of an annual salary for his services. The other sections of the act prescribe his duties. The supplement of April 5, 1878, amends the first section of the act of 1876, by providing that the term of office shall be for three years, at such yearly salary as shall seem just, "to be fixed from time to time; and in all counties containing not less than fifty thousand inhabitants; and before entering upon the duties required of him by this act, said county physician shall take and subscribe an oath or affirmation before the clerk of said county faithfully and fairly to perform the duties of his of-

fice to the best of his skill and unding, which oath or affirmation shall be by the clerk in his office." There constructions of this amendment corfor: First, on the part of the pro that the chosen freeholders are li the election of a county physician ties containing not less than 50,000 ants, and that this classification which is artificial, and renders the as contravening the constitutional tion of special legislation regulating ternal affairs of counties. The otention, made by the defendants, is act does not limit the power of b chosen freeholders to elect county cians in any county, but that, in co not less than 50,000 inhabitants, before entering upon the duties of fice, take and file the oath therei ed. If it be conceded that the ac constitutional, then the original act remains in full force and effect, power to appoint a county physicia ever may be his duties, or whate fees and emoluments to which he entitled, remains unimpaired in e spect. On the other hand, if the co of the defendant be adopted, the ment that the appointee in countie less than 50,000 inhabitants should file the oath prescribed would not the power of appointment conferred act; for, in such case, this prescri duty on his part is entirely severa the other parts of the amendmen character of relief sought by the r these proceedings of the board of freeholders does not either require mit the court to determine these q The proceedings of the board of freeholders show that Thompson w ed to the office of county physici procedure of election was had by board, in accordance with the po ferred by the terms of the statutes the office and providing for the elect person to fill the same. Thomps duly installed into the office, and tained in possession and performed ties. He is in full possession of t It is proposed by this writ, and the ject of the writ is, to attack both tity of the office and the proceeding board by which he was elected t Whether Thompson can or cannot a party to the writ of certiorari is n rial, at all, to consider. The sole of the writ is to try his title to the county physician by a review un writ. In this the prosecutor has r his remedy, if he has any at all. T cannot be removed from his office judgment upon this writ, and the ju whatever it might be, would be fru any effect upon him. These procee the board of chosen freeholders c

title to the office which Thompson holds, whether a valid or invalid title is of no moment in the consideration of this matter certiorari. His title can only be reviewed by a direct proceeding in the nature of a writ, and not by this writ. This is manifest, by established authority in this state, as not to admit of further discussion. *Haines v. Freeholders of Camden*, 1 N. J. Law, 454, 1 Atl. 515; *Simon v. City of Hoboken*, 52 N. J. Law, 367, 19 Atl. 259; *Roberson v. Mayor, etc., of City of New York* (decided at the present November term) 33 Atl. 734. The writ of certiorari must be dismissed, with costs.

STATE (DAILY, Prosecutor) v. BOARD OF CHOSEN FREEHOLDERS OF COUNTY OF ESSEX.

Supreme Court of New Jersey. Jan. 23, 1896.
DUTIES—REMOVAL OF COURTHOUSE JANITOR—NAVAL VETERAN—CERTIORARI.

1. The janitor of a county courthouse, appointed by the board of chosen freeholders of the county, is not a public officer, but holds a position; and if he be an honorably discharged sailor or in the naval service of the United States, he is protected from removal, under the provisions of the eighth section of an act of the legislature, entitled "An act to reorganize the boards of chosen freeholders in counties of the first class in this state," passed May 16, 1894 (P. L. 1894, p. 355), unless the removal be made on cause, and upon notice and hearing.

2. The legality of the proceedings for the removal of one holding the position of janitor of the county courthouse under an appointment of the board of chosen freeholders, and for filling the position by another appointment, can be reviewed by certiorari.

Syllabus by the Court.)

Certiorari by the state, at the prosecution of Henry Dally, against the board of chosen freeholders of the county of Essex, to review proceedings removing the prosecutor from the office of janitor of the county courthouse. Proceeding set aside.

Argued June term, 1895, before VAN CICKEL, MAGIE, and LIPPINCOTT, JJ.

Joseph A. Beecher, for prosecutor. John T. Munn, for defendants.

LIPPINCOTT, J. This writ was sued out by Henry Dally, the prosecutor, to review proceedings of the board of chosen freeholders of the county of Essex, had at a meeting held on December 3, 1894, by which Mr. Luckemeier was elected janitor of the courthouse of that county. The return to the writ shows that, at the meeting of the board held on that date, the following proceedings were had, viz.: "A motion was made to go into the election for a janitor of the courthouse. Mr. Muller nominated Mr. H. Luckemeier. Mr. Oury nominated Henry Dally. Mr. Luckemeier was elected by a vote of 26 to 2 for Mr. Dally. The clerk declared Mr. Luckemeier duly elect-

ed for the ensuing year." It is to these proceedings that this writ is directed, and no other proceedings of the board have been certified or appear in the return to the writ.

The arguments presented to the court were founded upon a statement of facts, agreed upon and signed by the counsel of the respective parties, by which it appears that, at the regular annual meeting of the board of chosen freeholders, in May of the years 1891, 1892, and 1893, he was duly re-elected. On May 9, 1894, at the regular annual meeting of the board, he was again re-elected as such janitor. Each of these re-elections was for the ensuing year, and his salary appears to have been fixed at \$1,200 per annum, payable in monthly payments. He continued in such position or employment as janitor, without any further action of the board, until December 3, 1894, and after the proceedings of that date he still continued to perform the services of his position, without interference, until May 9, 1895, during which time he received the salary provided by the board. On December 3, 1894, the board of chosen freeholders, elected in accordance with the provisions of an act of the legislature entitled "An act to reorganize the boards of chosen freeholders in counties of the first class of this state," passed May 16, 1894 (P. L. 1894, p. 355), organized, and, at a meeting on that day, elected Mr. Luckemeier to the position of janitor by the proceedings to which reference has been made, and which are here for review. Luckemeier refrained from acting as janitor until May 9, 1895 (the date of the expiration of the period for which Dally was employed), when he entered, so far as he was permitted to do so, upon the performance of the duties of janitor. The prosecutor remained at the courthouse, and refused to surrender the keys, and still claims to be the janitor, holds possession of his room, and refuses to yield to anything short of physical force. Both now claim to be doing the work of the janitor. It is undisputed that the prosecutor is an honorably discharged sailor in the naval service of the United States. He entered the naval service as a sailor, on June 7, 1855, and continued in such service until August 25, 1858, when he was honorably discharged. During his service he was in several engagements of the Barnes forts, near Canton, in China.

The only proceedings of the board of chosen freeholders appointing Mr. Luckemeier to any position are those of December 3, 1894, and it may be conceded that the formal effect of these proceedings was to remove the prosecutor from the position of janitor of the courthouse, and the only question which can be presented and determined is whether the prosecutor was subject to removal in the manner in which it was sought to remove him. Mr. Luckemeier can only be entitled, if at all entitled, to the position

filled by the prosecutor, by virtue of the appointment of December 3, 1894. The eighth section of the act of 1894, under the provisions of which the board of chosen freeholders of the county of Essex reorganized, provided that the "terms of office of all officers now holding office under appointment by the board of chosen freeholders of counties of the first class or under appointment by any officers of such boards, shall expire on the second day of December one thousand eight hundred and ninety-four, notwithstanding that such officers may have been appointed for a longer term; and all offices filled by appointment by such board of chosen freeholders shall be and become vacant from and after said second day of December, one thousand eight hundred and ninety-four, and the board of chosen freeholders constituted or elected under the provisions of this act shall forthwith upon their organization appoint successors to the offices hereby vacated who shall serve for term of one year only:

* * * and provided further that nothing in this section contained shall apply to or in anywise affect any honorably discharged soldier or sailor of the United States or the widow of such soldier or sailor in office at the time of the passage of this act, but any and all such persons shall continue and remain in their respective offices or positions the same as if this act had not been passed, and shall be removed only for cause." It is clear that, by the provisions of this section of the act of 1894, the prosecutor, as janitor of the courthouse, was protected from removal, unless for cause, and upon notice and a hearing. There exists no justification for the suggestion that he held a public office, and that, therefore, the remedy of the prosecutor should have been by information in the nature of quo warranto. He was holding "a position," as distinguished on one side from a public office, and on the other from mere employment. He was no more a public officer of the county, by virtue of his appointment by the board of chosen freeholders, than is the janitor of an insurance building an officer of the insurance company which occupies it. Throop, Pub. Off. §§ 1-15. In *Lewis v. Jersey City*, 51 N. J. Law, 240, 17 Atl. 112, a "bridge tender" appointed by the board of public works of Jersey City, was held to be "a person holding a position," within the meaning of an act providing that "no person holding a position in any city" should be removed, except for good cause shown, after a hearing, etc. P. L. 1888, p. 135; 19 Am. & Eng. Enc. Law, p. 387, tit. "Public Officers"; 1 Bouv. Law Dict. tit. "Office," p. 255. The prosecutor was entitled to remain in his position, and could be removed "only for cause." The proceedings of December 3, 1894, do not show that any hearing was had, or that any cause was assigned for his removal, and therefore they were in violation of the act, and the prosecu-

tor is entitled to remain in his position by some other action of the board or fully removed therefrom.

It is contended that the actual removal of the prosecutor did not take place until May 9, 1895, and that this actual removal was justified by the provisions of an act entitled "An act regarding honorably discharged soldiers, sailors and marines," March 14, 1895 (P. L. 1895, p. 31). The proceedings show that he was removed by virtue of the action of the board of chosen freeholders of December 3, 1894; and that action was not warranted in law, and it afforded no basis of authority for his removal at any time. If illegal when it remained so, and was without effect. No other action of the board has been certified for review, and therefore the court is not concerned with the constitution and effect of the act of 1895. The proceedings of the board of chosen freeholders of December 3, 1894, are set aside as to costs.

STATE (VAN REIPEN et al., Prosecutor) v. MAYOR, ETC., OF JERSEY CITY. STATE (MORRIS CANAL & BARGE CO. et al., Prosecutors) v. SAME. STATE (MONTCLAIR WATER CO., Prosecutor) v. SAME. STATE (WHELIHAN, et al., Prosecutors) v. SAME. STATE (FAVIER, et al., Prosecutors) v. SAME. STATE (ROCK & HUDSON CO., Prosecutor) v. SAME. (Supreme Court of New Jersey. Jan. 1895.)

CONSTITUTIONAL LAW—EMINENT DOMAIN. APPROPRIATION OF WATER SUPPLY—MUNICIPAL CONTRACTS—BIDS.

1. The act of 1888 (P. L. p. 366) is constitutional, and authorizes Jersey City to contract for a water supply.
2. The charter of the Morris Canal and Barge Co. which grants to that company the right to furnish for public use, furnish no insurmountable barrier to the appropriation of such rights to the state for the preservation of the health and safety, upon just compensation made, but the right to condemn is clearly granted by the legislature.
3. The act of 1895 (P. L. p. 769) authorizes the water rights granted by the act of 1888 to be condemned for the use of Jersey City.
4. In the absence of fraud or palpable abuse of discretion on the part of the municipal authorities, the only question for judicial cognizance is whether there has been any violation of the principles, or the neglect of any prescribed formalities, in entering into the water contract.
5. A contract for water supply awarded to the responsible bidder who offers the most advantageous terms, and proposal advertised for.
6. Bidders must have an opportunity to compete, and that can be afforded only by definite specifications, to which all bidders must conform.
7. Bids having been especially invited on the condition that the contractor should deliver water from the reservoirs capable of storing a water supply for 100 days' delivery at the rate of 50,000 gallons per diem, the contract was not awarded to one of the bidders for the reason

ffered to provide a storage capacity sufficient
250 days.

Syllabus by the Court.)

ctions by the state, on the prosecution of
n Reipen and others, the Morris Canal &
nking Company and others, the Montclair
ter Company, John Whellhan, Horace H.
rier, and the Rockaway & Hudson Com-
y, against the mayor and aldermen of
sey City and the Jersey City Water Com-
y, to review the award of a contract.
dict set aside.

argued November term, 1895, before DE-
E, VAN SYCKEL, and GUMMERE, JJ.

. W. Stevens, Collins & Corbin, Allan L.
Dermott, and Dickinson, Thompson & Mc-
sters, for prosecutors. John A. Blair,
encer Weart, Wm. D. Guthrie, J. B. Vre-
burgh, and Wallis, Edwards & Bumstead,
defendants.

VAN SYCKEL, J. The writs are prosecut-
for the purpose of reviewing the award of
contract by Jersey City to the Jersey City
ter Company for the supply of pure wa-
to Jersey City for a term of 25 years.
ree questions upon which, in the judgment
the court, the case turns, will be consid-
d:

Is the act of 1888, p. 306, constitutional?
provides "that it shall be lawful for the
rd of aldermen, common council, city coun-
aqueduct board, board of public works, wa-
commissioners, township committees, town
mmittee, or other board, body or depart-
nt of any municipal corporation in this
te, having the charge or control of the
ter supply of any such municipal corpora-
n to make and enter into a contract or
reement. * * * Provided, that in any
municipal corporation having a board of pub-
works, and a board of finance and taxa-
n, if the contract and agreement be made
entered into by any such board of public
rks it shall not be binding upon such
municipal corporation until the same shall
been approved by such board of finance
and taxation." Jersey City, at the time this
was passed, was the only city in the
te which had a board of public works and
o a board of finance and taxation. It is
efore insisted that this proviso, which ap-
es only to Jersey City, makes the act spe-
l and local. This act was not designed
effect any change, nor does it in any re-
ct change the body to which the contract
a water supply is committed in any of
local governments of the state. An act
ating these different boards, and at the
ne time lodging that power in one city in
oard of works, in a second in the com-
n council, and in a third in water com-
missioners, might be regarded as infirm in
t respect. The control of the water sup-
is left by this act, in every municipality,
cely where it was previous to its pas-
ge. The purpose and substance of this

legislation is to confer upon the various local
governments in the state the right to make
a contract for water supply through the de-
partment which controls that subject, by
whatever name it may be called. The name
of the board or department is not material,
nor is it the substance of the act; for, after
specifying various boards which may have
the control of the subject, the act says, "or
other board, body or department of any
municipal corporation in this state having
the charge or control of the water supply."

The act must be interpreted as if it was
simply in the following form: "That it shall
be lawful for the board, body or department
of any municipal corporation in this state,
having charge or control of the water supply
of any such municipal corporation, to make
and enter into a contract," etc. The act is
general. It creates no dissimilarity. It is
uniform in its effect, committing the subject
everywhere to the same department; that is,
to the persons who have control of the wa-
ter supply. The diversity of name by which
such department may be designated, and of
the manner in which it is constituted, was
not created by the act of 1888, and is whol-
ly immaterial, so far as concerns the gen-
erality of this statute. By the act of 1874,
p. 508, § 9, the board of public works of
Jersey City cannot make a contract for the
payment of any sum of money which exceeds
\$2,000 without the concurrence of the board
of finance and taxation. The department in
Jersey City in which, at the time of the pas-
sage of the act of 1888, control of the water
supply was lodged, was the board of public
works and the board of finance and taxation.
The act of 1888, therefore, without the pro-
viso, embraced Jersey City, and required the
concurrent action of the two boards, which
together constituted the department in
charge or control of the water supply for
Jersey City. The proviso made no change
whatever in the legal effect of the act. The
draftsman of it manifestly had in his mind
the fact that in Jersey City the department
in control of the water supply consisted of
two separate boards, and; out of abundant
caution, he inserted the proviso so that Jer-
sey City might not be excluded from the
benefit of its provisions, and the act thereby
rendered special and local. The act is consti-
tutional.

2. Under the act of 1895, p. 769, can any
part of the water rights granted by charter
of the legislature to the Morris Canal Com-
pany be condemned for the use of Jersey
City? The contention is that the canal char-
ter of 1824 constitutes a valid contract,
which cannot be impaired, and that its wa-
ter rights, which, under and by authority
of its charter, are now devoted to a public
use, cannot be taken under the power of
eminent domain. Every government which
regards the welfare of its people will exert
its highest power to preserve the public
health and safety. To that end a supply

of pure water is essential. To secure it involves the exercise by the state, not only of the power of eminent domain, but also of the police power. These necessities of the public are supreme, and private rights must yield to them. That I understand to be the accepted rule. The right, however, to take private property, or the property of a corporation, must be clearly granted by the legislature. In *State v. Montclair Ry. Co.*, 35 N. J. Law, 328, there was no such grant of power. The charter of the Morris Canal, and the fact that its water rights are held for a quasi public use, furnish no insurmountable obstacle to the appropriation of such rights to the use of the state, for the preservation of the public health and safety, upon just compensation being made. *Newark v. Watson*, 56 N. J. Law, 867, 29 Atl. 487; *In re New York, L. & W. R. Co.*, 99 N. Y. 12, 1 N. E. 27; *Central Bridge v. Lowell*, 4 Gray, 474; *Springfield v. Connecticut R. R.*, 4 Cush. 63. The question is whether the act of 1895 authorizes the taking of the water rights of the Morris Canal for a water supply to the municipalities of the state. The act provides that when the proper board or other municipal authorities of any city of this state shall deem it proper to acquire land, water, water rights, or property, within or without said city, for the purpose of supplying said city with water, the power of condemnation may be resorted to as in the act provided. The act contains this proviso: "That no lands, water, water rights, or other property purchased, condemned or held by any municipality in this state for the purpose of a water supply and used or intended to be used for such purpose shall be condemned, or taken under the authority of this act." If, in this statute, authority can be found to take the water rights of the Morris Canal, Jersey City may invoke in its aid the right of eminent domain. It is immaterial whether the grant of power is contained in the express words of the statute, or arises by necessary implication. Its force and value, when established, are no more potent in the one case than in the other. The act provides for condemnation of land, water, water rights, or property, when the governing authorities deem it proper to acquire them. This language is not, in my judgment, broad enough to include lands and water rights held and owned by the Morris Canal for its uses under state authority. The grant of power is not more extensive than that usually vested in local governments to acquire lands for public highways. Such a grant, under adjudged cases in this court, does not carry the right to extinguish the franchises of railroad corporations. Every franchise granted by the state is exclusive, except as against the state, in the absence of express provision or necessary implication to the contrary. While the government, in the exercise of its sovereignty, may sanction the acquisition of

rights resting upon prior grant, compensation being made, no power will flow from mere authority to by condemnation such rights as a state may deem it proper to obtain. This doctrine is clearly enunciated and firmly established in this court in the case of *New Jersey R. Co. v. Long Branch Com'rs*, 10 N. J. Law, 28. There a right to lay a street for a railroad was necessarily implied, as well as the charter privilege to the detriment of the state. The provision would have been futile. The proviso in the act cannot be construed to enlarge or extend its terms beyond the clear meaning and accepted signification of the words of the act. The office of a proviso generally is to narrow and restrain the enactment. In *Lanning v. Lanning*, 17 N. J. Law, 100, Chancellor Green said "that the purpose of a statute is generally intended to be gathered from the enacting clause, and to except from the thing which would otherwise have been included within it, or in some measure to modify the enacting clause. It is a limitation or exception to, the authority conferred by the proviso of an act is sometimes resorted to for the interpretation of ambiguous or doubtful language in the enacting clause. If there is nothing ambiguous or doubtful in the interpretation in this case. It is a ordinary grant of power, under which the right is granted in this court that rights previously acquired under the power of eminent domain cannot be assailed. The proviso is evidently inserted to allay any apprehension which might otherwise have arisen in the minds of the several municipalities which had theretofore secured a water supply. If the body of the act had provided that the lands and water rights of every person, by whatever means acquired or held, might be extinguished by condemnation, a different case would be presented. It might then, with much force, be contended that, by the exception made in the proviso of one corporation from the operation of the act, its framers, by the use of the word "person," intended to subject to condemnation both natural and artificial, to its power, and that no corporation could claim an exception save the one specified.

3. The question remains whether the proposed tract is valid if power is lodged in the state to make a contract. This court has held that the right to interfere with the exercise of that discretion which has been conferred upon the city officials, and to substitute their judgment for theirs. We are possessed of sufficient knowledge upon the subject to enable us to supply which will enable us to proceed with any confidence, that the judgment of those to whom this municipal scheme has been trusted is not well founded. We will therefore, enter into the discussion of the comparative merits of the several proposals put forth. In this court is not the constituted authority in the absence of fraud, or a palpable abuse of discretion, on the part of the municipal

rities, the only question for judicial cognizance is whether there has been any violation of legal principles, or neglect of prescribed formalities, in entering into the engagement which is the subject of this controversy. The charter of Jersey City provides that no contract for work or materials shall be entered into, except after due advertisement for six days, whereupon the contract shall be awarded to that responsible bidder who offers the most advantageous terms. P. L. 1871, p. 1160, § 159. In a recent case of the court of errors and appeals, this charter provision was held to be dominant in Jersey City. *Board of Finance v. Mayor, etc.*, 31 Atl. 625. In the same case it was held that by the fourteenth section of the act of March 28, 1891 (P. L. 1891, p. 249), which creates, for cities of the first class, boards of street and water commissioners, and defines their powers and duties, the provision of the charter of Jersey City above referred to became applicable to the board of street and water commissioners. It is highly improbable that the legislature, while the charter of Jersey City forbids a contract for work or materials, for even a comparatively small amount, without advertising for bids, intended by the act of 1888 to remove that check upon disbursements and safeguard to taxpayers, in the contract for water supply at a cost of \$7,000,000. A construction of that act so inimical to the public policy which has almost universally provided this legislative restraint upon the action of officials in the expenditure of the public funds cannot be accepted, unless the act will bear another reasonable reading. There is no express repealer in the act of 1888 of the provisions of the act of 1871. There is no inconsistency between the two acts. They stand together, and must be upheld, if they can be harmonized. The later act authorizes a contract for water supply, without specifying how that contract shall be entered into. It is not only entirely consistent with that act that the contract shall be made as provided in the charter of 1871, but, in the absence of language excluding that form, it is the true interpretation of it. The fourteenth section of the act of 1891 clearly indicates the legislative purpose to preserve the charter provision of 1871, and to apply it to all contracts. It will be assumed, therefore, that the board of works must advertise for proposals, and that the contract must be awarded in conformity with the proposals. The city can make a contract only in the mode prescribed by statute. In *Shaw v. Trenton*, 49 N. J. Law, 12 Atl. 902, Mr. Justice Magie held that, where the proposals advertised required bidders to guaranty rubber hose for six years, a contract could not be supported which was given to a bidder, who was not the lowest, partly for the reason that he offered to warrant for nine years. In his

opinion he says: "In my judgment, the contract awarded with a warranty for nine years was not the contract for which proposals were asked, and therefore the competition required by section 107 of the charter was not afforded." Although that case was reversed in the court of errors and appeals on a new point, the views expressed in the supreme court were concurred in. *Same Case*, 49 N. J. Law, 338, 12 Atl. 902. The case of *McDermott v. Jersey City*, 56 N. J. Law, 273, 28 Atl. 424, is to the like effect. By the rule adopted in these cases the validity of the Jersey City contract must be tested. The proposals for bids, among other things, require that "the contractor shall provide independent reservoirs and storage basins, located within the state of New Jersey, in such places as to receive and be capable of storing a water supply of one hundred days' delivery hereunder, at the rate of fifty million gallons per day." The reasonable interpretation of this clause, and that which would ordinarily be given to it by bidders, is that the bid must be made upon the basis of 100 days' storage. It is apparent that, as you increase the storage capacity, you lessen the drainage area essential to keep up the requisite supply per diem under the contract. So that it was a matter of great importance to the bidder to understand whether he was to secure and control a drainage area of 65 square miles, or one of double that extent. Under this construction of the terms of the proposals, bids, to be lawfully considered, must have been made upon the assumption that the drainage area was ample to give the stipulated per diem supply during the entire year, with a storage capacity for 100 days only. Bids not upon that basis would not fairly come into competition. If the proposal is construed to invite bids upon the basis that the minimum storage capacity shall be for 100 days, then the proposals are defective and insufficient, and the contract cannot be sanctioned. No contract can be upheld under proposals which do not require competitive bids upon the same definite basis. How could the bidder tell whether the city would prefer a drainage area of 120 square miles, with a storage capacity for 100 days, or a drainage area of 65 square miles, with 250 days' storage? How could one bidder know the storage capacity which another would offer, so as to meet his bid? It is a disputed question in this case whether the lesser drainage area, with the larger storage capacity, is of equal value with the larger drainage area and the lesser storage. Bidders must have the opportunity to compete, and that can be afforded only by definite specifications, to which all bidders can conform. The city may invite bids in various forms, provided each proposal is upon a specific, definite plan. If all had been invited to bid upon the condition that there should be 100 days'

storage, and also on the terms of 250 days' storage, then the city authorities would have had the right to accept the larger or the lesser drainage area. In that case opportunity would have been given for the competition which is a prerequisite to a valid contract. The fact that the Jersey City Water Company offered 250 days' storage was one of the circumstances which was persuasive in securing the award of the contract to that company, as appears by the report of the committee, on page 121 of the printed case, and also by estimates made, and by the discussion of the case before us. It is necessary to refer only to page 38 of the brief of counsel for the Jersey City Water Company to support this statement. In answer to the objection that the contract was awarded on the basis of an offer of storage capacity beyond that required by the specifications, the brief contains this reply: "The facts with regard to this are fully shown by the report of the committee of the whole of the board of street and water commissioners, to that board, on pages 121 to 129. The advantages of large storage capacity is also a business proposition clearly within the discretion allowed by the board. When what the board did is carefully examined, with the facts admitted, it will be seen that the board had a right to consider the advantage of this large storage; bearing as it does upon the purity of the water, and the scarcity in times of great drought. It there appears that the storage capacity was only one of the many elements which entered into the final judgment that the Jersey City Water Company's was the most advantageous bid to the city." We have not failed to notice that the reply brief of the same counsel takes a somewhat different position. Whether other bids, if proposed for upon the larger storage basis, would have been more favorable to the city, cannot be known until such bids are called for. So it seems apparent that in order to give a fair opportunity for competition, and to make an intelligent comparison of the bids, the proposals should specify whether there shall be a single pipe line, or two pipe lines. It is not necessary to discuss other alleged infirmities in the proposals, and the award of the contract under them. The contract, as awarded to the Jersey City Water Company, is interdicted by the case of *Shaw v. Trenton*, and must be set aside.

**MERCANTILE LIBRARY HALL CO. v.
PITTSBURGH LIBRARY ASS'N et al.**

(Supreme Court of Pennsylvania. Jan. 6, 1896.)
CORPORATIONS—BOARD OF MANAGERS—NOTICE OF
MEETING—POWERS—PERPETUAL LEASE.

1. In the absence of any by-law or fixed practice in that regard, a notice of a meeting of the board of managers is insufficient, if not re-

ceived by the members of the board before the morning of the day on which the meeting is to be held.

2. A notice of a special meeting of the board of managers, stating that it was to transact the treasurer's report, and transact any other business which might come before the board, and to elect successors to the members of which were to be elected, was insufficient, when the actual transaction at the meeting involved the surrender of the active duties of the board to the successors.

3. A corporation formed to erect a building for the use of a library association was authorized by its charter to lease the building, which was to be paid to the association, which was to pay the company, annually, the amount of the repairs and taxes, and in addition a sum not over 6 per cent. on the whole cost of the building. *Held*, that the board of directors of the corporation had no authority to lease the building to the association for a perpetual lease of the building to the association at a rent of 4 per cent. on its cost; and that the rent to be dependent on the amount of income from rents after payment of repairs, and interest on incumbrances.

Appeal from court of common pleas of Allegheny county.

Bill by the Mercantile Library Hall Company against the Pittsburgh Library Association; Joseph Horne, Durbin Horne, Leonard Shea, and Albert C. Burchfield, partners doing business as Joseph Horne & Co.; Richard M. Gullick and H. M. Benning, partners doing business as R. M. Benning & Co.; the Syria Temple; T. Brent Swann, James F. Hudson; Joseph Albree; William R. Thompson. From a decree of the court of common pleas, reversing the judgment of the court of common pleas in favor of the defendants, plaintiff appeals. Reversed.

On January 1, 1890, James F. Hudson, Joseph Albree, and Henry Holdship, all directors of the Pittsburgh Library Association, consulted with counsel on behalf of the association for the purpose of determining upon a plan of perpetual lease to the association from the Mercantile Library Hall Company, the plaintiff. The plan was submitted by Hudson, Albree, and Holdship to a meeting of the board of directors of the association, which they attended, and which their resignations as members of the board were accepted. On January 2, 1891, Thompson, who, as well as Hudson and Holdship, was a member of the board of directors of the Mercantile Library Hall Company, sent by mail a notice to the association of the hall company, as follows: "PITTSBURGH LIBRARY ASSOCIATION. January 2, 1891. Please attend a meeting of the directors of the Mercantile Library Hall Company at W. R. Thompson & Co. Building House, corner Fourth avenue and Third street, Saturday, January 3d, 1891, at 10 p. m., to hear the treasurer's report and transact any other business which may come before them. Wm. R. Thompson, Secretary. George I. Whitney, one of the directors of the hall company, was absent from the meeting and did not receive the notice until after the meeting had been held. January 3d, 1891. Hudson, Albree, Thompson, and Holdship, together with L. H. Williams, another

of the board, and treasurer of the company, met, pursuant to the notice, as directors or managers of the hall company; and by the vote of those present, except Williams, the perpetual lease in question was attempted to be authorized. It was executed on the same day. It departed from the proposition submitted by the library association to the board of managers, which proposition contained the terms upon which the board undertook to authorize it, in this: that it subjected the lessor to the burden of one payment of \$5,000 upon an existing first mortgage, which payment, by the terms of the offer, was to be assumed by the library association. The meeting of the managers on the 3d of January took place, sending a call for the regular meeting of the stockholders of the hall company. On January 5, 1891, the regular annual meeting of the stockholders of the hall company took place, and the meeting, by resolution, repudiated the alleged perpetual lease, as being unauthorized, and directed legal proceedings to be taken to procure a cancellation of the same; hence this suit.

The Mercantile Library Hall Company was incorporated March 18, 1859, by a special act of assembly (P. L. 1860, p. 811). By the second section of this act, it was empowered, inter alia, to take, purchase, hold, and receive, for the use of said company, leases, improvements, choses in action, goods and chattels, of whatever kind, nature, or quality, real, personal, or mixed, with the right to grant, bargain, sell, mortgage, improve, or dispose of the same for the use and benefit of the company. The fourth section of the act, however, provided "that it shall be the duty of the corporation, as soon as sufficient stock shall have been subscribed, to purchase ground to proceed and erect thereon a suitable and commodious library building for the use of the Young Men's Mercantile Library and Mechanics' Institute of the city of Pittsburgh, which building shall be completed without unnecessary delay, and when ready for use, shall, with the ground aforesaid, be perpetually leased to the Young Men's Mercantile Library Association upon the following terms, viz.: The library association shall pay to the hall company on or before the 1st

January, in each year, all necessary repairs and taxes to which said ground and building may be subjected, and in addition thereto, a sum not over six per cent. on the cost of the ground and building, or such part of said cost as shall not have been repaid by the library association to the hall company." And the act further provided that, "in consideration of payment of the before mentioned taxes, repairs and interest, the library association shall forever have in their possession and control, the said ground and building thereon erected, with power to sublet the whole or any portion thereof, and to collect the revenue and to make an appropriation of the same, provided nevertheless, that if the

library association shall at any time be in arrears for two whole years, taxes, repairs and interest, then they shall forfeit their lease aforesaid," and the hall company, after six months' notice, will be entitled to take possession of the ground and building, with the additional provision that the hall company shall annually pay to the library association such proportion of the net revenue from the ground and building as the amount paid by the library association towards the reimbursement of the cost of the ground and building shall be to the whole cost thereof; and the act still further provides that in case of a sale of the whole or part of the building the library association should be entitled to a like proportion of the proceeds of sale. The name of the Young Men's Mercantile Library and Mechanics' Institute of the City of Pittsburgh was afterwards changed to Pittsburgh Library Association.

The building to be erected by the hall company was completed in 1870. By the second section of the act of February 3, 1870 (P. L. 103), it was provided that "the said Mercantile Library Hall Company may lease its grounds and buildings to the Young Men's Mercantile Library and Mechanics' Institute, on such terms and conditions as may be agreed upon between the respective corporations; provided, that the rents and revenues which shall be received by the said Young Men's Mercantile Library and Mechanics' Institute, over and above the rent, taxes, interest, insurance and repairs, shall be paid to the Mercantile Library Hall Company, to reimburse the same for the cost of said ground and buildings; provided, further, nevertheless, that if the said Mercantile Library Hall Company shall agree thereto, the said surplus, receipts and revenues, and the increase of dividends arising therefrom, may be appropriated to the purchase of stock in the Mercantile Library Hall Company."

March 10, 1871, an agreement was entered into between the two companies under which they seem to have acted up to the 1st of January, 1891. This agreement contemplated the postponement of the making of a perpetual lease, and provided how the revenues of the hall company should be disposed of in the meantime. The first and second articles of the constitution and by-laws of the Mercantile Library Hall Company are as follows: "Article 1. The officers of the company shall consist of a president, vice president, treasurer, secretary, and five directors. They shall be stockholders, and shall have full power to conduct the affairs and carry out the objects of the company in accordance with the charter, and such by-laws consistent therewith as may from time to time be adopted. Art. 2. The president, vice president, secretary, and treasurer shall perform the usual duties pertaining to their respective offices, and shall, with the board of directors, constitute the board of managers. The managers shall an-

nually make a full report of their proceedings, and a detailed statement of all receipts and expenditures. They shall have power to fill vacancies occurring in their own body. Five members, all being notified, shall constitute a quorum."

Knox & Reed and Lyon, McKee & Sander-son, for appellant. Watson & McCleave and A. M. Neeper, for appellees.

MITCHELL, J. This is a regrettable controversy between two corporations occupying to each other practically the position of trustee and cestui que trust; both having the same end and object in view, but differing in opinion as to the time and mode of accomplishment. By the action of the trustee's agent, its former board of managers, the corpus of the trust has been transferred to the hands and management of the cestui que trust; and, while this result is in accord with the purpose of the trust, the trustee complains that it has been done without proper authority, and without due regard for the trustee's own rights and interests. We are obliged to say that this complaint is well founded. The notice for the special meeting of the hall company at which this lease was authorized was insufficient, both in time and in substance. It was dated and mailed to the members of the board on January 2d, and called for a meeting on January 3d, at 4 o'clock. There is no finding by the master as to the hour of mailing, nor any evidence that the notices were received by the members before the morning of the day on which the meeting was fixed. *Prima facie*, this was not a reasonable time. The managers are all reported as business men, who cannot be presumed to be ready to drop their own affairs, and attend offhand, on such a notice. One full day in advance of the time fixed is as little as the law could presume to be reasonable, and in many cases that would be too short. The by-laws or the practice of the particular board could, of course, fix any time that should be agreed upon; but there is no by-law here, and no sufficient evidence of any practice to supply a rule. Albree, the president, says it was customary to give two or three days' notice; and Thompson, the secretary, says that, to the best of his knowledge, two days' notice was given in this instance, in which he is admittedly in error.

The notice, further, was insufficient in substance. It was for a special meeting, with a definite object named,—“to hear the treasurer's report,” and the few general words added, “and transact any other business which may come before them.” It was for a meeting on the last business day that the board would be in existence prior to the election of their successors at the stockholders' meeting on the following Monday, and was calculated to convey the impression which Whitney says Williams complained of,—that it was a formal meeting to pass on annual reports, and simi-

lar matters of routine, prior to the stockholders' meeting. In fact, it was called for business of the most important and most exceptional character, involving the practical surrender of the trustees of the corporate trust. The meeting, irregularly called was equally unfounded in its attendance. The full board of directors consisted of the four principal officers of the hall company, and five directors, many of whom five were a quorum. Two of two vacancies at that time, and only seven managers, one of whom did not get the notice in time, and one (Brown) did not attend, for reasons explained. This left an attendance of five persons, of whom one reports that one was not a stockholder, and therefore not legally qualified to be a director, and another was not a stockholder, though he appears to have held some shares. These two, whose titles were questionable, and one other, making a minority of the quorum, knew all about the business to be put through; for, as members of the library association, they had been active in having the lease prepared and adopted by the association at its meeting on the previous day. It is true that on that day resigned as directors of the library association, so that at the meeting of the hall company on the third they technically occupied the positions of directors in both companies; but it cannot be seen from the evidence, that these resignations were not mere formalities, in order better to carry out the plan of leasing, which, prior to the resignations, the same persons, in their respective capacities, had prepared. The practice was that when the board of managers of the hall company met, on January 3d, to consider the lease thereof, the quorum present consisted of representatives of the lessor were admitted to the lease, in the interests of the lessor, and the vote of these three managers, by which the lease was approved. The master finds that in this action there was no fraud in fact, and we see no reason to question the correctness of this finding. The stockholders concerned had no pecuniary interest in the matter, and were acting for the benefit of the library association, which, as already stated, was the cestui que trust for which the lease was originally designed, and to which it was ultimately to go. But the master's statement of the facts is enough to show that the method of proceeding is open to no valid objection. By this it is not meant to intimate that the same person may not properly act as director in two capacities, even when dealing with the same corporation. The interests of corporations are so interwoven that it is desirable to have representatives in their respective capacities, and, at any rate, it is a not unusual and not unlawful practice. But that such persons should be open, and

ny suspicion of secret dealing in favor of one principal while acting as the representative of the other. Such action is always open to investigation, and the utmost good faith must of only exist, but be made manifest. In the present case we are not required to say whether or not the transaction is so contrary to settled policy that it must be conclusively pronounced a fraud in law, as there are other grounds which are decisive. Before leaving this branch of the case, however, we may call attention to the difference in *Gloninger v. Railroad Co.*, 139 Pa. St. 13, 21 Atl. 211, cited by appellee, in that the issue of bonds in that case was for payment of an undisputed debt, and was authorized by a note of the stockholders themselves.

But the lease in controversy here is fatally defective for want of authority in the board of managers to grant it. While the object of the incorporation of the hall company was to build a hall for the use of the library association, and to lease it, and ultimately convey it to that association, yet the act of 1859 looked to the payment of the stockholders of the hall company, and defined with great precision the respective rights of the parties, including the terms of the contemplated lease. The supplementary act of 1870 relieved the stringency of the former somewhat, as to the terms of the lease, by authorizing it, under certain restrictions, to be made upon mutual agreement. But it made no substantial change in the rights of the stockholders, and it is not clear how could have done so without their consent. The act, however, seems to have been acquiesced in, as a lease for 10 years was made under its authority in 1871, and appears to have been lived under until the action that led to the present controversy, in 1891. The present lease does not follow the terms of the act of 1859. It is not necessary to go into the discussion of the variations, further than to say that by the act of 1859 the library association, on taking possession under the lease provided for, was to pay to the hall company annually the necessary repairs and taxes, "and in addition thereto a sum not over six per cent. per annum on the whole cost of said ground and building," while under the lease of 1891 the payment to be 4 per cent., and that dependent on a surplus of income from rents, etc., after payment of taxes, repairs, and interest on encumbrances. As these last are necessarily

preferred claims, it may well be that the stockholders of the hall company would get a larger return under the lease, provided the library association is able to keep its covenants, than they would under their own management; but, under the act of 1859, they were entitled to keep the management of the property in their own hands until the terms of the act should be complied with, and this was a right of which they could not be deprived except by such compliance, or by their own consent. The lease in question surrenders the control of all the company's property, divests the company of all its active functions, and practically winds up its existence, except for such formal continuance as may be necessary for the receipt and distribution among its stockholders of such payments as the library association shall hereafter make. Such an act is not in the management of the current affairs of the company, but is extraordinary, and practically final. It cannot be fairly regarded as within the authority committed to the board of directors, but rather as an accepted completion of its corporate purpose, and a consequent surrender of its property, franchises, and rights, which only the true owners themselves—the stockholders—were competent to make.

At the close of respondent's answer there were some rather irregular averments,—that the objections of the present managers of the hall company, and the action of the majority of the stockholders, are for selfish aims and with a view to their own profit, rather than to the interests of the library association. These we understand to have been stricken out by the court below as impertinent, and they have not been considered as part of the case before us. They are mentioned now only to make this fact clear. The object of the hall company's corporate existence was to promote the interests of the library association. It is a trustee for that purpose, and bound to act in the utmost good faith to that end. Should it at any time fail to do so, the courts of equity are open to the cestui que trust for redress, and this adjudication will not be in the way. Decree reversed, bill reinstated, and decree directed to be made restoring parties to their respective positions before the lease of January, 1891, was made, but saving intervening rights of tenants who have paid rents, and others.

**NATIONAL BANK OF THE REPUBLIC v.
ROCHESTER TUMBLER CO. et al.**

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

STOCK CERTIFICATE—TRANSFER—LIEN OF CORPORATION—ESTOPPEL.

1. A corporation is not estopped from asserting a lien on stock for a debt due it, as against a transferee thereof, by the fact that the certificate states that the shares are "transferable personally or by attorney on the books of the company," without any reference to such a lien.

2. An employer may trust his employé to the extent of negligence without impairing his rights against the employé, or giving the employé's creditor any ground of complaint, if the employer has no notice of such creditor's rights.

3. Act 1874, § 7, makes certificates of stock in corporations formed under the act transferable at the pleasure of the holder, "subject, however, to all the payments due or to become due thereon," but provides that "no certificate shall be so transferred so long as the holder thereof is indebted to said company unless the board of directors shall consent thereto." *Held*, that the indebtedness referred to in the last clause is not restricted to that growing out of the original subscription and subsequent calls and assessments.

Appeal from court of common pleas, Allegheny county.

Bill by the National Bank of the Republic, of New York, against the Rochester Tumbler Company and others to compel such company to permit a transfer of certain stock upon its books. From a decree for defendants, plaintiff appeals. Affirmed.

Brown & Lamble, Watson & McCleave, and H. Aplington, for appellant. Knox & Reed, for appellees.

MITCHELL, J. The claim that the defendant is estopped by the form of the certificate, which sets out that the shares are "transferable personally or by attorney on the books of the company," without any reference to a lien by the stockholder's indebtedness, cannot be sustained. The language of the certificate is not a representation of any inherent quality of the shares or rights of the holder, but is merely information as to the mode of transfer. From the nature of the business, transfers must be under some regulation; and where, as in this case, the regulations are imposed by the statute, which is the fountain of the corporate power, all parties are bound to take notice of them. The Pennsylvania cases cited are not in point. *Willis v. Railroad Co.*, 6 Wkly. Notes Cas. 461, and *Kisterbock's Appeal*, 127 Pa. St. 601, 18 Atl. 381, decided that, as the issue of certificates was an act within the lawful powers of the corporation, and depended on facts not accessible to outside parties, the latter were entitled to rely upon them as evidence of title to shares, and, as against a purchaser for value, the company would be estopped. There was no question of the mode or conditions of transfer. *Wood's Ap-*

peal, 92 Pa. St. 379, and *Jeanes' Appeal*, 101 Pa. St. 573, 11 Atl. 862, were cases of private owners who had clothed themselves with apparent authority to transfer. They were held to be estopped thereby. On the other hand, an authoritative case on this question is *Hammond v. Hastings*, 101 Pa. St. 401, 10 Sup. Ct. 727, where the court was ruled in accordance with the view here expressed.

2. Nor can the claim be sustained that the defendant has lost its right to lien, by the act of the appellant, by reason of negligence in allowing the debt to be created. The appellant's obligation on a creditor to take care of the rights of the mutual debtor, founded upon by the avoidance of fraud. An employer may trust his employé to the extent of negligence without in any way impairing his rights against the employé, or giving the employé's creditor any ground of complaint, if the employer has no notice of such creditor's rights. Even after notice it does not follow that the employer must sacrifice his own rights. In the present case, it is doubtful if the learned judge did not go too far in favor of the appellant, in holding that knowledge by the president and directors of the treasurer's misconduct imposed any duty to outside parties to disclose it, or in any way impaired the right of the company for a subsequent increase of its capital. It is not the rule, even in favor of the appellant, in *Railway Co. v. Shaeffer*, 59 Pa. St. 301, that directors, being suddenly confronted with knowledge that their treasurer had been engaged in side speculation with the company, and had become a defaulter, had to decide whether it was for the interest of the company to allow him time and opportunity to pay off gradually from the illegal venture, or to reduce his debt, or to stop him from incurring all risks. In reaching a decision on this question, the court is not necessarily bound to take notice of the interests to his other creditors, or to the interests to their own. Those are questions which must depend on the particular circumstances of each case. It is not necessary to go into this inquiry, but the court conceded that the debt of Lippin, the appellee, incurred before knowledge of the misconduct, or of appellant's claim, did not exceed the value of the shares involved.

3. The main question is the extent of the lien given by the act of 1874, and the meaning of the word "in conformity with the seventh section." The section provides that certificates to be issued to the stockholder, according to the number of shares, which certificates "shall be transferable at the pleasure of the holder, in person or by attorney, * * * subject, however, to all the payments due or to become due thereon." * * * assignee * * * shall be a member of the corporation and have * * * all the rights, privileges and franchises, and be liable to all the liabilities, conditions and

ent thereto, in the same manner the original subscriber or holder would have been, but the certificate shall be transferred so long as the holder thereof is indebted to said company, unless the board of directors shall con-
 sider thereto." P. L. 1874, p. 78. The last clause is the operative one, from which the result in this case arises. On its face, and by the natural meaning of the words, it includes all kinds of indebtedness. Standing alone, it could be no question about it. But appellant contends that it should be read with and controlled by the previous expression, "subject to all payments due or to become due on," and its meaning, therefore, restricted to indebtedness growing out of the original subscription, and subsequent calls and assessments thereon. The argument is ingenious, but not convincing. It is opposed, not only to the already said, to the natural meaning of the words used, but also to the words which in almost every case most naturally have been used if the result had been as claimed. The prior part of the section makes the certificates transferable at the pleasure of the holder, and the transferee takes them subject to all payments and liabilities incident to the original subscription. If the indebtedness which would prevent a transfer without the consent of the directors had been intended to be only that growing from the same source, the easiest and most obvious mode of expression would have been to add to the first clause "and subject, nevertheless, as to all payments due thereon, to the consent of directors," or to have substituted for the last clause, "but no certificate shall be transferred so long as any payments remain due thereon," unless the directors consent, etc. Either of these forms would have expressed clearly and definitely the restriction of the kind of debt which would prevent transfer, and one of them, or the other similar phrase, would have been the natural expression chosen for such idea. Instead of using any such expression, the legislature indicated its intent by the broad word "indebted." The fact is, as was pointed out by the learned master, that the two clauses, as they stand in the act, do not refer at all to the same thing. The first, "subject to all payments due or to become due on," refers to the obligations to be assumed by the new taker, while the other, "so long as the holder is indebted," refers to the existing obligations of the former owner. A stockholder may become indebted to his company in many other ways than for calls upon his subscription, and the company may be content with his ability to pay, and rely upon his shares as security. But this security would be lost if he could step out at any time by the transfer of his shares from only a liability for calls upon the original subscription. The legislature clearly had these considerations in view when it made the distinction between the new obli-

gations of the transferee and the old ones of the transferor, and described the latter by the broad word "indebted."

But there is another section in the act which makes this conclusion irresistible. If the indebtedness which gives a lien is only such as arises from "payments due" on the stock, then a stockholder not so indebted can, as the language of the first part says, transfer at his pleasure, and the consent of the directors need only be obtained when he is so indebted. But, by section 12, "no shares shall be transferable until all previous calls thereon shall have been fully paid in." That is, if the present holder is not indebted on calls, the consent of the directors to a transfer is not necessary, and if he is so indebted the directors have no power to consent; so that, in either alternative, the prohibition against transfer without consent of the directors becomes ineffective, and the clause without meaning. A construction which leads to such results cannot be entertained. Where the legislative intent is clear from the words used, it is idle to discuss the agreement or variance of such intent from previous legislative policy. But, as the subject has been somewhat elaborated in the argument, it may be well briefly to call attention to the trend of legislation in this state towards the gradual assimilation of rights and duties between members of partnerships and of corporations. The statutory authorization of special, and later of limited, partnerships has approximated the status of the members to that of mere stockholders, in that they may invest a definite amount of capital, and avoid the unlimited common-law liabilities. On the other hand, when a partner sells out, either voluntarily or involuntarily, he passes to his vendee only a right to an account, and he cannot at any time, unless by consent, withdraw from the firm, and leave the others to pay its debts; and in this respect the legislature has passed many acts, including the one under present consideration, tending to put a stockholder desirous of withdrawing in an analogous position by requiring him first to pay up his indebtedness to the corporation. A number of such acts are cited in the argument of the appellee, and need not be enlarged upon here, further than to say that they have uniformly received from this court a construction in furtherance of their intent, and in harmony with the view we have expressed of the act of 1874. See *Rogers v. Bank*, 12 Serg. & R. 77; *Grant v. Bank*, 15 Serg. & R. 140; *Sewall v. Bank*, 17 Serg. & R. 285; *Bank v. Earp*, 4 Rawle, 384; *Railroad Co. v. Clarke*, 29 Pa. St. 146; *Bank v. Armstrong*, 40 Pa. St. 278; *Klopp v. Bank*, 46 Pa. St. 88; *Mount Holly Paper Co.'s Appeal*, 99 Pa. St. 513; *Reading Trust Co. v. Reading Iron-Works*, 137 Pa. St. 282, 21 Atl. 169, 170.

Decree affirmed, at the costs of appellant.

McBRIDE et al. v. RINARD et al.
(Supreme Court of Pennsylvania. Jan. 6,
1896.)

**FOREIGN INSURANCE COMPANY — NONCOMPLIANCE
WITH STATUTE — ACTION AGAINST
AGENTS—EVIDENCE.**

1. In an action by the holders of a fire insurance policy against the agents through whom the insurance was procured, to enforce a personal liability for the amount of the loss, under Act May 1, 1876, on the ground that the company issuing the policy had not complied with the state laws as to foreign companies, evidence that the insured gave defendants a package, addressed to the company, containing proofs of loss, is admissible as tending to show delivery of proofs of loss.

2. Defendants having refused to admit that the company which wrote the policy was a foreign one, they could not complain of the admission of evidence to show that this was the case because such evidence also showed the fictitious and fraudulent character of the company.

3. In order to enforce the statutory liability for the loss against an agent who wrote a policy for a foreign company which had not complied with the state laws, plaintiffs need not make proofs of loss to the company within the time stipulated by the policy, but the delivery of such proofs to the agent is sufficient.

4. Evidence as to whether defendants ever acted as agents for any other company which had not complied with the law is inadmissible.

5. Act May 1, 1876, makes not simply the general agents of the company liable for the amount of the loss, but makes the party who acts for the company in the particular transaction liable.

Appeal from court of common pleas, Allegheny county; McClung, Judge.

Action by J. M. McBride, Joseph F. Rodgers, and E. F. McBride, partners doing business as McBride, Rodgers & Co., against John Rinard and Watkins Y. Williams, partners doing business as Rinard & Williams. From a judgment for plaintiffs, defendants appeal. Affirmed.

Hudson & McCue, for appellants. William Yost, for appellees.

DEAN, J. The defendants are insurance agents doing business at Braddock, in the county of Allegheny. The plaintiffs owned and operated a steam planing mill in the borough of Rankin, same county. The mill, machinery, and material of the plant, excluding the land, were worth over \$5,000. On March 27, 1893, the Westmoreland Insurance Company, of Colonial Beach, Va., issued to plaintiffs a policy of insurance against fire, on their planing-mill property, in the sum of \$1,000, for the term of one year. There was an indorsement on the policy of "Other insurance permitted," and plaintiffs held another policy, in the sum of \$750, in the Royal Insurance Company, on part of same property. The defendants personally delivered the Westmoreland policy to plaintiffs, and received from them the premium, \$60, and charges. On 7th November, 1893, all the property insured was destroyed by fire. The plaintiffs, further than transmitting proofs of loss through defend-

ants, and ascertaining they were made no effort to collect the amount of the policy from the Westmoreland Insurance Company. The proof showed it was a company chartered by the laws of Virginia, had no office at Colonial Beach, or in Westmoreland county, Va. The secretary, D. Verney, resided in the city of Washington and was an employé of the government. Colonial Beach is a small village, 40 miles from the railroad. Letters addressed to the company at that post office were remailed to the post office at Washington. The evidence tended to show the company had no assets, no capital, no payment, and its substance consisted of a paper charter, which authorized it to do an insurance business. The company had not complied with the requirements of the Act of April 4, 1873, of our state, which created an insurance department. That act provided: "Sec. 10. No person shall act as agent or solicitor in this state of any insurance company of another state, or foreign government, in any manner whatever, until the provisions of this act have been complied with on the part of the company or association, and there has been filed with said company or association, to the commissioner, a certificate of authority from the state that the company or association is authorized to transact business in this state; and it shall be the duty of every such company or association, authorized to transact business in this state, to make report to the commissioner, within the month of January of each year, under oath of the president or secretary, showing the entire amount of premiums received of every character and description from the said company or association in this state during the year or fraction of a year ending on the thirty-first day of December; and whether said premiums were received in cash or in the form of notes, credits or other substitute for money, and pay into the state treasury a tax of three per centum on the amount of premiums; and the commissioner shall have power to grant a renewal of the certificate of said company or association, on the tax aforesaid is paid into the state treasury. The company not having complied with the law, and being a foreign company, was wholly without authority to make contracts of insurance within Pennsylvania. In the Act of May 1, 1876 (being a supplement to the act of 1873), it is thus enacted: "That no insurance company of any other state or foreign government which does not comply with the laws of this commonwealth, shall be legally liable on all contracts of insurance made by or through him, directly or indirectly, or on behalf of any such company. The plaintiffs, averring that their contract with the Westmoreland Company was made by and through defendants, as agents, and that the company, brought suit against the defendants for \$1,000, the amount of their loss by that policy. The defendants, in

of defense, denied they were agents of insurance company, and averred that, in as they were connected with this company they were agents of plaintiffs. At the court below the evidence offered on both sides was somewhat conflicting; at no the extent of being susceptible of contrary interpretations. The court submitted to the jury to find the truth, instructing that if defendants were agents of plaintiffs, there could be no recovery; if, however, they were not, then defendants were agents for the Moreland Company in procuring the insurance policy, then plaintiffs were entitled to recover for the amount of it. There was a verdict for plaintiffs, and, judgment being entered thereon, defendants now appeal, assigning errors,—13 to rulings of the court admitting and rejecting evidence, and 2 to the

plaintiffs offered to prove that after they made out proof of loss as to the Moreland policy, and delivered the same personally to defendants, at their office in Braddock, Pa. The defendants, not denying the receipt of a sealed package addressed to the company at Colonial Beach, did deny, in their affidavit of defense, that they had any knowledge of the contents of the package, and therefore the admission of the evidence would tend to prejudice them before the jury on the main issue, as the inference might be drawn that if they were the agents of the company they would deliver and transmit proofs of loss, they would also the agents to make contracts of insurance. If the defendants, ignorant of the contents of the package, merely received from plaintiffs a sealed package, and dropped it in the post office, no inference that they were agents for defendants, any more than they were agents for plaintiffs, was warranted by the facts. They were in no different position than that of the messenger who carried a letter intrusted to him in the post office. And the court, in its ruling, distinctly stated the effect of the evidence by saying it was prima facie evidence of the fact of delivery of the proofs of loss, and defendants would be entitled to make any explanation they saw proper. Plaintiffs, as content to showing personal liability of defendants on the contract, attempted to show the delivery and proof of its transmission to the company. In making this proof, the step was a delivery of the package to one, whether agents or not, who mailed it. In this view, the evidence was admissible, and the court properly so ruled.

The second to twelfth assignments, including the admission of evidence not intended to show, but the tendency of which was to show, the fictitious and fraudulent character of the company. This was objected to as irrelevant. Plaintiffs' case was based on these two averments: (1) The Moreland Company was a foreign com-

pany, not authorized to do business in this state, because of noncompliance with the statutory requirements; (2) defendants were agents of this company in making the contract, and were therefore personally liable on the contract. It follows that evidence of the fraudulent character of the company was irrelevant. They were not personally liable under the statute because of the fraud, but because of the contract with the foreign company which was forbidden. And if an offer had been made, as an independent element, to show the company was a fraudulent one, to constitute liability on part of defendants, the court should, and doubtless would, have ruled it out. The objectionable evidence is contained in depositions taken on commission by interrogatories, cross interrogatories, and answers thereto. The depositions are not printed in full by appellants, as they should have been, and it is difficult to get before us the exact scope of the testimony as it was before the court below, where the whole of it was read. However, plaintiffs' counsel and the court below tried the case on this theory: The act of 1876 makes the agent personally liable on all insurance contracts made by or through him. This contract is to indemnify the assured, to the amount of \$1,000, on loss by fire, if due proof of loss be made to the company within 30 days thereafter. Plaintiffs assumed the contract liability of the company, and therefore of the agents, was fixed only when that liability was established by proof of loss delivered to the company as provided in the contract, and that the company actually had its office in another state. Therefore they undertook to prove a delivery to these defendants of proof of loss for transmission to the company at Colonial Beach, Va., and, by witnesses at Colonial Beach and Washington, the actual receipt through the post office, by the officers of the company, of these proofs. Incidentally and necessarily, the answers of the witnesses at Colonial Beach to proper interrogatories inferentially demonstrated the fraudulent character of the whole scheme. The circumstances attending the offer should be first noticed: "Mr. Yost, Counsel for Plaintiffs: I offer in evidence the depositions of Gale Sherman. Mr. Hudson, for Defendants: I object to the deposition, with the exception of the first question and answer, and also object to the second as immaterial and irrelevant. Mr. Yost: The purpose is to locate this company outside the state of Pennsylvania. The Court (to defendants' counsel): You admit it is a company that comes under the act of assembly? Mr. Hudson: I admit, if such a company is in existence, and defendants are agents, they are liable. By the Court: Do you admit that it is a company that comes under that act, and if they are agents they are liable? Mr. Hudson: That is, if they have not complied with the law. I have no question that this com-

pany has not complied with the law.' We do not admit that it is an incorporated company outside of the state. I cannot admit what I don't know." This was a very equivocal admission. If defendants had candidly admitted the company was a foreign corporation, and proofs of loss had been transmitted to and received by it, such admission would have shut out every word of the deposition now objected to; but, as the case then stood, this offer by plaintiffs was justified: "Mr. Yost: I propose to prove the existence of this company outside of Pennsylvania, and also that he [the witness] knew of the company, and was the agent of it, and received the proofs of loss later on to be offered in evidence." The court, in view of the theory on which the case was tried, properly ruled such evidence admissible. The three witnesses to give testimony to sustain the offer resided at Colonial Beach and Washington. In testifying to the location of the company, receipt of the proofs, their transmission to Washington, and delivery to the secretary, the facts that Colonial Beach was a small village 40 miles from a railway; that the package of proofs was remailed to Washington, and receipted for by the keeper of a boarding house, and by her delivered to an agent of the company,—left room for no other inference than that the company was fraudulent. But of this defendants have no right to complain, because, by objections and equivocal admissions, they imposed on plaintiffs proof of alleged material facts, from which the jury would draw an obvious inference. The facts being properly proven, the court could not exclude the prejudicial inference. It was not necessary for plaintiffs to go as far as they did, and fix liability of defendants by proving they (the plaintiffs) had, after the fire, complied with every subsequent condition imposed upon the assured by the contract. Both parties in the court below assumed that plaintiffs must make proofs of loss to the company within the time stipulated by the policy; that is, the right to demand payment from the company must be fixed under the indemnity contract before defendants could be called upon personally to answer under the statute. This, in effect, assumed the liability of the agents to be no higher than that of sureties or guarantors for the foreign company, which had violated the law. We think the statute fairly susceptible of a more rigorous interpretation, as against the agents, than this. It declares the agent of a foreign insurance company which has not complied with the law shall be personally liable on the contracts of such company. The moment the agent makes a contract for a foreign company which has neglected to obtain the proper authority from the insurance commissioner to do business within the state, that is the inception of the agent's liability on the contract, which is consummated by

the loss by fire. Proofs of loss, delivered to him, would be sufficient. The words of the act make him liable as one of the principals to the contract. They do not declare he shall be personally liable in case proofs of loss are furnished the company at its office in the foreign state, or in case the office of the company cannot be found, or is insolvent or fraudulent, but that he "shall be personally liable on all contracts made by or through him directly or indirectly." The contract liability is complete the moment the loss occurs, and is payable upon proof thereof to him who is answerable therefor—the agent. And this view is practically that of counsel for appellants here, to sustain his assignments of error to the admission of the testimony, but he embodied no such proposition in his objection in the court below. There it, in effect, was that the evidence tended to prove the fraudulent character of the company, and was therefore irrelevant. If it was necessary, as was assumed at the trial, to prove the company's office was outside the state, and proofs of loss reached that post office, there was no error in admitting the evidence. The assignments of error from second to twelfth inclusive, are overruled.

As to the thirteenth assignment: W. J. Williams, one of defendants, when on the stand, was asked by plaintiffs if defendant had not procured two other policies from the general agents of the Westmoreland company, and the answer was in the affirmative. Afterwards, when recalled, he was asked by his own counsel this question: "Did you ever, or did your firm ever, act as agent for any company in Pennsylvania that had not complied with the law?" This was objected to, and the objection sustained. Such a general question had no relevancy to the issue. The point in controversy was whether defendants were agents of the Westmoreland in making this particular contract,—no what, in the course of their business, they had ever done. It is argued, the answer would have explained the admission that two other policies had been taken from the general agents of this company. If so, that purpose was not stated, and such answer would not have been responsive to the interrogatory. As the record stands before us, the court committed no error in sustaining the objection.

The fourteenth assignment is to this instruction of the court to the jury: "This act of assembly does not make simply the general agents of the company liable. It makes the party who acts for the company in the particular transaction liable. It is not necessary, in order to find against the defendants here, that you should find that they had been the agents of this company in other transactions. If you find that they were the agents of that company in this particular transaction,—that they were the agents by

through whom this contract was had,—
 they would be liable." This is manifestly
 correct interpretation of the intent of the
 legislature, from the language they used. If
 limitation of the penalty to general
 agents had been the purpose, it would have
 been easy to say so by merely prefixing the
 adjective to "agent." The omission of it
 leaves no doubt of the intention. And, clear-
 ly if the penalty had been restricted to gen-
 eral agents alone, the act would, in large de-
 gree, have failed in its purpose, for but a
 small proportion of insurance contracts are
 effected by general agents. Nearly all are
 effected by local agents. With these the
 public deal, and through them make their
 contracts with the companies. The four-
 teenth assignment is overruled.

In the fifteenth assignment, that the verdict
 against the evidence, raises a question
 which was for the court below, on a motion
 for a new trial. The evidence as to whether
 defendants were agents for plaintiffs, or for
 the company, to solicit insurance from plain-
 tiffs, was clearly for the jury, and was sub-
 jected to them in an unexceptionable charge.
 It is the declared policy of the common-
 wealth, in the interest of the public, to regu-
 late the business of insurance, the law be-
 comes, if firmly enforced by the courts,
 tend to promote that policy. It is a
 wholesome law; works no hardship on
 those of honest companies. It is but little
 trouble to him who is about to negotiate a
 contract of insurance with a property holder
 to ascertain from the insurance department
 whether the company is seeking to do busi-
 ness in violation of law. If it is, then he
 is dishonest in soliciting for it a policy, and
 has no reason to complain when personal
 responsibility is enforced by the policy hold-
 er. If the agent do not take the trouble to
 inquire as to the authority of his principal
 to do business in the state, he will save
 himself by not taking the trouble to defend
 his suit against himself, personally, on the
 contract. The judgment is affirmed.

HOOFSTITLER et al. v. HOSTETTER et al.
 Supreme Court of Pennsylvania. Jan. 6, 1896.)

APPEAL—AMENDMENT OF BILL—DELAY IN TAKING
 TESTIMONY.

1. Where there is a delay of several years
 in applying for leave to amend the bill, and
 the application is not made until after the tes-
 timony has been taken, it is proper to refuse
 the application.

timony has been taken, it is proper to refuse
 the application.

2. Where the delay of the master in taking
 testimony is at plaintiff's request, and the tak-
 ing of testimony is pursuant to agreement, it is
 error to strike the master's report and testimony
 from the record on the application of plaintiff,
 because the testimony was not taken within the
 time fixed by rule of court.

Appeal from court of common pleas, Alle-
 gheny county.

Bill by John Hoofstittler and Christian L.
 Stoner, surviving executors of the last will
 and testament of Jacob Hostetter, against
 D. Herbert Hostetter, administrator of David
 Hostetter, deceased, and Charles W. Cooper,
 surviving executor of George W. Smith, de-
 ceased, to set aside an assignment of a cer-
 tain secret recipe as having been fraudu-
 lently procured, and to obtain an account-
 ing. From a decree for defendants, plaintiffs
 appeal. Affirmed.

Levi Bird Duff, F. E. Andrews, J. D. An-
 drews, and O. F. Woodruff, for appellants.
 Johns McCleave and D. T. Watson, for ap-
 pellees.

PER CURIAM. In view of the circum-
 stances, the action of the court in refusing
 plaintiffs' application for leave to amend
 their bill was free from error. The delay of
 several years in making the application was
 very great, and, moreover, it was not made
 until after the testimony on both sides was
 taken. It would be contrary to every rec-
 ognized precedent to allow an amendment in
 such a case. Story, Eq. Pl. § 887; 1 Daniell,
 Ch. Prac. 417; 1 Beach, Mod. Eq. Prac. §
 159; 6 Am. & Eng. Enc. Law, 807. For like
 reasons, the refusal of plaintiffs' motion to
 strike from the record the master's report
 and the testimony was entirely proper. The
 delay was at plaintiffs' request, and the tak-
 ing of testimony was "pursuant to agree-
 ment." As stated by the court below, "to
 now let them take advantage of their own
 delay would be intolerable; and, if it is nec-
 essary, an order will now be made nunc pro
 tunc extending the time so as to bring the
 case within the rule of court." It is unnec-
 essary to express any opinion as to the valid-
 ity of the rule thus referred to. We find
 nothing in any of the other specifications of
 error that would justify a reversal or mod-
 ification of the decree, nor do we think that
 either of them involves any question that re-
 quires discussion. They are all dismissed.
 Decree affirmed, and appeal dismissed, with
 costs to be paid by the plaintiffs.

DONNELLY et al. v. RAFFERTY et al.
(Supreme Court of Pennsylvania. Jan. 6,
1896.)

JOINT DEED—EXECUTION AND DELIVERY.

1. Where, to avoid a family quarrel, each of the remainder-men under a devise agrees to join in a conveyance to the life tenants, provided it is joined in by all the remainder-men, the consideration for the deed fails if any of the remainder-men fail to join therein.

2. The fact that a deed calling for execution by several parties, and which it was agreed should be executed by all such parties, was given by the counsel who prepared it to a notary, who obtained the signatures and acknowledgments of part of the grantors, and then returned it to the counsel, does not show that it was delivered, so far as concerned the parties who had executed it.

3. Where a deed drafted in attempted performance of a family agreement was abandoned before delivery because the parties to the agreement would not sign the same, and another deed was substituted, in the hope that it might be more satisfactory, the fact that the latter also failed of its object, and was never delivered, did not revive the prior deed.

Appeal from court of common pleas, Allegheny county.

Bill by Charles Donnelly, Jr., and others, against Margaret J. Rafferty and Rose Ann Rafferty, to cancel a deed. From a decree for plaintiffs, defendants appeal. Affirmed.

Charles E. Hogg, W. H. Tomlinson, and F. C. McGirr, for appellants. Knox & Reed and Iams & Brock, for appellees.

MITCHELL, J. Notwithstanding the numerous assignments of error, and the earnest and exhaustive argument of appellants' counsel upon them, this case depends wholly on the correctness of the master's finding of fact that the deed of February 6th was to be executed by all the devisees in remainder under James Rafferty's will, before it should become operative as to any, and that neither it nor the later deed, of February 17th, was ever delivered. An examination of the evidence satisfies us that the master's finding was correct, and that no other conclusion could be sustained. James Rafferty devised all his estate to his two sisters, the appellants, for life, with remainders to certain nieces and a nephew in fee. He was of sound mind, as found by the master, and had the unquestionable right to do as he pleased with his own. But the appellants chose to be dissatisfied, and threatened to contest the will. There was no ground for a contest, as even their own counsel advised them; but nevertheless they proceeded to use the threat of one as a club to extort a release from the remainder-men of the estates that the testator had given them. This was so far successful that the deed now in controversy was prepared, and was executed by some of the parties. It was a voluntary conveyance of an undoubted legal estate, for which there was no consideration

even suggested, except the avoidance of a family quarrel, and perhaps scandal, by a contest over the will. This consequence would be just as certain and just as disagreeable if made against one remainder-man as against all; and Rose Ann Rafferty, one of the appellants, testified distinctly that she did not intend to relinquish the contest unless all should give up their shares. The circumstances therefore raise a strong presumption that, as a family arrangement, all were to join in it, or it would fall through; for, unless all joined, the whole object would be lost, and the whole consideration to the remainder-men would fail. That the actual agreement of the parties was in accordance with the presumption, we have the positive testimony of Charles Donnelly, one of the four persons present at the Sunday afternoon meeting at which the arrangement was started, and the equally significant testimony of Rose Ann Rafferty, already quoted. The testimony of Alice Donnelly and of Gilbert Rafferty and his wife is to the same effect. In accordance with this intent, the appellants and Bernard Rafferty, father of the complainants, and acting for them, went to counsel; and under their direction he prepared two deeds, one for the remainder-men in Allegheny county to sign, and the other for those residing elsewhere, thus including all as grantors. Some of the parties refused to sign these deeds, and the later deed, of February 17th, was then prepared by the same counsel, with a view to obviate certain specified objections. This deed also named all the remainder-men as grantors. All the acts of the parties thus concur in pointing to a joint conveyance by all the parties in remainders. Against this convincing evidence there is no testimony, except that of the appellants and Nellie Mowry that no such condition was made by them, or in their presence. The counsel for appellants, who have presented everything that learning and diligence could suggest, rely on the legal principle that a grantor cannot set up any intent or condition different from that appearing on the face of the deed, unless declared at the time of execution; citing *Blight v. Schenck*, 10 Pa. St. 285, and *Stinger v. Com.*, 26 Pa. St. 422. But the difference is obvious. Those were cases of complete deeds, to whose effectiveness nothing was wanting but delivery, and a delivery made by the grantor to a third person for the grantee.

It is further argued for appellants that a mere expectation by the plaintiffs that the other remainder-men would join in the deed would not deprive it of its force as a conveyance by those who did sign, and many cases are cited to this effect. This may be freely conceded, but, as already said, the evidence here is convincing that it was not a mere expectation, but an essential part of the agreement, that all should join. Though the

states of the grantors were several, the consideration for their conveyance was single; and, without the joint action of all, the consideration would fail as to each.

There remains the question of delivery. Although the consideration for the conveyance under the family agreement would not pass until all joined in the deed, yet any of the grantors might waive that requisite, and make an effectual delivery of what would then become a voluntary conveyance. The evidence and the circumstances, however, do not sustain such construction of the action of complainants. The deed of February 6th called for four principal grantors, besides the wife of one of the husband of another. The contemporary deed called for the fifth grantor, Mrs. Willard, and her husband, who lived in Chicago. The family arrangement was made by Charles Donnelly, on behalf of his wife, and Bernard Rafferty, on behalf of his children, and it does not appear that at any time there was a general meeting of all the parties. Those who came into the agreement did so by acquiescence in what Donnelly and Bernard Rafferty had done in their behalf. It is manifest, therefore, that the execution of the deeds was not to be the simultaneous act of the parties assembled for that purpose, but that each was to execute it separately, though in accordance with the general agreement, and this was the course that was actually pursued. The deed was given by the counsel who prepared it, to a notary, who obtained the signatures and acknowledgments of the complainants, and then returned to the counsel from whom he had received

So far there is an entire absence of evidence of the intent of any of the parties signifying to dispense with the requirements of the requirement; and there is certainly no presumption that an instrument calling for execution by several parties, for a single consideration, which will not be effectual to any less all join, is meant to be delivered in an incomplete state, when only partly signed. Delivery is the transfer of possession with intent to pass title. Here, as already said, the evidence fails to show any such intent. The principle is so elementary as not to need the citation of authority, but reference may be made to *Overman v. Kerr*, 17 Iowa, 5, as an instructive case on very analogous facts.

But there is still another reason why the

deed of February 6th cannot be considered as operative, and that is the practically undisputed evidence in regard to the preparation of the deed of February 17th. The former had failed of its purpose, and was an incomplete instrument. Alice Rafferty had refused to sign; Gilbert had drawn his pen through his signature; Mrs. Willard had not signed the contemporary deed which was to be part of the same transaction; Charles Donnelly had explicitly stated that he and his wife would not be bound unless all signed; and Rose Ann Rafferty had said, with equal positiveness, that she would not give up her threatened contest of the will unless she and her sister got all the shares. The deed was therefore not only incomplete on its face, but had utterly failed of its purpose, and the whole arrangement was in danger of falling through. But Bernard Rafferty was still desirous that his children should all agree to what he had done on their behalf, and he thought that, with certain changes, they—particularly Alice—would do so. He accordingly proposed to Mr. Buchanan, the attorney who had drawn the deed, to make a new one, but Buchanan refused until he had consulted appellants. He did so. Under his advice, they agreed; and he then prepared the deed of February 17th, which, as he testifies, included all the parties in remainder. The result of the evidence on this point, which is uncontradicted in any way, leads irresistibly to the conclusion reached by the learned master, that the deed of February 6th was abandoned before delivery, as an abortive effort to carry out the family arrangement, and the deed of February 17th, by consent of all parties, put in its place, in the hope of its being more successful. The fact that it also failed of its object, and was never delivered, could not revive the prior deed, which was *functus officio*.

Objection is made by appellants that Nellie Mowry is not a party, either complainant or respondent, to the bill. It is not necessary that she should be. She was a devisee in remainder, and one of the grantors who signed the deed of February 6th, but has taken no part in the litigation. The result of it will not affect her in any way, and, if she chooses to let the deed stand as a voluntary conveyance of her estate, the rights of the other parties are in no wise affected by such action on her part. Decree affirmed, at the cost of appellants.

SEAMAN v. BOROUGH OF WASHINGTON. (No. 91.)

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

REPEAL OF STATUTE—CHANGE OF STREET GRADE—ASSESSMENT OF DAMAGES.

1. Act May 24, 1878, giving to an abutting owner the right to have damage arising from a change of grade assessed against the borough, was not repealed by Act May 16, 1891, providing, comprehensively, for proceedings, to be instituted by municipalities chiefly, in all cases of laying out, opening, widening, and extending streets, alleys, and mains, and for the building of bridges, piers, abutments, sewers, and other works, and for ascertaining in one proceeding all the damages suffered by all abutting owners affected by the particular improvement, and assessing, upon all properties benefited, the amounts of the benefits as a fund out of which to pay the damages.

2. The act of 1878 giving a remedy against the borough for damage in case of a change of grade "without the consent of such owner, or in case" the borough authorities "fail to agree with the owner for the proper compensation," the owner need not first present a claim for damages to the council; nor is an unsuccessful attempt to agree a jurisdictional fact, essential to recovery,—the mere absence of consent of the owner to the change, or a mere failure to agree, being sufficient.

3. If the lot owner is allowed by the borough to plant shade trees between the line of the pavement and the driveway, and they are cared for by him a long number of years, so that they may add value to his property, their destruction may be considered in determining how the market value of the property is affected by the change of grade.

4. If a porch is erected over a part of the pavement by permission of the borough, on an established grade, an injury to the porch may be considered in determining the effect of a change in grade on the market value of the property.

Appeal from court of common pleas, Washington county; McIlvaine, Judge.

Proceeding by John W. Seaman against the borough of Washington for the assessment of damage arising from a change of grade. From the judgment rendered, defendant appeals. Affirmed.

The fourth assignment of error was as follows: "The court erred in his charge to the jury in not affirming, without qualification, defendant's fourth point, * * * said point and the answer of the court thereto being as follows: 'The evidence showing that the shade trees in front of the premises of J. W. Seaman, and porch in front of the premises owned by the Seaman heirs, for which the plaintiffs claim damages, were located upon and within the lines of the street, and so located subsequent to the establishment of said street, they were in the places they occupied by the sufferance of the borough; and in removing them, or in grading so that they were affected, the defendant borough cannot now be called upon to respond in damages for their removal or injury.' Answer: 'Now, that is affirmed so far as to say that you cannot allow any specific damages for any of these things, as

we have already charged you; but as to whether or not they can be taken into consideration, as affecting the market value, depends upon circumstances, upon facts as you may find them under the testimony that has been adduced. The streets, of course, are for public travel, but the soil to the middle of the street belongs to the lot owner; and if the borough permits or allows a lot owner to plant shade trees between the lines of the pavement and the driveway, and shade trees are planted by the owner with this consent or permission of the borough, and are cared for for a long number of years, so that they may add value to his property, and they were planted on the established grade at the time they were planted, we instruct you that any change of grade that would destroy those trees would be such a consequential injury to the lot as could be taken into consideration by the jury in determining how the market value of the property was affected by the change of grade. And the same thing can be said in regard to this porch. As I said before, the pavements, primarily, are for people to walk upon, for the people that pass along the streets; but they are under the control of the borough, and if the borough sees fit, for the convenience of these people that have dwellings on the street, to allow a certain portion of the pavement to be occupied by a porch, and the porch is erected by the lot owner in pursuance of a privilege granted, and it is within the grant, and is erected on a grade that has been previously established by the borough, and the borough then changes the grade of the street, so as to interfere with the house or its approach, then we instruct you that any injury, even to the porch, would be such an injury, although consequential, as can be taken into consideration by the jury in determining whether or not the market value of the property has been affected by the improvement.'"

Albert S. Sprowls, for appellant. Todd & Wiley, for appellee.

GREEN, J. The principal contention of the appellant in this case is that the act of May 24, 1878 (P. L. 129), under which the present proceeding was instituted, was repealed by the act of May 16, 1891 (P. L. 75). The proceeding was a petition of the plaintiff to the court of common pleas of Washington county to appoint five viewers to assess the damages alleged to have been sustained by him by reason of a change of grade made by the defendant in the street and sidewalk in front of his premises situate on Chestnut street in the borough of Washington. The proceeding was instituted under the act of 1878, and, if it has been repealed by the act of 1891, the plaintiff has no case. The learned court below held that the act of 1878 was not repealed, and ap-

pointed the viewers, who assessed the damages, from which assessment the defendant appealed to the common pleas, where the case was tried before a jury, who found in favor of the plaintiff, and from the judgment on the verdict this appeal was taken.

There was no repealing clause in the act of 1891, and the contention of the defendant is that the act of 1878 was repealed by necessary implication, because the two acts are so inconsistent that they cannot stand together. After a careful reading of the two acts, we are convinced that the court below correctly decided the question, and that the act of 1878 was not repealed by the act of 1891. The act of 1878 consists of a single section, and it provides "that in all cases where the proper authorities of any borough, within this commonwealth have or may hereafter change the grade or lines of any street or alley, or in any way alter or enlarge the same thereby causing damage to the owner or owners of property abutting thereon, without the consent of such owner or in case they fail to agree with the owner thereof for the proper compensation for the damage so done or likely to be done or sustained," the court of common pleas, on application, by petition, of the burgess and council, or the owner of the property injured, shall appoint five disinterested persons as viewers, who shall view the premises, and assess the damages, and report their proceedings to the court. The title of the act of 1878 is "An act for appointing viewers to assess damages where streets and alleys are changed in grades or location, in the several boroughs of this commonwealth." It will be observed at once that the jurisdiction conferred by the act is limited to the boroughs of the commonwealth, and to changing the grade or lines of any street or alley, or in any way altering or enlarging the same. No authority is given to open or lay out streets and alleys, nor to construct sewers, bridges, or other works, or vacate streets or alleys. The act of 1891, in its first section, provides "that all municipal corporations of this commonwealth shall have power whenever it shall be deemed necessary in the laying out, opening, widening, extending, or grading of streets, lanes, or alleys, the construction of bridges and the piers and abutments therefor, the construction of slopes, embankments, and sewers, the changing of water courses or vacation of streets or alleys, to take, use, occupy, or injure private lands, property, or materials"; and, in case the compensation for damages for benefits has not been agreed upon, the court of common pleas, or a judge thereof in vacation, on application, by petition, by the municipal corporation or any person interested, shall appoint three freeholders as viewers to view the premises, and they must give public notice, for at least 10 days, in one or more newspapers, of their first meeting. The second section directs the viewers to hear all parties interested, after having viewed the premises and examined the proper-

ty, and to estimate and determine the damages for property taken, injured, or destroyed, and to whom the same is payable. They shall also determine the benefits, and thereupon they shall prepare a schedule thereof, and give notice to all parties to whom damages are allowed, or upon whom assessments for benefits are made, of a time, not less than 10 days thereafter, and of a place, when said viewers will meet and exhibit said schedule, and hear all exceptions thereto and evidence. After they have heard and disposed of all exceptions filed, they shall make report of their action to the court, and file a plan showing the improvements and the properties injured, and also the properties benefited, after which public notice must be given of the filing of the report, and that, unless exceptions are filed within 30 days, the report will be confirmed absolutely. Other provisions follow, respecting the payment of the damages by the corporation or by the assessment of benefits on properties benefited, and other matters of detail, such as filing exceptions, and giving a right of appeal to obtain a trial by jury. All these provisions, none of which appear in the act of 1878, are simply intended to carry into effect the execution of the powers and authorities conferred by the act, and are not in any degree inconsistent with the provisions of the act of 1878 in the very limited class of cases for which that act was passed. As will be hereafter shown, there is no repugnancy between two acts which provide different proceedings even for the same class of cases. But it is at least doubtful whether the act of 1891 includes the cases provided for by the act of 1878. The principal jurisdictional section of the act of 1891, to wit, the first section, certainly does not include them, and it is only by a very liberal construction of the eighth section that it could be held that any part of the act of 1891 embraces them. The language of the eighth section is that "every municipal corporation shall have power to lay out, establish or re-establish grades of streets and alleys, and to construct bridges, piers and abutments therefor, and sewers and drains in any street or alley, or through or on or over private property." The remainder of the section gives power "to grade, pave, curb, macadamize and otherwise improve any public street or public alley within its corporate limits," etc. But this does not include the power to change or alter any existing grade, and the power can only be exercised "upon the petition of a majority of property owners in interest and number abutting on the line of the proposed improvement"; whereas, the powers of the court under the act of 1878 may be invoked on the single petition of the owner interested. There is nothing in the eighth section, except the word "re-establish," that can suffice to give jurisdiction in the case of altering or changing grades. But the re-establishment of a grade already established does not, necessarily, mean the alteration or changing of such

a grade. Hence, it is at least doubtful whether the jurisdiction conferred by the act of 1878 is embraced within that conferred by the act of 1891. But a doubtful repugnance is not sufficient to defeat the prior act, as we have many times held.

We do not see any reason why these two acts cannot stand together, and both be executed in their appropriate cases. The act of 1878 provides a remedy for the individual citizen in the single case of changing or altering grades, whereas the act of 1891 provides, comprehensively, for proceedings, intended to be instituted by municipalities chiefly, in all cases of laying out, opening, widening, and extending streets, alleys, and lanes, and for the building of bridges, piers, abutments, sewers, and other works, and for ascertaining in one proceeding all the damages suffered by all abutting owners affected by the particular improvement, and assessing upon all properties benefited the amounts of the benefits as a fund out of which to pay the damages. The act of 1878 contains no such provisions, and therefore there is no conflict between the two acts as to these most important matters. Comprehensive as the act of 1891 is, it does not embrace the very case provided for by the act of 1878, while it is only possibly true that under the eighth section of the act of 1891 redress might be had by the individual citizen for the injury inflicted by changing and altering grades. This subject is well illustrated by our decisions in the cases of *Hand v. Fellows*, 148 Pa. St. 456, 23 Atl. 1126, and *Appeal of Borough of Hanover*, 150 Pa. St. 202, 24 Atl. 660. In the former we held that the act of May 23, 1889 (P. L. 288), which provided a comprehensive code for the government of cities of the third class, and for the regulation of their municipal affairs, including the grading, paving, or macadamizing of streets, etc., was not repealed by the act of May 16, 1891, the one we are now considering. We held that the latter act applied to all the cities of the commonwealth, that it is an affirmative act, containing no repealing section or clause, and can have no effect on the act of 1889, unless the system provided by it is so inconsistent with that previously existing as to make it impracticable for them to stand together. Our Brother Williams, who delivered the opinion, carefully pointed out the points of similarity and difference between the two acts, and showed, in a course of reasoning directly applicable to the present case, that there was no such inconsistency between them as to require the repeal of the first act. He concluded by saying: "If the persons interested desire the improvement to be made upon the basis of liability according to benefits, they will proceed under the act of 1889; but, if they wish the foot-front rule applied, they will follow the line of procedure marked out by the act of 1891." Just so, in the present case, if the citizen desires to proceed on

his own account, and for the ascertainment of his own damages alone, he will proceed under the act of 1878, which is especially adapted to his case; whereas, if he wishes to embrace in his proceeding all the cases affected by the particular improvement, he will proceed under the act of 1891. In the case of *Appeal of Borough of Hanover*, supra, we held that the power of a borough, of its own motion, to open or widen a street, under the general borough law of April 3, 1851 (P. L. 320), is not impaired by the act of May 16, 1891, now under consideration, providing for the passage of ordinances for such purposes on the petition of a majority of the property owners; that there is nothing repugnant in the existence of two methods of initiating improvements, and that a borough council may exercise its own judgment as to a street in a built-up portion of a borough, while as to a remoter highway it may wait to be moved by the petition of the property owner. Our Brother Mitchell, delivering the opinion, said: "In steering through constitutional restrictions, well meant, but destructive of necessary governmental powers, the legislature had found it difficult to construct statutes conferring powers and modes of procedure suitable to all the diverse needs, situations, and wishes of the multitude of municipal organizations in the state. In the effort some well-intended acts had come to naught, and others had been shorn of sections that left inconvenient gaps here and there in the whole system. It was to fill these gaps, to supply the *casus omissi*, and to supplement powers doubtful or defective, that the act of 1891 was passed. It took away no power in any municipality that existed before, nor interfered with any mode of its exercise, except as already said, where there is an irreconcilable repugnancy." The opinion then pointed out that there was no such repugnancy in that case on account of the fact that two different modes of initiating proceedings were in existence under the two acts, and that the act of 1891 was "not a borough act merely, but relates to all municipalities. There is nothing repugnant in the existence of two methods of initiating the improvement." Upon the whole case we do not consider these two acts of 1878 and 1891 inconsistent or repugnant to each other; and as the act of 1878 is not repealed expressly, we hold it is still in force. That the legislature so regards it is conclusively proved by the fact that they enacted a supplement to it, by an act approved June 24, 1895 (P. L. 243), giving the viewers mileage at the rate of 10 cents per mile, in addition to the pay of \$1.50 per day provided by the act of 1878. The first assignment of error is dismissed.

As to the second, it will be observed that the petition for viewers expressly asserts that the change of grade "was made without the consent of the petitioner, and that no compensation for the injury inflicted upon his prop-

erty by reason thereof has been agreed upon by the said borough and the petitioner." This averment in the petition gave full jurisdiction to the court below to entertain the petition. We are not referred to any testimony to show that the borough and the plaintiff ever agreed upon any compensation to be paid, or that he ever assented to the change of grade; but the first point of the defendant, the answer to which is complained of in the second assignment, asked the court to instruct the jury that, if they found that no claim was presented to the council for damages on account of the grading and paving of the street in front of his premises, or that no attempt was made to arrive at an understanding or agreement with the borough regarding the amount of damages, or that the grading and paving was done with his consent, there could be no recovery. The point, as submitted, was much too broad. The presenting of a claim for damages to the council is no part of the statutory requirement, nor is an unsuccessful attempt to agree a jurisdictional fact essential to recovery. The mere absence of consent of the owner to the change is, of itself alone, sufficient to enable a recovery. So, also, is a mere failure to agree. This does not imply anything more than the language declares. It is different from most of the acts in this respect; that is, if there was an actual failure to agree from any cause, not necessarily as the result of an abortive attempt to agree, it is enough to justify a recovery. But either one of these conditions, alone, is sufficient. Now, undoubtedly, there was, in point of fact, a failure to agree. Whether there was an unsuccessful attempt to agree is not essential in cases under this act. But the answer of the court was correct in holding that, if the plaintiff did merely consent to the change of grade, he was not thereby estopped from recovering, unless his consent amounted to an express release of damages. This is fully sustained by our decision in the case of *Jones v. Borough of Bangor*, 144 Pa. St. 368, 23 Atl. 252, where we held that even the joining in a petition for the change of grade did not prevent one of the petitioners from recovering damages for the change. This consideration applies also to the third assignment of error, and for these reasons both the second and third assignments are dismissed.

The fourth assignment is without merit. The court charged correctly in regard to the shade trees, in the general charge, telling the jury that they could not allow any sum distinctly as damages either for the trees or porch, but that, in estimating the difference in market value of the whole property before the improvement and after it, they might take into account the condition of the property, as it was with the trees and porch, and as it was without them, and then determine whether the market value of the whole prop-

erty had been affected by the improvement. We regard this as a correct statement of the law on this subject, and therefore dismiss the fourth assignment. The merits of the case were necessarily submitted to the jury, and therefore the fifth assignment is dismissed. Judgment affirmed.

SEAMAN et al. v. BOROUGH OF WASHINGTON. (No. 92.)

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

Appeal from court of common pleas, Washington county; McIlvaine, Judge.

Proceeding by John W. Seaman, Mary E. Taggart, and Margaret A. Spriggs against the borough of Washington for the assessment of damage arising from a change of grade. From the judgment rendered, defendant appeals. Affirmed.

Albert S. Sprowls, for appellant. Todd & Wiley, for appellees.

GREEN, J. The judgment in this case is affirmed, for the reasons stated in the opinion just filed in the case of *Seaman v. Borough of Washington*, 33 Atl. 756. The two cases were tried together before the same jury, and the questions are precisely the same in both. Judgment affirmed.

BOWERS v. BOROUGH OF BRADDOCK. (No. 64.)

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

CHANGE OF GRADE—ASSESSMENT OF DAMAGES—PROCEDURE.

1. The borough is not entitled to have the viewer's report, assessing damages for a change of grade, set aside, and the case sent back to the same or new viewers, merely because the borough officials, after receiving proper service of notice of the proceedings to assess damages, failed to be present at such proceedings.

2. Under Act June 13, 1874, giving an appeal to the common pleas in cases of the assessment of damages for property taken or injured, and directing that the appeal shall be taken "within 30 days from the assessment of the damages or the filing a report thereof in court," the appeal must be filed within 30 days from the filing of the report.

Appeal from court of common pleas, Allegheny county.

Proceeding by William Bowers against the borough of Braddock for the assessment of damage caused by a change of grade. From the judgment rendered, defendant appeals. Affirmed.

E. J. Small, for appellant. William Yost, for appellee.

GREEN, J. The first and principal question urged in the argument of the appellant is, does the act of May 16, 1891 (P. L. 75) supersede and repeal the act of May 24, 1878 (P. L. 120), in so far as it relates to the as-

assessment of damages for change of grade in boroughs? We have just filed an opinion in the case of *Seaman v. Borough of Washington* (No. 91, Oct. term, 1895, in the Western district) 33 Atl. 756, in which we decide this question in the negative, and hold that the act of 1878 is not repealed by the act of 1891. For the reasons there stated we make the same ruling in the present case.

As to the second question presented, we can see no reason why the court below committed error in refusing to set aside the viewers' report and send back the case to the same or new viewers. Even if we regard the affidavits of the officials on which the application was based, which we cannot do, they simply make out a case of negligence on their own part in not regarding a proper service of notice of the proceedings to assess the damages.

As to the third question, was the appeal of the borough taken in time? It is perfectly clear that it was not. The general act of June 13, 1874 (P. L. 283), which gives an appeal to the common pleas in all cases of the assessment of damages for property taken, injured, or destroyed, directs that such appeal shall be taken "within thirty days from the ascertainment of the damages, or the filing a report thereof in court, pursuant to any general or special act, and not afterwards." Whatever may be the precise meaning of the words "ascertainment of damages," it certainly does not mean an ascertainment after the report of the viewers has been filed in court, because the filing of the report is a definite act, which cannot occur until after the viewers have acted in the ascertainment of the damages. Therefore, it is safe to say that the time within which the appeal must be filed is 30 days from the filing of the report. This very point was decided in the case of *Gwinner v. Railroad Co.*, 55 Pa. St. 126. The filing of exceptions to the report of viewers has nothing to do with the right of appeal. That right can only be exercised according to the terms in which it is given. The hearing of the exceptions can go on and be completed before the case is actually tried, and if the exceptions are decided favorably to the appellant, so as to defeat the proceeding, no trial will be necessary. If otherwise, the trial can then proceed. The assignments of error are all dismissed. Judgment affirmed.

**STRANG v. BOROUGH OF BRADDOCK.
BERRY v. SAME.**

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

CHANGE OF GRADE—ASSESSMENT OF DAMAGES.

The filing of exceptions to the report of the viewers does not affect the entering of an appeal to the common pleas.

Appeals from court of common pleas, Allegheny county.

Separate proceedings by P. G. D. Strang and George W. Berry, respectively, against the borough of Braddock. From the judgments rendered in each case, the borough appeals. Affirmed, the same opinion being rendered in each case.

E. J. Small, for appellant. William Yost, for appellees.

GREEN, J. The judgments in these cases are affirmed, for the reasons stated in the opinion just filed in the case of *Bowers v. Borough of Braddock* (No. 64, Oct. term, 1895) 33 Atl. 759. The motions to quash are refused, as there is no inconsistency in filing exceptions to the report of the viewers and at the same time entering an appeal to the common pleas under the act of June 13, 1874 (P. L. 283). Judgment affirmed.

DOUGHERTY v. BOROUGH OF BRADDOCK. EARLY v. SAME. FELDER v. SAME. KOEHL v. SAME. HOPKINS v. SAME. SQUIRES v. SAME. LAMM v. SAME.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

Appeals from court of common pleas, Allegheny county.

Separate proceedings by William Dougherty, Patrick Early, Frank Felder, Charles Koehl, Ann Hopkins, Enoch Squires, and Thomas Lamm, respectively, against the borough of Braddock. From the judgments rendered in each case, said borough appeals. Affirmed, the same opinion being rendered in each case.

E. J. Small, for appellant. William Yost, for appellee.

GREEN, J. The judgment in this case is affirmed, for the reasons stated in the opinion just filed in the case of *Bowers v. Borough of Braddock* (No. 64, Oct. term, 1895) 33 Atl. 759. Judgment affirmed.

ROWE v. BALTIMORE & O. R. CO.

Court of Appeals of Maryland. Jan. 31, 1896.)

NEGLECTANCE—EVIDENCE—SUFFICIENCY—TOWNS—
APPEAL—BILL OF EXCEPTIONS.

1. In an action against a railroad company or personal injuries, alleged to be due to the dangerous condition in which defendant had left a highway, the location of which it had changed under permission from the county commissioners, evidence of statements by defendant's foreman as to the dangerous condition of the road is inadmissible against defendant.

2. Evidence of the opinion of the county commissioners as to the condition of the road is also inadmissible.

3. The negligence claimed was leaving a large rock, around which considerable blasting had been done, overhanging a road which was constructed along a mountain side. Plaintiff testified that, as he was driving under the rock, stones fell from under it, one of which struck his horse. There was evidence that the stone beneath the rock was seamy and loose. *Held*, that the question of defendant's negligence was for the jury.

4. That the county commissioners were liable to plaintiff for his injuries does not prevent his suing the railway company therefor.

5. A bill of exceptions to the granting of a prayer to direct a verdict for plaintiff, which states that, "plaintiff having rested his case, the defendant offered the following prayer," which shows that it was offered in reference to the insufficiency of plaintiff's proof, sufficiently connects the bill of exceptions with another bill, which contains the material evidence in the case, to enable the appellate court to consider the latter in connection with it.

Appeal from circuit court, Frederick county. Action by Samuel A. Rowe against the Baltimore & Ohio Railroad Company. There was a judgment for defendant, and plaintiff appeals. Reversed.

Argued before BRYAN, FOWLER, BOYD, and BRISCOE, JJ.

J. C. Motter and M. L. Keedy, for appellant. John K. Cowen, Wm. P. Maulsby, M. G. Urner, C. W. Ross, and John S. Newman, for appellee.

BRISCOE, J. The appellee was authorized by the county commissioners of Washington county to change the location of the roadbed on a public road or highway of that county leading from Sandy Hook, Md., to Harpers Ferry, W. Va., subject to their approval. The object of this change was to enable the appellee to construct a tunnel under the southern portion of what is known as "Maryland Heights," and to change the location of its allway tracks. And this suit is brought to recover damages for injuries sustained by the plaintiff while driving over and along the changed and newly-constructed portion of the public road, and before it had been accepted or approved by the county commissioners. At the trial of the case the plaintiff reserved his exceptions to the rulings of the court, and, the judgment being against him, he has appealed. We will consider these exceptions in their regular order, as the questions in the case are presented by him.

The first exception is to the refusal of the

court to allow the witness Merriman to relate a conversation had with a foreman of the work as to the dangerous condition of the rock which had been left overhanging the public road, and to give the opinion of the foreman as evidence to the jury. This, being hearsay evidence, was clearly inadmissible, and was properly rejected by the court.

The second exception was to the offer by the plaintiff to prove by the clerk of the county commissioners that the road had been examined by the commissioners, and the overhanging rock had been ordered to be removed. This, we think, has been disposed of, for the reasons assigned in considering the first exception. The witness had previously testified—and the plaintiff had the benefit of his testimony—that the road had not been approved or accepted by the commissioners at the time of the accident, and the testimony here sought to be introduced was the opinion of the commissioners as to the condition of the road.

The third and fourth exceptions embrace the ruling of the court upon the prayer, and that is, was there error in granting the defendant's prayer at the close of the plaintiff's case, which instructed the jury that there was no legally sufficient evidence that the injury was occasioned by the negligence of the defendant, and their verdict must be for the defendant? Now, it is the well-settled law of this state that the legal sufficiency of evidence is a question of law, for the court. The onus of proving that the injury was caused by the negligence of the company was on the plaintiff, and, if there was no evidence legally sufficient for that purpose, there could be no recovery. But the prayer was in the nature of a demurrer to the evidence, and was a concession of all the facts; and, if there was any evidence from which a jury might honestly reach the conclusion that the injury had been caused by the negligence of the defendant, then there was error in withdrawing the case and not allowing the jury to consider it. We will, then, consider the evidence. It appears from the record that the defendant, in constructing its tunnel, filled up the old roadbed with the rock and earth taken from the tunnel, and the new roadbed was made about 30 feet further north, along and against Maryland Heights. At the eastern end of the tunnel a large rock was encountered, in making the changed roadbed; and, to properly construct the road for the use of the public, considerable blasting and cutting, out and under this rock, became necessary, which left a large rock, called the "overhanging rock," extending 10 feet over the roadbed, and about 35 feet high. The plaintiff testifies that while returning to his home, in Harpers Ferry, on the 18th of April, 1894, and while driving along the east end of the tunnel, he heard a noise, and, on looking to the side, he saw stones falling from under the overhanging rock, along the road; that a portion of them struck one of his horses, "knocked his hind foot from under him, as I thought, for be-

went down"; that a larger stone dropped between the wagon and the cut; that the stone that struck his horse came from under the overhanging rock (and by this he meant the rock that hangs out over the road); that it was the same kind of rock as the overhanging rock. The witness Cornellius Virts testified that he frequently traveled the road; that the defendant had blasted under the rock, in making the road; that the rock under the overhanging rock looked seamy, as if it would come down in time; that he saw rock in the road the day the plaintiff was injured; and that it came from the overhanging rock. And there were other witnesses who testified as to the dangerous condition of this rock overhanging the road at the time of the accident, and who further testified that stones rolling from the mountain above would not fall under the rock, but would roll beyond the roadbed. Now, without stopping to further review the testimony here, we think it is clear that the plaintiff had established such a case as entitled him to have the whole evidence passed upon, and there was error in the court's withdrawing the case from the jury. In the case of *Northern Cent. Ry. Co. v. State*, 29 Md. 440, it was said that while it is true negligence may, in many cases, become a mere question of law, to be determined by the court upon a given state of facts, either admitted, or to be found by the jury, it is not, however, the duty of the court to draw inferences and make deductions from evidence. To do that falls within the well-defined province of the jury, that courts should ever be careful not to invade. And in the more recent case of *Railroad Co. v. Keedy*, 75 Md. 320, 23 Atl. 643, it was held that, "if there be evidence from which the jury may honestly find negligence on the part of the defendant, there is no error in allowing them to consider it, although it may not be of such character as to convince all minds that such negligence was committed." And whether or not the facts in this case constituted negligence was a matter for the jury to pass upon, with proper instructions from the court. *Bank v. Morgolofski*, 75 Md. 441, 23 Atl. 1027; *Grabruess v. Klein*, 81 Md. 83, 31 Atl. 504.

We come, then, to the question as to the liability of the defendant. It is contended that, if any liability exists at all, it attaches to the county commissioners of Washington county, and not to the defendant. This question, and the principles controlling it, have been too recently passed upon by this court to need more than a single citation here. In the case of *Chesapeake & O. Canal Co. v. Commissioners of Allegany Co.*, 57 Md. 224, it was said "that the party injured could have sued the canal company, instead of the present appellee, if he had elected so to do. The remedy against the commissioners is cumulative, and it is well settled that a party injured may, if he see fit, proceed directly against the party actually guilty of the tort, and against whom an action over for indemnity

will lie." *Eyler v. Commissioners*, 49 Md. 239. This objection cannot, then, be maintained.

But it is objected that the bills of exception in this case are not sufficiently connected, by apt words of reference, so as to permit the court to look to the evidence for the purpose of considering the ruling of the court upon the prayer. While it is true that facts stated in one exception cannot be looked to in disposing of a question raised under another, unless the two are connected by some apt reference (*Cooper v. Holmes*, 71 Md. 25, 17 Atl. 711), yet even if it be conceded here that there is no connection between the first and second bills of exception, and we cannot consider the evidence in the second bill, still we think the third and fourth bills can be considered in connection with the first. In the case of *Ruhl v. Corner*, 63 Md. 189, where all the testimony was contained in the first bill, it was held that the court could look at the evidence in that exception for the purpose of determining upon the rulings on the prayers, because the second exception, which contained the prayers, began as follows: "All the testimony being in, the plaintiffs offered the following prayers." And the court said: "All the evidence was in, and the prayers were not intended to be mere abstractions. They were offered with reference to the proof, as their form shows. The most appropriate language is not used for connecting the two bills of exception, but we regard it as entirely sufficient. * * * Reference to the testimony recited is manifestly made. It is equivalent to saying, 'There being no other testimony,' or 'This being all the testimony.' The intention is too plain to be disregarded." And in the case now under consideration the third exception states, "The plaintiff having rested his case, the defendant offered the following prayer;" and it is clear that the prayer was offered with reference to the proof, because the prayer recites that "there is no legally sufficient evidence in this case that the injury to the plaintiff alleged in the declaration," etc. And this statement that, "The plaintiff having rested his case, the defendant offered the following prayer," sufficiently connects that exception with the first, which contains the material evidence in the case. In *Baltimore & O. R. Co. v. State*, 30 Md. 54, it was also said that: "This objection we think rather more technical than substantial. We cannot fail to perceive that the bill of exception to the refusal to grant the defendant's prayers was second in the course of the trial, and that it was taken after all the evidence had closed, and the terms * * * 'whereupon,' etc., sufficiently refer to what had preceded it, to authorize resort to the first bill of exception to ascertain from the evidence whether the prayers refused were, or not, abstractions." But, apart from this, we think that the beginning of the second exception sufficiently shows that it was connected with the first. It begins, and is headed, "Cross-Examination by Mr. Maulsby." And an ex-

mination of it sufficiently shows that it is a continuation of the examination of the witness Reese Merriman, whose testimony in chief is embraced in the first bill of exception. Upon a consideration, then, of the whole record, it seems to us that the prayer was admitted with reference to all the testimony. Manifestly, any other construction would be both narrow and technical. Being, then, of the opinion that there was error in the court's ruling upon the prayer, in withdrawing the case from the jury, we shall reverse the judgment and grant a new trial. Judgment reversed and new trial awarded, with costs.

WESTERN UNION TEL. CO. OF BALTIMORE CITY et al. v. STATE, to Use of NELSON.

Court of Appeals of Maryland. Jan. 8, 1896.)

SUMMONS AND COMPLAINT—MISNOMER OF DEFENDANT—AMENDMENT—LIMITATIONS—ELECTRIC COMPANIES—INJURIES FROM WIRES—ACTION—INSTRUCTIONS.

1. Code, art. 75, § 36, provides that no action shall abate for misnomer, and authorizes the substitution of the proper name of a defendant sued under a wrong name by mistake. The "Western Union Telegraph Company," a corporation of New York doing business in Maryland, and the "Western Union Telegraph Company of Baltimore City," a Maryland corporation, have a common general manager in Maryland. The general manager was served with summons, in a suit for injury caused by the Maryland corporation, naming the defendant as the "Western Union Telegraph Company," and adding to it, in the bill of particulars, "a corporation of the state of New York." Held, that the substitution of the defendant's proper name in the declaration and bill of particulars as the "Western Union Telegraph Company of Baltimore City" did not bring in a new party so as to enable it to plead limitations computed from the date of the amendment, and not from date of the original service of summons.

2. In an action against a telegraph company and an electric street-car company for death by a shock from a current conducted from the broad's feed wires through a wild wire hanging from the telegraph company's poles, where there is evidence that the wild wire had been hanging across the feed wire for at least two weeks, rubbing against the insulation, that such rubbing would render the insulation defective, and no evidence of any way by which the wild wire could be charged other than by the feed wire, it is proper to refuse to instruct, at request of either defendant, that no evidence has been produced to show that the death was caused by negligence.

Appeal from Baltimore city court.

Action by the state, to the use of Edward Nelson, against the Western Union Telegraph Company of Baltimore City and the City & Suburban Railway Company for the death of Michael Nelson. From a judgment for plaintiff, defendants appeal. Affirmed.

Two requested instructions, the refusal to grant which was made the ground of the third exception, were presented,—one by the defendant the City & Suburban Railway Company, as follows: "The City and Suburban Railway Company, one of the defendants

in this case, prays the court to instruct the jury that there has been no evidence offered in this case legally sufficient to show that the death of the said Michael Nelson, the son of the equitable plaintiff, was caused by negligence of the said City and Suburban Railway Company, and the verdict of the jury must be for the said City and Suburban Railway Company;" and another by the defendant the Western Union Telegraph Company of Baltimore City, as follows: "The Western Union Telegraph Company of Baltimore City prays the court to instruct the jury that no evidence has been produced legally sufficient to show that the alleged cause of action occurred within twelve months before the bringing of this suit against said defendant, nor to show that the death of Michael Nelson was directly caused by the negligence of said Western Union Telegraph Company of Baltimore City, and their verdict must therefore be in favor of said defendant."

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, PAGE, and BOYD, JJ.

W. Irvine Cross, John K. Cowen, and E. J. D. Cross, for appellants. Isidor Rayner and Isaac L. Straus, for appellee.

PAGE, J. This action was brought against the Western Union Telegraph Company and the City & Suburban Railway Company, to recover damages for the alleged neglect of the defendants, whereby one Michael Nelson lost his life. In the narr and summons the telegraph company is referred to as "The Western Union Telegraph Company," but in the bill of particulars, filed with the narr, the words "a corporation of the state of New York" are appended to the corporate name. The summons was served on Richard Bloxham, "its manager." During the trial, it appeared from the evidence that there are two companies, one whose corporate name is "The Western Union Telegraph Company," a corporation of the state of New York, and another whose corporate name is "The Western Union Telegraph Company of Baltimore City," a corporation of the state of Maryland. Richard Bloxham, on whom the writ was served, is the general manager of the former in this state, and the president and manager of the latter. The evidence also established the facts that the pole on which the fatal wire was suspended is the property of the Maryland corporation, and that the New York company neither owned nor controlled poles in that vicinity. Thereupon the counsel for the plaintiff asked leave to amend the declaration and bill of particulars to conform to the proof, and stated, at the time, that the Maryland company was the one intended to be sued, and it was only because of his want of knowledge as to the correct name of the corporation that the words "of Baltimore City" had been omitted. There being no objection, the leave was granted, and the amend-

ment made. Mr. Cross, who was the counsel for the defendants, then had his appearance entered for the Western Union Telegraph Company of Baltimore City, and filed the three following pleas, viz.: First, the plea of limitations; second, that the cause of action did not accrue within 12 months before the filing of the plaintiff's amended declaration, by which it was made a party to the suit; and, third, the general issue plea. The plaintiff, having joined issue on the first and third of these pleas, moved to strike out the second; and the action of the court in granting this motion constitutes the defendants' second exception.

It is contended on behalf of the telegraph company that by the amendment a new party was made, which was, in fact, so far as it was concerned, the equivalent of bringing a new suit, and therefore a plea which averred that the cause of action did not accrue within 12 months before the filing of the amended declaration was not improperly setting out that provision of the Code that provides that actions like the present must be commenced within 12 months after the death of the deceased person. Code, art. 67, § 2. But to this we cannot agree. The thirty-sixth section of article 75 of the Code provides that no action shall abate by reason of the misnomer of a defendant, but the court, at its discretion, on suggestion, etc., or other proof to the satisfaction of the court that "by mistake the plaintiff has sued in a wrong name or that the party summoned in virtue of said writ or action is in fact the party intended to be sued by such writ or in such action may at any time, before judgment, direct the writ or any of the proceedings to be amended by inserting therein the true name" of any defendant. In this case, the summons was served on a person who was an officer of both companies, and upon him as manager of the defendant corporation. He was, in fact, the manager of both. The service was efficient to bring into court either one of the companies. Under these circumstances, it might well happen that an attorney who was closely connected with both, and knew the very slight differences in the two corporate names, might fall into error as to which company was intended to be sued; but if he did, his mistake could not operate to deprive the plaintiff of his right, when he discovered there were two companies with names so nearly alike, of designating which of the two he was suing. When, therefore, the suggestion of misnomer was made, with the statement that it was the Maryland corporation that it was intended to sue, and the court, in its discretion, ordered the amendment to be made, not for the purpose of adding a new party, but to correct the name of a party actually summoned, the defendant could thereby acquire no right to interpose any other or different plea than it would have had if it had been correctly named in the first instance. If, upon the amendment being made,

the ends of justice required further time, to enable the defendant properly to prepare its case, the court had full power to have ordered a continuance. It does not appear, however, that the counsel for the defendant asked for or desired delay. He could not have been surprised. The narr disclosed that the negligence complained of was in connection with a wire on Eastern avenue near Luzerne street, and Bloxham, who was manager of both companies, knew, or ought to have known, that the telegraph poles and wires in that locality were owned or controlled by the Maryland company, and that the New York company had none in that vicinity. He therefore must have known that it was the Maryland company that was intended to be sued, and it did not require much mental acuteness to enable him to understand that the misnomer occurred by reason of the very slight difference in the two names. It is plain that the error of the plaintiff's attorney was due to the fact that he did not know that the company he intended to sue had the words "of Baltimore City" as a part of its name, and, as soon as he became better informed, he so stated to the court, and prayed the amendment. To hold, under such circumstances, that the amendment brought in a new party, and thereby enabled it to plead limitations, to be computed from the filing of the amended declaration and not from the commencement of the action, would be a gross injustice to the plaintiff. It follows from what has been said that we find no error in the second and fourth exceptions, or in the rejection by the court of the second and third prayers of the telegraph company. By the fourth exception it appears that the defendants were not permitted to offer in evidence the charter of the New York company. But it was not a party to the suit, and the contents of its charter were wholly irrelevant to any of the issues before the court or jury. The first exception was not referred to in argument, and we understand was abandoned.

The remaining exceptions present for our consideration the several instructions granted and rejected by the court, and this renders necessary a statement of the main facts of the case. On August 24, 1893, Michael Nelson, a child of 11 years, while walking on Eastern avenue near Luzerne street, came in contact with a telephone wire which hung from a pole owned and controlled by the Western Union Telegraph Company of Baltimore City. Along that part of Eastern avenue the City & Suburban Railway Company operates one of its lines of electric railway. Its iron poles are placed at intervals along the curb line, and carry wires strung across the street to support the trolley wire in the middle of the street. Besides these, they also support the railway's feed wires, which stretch from pole to pole along the street, over the curb line and parallel to it. The function of these feed wires is to supply electricity to the trolley wire, so that

the potential of that wire may be always constant; and when the road is being operated they carry a voltage of 500 volts, sufficient to produce upon anyone receiving it serious injury or death. By means of a preparation of braided cotton, saturated with insulating material, and covered with a waterproof compound, feed wires are kept insulated, so that, when the insulation is properly done, and in good condition, there can be no escape of electricity. If exposed, however, long to atmospheric influence, it becomes depreciated, and will not serve its purpose. Defects are also sometimes to be attributed to improper handling of the wire in the process of construction, so that the covering becomes broken, and the frictional contact of another wire rubbing against it would cause serious damage to the insulation, and in such a case the current would commence to be carried through before the insulation was "probably absolutely worn through." If imperfect insulation were due to such rubbing, so that the charged wire was laid bare, or so worn that the current found a path to the overhanging wire, there would be no sparks at the point of contact, unless there was an "arcing or air space" between the two. The defendant offered evidence tending to show that the particular feed wire was erected in 1893. It was not contended that the insulating material was not of the best, or that it was not originally put up in a proper manner. The defendants also offered evidence to show that at the time of the accident the insulating material was intact at the place where the telephone wire rested on it. It was shown the swinging wire did not belong to the telegraph company, but was suspended from a bracket or lug on one of its poles. It was erected, with the permission of the company, by a gentleman for his private uses. It had long been unused, but was permitted by the company to remain, a dead wire, on the poles where it was first placed. In some manner it parted, and one of the ends, suspended from the lug, passed over or around the feed wire, and extended to the pavement, where it swayed to and fro in the wind. In this position it remained for at least two weeks. At first, it seems not to have been charged with electricity, for a policeman, at some time during that period, gathered up the swinging end and placed it in a tree box near by, so as to get it out of the way of persons passing along the street. The unbroken portion of the wire passed along for some distance into the city, but, further than to show there was no contact with other wires for two squares, there was no evidence tending to prove that it received its deadly charge elsewhere than at the place where it crossed the feed wire. It is not contended that Nelson was guilty of contributory negligence. How he came in contact with the wire does not clearly appear. Some of the witnesses thought it was blown against him

by the wind. However that may be, it passed between his fingers, and as he recoiled from the shock he drew it about his neck and throat. He was badly burned. In a few days, lockjaw set in, and he died. At the conclusion of the plaintiff's testimony, the court was asked by the defendants to instruct the jury that there was no legally sufficient evidence to show that the death of Nelson was caused by the negligence of the defendants, or either of them; and this the court refused to do. To entitle the plaintiff to recover, it was requisite that the proof should establish some duty on the part of the defendants in respect to the person injured, and that the injury was occasioned by reason of the failure of the defendants to perform that duty. This principle is stated in *Maenner v. Carroll*, 46 Md. 212, as follows: "To constitute a good cause of action, in a case of this nature, there should be stated a right on the part of the plaintiff, a duty on the part of the defendant in respect to that right, and a breach of that duty by the defendant, whereby the plaintiff suffered injury." Now, the deceased, at the time of the injury, was upon a public highway, at a spot where he had a right to be, and was going along it, to his home, in a lawful and proper manner. The sidewalks of the streets in a city are for the use of all persons who have occasion to pass along them, and Nelson, while in the exercise of this unquestioned right, was entitled to be protected and safe from all injury on account of dangerous obstructions. On the other hand, both of the defendants were using the streets, under the permission of the state and municipal authorities, for purposes of private gain, by means of agencies such as could and would become dangerous to human life if not properly and carefully employed. The railway company pursued its business by means of cars propelled by electricity partially supplied through feed wires over and along the edge of the pavement. The telegraph company had its poles also along the curb line, and its wires, extending along the street, were over and along the feed wire, which, though insulated, carried a deadly current. The privilege so granted thus to incumber the public highway with appliances so likely to become dangerous to the public safety, unless properly employed and controlled, imposed upon them, and each of them, the duty of so managing their affairs as not to injure persons lawfully on the streets. They owed it to Nelson that his lawful use of the street should be substantially as safe as it was before the telegraph and railway plants had so occupied it. It was their plain duty, not only to properly erect their plants, but to maintain them in such condition as not to endanger the public. It follows from this that if the property of the defendants was not in proper condition, and by reason thereof Nelson was injured, these facts alone, in

the absence of other evidence to show that the defect originated without the fault of the companies, afford a prima facie presumption of negligence. In such a case the doctrine of "res ipsa loquitur" ("a simple question of common sense." Whitt. Smith, Neg. 423) fairly applies. In the leading case of *Kearney v. Railway Co.*, L. R. 5 Q. B. 411, affirmed in the exchequer chamber (L. R. 6 Q. B. 759), and cited approvingly in *Howser's Case*, 80 Md. 148, 30 Atl. 906, Cockburn, C. J., said, "Where it is the duty of persons to do their best to keep premises or a structure in a proper condition, and we find it out of condition, and an accident happens therefrom, it is incumbent upon them to show that they used that reasonable care and diligence which they were bound to use, and the absence of which, it seems to me, may fairly be presumed from the fact that there was the defect from which the accident has arisen." In *Byrne v. Boadle*, 2 Hurl. & C. 722, also cited in *Howser's Case*, the plaintiff, while walking in the street, was injured by a barrel falling from an upper window of a warehouse belonging to the defendant, and on these facts alone it was held there was evidence of negligence to go to the jury. In *Thomas v. Telegraph Co.*, 100 Mass. 156, where two horses driven along the highway, became entangled in a telegraph wire, swinging across a public way at such a height as to obstruct and endanger ordinary travel, it was held these facts alone, unexplained and unaccounted for, were evidence of neglect on the part of the company, and should have been submitted to the jury. *Haynes v. Gas Co.* (N. C.) 19 S. E. 344; *Uggle v. Railway Co.*, 160 Mass. 353, 35 N. E. 1126; 2 Thomp. Neg. 1220 et seq.; Thomp. Elect. § 178; *Telephone Co. v. Robinson*, 1 C. C. A. 684, 50 Fed. 813; *Stephens & C. Transp. Co. v. W. U. Tel. Co.*, 8 Ben. 502, Fed. Cas. No. 13,371; *Telegraph Co. v. Eyser*, 2 Colo. 163; *Blanchard v. Telegraph Co.*, 60 N. Y. 510; *Wolf v. Telephone Co.*, 33 Fed. 322.

Was there evidence before the jury, when these instructions were asked, from which they could find that the property of the defendants was out of proper condition at the time of the accident, and that by reason thereof Nelson was injured? There was evidence that the telephone wire had been hanging over the feed wire for at least two weeks; that in that position it was swayed by the wind, causing it to rub against the insulating material; that such rubbing for two weeks would cause a very serious damage to the insulation. No information had been given to the jury of any means by which the telephone wire was charged, otherwise than from the feed wire, and that could have been possible only by a defect in the insulation. This was, assuredly, evidence tending to prove that the telephone wire was charged through the feed wire. Whether sufficient, or not, to establish it as

a fact, was for the jury to determine. It was within the province of the defendants to rebut the plaintiff's case in any manner they were able,—to show that the insulation was perfect; or, if that could not be done, that the defect was caused by circumstances over which they had no control; or that it existed for so short a time that they could not be reasonably expected to have been informed of it, and thereby have had an opportunity to mend it. To raise the presumption of negligence in this case it was not necessary for the plaintiff to negative all possible circumstances which could excuse the defendants. If the jury were informed of but one point where the telephone wire was in contact with a live wire, it would not be a wild speculation for them to infer—it would not, in view of all the circumstances, and in the absence of any evidence of contact elsewhere with the feed wire, or with other live wires—that that was the source from whence the electricity came, although it may have been a physical possibility that there might have been such contact with other wires further along the line. This the defendants might have shown, if they could, by way of defense; but, in the absence of all evidence on the point, the jury could infer, without violence, that the electrical charge was in fact obtained by contact of the telephone wire with the feed wire. We find no error in the rejection of the instructions set out in the third exception. We deem it unnecessary to refer particularly to the action of the court in granting or rejecting the other prayers in the case. What we have said is sufficient to dispose of them. We are of opinion the case was fairly put to the jury. Finding no error in the rulings of the court, the judgment will be affirmed. Judgment affirmed.

In re MONTGOMERY SPOOL & BOBBIN CO.

(Supreme Court of Vermont. Franklin. Dec. 24, 1895.)

APPEAL—INSOLVENCY—JUDGMENT OF COUNTY COURT—ALLOWANCE OF CLAIMS—PARTIES.

1. R. L. § 1870, provides that for appeal from the court of insolvency to the county court "upon the question of the insolvency of the debtor"; and Acts 1884, No. 125, § 4, provides that final judgment of the county court thereon shall be conclusive. Acts 1888, No. 79, § 3, provides that, where an appeal is taken from the allowance or disallowance of a claim against an insolvent estate, the same may pass from the county to the supreme court on exceptions. *Held*, that the act of 1888 relates solely to allowance or disallowance of claims, and that the judgment of the county court on the question of insolvency remains conclusive.

2. Under R. L. § 1870, the only provision for an appeal from the insolvency court is on the question of the insolvency of the debtor; and, if an appeal was taken thereunder on the question whether a certain person was or could be a petitioner, the judgment of the county court was conclusive.

Exceptions from Franklin county court; Tyler, Judge.

Petition by certain creditors to have the Montgomery Spool & Bobbin Company adjudged insolvent. On appeal to the county court, the petition was dismissed, and exceptions were taken by petitioners. In the supreme court the case was heard on petitioner's motion to dismiss those exceptions. Dismissed.

Wilson & Hall, O. N. Kelton, and E. McTeeters, for petitioners. A. K. Brown, W. Stewart, and Dickerman & Young, for petitioners.

START, J. The Montgomery Spool & Bobbin Company was, on a creditors' petition, adjudged insolvent by the court of insolvency of the district of Franklin. From this adjudication the company appealed, and the county court reversed the decision of the court of insolvency, and dismissed the petition. The case comes to this court on exceptions by the petitioning creditors. The company moves to dismiss the exceptions, and insists that the decision of the county court is final and conclusive. The petitioners claim that the decision of the court below may be reviewed in this court upon exceptions, and cite R. L. §§ 1385, 1810-1812, and Act No. 79, Acts 1888. In *Re Sowles*, 57 Vt. 385, it is held that these sections of the Revised Laws do not give a right of exception to the supreme court upon questions relating to the insolvency of the debtor. R. L. § 1870, provides that an appeal may be taken from the decision of the court of insolvency to the county court upon the question of the insolvency of the debtor, as is provided in chapter 93 of Revised Laws for appeal from the findings of the judge; and section 4, Act No. 125, of the Acts of 1884 provides that final judgment of the county court shall be conclusive. This act concludes the right of the petitioners to be heard in this court upon exceptions taken to the holding of the court below upon questions relating to the insolvency of the debtor, unless the right is given by section 3, Act No. 79, of the Acts of 1888. This act amends section 1812 of the Revised Laws by providing that, when an appeal is taken from the allowance or disallowance of a claim presented against an insolvent estate, the same may pass from the county to the supreme court upon exceptions. The petitioners claim that this enactment gives them a right to be heard in this court upon exceptions, and contend that, after this amendment, chapter 93 provides for exceptions, and that the act of 1884, so far as it relates to the finality of the judgment of the county court, is repealed. We do not think this contention sound. The act of 1888 relates solely to the allowance and disallowance of claims presented against insolvent

estates, and provides that such cases may pass from the county to the supreme court upon exceptions. It makes no reference to an adjudication upon the question of the insolvency of a debtor, and is not repugnant to that part of the act of 1884 which provides that the final judgment of the county court upon the question of the insolvency of the debtor shall be conclusive. When the act of 1888 was passed, the finality of the judgment of the county court upon this question was not controlled by chapter 93. The conclusiveness of such judgments was then determinable by the independent act of 1884. The acts relate to entirely different subjects. The act of 1884 made the final judgment of the county court conclusive, and in this respect it is not inconsistent with the later enactment. We hold that the later act does not, by implication or otherwise, repeal the former; that the former act was in force when the cause was heard in the court below; and that the decision of that court upon the question of the insolvency of the debtor cannot be reviewed upon exceptions in this court.

The petitioners also claim that the only question heard in the court below was whether Jerry Murray was or could be a petitioning creditor, and contend that the act of 1884 makes the final judgment of the county court conclusive only upon the question of the insolvency of the debtor, and does not affect their right to be heard in this court upon the question of whether Murray could be a petitioning creditor. The only provision for an appeal from an adjudication by the court of insolvency upon a creditors' petition is found in the last paragraph of section 1870 of the Revised Laws. This provides for an appeal upon the question of the insolvency of the debtor. If an appeal was taken from the decision of the court of insolvency upon the question of whether Murray could be a petitioning creditor, it was taken by virtue of this paragraph, as amended by the act of 1884; and the construction we have given to that act must control the petitioners' right to be heard in this court on exceptions. Exceptions dismissed.

CHALMERS v. McAULEY.

(Supreme Court of Vermont. Dec. 24, 1895.)

SALE—DELIVERY—WHEN CONCURRENT WITH PAYMENT.

Where payment for property offered at public sale was to be made by approved paper, and it was some days thereafter before a bidder and the seller agreed as to an acceptable note, at which time the property was turned over to the buyer, delivery and payment were concurrent acts, and the property remained the seller's until actually surrendered.

Exceptions from Caledonia county court; Tyler, Judge.

Action by Robert Chalmers against John McAuley. Judgment for plaintiff, and defendant excepts. Reversed.

Dunnett & Slack, for plaintiff. J. P. Lamson, for defendant.

START, J. The plaintiff, owning certain cattle that were subject to a mortgage, made an arrangement with the mortgagee whereby the same were sold at public auction. By the terms of the sale, six months' credit was given, on approved paper, on sales of over \$10. The defendant bid off some cows and calves, and went directly to the plaintiff to arrange the terms of payment, and the plaintiff sent him to the mortgagee, telling him that any arrangement he could make with the mortgagee would be satisfactory, as the pay was going to him. The defendant went to the mortgagee, who was present at the sale, and he told the defendant if he would bring him a good note the following Tuesday or Wednesday he might have the cattle. On the following Wednesday the defendant offered the mortgagee a good note for the cattle, and the mortgagee refused to take it, whereupon the defendant told him he would not take the cattle. The mortgagee then told the defendant to meet him at the plaintiff's house the next Saturday, and he would let him have the cattle upon some terms. Pursuant to this proposal, the defendant met the mortgagee at the plaintiff's house, and made an arrangement whereby he took the cattle for the amount at which they were bid off, and gave the mortgagee a lien note therefor. The plaintiff was present when this arrangement was made, and, when it was completed, he and his son turned the cattle out of the barn, and the defendant's man drove them away. The defendant did not have anything to do with the cattle, except to bid them off, until he gave his lien note and they were driven away by his man. Nothing was said about keeping or feeding the cattle, until an hour or more after they had been driven away. The plaintiff seeks to recover the expense incurred in keeping the cattle from the day of the auction until they were delivered to the defendant. At the close of the evidence, the defendant moved for a verdict. The court overruled this motion, and instructed the jury that the only question for them to consider was how much it was worth to keep the cattle, to which ruling and instruction, the defendant excepted.

In determining whether the court should have ordered a verdict for the defendant, it becomes important to inquire when the title to the cattle passed to the defendant. If the title did not pass until the lien note was given and the cattle delivered to the defendant, the plaintiff was the owner of the cattle, and was keeping his own cattle from the day of the auction until the time they were delivered,

ed, and, in the absence of an express contract on the part of the defendant to pay for the keeping, the plaintiff could not recover. *Cole v. Kerr*, 20 Vt. 21. It is undoubtedly the rule in this state, as between vendor and vendee, where the sale of a chattel is a cash sale the delivery of the thing sold and the payment of the purchase money are concurrent acts, and the title does not pass until payment, or tender of payment, is made. *Turner v. Moore*, 58 Vt. 455, 3 Atl. 467; *State v. O'Neil*, 58 Vt. 140, 2 Atl. 586; *Miller v. Cushman*, 38 Vt. 593; *Towsley v. Dana*, 1 Aikens, 344; *Riley v. Wheeler*, 42 Vt. 528. When chattels are sold to be paid for in approved paper or good notes, and delivery and payment are to be simultaneous acts, the title remains in the vendor until delivery. *Lupin v. Marie*, 6 Wend. 77; *Whitwell v. Vincent*, 4 Pick. 449. When, by the terms of a contract for the sale of a chattel, payment is to be made in cash or approved paper, the delivery of the chattel and payment are concurrent acts; and unless the vendor waives his right to payment before delivery, or there is an agreement to the contrary, the title does not pass until payment is made or tendered. As we construe the exceptions, no question was made in the court below but that payment and delivery of the cattle were to be concurrent acts. The plaintiff did not waive his right to insist on payment before delivery, and there was no agreement or circumstance attending the contract of sale that tended to show that the plaintiff intended to part with his property before payment was made by a good or approved note. The time of payment and delivery of the cattle was deferred, by the agreement of the parties, until the day the cattle were delivered. There was no express agreement that the defendant should pay for keeping the cattle, and, under the circumstances disclosed by the evidence, the law will not imply one. The giving of the lien note was pursuant to an agreement then made. Until this was done, the sale was not complete, and the plaintiff was the owner of the cattle, subject to the rights of the mortgagee. He was not entitled to the expense incurred in their keeping, and a verdict should have been ordered for the defendant. Judgment reversed, and cause remanded.

KENT v. MILES.

(Supreme Court of Vermont. Nov. 23, 1895.)

FALSE IMPRISONMENT—PLEAS—SUFFICIENCY—ARREST—COMMITMENT—DISCHARGE.

1. Where it appears from the pleas to a declaration in an action for false imprisonment that defendant attempts to justify the detention of plaintiff "for the said space of time in the said declaration mentioned," the pleas are not objectionable on the ground that they fail to answer the whole declaration.

2. It appeared that plaintiff was indicted for perjury, and that a warrant was issued by

the court then in session directing a proper officer "to apprehend * * * said plaintiff, and have him forthwith appear" before the court at N.; that defendant arrested plaintiff, and took him to N., but that the court had adjourned; that defendant lodged plaintiff in the county jail, to await a session of the court. *Held*, that the plaintiff was lawfully committed.

3. The state's attorney has the power to discharge one from arrest, if justice requires it.

Exceptions from Washington county court; Start, Judge.

Action by James M. Kent against L. D. Miles for false imprisonment. To a judgment in favor of defendant, plaintiff excepts. Affirmed.

T. J. Deavitt, for plaintiff. W. W. Miles, for defendant.

TAFT, J. The first objection made to the pleas is that they fail to answer the whole declaration, for that they justify the detention of the plaintiff for three days only, instead of the six months' detention charged in the declaration. We might well pass this question unnoticed, as no copy of the declaration has been furnished us; but it appears from the pleas that the pleader attempts to justify the detention of the plaintiff "for the said space of time in the said declaration mentioned." The point is not well taken.

The main question before us is whether a justification is set forth in the pleas. It is alleged therein that the plaintiff was indicted for perjury, at the September term, 1887, of the Orleans county court, sitting at Newport, in said county; that on the 14th day of September, 1887, a warrant was issued by the court then in session, properly directed to any sheriff, etc., commanding him "to apprehend the body of the said plaintiff, and have him forthwith to appear before the county court in and for said county, at said Newport," etc., to answer to said charge of perjury; that the warrant was delivered the defendant to serve; that, by virtue of it, he did arrest the plaintiff, and took him to Newport, but that said county court was not then in session so that the defendant could have the plaintiff before it, and for that reason he kept and detained the plaintiff, "for the purpose of having him, the said plaintiff, to appear before said court as soon as the same should be in session," and lodged the plaintiff in the common jail at Newport for safe-keeping, and made due return of the warrant. When the defendant reached Newport, with the plaintiff under arrest, the court having adjourned, it was his duty, under the warrant, to keep and detain the plaintiff until the court again convened, either by adjournment or at its next term, and he could lawfully commit the plaintiff to jail for safe-keeping. The case of *State v. Lamoine*, 53 Vt. 568, involved no question in the case before us. That action was *scire facias* upon a void recognizance taken by a judge having no jurisdiction. It was not necessary to call the sufficiency of the warrant in question. The facts set forth in the first

plea, are alleged in the second, and, in addition thereto, the further fact that the defendant discharged the plaintiff from arrest and confinement in the jail at Newport, where he had committed him, by direction of the state's attorney for Orleans county, the official in charge of the prosecution. It is the duty of the state's attorney to "prosecute for offences" (Vt. St. § 2055), and we think he had power to discharge one from arrest if, in his judgment, the administration of justice requires it. Judgment affirmed, and cause remanded.

OVITT v. SMITH.

(Supreme Court of Vermont. Caledonia. Dec. 5, 1895.)

RIGHTS OF DIVORCED PERSONS — REMARRIAGE — VALIDITY.

Rev. Laws, § 2391, declares that when a marriage is dissolved pursuant to the provisions of that chapter the parties may lawfully marry again, but that it shall not be lawful for the petitionee, in divorce proceedings in which a divorce is granted, to marry another person than the petitioner for three years, unless petitioner dies within that time; and section 2392 provides that a person violating the preceding section shall be imprisoned, etc. *Held*, that a marriage in contravention of section 2391 is absolutely void.

Exceptions from Caledonia county court; Start, Judge.

Petition by Martin H. Ovitt against Hattie E. Smith to annul a marriage. There was a judgment dismissing the petition, and petitioner excepts. Reversed.

Harry Blodgett, for petitioner.

TYLER, J. The petition alleges, and the court below found, that the parties were married in this state in due form of law; that the petitioner married the petitionee, upon her representation that she had been married to one Farrand, but had obtained a divorce from him, and was at liberty to marry again, which representation the petitioner believed and relied upon; that the parties lived together as husband and wife for some months after their marriage, when the petitioner learned that, at the April term, 1891, of the Lamoille county court, said Farrand had obtained a divorce from the petitionee by reason of her adultery, whereupon the petitioner ceased to live with her; that there was no issue of this marriage, and that Farrand was living when the petition was brought.

The only question discussed in the brief of the petitioner's counsel is whether, in the circumstances stated, there was a voluntary cohabitation within the meaning of Rev. Laws, § 2357. In the view which we take of the case, this question does not arise. The decision depends upon the effect that is to be given to the following sections of the statute: "Sec. 2391. When a marriage is dissolved

pursuant to the provisions of this chapter the parties shall be deemed single and may lawfully marry again. But it shall not be lawful for the petitioner in divorce proceedings in which a divorce is granted, * * * to marry another person than the petitioner for three years from the time such a divorce is granted, unless the petitioner dies within that time, in which case the petitioner may marry again. Sec. 2392. A person who violates the provisions of the preceding section, or lives in this state under a marriage relation forbidden by said section, shall be imprisoned in the state prison for not less than one year nor more than five years." The question is whether, under the first sentence of the former section, the marriage not being declared void, a marriage with the petitioner may not be valid, although the petitioner incurs the penalty imposed by the next section. Bish. Mar., Div. & Sep. §§ 707, 708, 1621, discusses the question at length, but leaves it undecided whether or not a statute should be interpreted to make void the marriage unless it contains an express clause of nullity. In Tennessee, a statute which provided that, where a marriage was absolutely annulled, the parties should severally be at liberty to marry again, but that a defendant who had been guilty of adultery should not, during the life of the former husband or wife, marry the person with whom the crime had been committed, was held not against public policy, and that, where the husband from whom the divorce had been obtained on account of his adultery, married his particeps criminis during the life of the first wife, the second wife was not entitled to homestead. *Owen v. Bracket*, 7 Lea, 448. In *Re Borrowdale*, 28 Hun, 336, the pretended widow was refused letters upon her husband's estate, upon proof that a former husband, who was still living, had obtained a divorce from her on account of her adultery, the statute merely prohibiting her remarriage. In 14 Am. & Eng. Enc. Law, 504. It is said in the text that, where the prohibition has any effect, a marriage in disregard of it is a mere nullity, though it be contracted with the innocent party and former spouse. In the notes, *Stew. Mar. & Div.* § 53, is cited to the effect that unlawful marriages are not void unless declared to be so by the statute. In Georgia, under a statute which prohibits the guilty party to a divorce remarrying, the court refused to hold a second marriage void and render children illegitimate. *Park v. Barron*, 20 Ga. 702. Gen. St. Mass. c. 107, § 25, declared any marriage contracted by such guilty party void. Pub. St. c. 148, § 23, only prohibited such party from remarrying. From the reasoning of the court in *Com. v. Lane*, 113 Mass. 458, which arose under the later statute, we infer that that statute was regarded as rendering the second marriage void,—that the respondent would have been convicted of polygamy but for the fact that his second marriage was

solemnized in another jurisdiction. Courts are unwilling to make decrees which may render innocent persons illegitimate; but our statute must receive a reasonable, and not a forced, construction. The two sentences of section 2391, Rev. Laws, must be construed together. It seems clear that the intent of the legislature was to make the last a limitation upon the first. The latter makes an exception to the enabling provisions of the first. The Massachusetts statute reads: "After a divorce * * * either party may marry again as if the other were dead, except that the party against whom the divorce was granted shall not marry again," etc. Construing the whole of section 2391, Rev. Laws, it certainly would be illogical to hold a marriage valid, when the statute itself declares it unlawful for one of the parties to remarry. It is elementary that contracts are illegal when founded on a consideration *contra bonos mores*, or against the principles of sound policy, or founded in fraud, or in contravention of the positive provisions of some statute law; that if the contract grows immediately out of, or is connected with, an illegal or immoral act, a court of justice will not enforce it; that the object of all laws is to repress vice, and promote the general welfare of the state and of society. The legislature evidently considered that a second marriage, within the limitations named, by a person from whom another had obtained a divorce for any of the statutory causes, was against the policy of the domestic relations and the best interests of society. The statute not only declares that it shall not be lawful for the libelee to marry again, but it imposes a severe penalty upon such person for violating the prohibition. It is held that, when a statute merely inflicts a penalty for the doing of a particular act, that act is by implication prohibited and illegal. *Roby v. West*, 4 N. H. 285; *Pray v. Burbank*, 10 N. H. 377. The penalty imposed implies prohibition. See numerous cases cited in 1 Rap. Dig. p. 824, pl. 94, and Mack, Dig. p. 342; *Benj. Cont. c. 6*. This court has held that a contract which has for its object, or which contemplates, any act prohibited by express statute, or the commission of which incurs a penalty, is as much illegal and void as if the statute in express terms so declared. *Territt v. Bartlett*, 21 Vt. 184; *Bank v. Parsons*, Id. 199; *Bancroft v. Dumas*, Id. 456. In *Aiken v. Blaisdell*, 41 Vt. 655, it is said that the distinction spoken of in the books, between a law that forbids an act and imposes a penalty for its commission, and a law that imposes a penalty without in terms forbidding the act, is not a distinction in legal effect. We think this case must be controlled by the general rules of law respecting contracts. It was not lawful for the petitioner to remarry. Therefore her marriage with the petitioner was illegal, and its illegality rendered it void. Judgment reversed, and the marriage declared null and void.

SCALES v. WILEY.

(Supreme Court of Vermont. Windsor. Dec. 5, 1895.)

STATUTE OF FRAUDS—INTEREST IN LANDS—SALE OF GOODS—RESCISSION.

1. An agreement by plaintiff to take down a barn on her premises, and, after the lumber shall have been drawn to defendant's premises, to re-erect it there for a valuable consideration, is not a contract for the sale of an interest in lands.

2. Such agreement is not a sale of goods, but an agreement to make improvements on real estate, the consideration to be paid for work done and materials furnished in adding something to the land.

3. Defendant cannot rescind such agreement because of defects in the lumber which he knew to exist when the agreement was made.

Exceptions from Windsor county court; Taft, Judge.

Action by Aurilla Scales against Andrew Wiley to recover damages for breach of an agreement. To a judgment in favor of plaintiff, defendant excepts. Affirmed.

It appeared that the plaintiff owned a barn standing upon her land, and that she and the defendant entered into an agreement by which the plaintiff was to take it down and re-erect the frame upon the land of the defendant for \$75, the defendant to draw the frame from her land to his, and to furnish what new timber might be necessary. The plaintiff did take down the barn, but the defendant refused to proceed with the contract, upon the ground that the timber was rotten and worthless. The evidence of the defendant tended to show that the plaintiff falsely represented the condition of the frame, and warranted it to be sound; that of the plaintiff, that the defendant, before the contract, examined it, and saw its condition as it actually was. The court instructed the jury that if the defendant inspected the barn, and saw the alleged defects before he made the agreement, he could not avail himself of any fraudulent representation or false warranty in that respect. The defendant also claimed that the contract was within the statute of frauds, either as a contract for the sale of an interest in land, or for the sale of goods of the value of more than \$40, and excepted to the refusal of the court to so hold.

W. W. Stickney and J. G. Sargent, for plaintiff. G. A. Davis, M. S. Buck, and S. E. Emery, for defendant.

TYLER, J. The special count alleges that the plaintiff sustained damages by reason of the nonperformance by the defendant of a contract by which the plaintiff was to erect a barn frame on the defendant's land, which contract the defendant prevented the plaintiff from completing by not removing the timber to his premises, as he had agreed, and refusing to proceed with the contract after the plaintiff had provided labor and materials according to her agreement. The plaintiff's evidence tended to show that in the year 1893

she owned a barn, situated upon her premises, which the defendant wished to purchase; that the plaintiff was to take the barn down, the defendant to draw it to his premises, the plaintiff's son to re-erect it upon the defendant's land, the defendant furnishing such new timber as should be required, and to pay the plaintiff \$75. It clearly was not a contract for the sale of land or of any interest therein. While the building, as it stood on the plaintiff's land, was a part of the realty, by the contract it was to be taken down, and the timber piled up ready for removal; so that it was to be changed from real to personal estate before anything was to be done by the defendant. It was not a contract for the sale of personal property. If the contract had been that the defendant should pay a certain price for the timber when the building was taken down, it would have been a contract for the sale of personal property; but it was not intended that the title should pass until the building should be re-erected. No act was required of the defendant except to move the old timber, and furnish whatever new timber was required.

The general rule is stated in Benj. Sales, § 116: "Things attached to the soil are not goods, though, when severed from it, they are. Thus, growing trees are part of the land, but the cut logs are goods. Bricks and stones, which are goods, cease to be so when built into a wall; they become a part of the soil." In section 117: "It seems pretty plain, upon principle, that an agreement to transfer the property in something that is attached to the soil at the time of the agreement, but which is to be severed from the soil and converted into goods before the property is to be transferred, is an agreement for the sale of goods, within the meaning of the statute. The agreement is that the thing shall be rendered into goods, and then in that state sold. It is an executory agreement for the sale of goods not existing in that capacity at the time of the contract. And, when the agreement is that the property is to be transferred before the thing is severed, it seems clear enough that it is not a contract for the sale of goods. It is a contract for a sale, but the thing sold is not goods. If this be the principle, the true subject of inquiry in each case is, when do the parties intend that the property is to pass?" *Clark v. Bulmer*, 11 Mees. & W. 243, was *indebitatus assumpsit* for the price and value of a main engine and other goods sold and delivered. It appeared that the contract was to build an engine for a certain price, to be completed and fixed by a certain time; that the different parts were constructed at the plaintiff's manufactory, and sent in parts, at different times, to the defendant's works, where they were fixed piecemeal, and so made into an engine. The court said: "The engine was not contracted for to be delivered, or delivered, as an engine, in its complete state, and afterwards affixed to the freehold. There was no sale of it as an en-

the chattel, and delivery in that character; and therefore it could not be treated as an engine sold and delivered. Nor could the different parts of it which were used in the construction, and from time to time fixed to the freehold, and therefore became parts of it, be deemed goods sold and delivered, for there was no contract for the sale of them as movable goods. The contract was, in effect, that the plaintiff was to select materials, make them into parts of an engine, carry them to a particular place, and put them together, and fix part to the soil, and so convert them into a fixed engine on the land itself. * * * The cases of *Cotterell v. Apsey*, 6 Taunt. 322, and *Tripp v. Armitage*, 4 Mees. & W. 687, are authorities that materials used, or intended to be used, in the construction of a fixed building, cannot be deemed goods sold and delivered, and there is no difference between the erection of this sort of fixture and any other building." In *Benj. Sales*, § 108, it is said: "Where a contract is made for furnishing a machine or a movable thing of any kind, and fixing it to the freehold, it is not a contract for the sale of goods. In such contracts the intention is plainly not to make a sale of movables, but to make improvements on the real property; and the consideration to be paid to the workman is not for a transfer of chattels, but for work and labor done and materials furnished in adding something to the land." The case at bar falls clearly within this definition. In *Ellison v. Brigham*, 38 Vt. 64, upon which the defendant's counsel relies, the contract was that the defendant should cut into logs all the butternut trees then standing on his own farm that were suitable for logs, and deliver them, with a few logs that were cut, to the plaintiffs, at a certain mill, for an agreed price. Held, that this was a contract within the statute. It was clearly a contract relating to an interest in land, within the above rule laid down in *Benjamin*.

The defendant's five requests for instructions to the jury were properly denied, for the reasons above stated. There was no error in the instruction given, which was, in substance, that the defendant could not assert a claim for defects in the barn which he saw and knew existed. Judgment affirmed.

SOMERSET RY. v. PIERCE et al.

(Supreme Judicial Court of Maine. June 1, 1895.)

RAILROADS—MORTGAGES—EQUITY OF REDEMPTION—PURCHASE BY MORTGAGEE—EFFECT.

1. July 1, 1871, the Somerset Railroad Company made a mortgage of its road and franchise to trustees to secure the payment of its bonds. The condition of this mortgage having been broken, and so continued for more than three years, the mortgage bondholders, in 1883, organized a new corporation, under the statute, by the name of the Somerset Railway. This corporation, the complainant, took possession of the mortgaged property on the 1st day of September, 1883, and has ever since retained it, and operated the road. On the 8th day of July, 1884, complainant pur-

chased, at execution sale, the equity of redemption from the mortgage, from which sale no redemption has been had. Held, that full title has thereby been acquired by the Somerset Railway, and that, under the statute, the complainant represents all the mortgage bondholders, and its title to and possession of the mortgaged property inure to their benefit.

2. Also, that each mortgage bondholder thenceforward became a shareholder in the property covered by the mortgage, in the proportion that his bonds bore to the whole issue secured by the mortgage, and the bonds themselves are paid to the extent of the value of the mortgaged property, full title to which passed to the Somerset Railway.

3. A large part of the bondholders have exchanged their bonds for stock in the Somerset Railway, par for par, and are now stockholders; those who have not so exchanged remain shareholders, and are entitled to receive from the earnings of the road the same pro rata dividends as the stockholders (if they decline to exchange their bonds for stock), but the possession and operation of the railroad will continue in the Somerset Railway.

4. Held, that trustees under the mortgage should release and convey whatever legal title remains in them to the Somerset Railway, on payment of any sums that may be due them for services or disbursements, and be perpetually enjoined from the further prosecution of their pending suits, and from interfering in any way with the title, possession, or use, by the Somerset Railway, of any and all the property described in the mortgage of July 1, 1871, except so far as it may be necessary for them by suitable legal process, to enforce a lien, if any, which they may have upon the property, for the payment of such sums as may be found due them as such trustees.

See *In re Inhabitants of Anson*, 26 Atl. 996, 85 Me. 79.

(Official.)

Report from supreme judicial court, Cumberland county.

Bill in equity by the Somerset Railway against Lewis Pierce and others to quiet title and for injunction. Sustained as to some, and dismissed as to other, defendants.

Edmund F. & Appleton Webb, J. W. Symonds, D. W. Snow, C. S. Cook, and J. H. Drummond & J. H. Drummond, Jr., for plaintiff. D. D. Stewart, H. M. Heath, O. A. Tuell, F. M. Drew, L. Pierce, N. & H. B. Cleaves, and Everett R. Drummond, for defendants.

STROUT, J. On the 1st day of July, 1871, the Somerset Railroad Company, having a charter for a railroad from a point near Caritunk Falls, in Solon, in the county of Somerset, to the town of Waterville, in the county of Kennebec, and being on that day possessed of franchises, and real and personal estate, for the purpose of building, equipping, and operating such railroad, made a mortgage to Lewis Pierce, Daniel Holland, and Stephen D. Lindsey of the railroad from Waterville to its terminus in Solon, in the county of Somerset, together with the franchise of the company, and all its real estate, and all its personal property of every nature, used in connection with its railroad, then possessed or to be thereafter acquired, in trust to secure the payment of the bonds of said company to an amount not exceeding \$500,000, payable in 20

years from the date of the mortgage, with interest at the rate of 7 per cent. per annum, according to the coupons annexed to the bonds. Lindsey and Holland, two of the trustees, having deceased, Herbert M. Heath and Franklin M. Drew, were duly appointed trustees to fill the vacancies; and they, together with Lewis Pierce, are now the trustees under said mortgage. The Somerset Railroad Company issued and sold bonds, secured by the mortgage, to the amount of \$450,000 only. The company subsequently defaulted on the interest upon the bonds, and for more than three years prior to July 11, 1883, the company had failed to pay the interest on the mortgage bonds, and thereby had made a breach of the condition of the mortgage, though the principal of the bonds was not then due. The trustees under the mortgage never entered into possession of the mortgaged property, nor took any measures to secure a foreclosure of the mortgage; but the Somerset Railroad Company remained in possession of all the property until the formation of a new corporation, under the name of the Somerset Railway. On the 11th day of July, 1883, the holders of the mortgage bonds, to an amount largely exceeding one-half of the same, elected, in writing, to form a new corporation, and on the 15th day of August, 1883, did form a new corporation, under the name of the Somerset Railway, as provided by chapter 51 of the Revised Statutes, and acts additional thereto and amendatory thereof, and made the capital stock of the new corporation \$736,648.76, which was made up as follows: \$450,000, amount of outstanding bonds secured by the mortgage as principal, and \$286,648.76, amount of interest upon the bonds due August 15, 1883, and then unpaid.

On the 13th day of July, 1883, the stockholders of the Somerset Railroad Company, at its annual meeting, voted that the mortgage bondholders organize a new corporation, under the statute, and take possession of the road at such date as their organization should entitle them to do; and the stockholders also voted, at the same meeting, to surrender possession of the Somerset Railroad Company to the new corporation. In pursuance of the organization of the new corporation, and by the consent of the Somerset Railroad Company, as indicated by the votes of its stockholders, the Somerset Railway, on the 1st day of September, 1883, took possession of the railroad, and all other property included in the mortgage, and have ever since held possession of the same, and operated the road. The capital stock of the Somerset Railway, being the amount of the unpaid bonds and coupons at their face value at the date of the organization of the new corporation, August 15, 1883, was divided into shares of \$100 each, which shares were offered to the mortgage bondholders at the rate of one share of stock for each \$100 of bonds, or that amount of coupons due August 15, 1883. Bonds and coupons to amount of \$552,200 have been ex-

changed for stock in the new corporation, which has been issued, leaving outstanding and unexchanged \$110,600 of mortgage bonds, and the coupons thereon.

A decree of strict foreclosure of this mortgage was entered by this court on the 1st day of April, 1887. On the 8th day of July, 1884, all the right in equity of the Somerset Railroad Company to redeem the mortgage was sold on execution, and purchased by the Somerset Railway, from which sale no redemption has been had.

The trustees under the mortgage have brought suits to recover possession of all the property included in it, and mesne profits against various officers and servants of the Somerset Railway, which are now pending.

The bill prays to have the title and possession of the Somerset Railway to the property described in the mortgage declared valid, and the mortgage of July 1, 1871, declared void, and the holders of outstanding bonds and coupons ordered to surrender the same in exchange for stock in the Somerset Railway, and that the plaintiffs in the suits at law may be enjoined from prosecuting their suits, and from disputing the title and possession of the Somerset Railway, and for further relief.

That the bill presents a case within the equity jurisdiction is beyond doubt. Rev. St. 1871, c. 51, § 53, and following sections, in force when this mortgage was made, prescribed a method of foreclosure of such mortgages by the trustees on application of one-third of the bondholders in amount; and by section 55 it was provided that such foreclosure should inure to the benefit of all holders of bonds and coupons secured by the mortgage, and that the holders of such bonds and coupons, or their successors or assigns, become a corporation, as of the date of the foreclosure, "for all the purposes, with all the rights and powers, duties and obligations of the original corporation by its charter," and required the trustees to convey to such new corporation all the right and title they had under the mortgage and its foreclosure. Section 56 provided for calling the first meeting of the new corporation, adopting a name, and authorized the new corporation to take and hold the possession and have the use of the mortgaged property.

These provisions for perfecting the security of the mortgage bondholders, and to enable them to realize their debts, by operation of law, must be treated as part of the mortgage contract, and the rights thereby secured to the bondholders could not be abridged or taken away by subsequent enactments. But it was competent for the lawmaking power to change the form and method of the bondholders' remedy, provided the new method protected their rights as fully as that existing when the mortgage was given. *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Seibert v. Lewis*, 122 U. S. 294, 7 Sup. Ct. 1190; *Edwards v. Kearzey*, 96 U. S. 595; *Louisiana v. New Orleans*, 102 U. S. 206. Without changing the manner

of foreclosure provided in Rev. St. 1871, c. 51, the legislature, in 1876, by chapter 122, gave the benefit of the provisions of chapter 51, from sections 47 to 70, inclusive, to the holders of all mortgage bonds, whether the mortgage was foreclosed as provided in chapter 51, "or in any other legal manner"; and, by chapter 53 of the Laws of 1878, sections 47-70, c. 51, Rev. St. 1871, were made to apply to and include all such mortgages, "in all cases in which the principal of said scrip or bonds shall have been due and payable for more than three years, and shall remain unpaid in whole or in part, in the same way and to the same extent as if the mortgage had been legally foreclosed," and authorized such bondholders to form a new corporation, in the manner provided in chapter 51, Rev. St. 1871, "whenever the holders of such scrip or bonds to any amount exceeding one-half of the same shall so elect in writing." The same statute, in section 2, provided that the "capital stock of such new corporation shall be equal to the amount of unpaid bonds and coupons secured by such mortgage, taken at their face at the time of the organization of the new corporation"; and, by chapter 166, Laws 1883, the act of 1878 was extended to apply to cases in which "no interest has been paid for more than three years."

The remedy by foreclosure by the trustees, existing when the mortgage of 1871 was given, has never been abridged or taken away, but the subsequent statutes have enlarged and made more efficient the bondholders' remedy; but these enactments did not operate injuriously to the Somerset Railroad Company, and are not, therefore, open to constitutional objection. The trustees had no power to take possession of the mortgaged property, nor to foreclose the mortgage, except directed so to do by a vote of the bondholders, by a majority in value in the one case, or one-third in value in the other. Rev. St. 1871, c. 51, §§ 49-53. The new provisions in the subsequent acts enabled a majority in amount of the bondholders to act directly, without the intervention of the trustees, thus simplifying the proceeding.

The interest upon the mortgage bonds having been unpaid for more than three years prior to July 11, 1883, the bondholders, holding \$351,900 in amount of the bonds secured by the mortgage, on that day elected in writing to form a new corporation, in accordance with chapter 51, Rev. St. 1871, as amended by the acts of 1878 and 1883, instead of resorting to a foreclosure by the trustees. It will be noticed that the amendatory acts required the action of a majority in amount of the mortgage bondholders, while the foreclosure by the trustees required the concurrence of only one-third of the amount. The proceedings to organize the new corporation and establish the capital stock, under the amendatory acts, appear to be in strict conformity thereto; and

the new corporation, under the name of the Somerset Railway, thereby became a legal corporation, on the 15th day of August, 1883, and then became entitled to "take and hold the possession and have the use of the mortgaged property." Rev. St. 1871, c. 51, § 56. The fact that some holders of mortgage bonds who participated in the organization of the new corporation, and voted upon their bonds, have since transferred them to other parties not bondholders at the time the Somerset Railway was organized, cannot affect the status of the corporation. The bonds, being once voted, are subjected to the consequences of that vote, regardless of whose hands they may subsequently fall into. It is not in the power of a bondholder participating in the formation of a new corporation, based upon his bonds, with others, to destroy the existence of the corporation, once legally formed, by a subsequent transfer of his bonds to third parties. *Barnes v. Railway*, 122 U. S. 1, 7 Sup. Ct. 1043. The new corporation took possession of the mortgaged property on the 1st day of September, 1883, and has ever since held it, and operated the railroad. This action was authorized by the statute, consented to by the Somerset Railroad Company, the mortgagor, actively proposed and aided by one at least of the trustees, and ever since acquiesced in by all the trustees. It is too late for the trustees or dissenting bondholders now to object to technical irregularities, if any exist, especially as the Somerset Railway has since extended the railroad from North Anson to Bingham, a distance of about 16 miles, built a branch railroad of 1 mile in length, of great importance to the productiveness of the main line, placed a mortgage upon the road for \$225,000 to make these extensions and other improvements, and in other ways materially changed the condition and relations of all parties interested in the road. Their long acquiescence, without objection, coupled with the changed conditions and relations, resulting from the possession and management of the property by the Somerset Railway, estops them from now questioning the legality of the organization of the new corporation. *Kent v. Mining Co.*, 78 N. Y. 159; *Zabriske v. Railroad*, 23 How. 395; *Halstead v. Grinnan*, 152 U. S. 412, 14 Sup. Ct. 641; *Harwood v. Railroad Co.*, 17 Wall. 78; *Boston, C. & M. R. R. v. Boston & L. R. R.*, 65 N. H. 400, 23 Atl. 529.

The case shows that on July 8, 1884, all the right in equity which the Somerset Railroad Company had to redeem from the mortgage was legally sold on execution to the Somerset Railway, from which no redemption was had. It follows that on July 8, 1885, when the time for redemption from the execution sale expired, the Somerset Railway, representing all the mortgage bondholders, held the legal and full title to the equity of redemption which the Somerset Railroad Company had before held, and also the equitable,

beneficial title under the mortgage, and was in full, entire, and exclusive possession and use of all the property described in the mortgage. And, as the trustees had no beneficial interest under the mortgage, and held only a dry trust, with no duties to perform under it, they could not interfere with the title or possession of the Somerset Railway. It had become the duty of the trustees to release their naked legal title to the Somerset Railway. Rev. St. 1871, c. 51, § 55. And as equity regards that as done which ought to be done, the title of the Somerset Railway to all the property described in the mortgage must, in equity, be regarded as full and complete, and will be absolute at law when the trustees release their naked legal title, which they are required to do.

The title thus acquired to the mortgaged property operated as payment of all the bonds secured by the mortgage, if the mortgaged property was of sufficient value over and above the amount paid for the equity of redemption; if not, all the bonds must be regarded as paid pro tanto, and the balance remains an unsecured debt against the Somerset Railroad Company. But as the life and existence of the Somerset Railway was based upon and derived from the mortgage bonds, and the corporation was in fact the mortgage bondholders in organization, its title and possession inured to the benefit of all holders of bonds and coupons secured by the mortgage; and every bondholder became a shareholder in the property in the proportion the bonds held by him bore to the whole issue under the mortgage. This result follows, even if some of the bonds had passed into other hands since the organization of the bondholders in the new corporation, and before the title had ripened in that corporation. *Haynes v. Wellington*, 25 Me. 458; *Jones, Mortg.* § 950; *Hurd v. Coleman*, 42 Me. 182; *Hatch v. White*, 2 Gall. 152, Fed. Cas. No. 6,209. Any subsequent transfer of the mortgage bonds, unexchanged for stock, operated only as a transfer of the bondholders' share in the property originally conveyed by the mortgage, if the property was of sufficient value to pay all the mortgage bonds and the amount paid for the equity of redemption for the mortgage. If insufficient for that, the transfer of the bonds carried that share as property, and the balance of the bonds unpaid by the property as an unsecured debt of the Somerset Railroad Company. In *re Bondholders of York & Cumberland R. Co.*, 50 Me. 564.

But it is claimed that the action of this court in *Re Inhabitants of Anson*, 85 Me. 79, 26 Atl. 906, appointing a trustee under the mortgage of July 1, 1871, to fill a vacancy, was a decision upon the question involved here, and that the status of the bondholders who have exchanged their bonds for stock of the Somerset Railway and the holders of mortgage bonds unexchanged, is *res adjudicata*. Not so. The case was a petition

for appointment of a trustee to fill a vacancy caused by death of an original trustee; and the court expressly says: "The rights of the different bondholders are not now to be distinguished, for all the facts which might have a tendency to create differences are not now before us, and any attempt to settle all the conflicting claims, suggested by the history of the enterprise, would be premature. We do not now undertake to decide the relative equities between the outstanding bonds and those which were surrendered and canceled in exchange for the stock of the new corporation, nor to decide the status of the new organization and its new issue of bonds."

The court, in that case, carefully refrained from determining the rights and powers of the trustees, or the rights of the new corporation, or of the mortgage bondholders. It did not have before it a case calling for or authorizing such determination. It was mainly because the questions involved in this suit could not be determined in that, that the trustee was appointed, to avoid possible delay or confusion in determining the rights of all parties, and to afford the means to bring the whole case before the court, with no embarrassment from lack of parties.

The mortgage, coupled with the purchase of the equity, has ripened into full title, and ceased to have the character of a mortgage. It is now only valuable as a muniment of title, which has been perfected in the beneficiaries under the mortgage. There remains no property for the mortgage to operate upon. The trustees hold only a dry trust, without beneficial interest, with no duties to perform, except to release and transfer to the Somerset Railway the bare legal title which they held under the mortgage, which is now but a cloud upon the title of the Somerset Railway. This they must do on payment of any amount that may be due them for services or disbursements. As to them and their office, the mortgage is *functus officio*, and they cannot interfere with the title or possession of the Somerset Railway, rightfully holding the property as representing the mortgage bondholders.

It appears that in April, 1883, before the formation of the Somerset Railway, Reuben B. Dunn and others, holding more than one-half of the entire issue of bonds under the mortgage of July 1, 1871, in behalf of themselves and all other holders of bonds secured by the mortgage, brought a bill in equity in this court, in the county of Kennebec, against the Somerset Railroad Company, praying a decree of foreclosure of this mortgage for breach of condition. The trustees were not made parties to this bill, as they properly should have been, but no objection appears to have been made on that account. A decree was entered in the suit, at a term of this court held on the third Tuesday of October, 1884, that if the Somerset Railroad

Company should pay the over-due coupons on or before the 1st day of July, 1885, the complainants should take nothing by their bill, but, if not so paid, that the right of redemption should be barred. The amount not being paid at the time mentioned in the decree, nor afterwards, a final decree of strict foreclosure was entered on the 31st day of March, 1887. Rev. St. 1871, c. 51, provided a method for foreclosure of railroad mortgages by trustees. Chapter 166, Laws 1883, § 4, provided that where the principal of any bonds issued by a railroad corporation, secured by mortgage, shall have been due and payable more than three years, "or no interest has been paid thereon for more than three years, a corporation formed by the holders of such scrip or bonds, or, if no such corporation has been formed, the holders of not less than a majority of such scrip or bonds, may commence a suit in equity for the purpose of foreclosing such mortgage; and the court may decree a foreclosure of such mortgage, unless the arrears are paid within such time as the court may order."

Aside from the foreclosure proceedings authorized by the trustees, equity furnishes the best, and perhaps now the exclusive, forum for foreclosure of this class of mortgages. The ordinary method of foreclosure of mortgages on real estate is ill adapted to the foreclosure of railroad mortgages. The protection of all the large interests usually involved in the latter may require a receivership, or an injunction, or an order of sale, none of which can be accomplished by the ordinary proceedings for foreclosure, but can easily be provided for by the flexible processes of equity. The case of *Kennebec & Portland R. Co. v. Portland & Kennebec R. Co.*, 59 Me. 1, holding otherwise, was decided when the equity powers of this court were limited, and is not applicable under the full equity powers now possessed.

When the bill was filed by Dunn and others, no corporation of the bondholders had been formed, and the bill was properly brought and maintainable under the statute last cited, and might have been sustained, under the full equity power then existing in this court. Before the final decree was entered, all right and title of the Somerset Railroad Company had been divested, by the sale of its equity on execution, to the Somerset Railway, and it had no further interest in the property, or the proceedings in the equity suit, and it was therefore unnecessary to continue the equity suit for foreclosure to a final decree; but it was done, perhaps from extra caution. The Somerset Railroad Company might have complained that the decree limited the right of redemption to a shorter time than the law allowed it under the mortgage, if it had retained any interest in the property. Having parted with its interest, it could not be injured by the decree. The bill being for the benefit of the bondholders, and the decree, if valid, operating to perfect their title to the

mortgaged property, they can hardly be heard to complain. But whether this decree was valid or not we are not called upon to decide, as we do not deem it material to the determination of the rights of these parties.

When the new corporation was formed, and took possession of all the mortgaged property, and acquired the right of redemption from the mortgage from the Somerset Railroad Company, all the holders of bonds secured by the mortgage then became shareholders in the property, to which they then had the entire title and beneficial interest. The capital of the new corporation was exactly the amount of the outstanding bonds and coupons secured by the mortgage. This corporation proposed to issue its stock to the holders of bonds and coupons, upon surrender of the bonds and coupons, at the rate of one share of stock, of the par value of \$100, for the same amount in bonds and coupons. This proposition has been accepted and acted upon by the holders of bonds and coupons to the amount of \$552,200, leaving outstanding bonds to the amount of \$110,600 and the unpaid over-due coupons thereon. This exchange of bonds for stock does not lessen or enlarge the rights of the holders of unexchanged bonds. They were all paid, so far as the value of the mortgaged property in excess of amount paid for the equity of redemption was sufficient to do so; and thenceforward the bonds, so far as paid, became evidence of the amount of interest the holder had in the railroad property, and not of a debt, the balance only being evidence of a debt for such balance. The Somerset Railway stood in the place of and represented all the mortgage bondholders. Its stock, when issued in exchange for bonds, practically represented the bondholders' share in the property; the unexchanged bonds represented the same, and no more. The Somerset Railway can only issue its stock in exchange for mortgage bonds and coupons. It cannot sell and issue it to other parties. If any bondholder declines ultimately to exchange his bonds for stock, an amount of stock of the company equal to such bonds cannot be issued at all. The capital stock of the railway represents the bonds, and stands for them.

It was, and is, optional with the bondholder to exchange his bonds for stock. He cannot be compelled to do so. The Somerset Railway, representing all the mortgage bondholders, and being simply the bondholders in organization, is entitled to hold, possess, and operate the property. Its net earnings, when distributed in the form of dividends or otherwise, must be distributed to its stockholders and to the holders of unexchanged bonds in equal proportions.

If the holders of unexchanged bonds choose to take stock, they can do so at any time; or, if they choose, they can retain their present position, and receive their share of the

net earnings pro rata with the stockholders. If they become dissatisfied with this position, and decline to take stock, upon a proper bill, and sufficient equitable cause shown, they may have partition of the property, as between equitable tenants in common, if practicable; or, if that is impracticable, as it probably would be, a decree of sale of the railroad property, subject to legal incumbrances, and division of the proceeds, on the basis of taking the entire amount due on the \$450,000 of bonds and unpaid coupons at the date of the organization of the new corporation, and apportioning the proceeds pro rata among the holders of stock in the railway and the outstanding unexchanged bonds, thus doing exact justice to all. Pom. Eq. Jur. §§ 1388-1390; Nash v. Simpson, 78 Me. 142, 3 Atl. 53.

It appears that the Somerset Railway, on the 1st day of October, 1887, for the purpose of extending and improving the road and its equipment, made a mortgage of its entire property to trustees, to secure the payment of its bonds, to the amount of \$225,000, all of which have been issued, sold, and are now outstanding, the proceeds being used in extending and improving the road. The mortgage of July 1, 1871, having exhausted its life, and become inoperative as an existing mortgage, by union of the legal right of redemption and the equitable, beneficial title, under the mortgage, to all the property described therein in the Somerset Railway, representing all the mortgage bondholders, the mortgage for \$225,000 has become the first mortgage upon the road and its property. Whether the property was sufficient to pay the mortgage debt of July 1, 1871, or not, there is nothing more for it to operate upon. The trustees must release and convey whatever title and interest may be in them to the Somerset Railway, on payment of any amount that may be due them for services and disbursements. A master to be appointed to ascertain and report the amount.

The trustees, Lewis Pierce, Herbert M. Heath, and Franklin M. Drew, must be perpetually enjoined from the further prosecution of their pending suits, and from interfering in any way with the title, possession, or use, of the Somerset Railway, of any and all the property described in the mortgage of July 1, 1871, except so far as it may be necessary for them, by suitable legal process, to enforce lien, if any, which they may have upon the property for the payment of such sums as may be found due them for services and disbursements as such trustees; and the trustees must be commanded and enjoined to release and convey to the Somerset Railway all right and title they hold as trustees under the mortgage of July 1, 1871, upon payment of their charges.

Bill sustained, with costs, against the trustees, Pierce, Heath, and Drew, and dismissed as to all the other respondents. Decree in accordance with this opinion.

PIERCE et al. v. AYER et al.

(Supreme Judicial Court of Maine. June 1, 1895.)

MORTGAGES—EQUITY OF REDEMPTION—PURCHASE BY MORTGAGEE—EFFECT.

In a writ of entry the following facts appeared: July 1, 1871, the Somerset Railroad Company made a mortgage of its franchise and railroad property to trustees to secure the payment of bonds. The trustees under the mortgage brought suit to recover possession of all the property embraced in that mortgage. It was brought against various servants and officers of the Somerset Railway. The conditions of the mortgage having been broken, the mortgage bondholders in 1883 organized a new corporation, under the statute, by the name of the Somerset Railway, and that corporation, in accordance with the statute, took possession of all the mortgaged property on the 1st day of September, 1883, and has ever since retained possession and operated the road. On the 8th day of July, 1884, it purchased, at execution sale, the equity of redemption from the mortgage, from which sale no redemption has been had.

Held, that by the statute the Somerset Railway represents all the mortgage bondholders, and its title to and possession of the mortgaged property inures to their benefit. Having acquired the equity of redemption once held by the mortgagor, there is no occasion for a foreclosure of the mortgage. The cestuis que trustent under the mortgage, and the real owners, now that the equity of redemption from the mortgage has been acquired, have a sufficient title to the property, and, being in undisturbed possession and use of the same, the trustees, who have no beneficial interest, cannot maintain an action to dispossess them.

See Railway Co. v. Pierce, 33 Atl. 772, 88 Me. 86.

(Official.)

Report from supreme judicial court, Kennebec county.

Writ of entry on the application of Lewis Pierce and others against John Ayer and others. Judgment for defendants.

D. D. Stewart, N. & H. B. Cleaves, H. M. Heath, and O. A. Tuell, for plaintiffs. Edmund F. & Appleton Webb and J. H. Drummond & J. H. Drummond, Jr., for defendants.

STROUT, J. This is a writ of entry. On July 1, 1871, the Somerset Railroad Company made a mortgage of its franchise and railroad property to trustees to secure the payment of bonds. The trustees under the mortgage bring this suit to recover possession of all the property embraced in that mortgage. It is brought against various servants and officers of the Somerset Railway. The conditions of the mortgage having been broken, the mortgage bondholders in 1883 organized a new corporation, under the statute, by the name of the Somerset Railway; and that corporation, in accordance with the statute, took possession of all the mortgaged property on the 1st day of September, 1883, and has ever since retained possession, and operated the road. On the 8th day of July, 1884, it purchased, at execution sale, the equity of redemption from the mortgage, from which sale no redemption has been had. By the

statute, the Somerset Railway represents all the mortgage bondholders, and its title to and possession of the property described in the mortgage inures to their benefit. Having acquired the equity of redemption once held by the mortgagor, there is no occasion for a foreclosure of the mortgage. The cestuque trust under the mortgage, and the real owners, now that the equity of redemption from the mortgage has been acquired, have a sufficient title to the property, and, being in undisturbed possession and use of the same, the trustees, who have no beneficial interest, cannot maintain an action to dispossess them.

The rights of all parties are fully discussed and determined in the case of *Railway Co. v. Pierce* (argued with this case) 33 Atl. 772. Another suit to recover possession of the property is pending in Somerset county, which, by the agreement of parties, is to abide the result in this. According to the terms of the report, the entry in this suit and in the Somerset suit must be,

Judgment for defendants.

WEEKS v. HILL.

(Supreme Judicial Court of Maine. June 4, 1895.)

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—AGENCY.

1. Actral insolvency of the donor of a gift of property is not an indispensable element in the proof of a fraudulent intent as to creditors.

2. When a conveyance is made without consideration, the fact of the grantor's insolvency is undoubtedly presumptive evidence of a fraudulent purpose towards creditors; but it is not a conclusive, nor the only, criterion by which to determine that question. The facts and circumstances may clearly show, under St. 13 Eliz. c. 5, such a fraudulent intent on the part of a grantor who is not actually insolvent.

3. Whether a conveyance is made with an intent to hinder, delay, and defraud creditors is a question of fact for the determination of the jury upon the consideration of all the circumstances attending the conveyance.

4. Semble, that the remedy of creditors is wholly an equitable one in cases of fraudulent conveyances of personal as well as real property between husband and wife.

5. Held that, there being evidence from which a jury might infer that the husband acted only as the wife's agent in purchasing the chattels, an instruction that she must be proved to be insolvent in order that creditors may avoid the transaction, and so hold the property as belonging to the wife, would be erroneous.

(Official.)

Exceptions from superior court, Kennebec county.

Replevin by Frank N. Weeks against James P. Hill. There was a verdict for plaintiff, and defendant brings exceptions. Sustained.

W. C. Philbrook, for plaintiff. Harvey D. Eaton, for defendant.

WHITEHOUSE, J. This is an action of replevin for four cows taken by the defendant, as a deputy sheriff, by virtue of an

execution against Alice Weeks, the wife of the plaintiff, and in favor of Mary C. Wing. The judgment on which the execution issued was recovered on a promissory note, signed by Alice Weeks and payable to her sister, Mary C. Wing, for the sum of \$135, dated April 30, 1892. The cows were found by the officer in the custody of the plaintiff, and it is not in controversy that at least two of them were purchased by the plaintiff with money furnished by his wife, Alice Weeks, October 1, 1892. It was contended in behalf of the defendant that if this was a gift from the wife to her husband it was made in fraud of existing creditors, and that the officer was justified in seizing the cows purchased with it as the property of the wife.

The verdict was for the plaintiff, and the case comes to this court on motion and exceptions by the defendant.

The presiding justice instructed the jury, *inter alia*, as follows:

"If Mrs. Weeks was insolvent, was owing this debt to Mrs. Wing, her sister, and, for the purpose of preventing her recovering her debt, passed this money over into the hands of her husband with his knowledge or connivance, it would be such a fraud as would make void the gift, and anything purchased with that money could be pursued by Mrs. Wing, the creditor, and taken in satisfaction of her execution. * * * You see that the premises which must be proven in order to make it a fraud must be that Mrs. Weeks, at the time she gave the money to her husband, was insolvent, and that she gave it to him with intent to defraud her sister or prevent her recovery of her debt."

This instruction must be held erroneous. Actual insolvency of the grantor in a voluntary conveyance, or of the donor of a gift of property, is not an indispensable element in the proof of a fraudulent intent as to creditors. Whether or not a gift, sale, or conveyance is made in good faith or with the intent to hinder, delay, or defraud creditors, under St. 13 Eliz. c. 5, recognized as a part of the common law of this state, is a question of fact for the determination of the jury, upon consideration of all the circumstances attending it. *French v. Holmes*, 68 Me. 525; *Laughton v. Harden*, Id. 208; *Thacher v. Phinney*, 7 Allen, 146; *Pomeroy v. Bailey*, 43 N. H. 118. When a conveyance is made without consideration, the fact of the grantor's insolvency is undoubtedly presumptive evidence of a fraudulent purpose towards creditors; but it is not a conclusive, nor the only, criterion by which to determine that question. The facts and circumstances may clearly show such a fraudulent intent on the part of a grantor who is not actually insolvent. *Parkman v. Welch*, 19 Pick. 231; *Parish v. Murphree*, 13 How. 92. It is not necessary that insolvency should either be proved or presumed in order to render a voluntary conveyance void as to creditors. *Bump, Fraud. Conv.* 293, and cases cited.

But the plaintiff contends that any error in this instruction respecting the insolvency of the donor as an element in the proof of fraud becomes immaterial in this case, for the reason that the title to the cows had never been in the wife, Alice Weeks, it was vested directly in the husband, and hence, if it be conceded that there was a gift of the money made in fraud of creditors, the cows purchased with it were not subject to seizure on execution, but could only be reached, and made available to the execution creditor, by a proceeding in equity. This contention of the plaintiff that tangible property, susceptible of identification, purchased with money thus fraudulently given by the wife to the husband, cannot be seized on execution as the property of the wife, but can only be reached by process in equity, is supported by the rule laid down in *Low v. Marco*, 53 Me. 45, in which the title to real estate fraudulently conveyed by the husband to the wife was under consideration, and to some extent by the doctrine of *Lawrence v. Bank*, 35 N. Y. 320; and although a different conclusion has been reached by several courts of last resort in other states, it may be conceded that the same rule will be followed in this state in cases involving the title to personal property. Still, the erroneous ruling in question may have been material; for there was evidence in this case tending to show, and the jury might have been justified in so finding, that in purchasing the cows the plaintiff acted solely as the agent of his wife. In that event, the ownership of them originally vested in the wife, and the act of fraud towards her creditors, if any, consisted not merely in placing the money in her husband's hands, but in transferring the cows purchased into his custody, to be held in his name and as his property, for the purpose of preventing levy thereon by the execution creditor. In this view of the case, the erroneous instruction was equally prejudicial, and the verdict must be, Exceptions sustained.

WING v. WEEKS.

Supreme Judicial Court of Maine. June 4, 1895.)

FAUDULENT CONVEYANCE—DISCLOSURE OF EXECUTION DEBTOR—RECOVERY OF DOUBLE AMOUNT OF EXECUTION—PLEADING.

1. In an action to recover "double the amount of the execution" for "fraudulently aiding in the transfer, concealment, or disposal" of property disclosed by an execution debtor, *held*, at the statute on which it is based (Laws 1887, 137, § 12) is penal, as well as remedial, and is not to be extended by construction beyond the reasonable meaning of its terms. It makes a clear distinction between the liability of a debtor and that of a third person.

2. Such action cannot be maintained, when it appears that the situation of the property disclosed was not changed during the 30 days after disclosure.

3. *Held*, that a declaration in such an action is defective that contains no averment of any specific act of the defendant whereby the debtor was "fraudulently aided" in transferring, concealing, or disposing of the property during that period, or at any other time; nor a general allegation that the defendant "fraudulently aided" in the transfer, concealment, or disposal of the property at any time.

See *Weeks v. Hill*, 33 Atl. 778, 88 Me. 111. (Official.)

Report from superior court, Kennebec county.

Action by Mary C. Wing against Frank N. Weeks under Laws 1887, c. 137, § 12.

Declaration: "In a plea of the case, whereas the said plaintiff, on the 22nd day of April, 1893, at said Augusta, by the consideration of our judge of our superior court, holden for and within our county of Kennebec, aforesaid, on the first Tuesday of April, 1893, recovered judgment against one Alice Weeks, of said Waterville, for the sum of one hundred forty-five dollars and forty-one cents debt or damage, and nine dollars ninety-three cents costs of suit, as by the record thereof now remaining in our said court more fully appears; and whereas, on the thirty-first day of May, 1893, said plaintiff presented a petition to Frank K. Shaw, Esq., a disclosure commissioner, within and for our county of Kennebec, duly appointed by the supreme judicial court, praying him to issue a citation for disclosure to said Alice Weeks, and said commissioner granted said prayer, and issued a citation commanding the said Alice Weeks to appear before him at the municipal court room, in Waterville, on the first day of June, 1893, at ten o'clock in the forenoon, for the purpose of making a full and true disclosure of all her business and property affairs, in accordance with the provisions of chapter 137 of Public Laws of 1887 of Maine. Said citation was duly served, and in obedience thereto said Alice Weeks appeared, at the time and place aforesaid, and disclosed that she was the owner of one top carriage, valued at \$50, and five cows, valued at \$200, all being then in the possession of this defendant, the said Frank N. Weeks. Whereupon the said disclosure commissioner decreed that said petitioner have a lien for thirty days on so much of said property as was not exempt from attachment and seizure on execution, and the plaintiff alleges that none of said property was then exempt from attachment and seizure on execution. And afterwards, on the 21st day of June, 1893, James P. Hill, a deputy of the sheriff of Kennebec county, having in his hands for collection the execution issued on said judgment in favor of Mary C. Wing, by virtue of said execution and the disclosure commissioner's certificate thereon indorsed, granting a lien as above set forth, demanded of said Frank N. Weeks the said top carriage and the said five cows; but the said Frank N. Weeks, then and there being in possession of said property, and under a duty to surrender it to said officer on demand, and having no lien or other reason for not so surren-

dering it, being unmindful of his said duty, and disobedient to the decree of said commissioner and the statute in such case made and provided, refused then and there to surrender said property, and concealed it, and kept it from coming into the hands of said officer, as by law it should have done; wherefore, and by force of the statute in such case made and provided, the said Frank N. Weeks has forfeited to the said plaintiff double the amount due on said execution, to wit, double the sum of one hundred fifty-five dollars and forty-nine cents, being the sum of three hundred ten dollars and ninety-eight cents. Yet, though often thereto requested," etc. Plaintiff nonsuit.

Harvey D. Eaton, for plaintiff. W. C. Philbrook, for defendant.

WHITEHOUSE, J. The plaintiff in this action was the execution creditor and the defendant in interest, in the replevin suit, *Weeks v. Hill*, 88 Me. 111, 33 Atl. 778, and the case is an outgrowth of the same transaction.

This suit is based on section 12 of chapter 137, Laws 1887, relating to the disclosure of execution debtors. That section provides that, if the debtor "discloses personal estate liable to be seized on execution, the petitioner shall have a lien on it, or so much of it as the magistrate in his record judges necessary, for thirty days; and if the debtor transfers, conceals, or otherwise disposes of it within said time, or suffers it to be done, or refuses to surrender on demand, * * * the petitioner may recover, in an action on the case against him, or any person fraudulently aiding in such transfer, concealment or disposal, double the amount due on said execution."

It is alleged in the plaintiff's declaration that Alice Weeks, the execution debtor in the replevin suit, and the wife of this defendant, pursuant to a citation for that purpose, appeared before a disclosure commissioner on the 1st day of June, 1893, and "disclosed that she was the owner of one top carriage, valued at fifty dollars, and five cows, valued at two hundred dollars, all being then in the possession of this defendant, Frank N. Weeks; whereupon the disclosure commissioner decreed that said petitioner have a lien for thirty days on so much of said property as was not exempt from attachment and seizure on execution." It is further alleged that the property thus disclosed was duly demanded of the defendant by the officer having the execution in favor of the plaintiff, but that the defendant "then and there being in possession of said property, and under a duty to surrender it to said officer on demand, and having no lien or other reason for not so surrendering it, being unmindful of his said duty, and disobedient to the decree of said commissioner and the statute in such case made and provided, refused then and there to surrender said property, and concealed it, and kept it from coming into the hands of said officer, as by law it should have done."

There is no evidence in this case, nor in the report of the replevin suit, which is made a part of this case, aside from the recital in the certificate of the disclosure commissioner, which gives any support to the averment that Alice Weeks disclosed that she "was the owner" of the cows and carriage in question. She "disclosed" that, some eight months prior to that time, she gave her husband the sum of \$300, and it appears that he purchased five cows with the money. She uniformly disclaimed any ownership in the cows. There is no evidence whatever, other than the commissioner's certificate, respecting the title to the carriage. The defendant appears to have asserted the right to hold it, and there is no evidence that he did not own it. It also appears that four of the cows in the defendant's possession had been seized, on this same execution, as the property of Alice Weeks, some two months before, and replevied by the defendant, as above stated.

But it must be remembered that this is an action, not against the execution debtor who is alleged to have disclosed the property, but against the defendant, to recover "double the amount of the execution," presumably for "fraudulently aiding in the transfer, concealment, or disposal" of the property within 30 days after the disclosure, and while the lien was decreed to continue. The statute invoked is penal, as well as remedial, and is not to be extended by construction beyond the reasonable meaning of its terms. The rule of strict construction is applicable; and this signifies that an act of a penal nature "is not to be regarded as including anything which is not within its letter as well as its spirit, which is not clearly and intelligibly described in the very words of the statute, as well as manifestly intended by the legislature." *Abbott v. Wood*, 22 Me. 541; *Butler v. Ricker*, 6 Me. 268; *End. Interp. St.* §§ 329-334, and cases cited.

This statute makes a clear distinction between the liability of the debtor and that of a third person. The petitioner may recover the penalty of the debtor himself, if "he transfers, conceals, or otherwise disposes of the property within thirty days," or "refuses to surrender it on demand," etc., but he can only recover the penalty of a third person for "fraudulently aiding in such transfer, concealment, or disposal." Such third person is not made liable for simply "refusing to surrender" property which he claims as his own, which has not been "transferred, concealed, or disposed of" during this period of 30 days, but has been exposed to seizure on execution during that period, and for 8 months prior to that time.

It is not contended that the situation of this property was changed in the slightest degree during the 30 days after disclosure. There is no averment in the declaration of any specific act of the defendant whereby the debtor was "fraudulently aided" in transferring, concealing, or disposing of the property dur-

that period, or at any other time; nor is there even a general allegation that the defendant "fraudulently aided" in the transfer, concealment, or disposal of the property at that time. There are no proper averments in the declaration to bring the case within the terms of the statute. It follows that the action must fail, for want of both allegation and evidence.

Plaintiff nonsuit.

DANFORTH v. DANFORTH.
 Supreme Judicial Court of Maine. June 5,
 1895.)

DIVORCE—DESERTION—CONDONATION.

1. "Utter desertion continued for three consecutive years" is one of the causes for which a divorce may be granted. Rev. St. c. 60, § 2.

2. If a wife deserts her husband and remains away from him for the full period of three consecutive years, and during all that time consciously and unreasonably refuses to return, right to a divorce is complete, and cannot be defeated by proof that on one occasion, within three years, he visited his wife, and, for two or three nights, occupied the same bed with

(Official.)

Report from superior court, Kennebec county.

Bill of divorce by George O. Danforth against Etta M. Danforth.

The allegation relied on as a cause for divorce was utter desertion, without reasonable cause, for three consecutive years next prior to the filing of the libel.

The evidence was taken out before the presiding judge, and his report of the facts, as made by him, was submitted by the parties to the law court, for it to determine whether or not they show legal cause for divorce.

The facts as found are as follows: Libel filed May 29, 1893. The libelee deserted the libellant April 20, 1890, without reasonable cause, and has continued such desertion ever since, unless it was interrupted by the fact stated below. The libellant lived on a farm owned by him in Albion in Kennebec county. His wife refused to live with him there, although often requested, but lived in Lewiston, where she has lived ever since her desertion of the libellant.

On September, 1891, and within three years before the date of the libel, the libellant went to the house occupied by his wife in Lewiston, and there lodged with her, occupying the same bed as husband and wife two or three nights. He still refusing, however, to return to his wife and live with him as his wife, and has since the time since refused to do so, without legal justification. Remanded for further hearing.

W. T. Haines, for libellant. W. H. Newell and W. H. Judkins, for libelee.

WALTON, J. The question is this: If a wife deserts her husband, and remains away from him for three consecutive years, and, during all that time, continuously and unreasonably refuses to return, will the fact that, within the three years, her husband once visited her and occupied the same bed with her for two or three nights, necessarily interrupt the desertion, and bar his right to a divorce for that cause?

We think not. Desertion, such as will be a valid cause for a divorce, is not easily defined. *Stewart v. Stewart*, 78 Me. 548, 7 Atl. 473, and cases there cited. And it may be equally difficult to define what will constitute an interruption or condonation of desertion. The authorities are conflicting and confusing.

In *Kennedy v. Kennedy*, 87 Ill. 250, where a wife, without justification, refused to go to a new home which her husband had prepared for her, and remained away for the statutory length of time necessary to create a valid ground for divorce, the court held that the fact that, on one occasion, he cohabited with her at her brother's house, did not interrupt the desertion or bar his right to a divorce.

And we have reached the same conclusion. "Utter desertion continued for three consecutive years," is one of the causes for which a divorce may be granted. Rev. St. c. 60, § 2. And we think that if a wife deserts her husband, and remains away from him for the full period of three consecutive years, and, during all that time, continuously and unreasonably refuses to return, his right to a divorce is complete, and cannot be defeated by proof that on one occasion, within the three years, he visited his wife, and, for two or three nights, occupied the same bed with her.

Such a visit is not illegal or improper. On the contrary, it has often been held to be the duty of the husband to visit his absent wife, and to endeavor by all proper means to effect a reconciliation. If he succeeds, and his wife returns to her home, and to her duties as his wife, undoubtedly her prior desertion will be interrupted or regarded as condoned, and cannot be added to a subsequent desertion for the purpose of completing the three years necessary to entitle her husband to a divorce. But if, in spite of his efforts, his wife persistently and unreasonably refuses to return, and continuously remains away from him for three consecutive years, we think her husband's right to a divorce is complete; that the mere fact that on one occasion he visited her, and for two or three nights occupied the same bed with her, does not interrupt the continuity of her desertion.

Case remanded, for further hearing in the court below.

**MORRISON et al. v FIRST NAT. BANK
OF SKOWHEGAN.**

(Supreme Judicial Court of Maine. June 19,
1895.)

**DEED—DESCRIPTION—CONSTRUCTION—EASEMENT—
HIGH-WATER MARK—SHORE.**

1. A deed of real estate contained this clause: "Saving and reserving from this conveyance that said Dyers [the grantees] are not to have the right of erecting a building within five feet from the easterly line and within twenty-five feet from my store, and that said five feet is to be forever reserved for a passageway back in common with themselves and others." The description of the granted premises included the strip. *Held*, that the deed conveyed the fee of the five-foot strip and reserved merely an easement.

2. The term "high-water mark," when applied to a nontidal river, means the highest limit reached by the water when the river is unaffected by freshets and contains its natural and usual flow.

3. The bank of a river or stream extends to the margin of the stream, to that point where it comes in contact with the water of the stream.

4. There is no inconsistency, therefore, in the two calls of a deed, one of which is, in effect, "to high-water mark of the Kennebec river," and the other, "thence westerly by the bank of the river." As used in the deed, they mean exactly the same thing. They are correlative. The one touches the other.

(Official.)

Report from supreme judicial court, Somerset county.

Action by Lucius L. Morrison and another against the First National Bank of Skowhegan. Judgment for defendant.

D. D. Stewart, for plaintiffs. S. J. & L. L. Walton, for defendant.

WISWELL, J. Action of trespass *quare clausum*. Both parties derive title to their respective and adjoining lots of land from Samuel Weston, who at one time owned all the land in controversy. The lot now owned by the defendant was conveyed by Weston to Asa and Quincy Dyer by deed dated March 6, 1838, while the plaintiffs' lot was conveyed by the administrator of Samuel Weston to Judah McClellan August 28, 1841. The lot is described as bounded "westerly by land deeded by the late Samuel Weston to A. and Q. Dyer."

The only questions raised are as to the construction of the deed under which the defendant claims.

1. That deed contains this clause: "Saving and reserving from this conveyance that said Dyers are not to have the right of erecting a building within five feet from the easterly line and within twenty-five feet from my store, and that said five feet is to be forever reserved for a passageway back in common with themselves and others."

Does this language in the deed convey the fee of the five-foot strip, and reserve a right of way to be used by the grantees in common with others, or does it except from the conveyance the land itself, and grant only an easement?

Such construction should be given to a deed that each part, phrase, and word may have force and effect, that the intention of the parties, if by law it may, shall prevail; and exceptions from the grant must be construed, in cases of doubt, most strongly against the grantor. *Wellman v. Dickey*, 78 Me. 29, 2 Atl. 133.

We have no doubt that the intention of the parties was that the land should be conveyed and the easement reserved. The description of the premises includes the strip. If the intention had been otherwise, the description would have naturally excluded it, and the deed would have contained appropriate language to grant a right of way in addition and as appurtenant to the land conveyed. Moreover, it will be noticed that the clause quoted contains a provision restricting the grantees from erecting a building on this strip. There could be no object in doing this unless the fee in the soil was conveyed. No excess of caution, however extreme, would cause a grantor, in conveying land, to put in his deed a clause restricting the grantee from building on other land of the grantor not conveyed, nor from erecting a building upon land of the grantor over which a right of way only was granted.

Although the words "reserving" and "excepting" are so often used indiscriminately that no controlling effect should be given to the use of one when it is evident that the other was intended, in this case the language of the deed is technically correct for the purpose of accomplishing that which it is evident, from other parts of the clause, was intended.

An exception in a deed is always a part of the thing granted, and of a thing in being, while a reservation is the creation of a right or interest which had no prior existence as such. *Winthrop v. Fairbanks*, 41 Me. 307. In this case, the deed provided "that said five feet is to be forever reserved for a passageway," etc.

The language used shows that the five-foot strip is on the grantees' side of the line of the land conveyed; it is the five feet next west "from the easterly line." This necessarily means the easterly line of the lot conveyed.

Our conclusion is supported by the authorities.

In *Stetson v. French*, 16 Me. 204, a deed contained this provision: "Reserving and providing for the keeping open and extending to low water Poplar street and Washington street, said streets to be for the future disposition of the parties to this deed in such manner as may hereafter be mutually agreed on by them." These streets were within the limits of the land conveyed. It was held that the fee in the whole land passed by the deed, and that an easement only in this part of it was reserved to the grantor.

In *Tuttle v. Walker*, 46 Me. 280, a deed contained the following reservation: "Excepting

and reserving as follows: If the town should hereafter lay out and accept a road, from the road first mentioned to the river road, near the house of J. H. Hill, then the south end of the above-described premises shall be considered and occupied for the use of the same, three rods wide; and, otherwise, reserving the same for a private way forever." It was held that the deed conveyed the fee of the whole lot of land described therein, subject to an easement for a town way over the three rods, if the town will accept it; and if the town does not use it for that purpose, then for a private way.

In *Kuhn v. Farnsworth*, 69 Me. 404, a deed of warranty, after describing the exterior lines of the farm, conveyed by monuments, courses, and distances, continued as follows: "Containing one hundred and twenty-five acres and sixty-four rods, and no more, exclusive of the county road four rods wide through the above premises, which is reserved to the said grantor." It was held that the fee in the land contained in the road was not excepted or reserved to the grantor, but passed to the grantee, the easement only being excluded, to relieve the warrantor from his covenant against incumbrances.

In *Wellman v. Dickey*, 78 Me. 29, 2 Atl. 133, it was decided that a deed containing these words, "Excepting the roads laid out over said land," conveys the fee within the limits of the road, subject to the easement of the public incident to the use of the way. In the opinion it is said that this was undoubtedly the intention; "otherwise the locus would naturally have been bounded by the line of the road."

In *Day v. Philbrook*, 85 Me. 90, 26 Atl. 999, a deed contained these words: "Reserving the town road leading through the farm." The town road was subsequently discontinued. Held, that the fee of the road was not reserved in the deed, but only in its use as an incumbrance.

In *King v. Murphy*, 140 Mass. 254, 4 N. E. 508, a deed contained a reservation of a strip of land on the westerly side of a lot conveyed, 10 feet wide and 50 feet long, "for an open passageway, to be used in common by the said Davis and Murphy [grantor and grantee], and their heirs and assigns, forever." In the opinion it is said: "The description in the deed to the defendant covers the strip ten feet wide; and we agree with both counsel that the clause of reservation cannot be construed as an exception of this strip, the fee being retained in Davis, but is merely a reservation to him of a right of way over the strip."

The defendant, therefore, being the owner of the fee in the five-foot strip, this action cannot be maintained for the acts complained of on that portion of the locus, however it might be in an action on the case for a disturbance of the plaintiffs' right to use the same for the purposes of a way.

2. The next question presented involves the

construction of these calls in the deed under which the defendant derived its title, "thence southerly, or a line at right angles with said southerly side of said road, to Kennebec river to high-water mark; thence westerly by the bank of the river or shore thereof to land conveyed by Josiah Parlin and myself to Joseph Leavitt and Osgood Sawyer many years since."

It becomes necessary to inquire into the meaning of the words in the description, "high-water mark," "shore," and "bank," when applied to a nontidal stream.

The term 'high-water mark,' although sometimes used, is inappropriate when applied to a fresh-water stream, where the tide does not flow and ebb. But we think it must be construed as meaning the line on the river bank reached by the water when the river is ordinarily full and the water ordinarily high. Not the highest point touched by the water in a freshet, nor when the water is the lowest in seasons of drought, but the highest limit reached when the river is unaffected by freshets and contains its natural and usual flow.—the highest limit at the ordinary state of the river. This does not mean, as claimed by the plaintiffs' counsel, the top of the bank, many feet distant from the bed of the river in its ordinary state, and only reached by the water on rare occasions of extreme freshet.

In *Plumb v. McGannon*, 32 U. C. Q. B. 8, it is said: "For the great flow caused by the melting of the snow and ice, and by the spring rains, or by other unusual floods or causes, is to be excluded in determining the limit of high-water mark. The true limit would appear to be, by analogy to tidal waters, the average height of the river after the great flow of the spring has abated and the river is in its ordinary state."

In *Railway Co. v. Ramsey*, 53 Ark. 314, 13 S. W. 931, it is said: "But it is necessary, to a full understanding of the rights of a riparian owner and of the public in the lands between the banks of a river, to determine the legal meaning of the phrase 'high water.' It does not mean, as has been sometimes supposed, the line reached by the great annual rises, regardless of the character of the lands subject at such times to be overflowed. But, as decided in the case of *Houghton v. Railway Co.*, 47 Iowa, 370, 'High-water mark,' then, as the line between the riparian proprietor and the public, is to be regarded as co-ordinate with the limit of the river bed."

The term "shore" is also inapplicable to a nontidal river. The word strictly means that space which is alternately covered and exposed by the flow and ebb of the tide,—the flats between ordinary high and low water mark. The "shore" is the ground between the ordinary high and low water marks,—the flats,—and a well-defined monument. *Montgomery v. Reed*, 69 Me. 510.

A fresh-water river has banks, instead of

shores, but the word is sometimes used, with reference to a nontidal river, synonymously with bank. The bank of a river or stream extends to the margin of the stream,—to that point where the bank comes in contact with the stream. Gould, Waters, § 41, and cases cited in note.

In *Stone v. Augusta*, 46 Me. 127, two of the calls in a deed were, "Thence southerly and westerly, parallel with north line of said lot No. 10, to the mill brook; thence by the bank of said brook to the north line of said lot No. 10." The court said, in the opinion: "The plaintiff's land is, therefore, bounded by ordinary high-water mark, and this principle will not be changed by the fact that the land or bank continues to rise more or less precipitously above that point. His land is not limited to the top of the hill or bank beside the stream, but extends to the margin of the stream,—to that point where the bank comes in contact with the stream."

In *Starr v. Child*, 20 v end. 149, it is said: "The bank and the water are correlative. You cannot own one without touching the other." In that case it was decided that where, in a conveyance of premises situated on the bank of a stream not navigable, the lines are stated to run from one of the corners of the lot to the river, and thence along the shore of said river to a certain street, the grantee takes to the thread of the stream. And although this decision was reversed by the court of errors of New York in *Child v. Starr*, 4 Hill, 369, in the latter case a similar definition of the bank of a river was given.

While it has often been held that the bank of a river includes to low-water mark, we think that, in this case, at least, by reason of the other calls, it should be limited to ordinary high-water mark. And as high-water mark is not at the top of a bank, reached only by the water of the river in extreme freshets, neither does a call "thence by the bank" limit the grant to the top of the hill or a bank beside the stream, but extends it to the margin of the stream or river.

There is no inconsistency, therefore, in the two calls of the deed, one of which is in effect to high-water mark of the Kennebec river, and the other, "thence westerly by the bank of the river." As used in this deed, they mean exactly the same thing. They are correlative. The one touches the other.

The southerly boundary, then, of the defendant's land, is at high-water mark of the river when the river is unaffected by freshets and is in its ordinary state, and where the bank touches the water when the river is in this condition.

To ascertain just where this would be in any case may be a matter of some difficulty. It may be the line which the river impresses upon the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture. Gould, Waters, § 45; *Railway Co. v. Ramsey*, supra.

In other cases where the conditions are

not favorable for such a line of demarkation to be made by natural causes, it can only be ascertained by careful observation.

In this case, we can do no more than to give the general principles and rules which will control in ascertaining where high-water mark, as above defined, is. We cannot, from the evidence before us, definitely and accurately locate it.

But it is evident that the acts complained of as trespasses were committed above ordinary high-water mark, and we do not understand that it is claimed by the counsel for the plaintiffs that any of these acts were done below the place where the line as above indicated would fall.

In accordance with the terms of the report, therefore, the entry will be,
Judgment for defendant.

WHITEHOUSE, J., being related to one of the parties, did not sit.

FIRST NAT. BANK OF SKOWHEGAN v. MORRISON et al. (two cases).

(Supreme Judicial Court of Maine. June 19, 1895.)

DEED—DESCRIPTION—CONSTRUCTION—EASEMENT—RIGHT TO POSSESSION.

1. A deed of real estate contained this clause: "Saving and reserving from this conveyance that said Dyers [the grantees] are not to have the right of erecting a building within five feet from the easterly line and within twenty-five feet from my store, and that said five feet is to be forever reserved for a passage-way back in common with themselves and others." The description of the granted premises included the strip. *Held*, that the deed conveyed the fee of the five-foot strip and reserved merely an easement.

2. The demandant, having the fee, is entitled to judgment for possession, notwithstanding the tenant has an easement for a passage-way over a portion of the demanded premises.

See *Morrison v. Bank*, 33 Atl. 782, 88 Me. 155. (Official.)

Report from supreme judicial court, Somerset county.

Actions by the First National Bank of Skowhegan against Lucius S. Morrison and another. Judgment for plaintiff.

S. J. & L. L. Walton, for plaintiff. D. D. Stewart, for defendants.

WISWELL, J. These two cases, one a real action, the other an action of trespass *quare clausum*, were argued together.

The real action is to recover possession of a lot of land in Skowhegan, including a five-foot strip, extending from Water street southerly, at right angles with the street, to the Kennebec river at high-water mark.

The defendants seasonably disclaimed as to all the land demanded, except the five-foot strip, and as to that pleaded *nul disseisin*. This plea admits that the defendants are in

possession, and the only question is, which is the better title? The plaintiff derived its title by various mesne conveyances from Samuel Weston, who, in 1838, conveyed to the plaintiff's predecessor in title a lot the boundaries of which included the land in controversy. That deed contains this clause: Saving and reserving from this conveyance that said Dyers [the grantees] are not to have the right of erecting a building within five feet from the easterly line and within twenty-five feet from my store, and that said five feet is to be forever reserved for a passageway back in common with themselves and others."

The defendants' counsel contends that this clause, properly construed, excepts the soil of the five-foot strip, and grants merely an easement over it.

In the case of *Morrison v. Bank*, 88 Me. 55, 33 Atl. 782, this court has decided, contrary to the contention of the defendants' counsel, that the deed referred to conveyed the soil and reserved an easement. That case is decisive of this. The plaintiff has the better title, and should have judgment for possession.

This result is not affected by the fact that the defendants have an easement of a right of way over the strip in controversy.

"The fee in the land is to be regarded as distinct from an easement in the same. The fee may be in one and the easement in another. The demandant, having the fee, is entitled to recover, notwithstanding the defendant may have an easement in the passageway for the use of the mill." *Blake v. Am*, 50 Me. 311.

In *Morgan v. Moore*, 3 Gray, 319, it was held that the owner in fee of land may maintain a writ of entry to establish his title against the owner of a perpetual right to use for a passageway.

In *Hancock v. Wentworth*, 5 Metc. (Mass.) 46, it was held that it is no objection to a recovery in a real action that the tenant has an easement in the demanded premises.

The action of trespass quare clausum is to recover damages for certain acts of the defendants in making excavations, and in laying a foundation wall for a building erected by them upon their own lands, next east of the plaintiff's land. This foundation wall illicitly extended slightly over the plaintiff's line, upon the five-foot strip in controversy. This is a technical trespass. The jury was slight, and the damages should be nominal.

In the real action, the plaintiff is entitled to judgment for possession of so much of the demanded premises as was not disclaimed, subject to the defendants' easement in the five-foot strip next to the demandant's easterly line for a right of way, as reserved by the grantor in the deed from Samuel Weston to Asa and Quincy Dyer, dated March 6, 1838.

In the action of trespass quare clausum,

the plaintiff should have judgment for damages, assessed at one dollar.

Judgment accordingly, in both suits.

WHITEHOUSE, J., did not sit.

TASKER v. INHABITANTS OF FARMINGDALE.

(Supreme Judicial Court of Maine. June 3, 1895.)

DEFECTIVE HIGHWAYS—CONTRIBUTORY NEGLIGENCE.

A new trial will be granted where the thoughtless inattention of the plaintiff—the very essence of negligence—is the cause of the accident.

The court adheres to its former opinion in this case in 27 Atl. 464. 85 Me. 523.

(Official.)

Action by Frances E. Tasker against the inhabitants of Farmingdale. Verdict for plaintiff. Motion for new trial. Granted.

A. M. Spear, for plaintiff. Orville D. Baker and Frank L. Staples, for defendant.

PER CURIAM. This case came before the law court at a former term, upon substantially the same evidence, and was there fully heard and considered. 85 Me. 523, 27 Atl. 464. At that time the court said: "As the plaintiff was driving with two of her children over a road, with which she was perfectly well acquainted, having driven over it hundreds of times, she saw an electric car coming. She says that her horse did not appear to be at all alarmed, and that she had him under full control. She nevertheless reined her horse out of the road, on the opposite side from the car, so as to go as far from it as she could, and, the first she knew, her carriage wheel dropped down over the end of a culvert, and she and her two children were thrown out. The children were not hurt; but for injuries claimed to have been received by her she recovered a verdict against the town of Farmingdale for \$1,150." She has now recovered a second verdict, upon the same facts, for \$1,566.66.

The court, in the same opinion, further says: "We think the verdict is clearly wrong. We cannot doubt that the accident was due entirely to the plaintiff's own thoughtless inattention. The road was smooth and nearly level, and wide enough for three such carriages as the one in which the plaintiff was riding to pass abreast. Her horse was not frightened, and she had him under full control. She so testifies. She intentionally and unnecessarily reined him out of the road. It was in the evening, and the kindest view that we can take of the plaintiff's conduct is that her attention was so absorbed by the electric car that she gave no thought to the danger she might encounter by driving out of the road. She saw the car, but she did not see, and did not think of, the culvert.

Thoughtless inattention—the very essence of negligence—was the cause of the accident.”

Upon second argument, and further consideration, the court considers that its views before expressed must control the case, and the verdict be set aside. Motion sustained.

RICHMOND v. PHOENIX ASSUR. CO.

SAME v. LIBERTY INS. CO.

(Supreme Judicial Court of Maine. June 3, 1895.)

INSURANCE—SALE OF INSURED PROPERTY—POWERS OF AGENT—NOTICE.

1. A sale and conveyance of the insured property terminates and avoids a policy which contains the following stipulation: “If the property be sold or transferred, * * * or if this policy shall be assigned before a loss, without the consent of the company indorsed hereon, * * * then, and in every such case, this policy shall be void.”

2. *Held*, that there is no statute in this state affecting the force of such clauses in policies of insurance.

3. Where the broker who procured the policy is not the agent of the insurance company, he cannot receive notice and give consent to the transfer or assignment of the policy, under Rev. St. c. 49, §§ 19, 90; nor is such authority conferred upon insurance brokers by St. 1891, c. 112.

4. A policy containing a memorandum that makes it payable to a third party, in case of loss, to the extent of his interest, becomes functus officio when the interest of the insured ceases.

(Official.)

Report from supreme judicial court, Androscoggin county.

These were actions of assumpsit brought by the plaintiff, Frederick S. Richmond, for the benefit of the American Bobbin, Spool & Shuttle Company against the Phoenix and Liberty Insurance Companies, for the recovery of a loss under three policies in the Phoenix, one being called “the lost policy,” for \$500, and one policy in the Liberty Insurance Company, for \$750. All of said policies covered the same property, and both cases were heard and tried on the same evidence, excepting the policies themselves. There was no evidence in the case denying the loss, and no claim made by the defendants that the policies, if payable at all, should not be paid in full. Two points only were raised by the defense: First, that no due, proper, and lawful proof of said loss was made to the defendants; and, second, that Richmond, after the date of the policies, and before the loss, sold and transferred the property covered by the policies, without the consent of the companies in writing indorsed on the same. Judgments for defendants.

J. P. Swasey and E. M. Briggs, for plaintiff. Nathan & Henry B. Cleaves, Stephen C. Perry, and Henry W. Swasey, for defendants.

EMERY, J. These are actions upon fire insurance policies issued by the defendant companies. The plaintiff, Frederick S. Rich-

mond, while the owner in fee of the insured property, procured the insurance represented by these policies through one George A. Gordon, an insurance broker, but not holding a commission as agent from either of the defendant companies. Soon afterwards, the plaintiff conveyed the insured property in fee to the American Bobbin, Spool & Shuttle Company, of Boston. Still later, but during the term covered by the policies, the insured property was wholly consumed by fire. The American Bobbin, Spool & Shuttle Company, after the fire, assigned to the plaintiff (the original assured) all its claims under these policies, whereupon the plaintiff has now brought these suits.

At the time of the fire, the plaintiff had no insurable interest in the property, and sustained no loss by the fire. He claims, however, that his grantees succeeded to his rights under the policies, and that he can maintain these actions for his own benefit under the assignment to him, or, at least, for the benefit of the American Bobbin, Spool & Shuttle Company, the owner at the time of the fire.

In each of the policies issued by the Phoenix Assurance Company is the following clause of stipulation and condition: “If the property [insured] be sold or transferred, * * * or if this policy shall be assigned before a loss, without the consent of the company indorsed hereon, * * * then and in every such case this policy shall be void.” In the policy issued by the Liberty Insurance Company is this clause of stipulation and condition: “This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if * * * any change, other than by the death of the insured, take place in the interest, title, or possession of the subject of insurance,” or “if this policy be assigned before a loss.” There is nothing in our statutes affecting the natural force of these clauses. *Waterhouse v. Insurance Co.*, 69 Me. 400. The conveyance of the insured property in fee by Mr. Richmond was within these clauses, and, by their express terms, that conveyance terminated or voided each of these policies, unless it was consented to by the company according to the terms of the policy. *Brunswick Sav. Inst. v. Commercial Union Ins. Co.*, 68 Me. 313; *Gould v. Insurance Co.*, 76 Me. 298.

The case does not show any such consent on the part of either company. The plaintiff informed Mr. Gordon, the broker, of the change in ownership, and requested him to procure the necessary indorsement upon the policies, of the consent of the companies. Mr. Gordon testified that he communicated this information and request to each insurance agent from whom he had procured the policies. These agents explicitly deny having received any such information or request, and deny that they or their companies ever consented to the transfer, or ever knew of

till after the fire. The three policies in the case do not show any indorsement of assent, and there is no evidence that the writ policy (which is lost) ever bore any such indorsement.

The plaintiff urges that George A. Gordon, insurance broker, should be considered the agent of the insurance companies, to receive notice and accord assent, under sections 19 and 90 of the Insurance act (Rev. St. c. 49), and cites the language of the opinion in *Day v. Insurance Co.*, 81 Me. 248, 16 Atl. 894. The evidence in the case shows affirmatively that Mr. Gordon was not the agent of either of the defendant companies, and did not assume to act for either of them. The plaintiff testified that he understood Mr. Gordon was not the agent of the companies. The statute providing for the licensing of insurance brokers (1891, c. 112) does not confer upon such brokers any authority to bind insurance companies from whom they may obtain insurance for their principals.

But these policies also contained this clause: "Loss, if any, payable to Whitall, Tatum & Co., New York, as far as their interest may appear." Whitall, Tatum & Co., after the fire, assigned to the plaintiff all their interest in these policies. The plaintiff claims that the interest of Whitall, Tatum & Co. was not affected by his conveyance to the American Bobbin, Spool & Shuttle Company, to which conveyance they were not parties, and that, as their assignee, he can cover their interest. The case does not show that Whitall, Tatum & Co. had any interest at the time of the fire, nor does it appear that any interest of that firm was ever insured. They procured no insurance, nor, so far as appears, did the plaintiff procure any insurance for them. The plaintiff simply insured his own interest, and then directed that, out of such sum as might accrue to him as insurance upon his interest, there should be paid to Whitall, Tatum & Co. enough to satisfy their claim. When the plaintiff's own insurable interest vanished, Whitall, Tatum & Co.'s claim upon that interest also vanished. They were subject to the conditions of the policies. *Biddeford v. Bank v. Dwelling House Ins. Co.*, 81 Me. 3, 18 Atl. 298.

Judgment for defendant in each case.

TURGEON v. COTE et al.

Supreme Judicial Court of Maine. June 3, 1895.)

ASSUMPSIT—PLEADING—ACCOUNT ANNEXED.

1. An account is a detailed statement of sums of debt and credit, or of debt, arising out of contracts between parties.

2. A demurrer will defeat a writ when there is annexed to the declaration an account as follows: "For balance due on account for labor performed and materials furnished, as contractor for the erection and construction of the above building, as per agreement, \$725."

00;" on which balance of account are credited several items of cash, leaving a final balance of account of \$260, there being no other count in the writ excepting that on the account annexed. The contract price is not stated; nor are any items given that constitute the balance of \$725 due on account.

(Official.)

Exceptions from supreme judicial court, Androscoggin county.

Action by Theophile Turgeon against Joseph Cote and another.

The declaration in the writ contained a single count upon an account annexed.

The account annexed is as follows:

November 10, 1894.

Joseph Cote and Agnes Cote, to Theophile Turgeon, Dr.

To balance due on account for labor performed and materials furnished, as contractor for woodwork for the erection and construction of the above building, as per agreement..... \$725 00

1894.	Cr.	
June 19th, by cash received on account	\$125 00	
July 7th, by cash received on account	150 00	
Sept. 1st, by cash received on account	100 00	
Sept. 4th, by cash received on account	40 00	
Sept. 10th, by cash received on account	50 00	
		<u>465 00</u>

Balance due \$260 00

The defendants demurred to the declaration, which was joined, and, after hearing, overruled.

The defendants thereupon took exceptions to the decision of the court overruling the demurrer, and the case was certified to the chief justice, under Rev. St. c. 77, § 43. Demurrer sustained.

J. G. Chabot, for plaintiff. D. J. McGillicuddy and F. A. Morey, for defendants.

PETERS, C. J. The account annexed to the writ, which, as a part of the plaintiff's declaration, is demurred to by the defendants, is as follows: "For balance due on account, for labor performed and materials furnished as contractor for woodwork for the erection and construction of the above building, as per agreement, \$725.00."

On this balance of account are credited several items of cash, leaving a final balance of account of \$260. The building alluded to is one attached on the writ, and on which it is averred a lien claim for the amount of the account exists.

It is not alleged what the price of the work contracted for was, nor does it in any way appear what any or all of the items are, constituting the balance due on account of \$725. The defendant is entitled to know what these particulars are, before he can be required to determine whether he will admit or contest the claim. Had the balance been declared upon as a sum due on an account stated, it might have been different. An account is a

detailed statement of items of debt and credit, or of debt, arising out of contracts between parties. The phrase "a balance due on account" discloses no items. *Bennett v. Davis*, 62 Me. 544.

Demurrer sustained.

HAMLIN v. MANSFIELD et al.

(Supreme Judicial Court of Maine. June 17, 1896.)

WILL—CONSTRUCTION—PERPETUITIES—DEBTS—PARTNERSHIP.

1. It is the duty of an executor to pay the debts of the deceased and expenses of administration promptly and within the statute period, even if to do so defeats every devise and legacy.

2. The testator was a member of a copartnership, of which his son and another person were members. By the second clause of his will he provided for the continuance of the partnership, with the use of his property therein "so long as my said son or any of his children see fit or desire to carry on the business, subject to any change as to the membership which my said son or his children may see fit to make, so long as he or his children or any one of them remain members"; and by clause 4 of his codicil he provided that "said partnership shall have the right to retain and enjoy the benefit of all my portion of the assets of the firm which at my death constitute a part of their working capital." These provisions, if carried out, would make the executor a trustee of that portion of his estate which was part of the capital of the firm, and to so continue as long as his son, or any of his children then living or thereafter born, should desire. *Held*, that this provision is clearly obnoxious to the rule against perpetuities, and therefore void.

3. Also that, the firm having been dissolved by the death of the testator, and the provisions of the will for its further continuance being inoperative and void, it becomes the duty of the surviving partners to close up its affairs under the provisions of the statute. If they fail to do this, the like duty will devolve upon the executor.

4. Also, the bequest over, of the testator's portion of the firm property, became operative immediately from the probate of the will, and vests in the legatees therein named.

5. By another provision of the will all moneys made payable to the several legatees or devisees were to be paid by the executor to the treasurer for the time being of the Bangor Theological Seminary, as trustee. *Held*, that the treasurer became a trustee with no duty or control over the fund, except to receive the money and immediately pay it over in the proper shares to each donee. It is harmless, if the executor pursue this course: and he will be justified in ignoring the trust, and paying directly to the beneficiaries the shares of each.

6. By another item of his will the testator devised his machine and blacksmith shop, and the land on which they stood, with the water rights, to three societies, in differing proportions, subject to the occupancy by the copartnership, under its continuance, as contemplated by the testator. By his codicil he revoked the devise to the three societies, and devised the whole to one society absolutely. The provision for the continuance of the firm being void, *held*, that the devise to the last-named society is valid, and vests the fee in it, which it is competent for the society to convey.

7. By a residuary clause the testator gave all the remainder of his estate to a missionary society. *Held*, that the testator intended to dispose of his entire estate, including his interest

in the firm not required for the payment of debts, etc., and not otherwise bequeathed or devised. Said interest is assignable by the society.

(Official.)

Report from supreme judicial court, Penobscot county.

Bill in equity by George H. Hamlin, executor, against Edward W. Mansfield and others to obtain a construction of the will of Edward Mansfield, deceased. Sustained.

The material portions of the will and codicil are as follows:

"1. To my adopted daughter Helen M. Mansfield, of Orono aforesaid, I give the sum of one thousand dollars.

"2. I will that the partnership which now exists between myself and my son Edward W. Mansfield and another, in the transaction of business at said Orono, as the same shall exist at the time of my death, shall be continued and not dissolved, but be carried on at the same place, so long as my said son or any of his children see fit or desire to carry on the business, subject to any change as to the membership which my said son or his children may see fit to make, so long as he or his children or any one of them remain members; and to that end that the partnership be authorized and have the right to use and occupy the machine shop and the blacksmith shop and their respective privileges, and all the tools and machinery in use in the business of the firm, to the full extent of my ownership thereof, the firm to pay for the use or rent of the real estate, thus occupied by it, the sum of two hundred dollars per annum, as hereinafter provided, and also to pay all taxes on the real estate, as also on all the personal effects of the firm; also keep the whole well insured and in good repair, at their own expense, including the buildings, as well as all the machinery and other property aforesaid, all such payments and expenses to be charged against the gross income of the firm's business. My estate to be regarded as a member of the copartnership, and to receive its equal pro rata share of the net income, the same as I now do, except that my estate is to receive nothing for personal services, as I now do, and such as the other members now do and will continue to receive.

"These provisions apply to any partnership or business which my said son or any of his children may be engaged or interested in, either solely or in copartnership among themselves or with others, in connection with the shops and privileges aforesaid.

"At the end of each year there shall be an account made up of the business of the copartnership, and the net income ascertained, as nearly as possible and the amount thereof, so far as the interests of the firm admit, paid over to the respective members, the portion belonging to my estate to be divided as hereinafter provided.

"The firm aforesaid to have the right to use the patent rights which I own, as such firm,

but no right to sell or use the same outside of their said business. Whenever there ceases to be any of my said son or of his children, solely or in partnership with others, to carry on said business as aforesaid, from any cause, then the portion of the firm's property belonging to my estate, as aforesaid, shall go, one-fourth to said Edward, my son, or his heirs, according to the laws of descent, and the other three-quarters as hereinafter provided.

"3. To the American College and Education Society of Massachusetts, and American Home Missionary Society of New York, and the Congregational Union, I do give and devise my machine and blacksmith shops, with the land on which they stand, and all the water rights and privileges connected therewith, including all the real estate which I own outside or easterly of the railroad track, not, however, including any machinery or fixtures which I own as copartner with others, or which the copartnership owns, to have and to hold said premises, one-half to said American Home Missionary Society, and one-fourth each to said American College and Education Society and Congregational Union, and their respective successors and assigns, in common and undivided, subject, however, to the rights of my son and his children and copartnership to occupy the premises and carry on business thereon, as herein provided in the previous item of this will. * * *

"4. * * * [Revoked by codicil.] All moneys which, by the different items of this will, including rents and partnership incomes, are made payable to the several donees or devisees aforesaid, I will, for convenience, shall be paid to and received by the treasurer for the time being of said seminary, as trustee, to be paid by him to the respective parties aforesaid entitled thereto.

"5. All the remainder of my estate real and personal, after the payment of all my debts and funeral charges, I do give and devise to said American Home Missionary Society of New York, and to its successors and assigns, forever.

"(Codicil.) * * *

"4. In addition to the rights and privileges devised in the second item of my original will aforesaid to the partnership therein mentioned, said partnership shall have the right to retain and enjoy the benefit of all my portion of the assets of the firm which at my death constitute a part of their working capital, the income or profits of the partnership as thereby constituted to be divided and appropriated as already provided in my original will and this codicil, except as herein otherwise disposed of, this provision not to include the two power presses belonging wholly to me.

"5. * * *

"6. I will that George H. Hamlin, of Orono, be the executor of my will, instead of my son, Edward W. Mansfield, as provided in

my original will, free from all obligation to give any bond as such. And it is hereby made the duty of my executor to see that the provisions made in the will and codicil respecting the copartnership business are strictly enforced and carried into effect, he having full authority to make any agreement or other arrangement about the partnership business and effects which he may think best, including the sale or other disposition of the presses now belonging to me, he to have all power, the same as I now have, as owner of the property wholly, or partially as member of the firm."

Questions by complainant:

"(1) Whether your complainant, as executor, can permit the property of the testator to remain in the business of the copartnership of which the testator was a member, as set forth in item 2 of said will, as amended by items 4 and 5 of the codicil; and, if so, within what limitations as to time said property can be so continued?

"(2) Is it obligatory upon the executor of said will to continue said property in said copartnership, as set forth in said item 2 and amendments; and, if so, from what source shall he procure money to pay the debts of the testator, the charges of administration, and the specific cash legacy provided for by item 1 of said will?

"(3) Whether your complainant, as executor, in accordance with item 4 of said will, is required to pay all moneys made payable to the several donees or devisees, to the treasurer for the time being of the Bangor Theological Seminary as trustee?

"(4) Whether your complainant, as executor, not expressly appointed a trustee, becomes such from the provision of the will?"

Questions by respondents, Edward W. Mansfield and Guy P. Bailey:

"(1) Whether or not the devise by said testator to the American Home Missionary Society, its successors and assigns, of said testator's 'machine and blacksmith shops, with the land on which they stand, and all the water rights and privileges connected therewith,' was valid.

"(2) Whether or not said society, under the terms of said will, acquired such a title to said real estate that it could by deed give its grantees a good and valid title thereto.

"(3) Whether or not said society, as legatee, either specific or residuary, under said will, took any interest in and title to the personal estate, individual and partnership. If so, is said interest assignable?

"(4) Whether or not the bequests to Helen M. Mansfield, Edward W. Mansfield, The Bangor Theological Seminary, the Congregational Church of Orono, and to the children of Angie M. Bailey, of the testator's share in the property and assets of the firm of E. Mansfield & Co., were valid bequests; and whether or not said legatees, or any of them, could make legal transfers of said interests in said property.

"(5) Whether or not said Edward W. Mansfield and Israel W. Mansfield, as surviving partners of the late firm of E. Mansfield & Co., have a right to give the bond, and to close up the affairs of said partnership, as provided in Rev. St. c. 69."

Charles J. Dunn, for George H. Hamlin, executor. Jasper Hutchings and Frank A. Floyd, for Edward W. Mansfield, Israel W. Mansfield, Guy P. Bailey, Grace Stetson, and Edward M. Bailey. Franklin A. Wilson, for Helen M. Mansfield, the Bangor Theological Seminary, and the American Home Missionary Society.

STROUT, J. Bill in equity for construction of the will of Edward Mansfield.

It is the duty of the executor to pay the debts of the deceased and expenses of administration promptly, and within the statute period, even if to do so defeats every devise and legacy. He should first apply to this purpose that portion of the personal estate not specifically bequeathed; and if that proves insufficient, then so much of the real estate, not specifically devised, as may be needed to accomplish the object.

The testator was a member of a copartnership, of which his son and another person were members. By the second clause of his will he provided for the continuance of that partnership, with the use of his property therein, "so long as my said son or any of his children see fit or desire to carry on the business, subject to any change as to the membership which my said son or his children may see fit to make, so long as he or his children or any one of them remain members"; and by clause 4 of the codicil he provides that "said partnership shall have the right to retain and enjoy the benefit of all my portion of the assets of the firm which at my death constitute a part of their working capital." These provisions, if carried out, would make the executor a trustee of that portion of his estate which was part of the capital of the firm, and to so continue as long as his son or any of his children then living or thereafter born should desire. This provision is clearly obnoxious to the rule against perpetuities, and is void. *Slade v. Patten*, 68 Me. 382; *Perry, Trusts*, §§ 381-383; *Kimball v. Crocker*, 53 Me. 263. The executor, therefore, is not authorized by law to continue the partnership, but its affairs should be closed, and the testator's interest withdrawn, to be disposed of under the valid provisions of the will.

The bequest over of the testator's portion of the firm property became operative immediately upon probate of the will, and is vested, one-fourth in his son Edward, and three-fourths in the American Home Missionary Society, as provided in the codicil. The answer to the first, second, and fourth questions in the bill is contained in the foregoing.

To the third question, whether the executor,

under item 4 of the will, is required to pay all moneys made payable to the several donees, to the treasurer of the Bangor Theological Seminary, as trustee, we answer that the leading idea in that clause referred to the disposition of the profits arising from the continuance of the partnership business, and the testator appeared to regard the payment to the treasurer of the seminary as a matter of convenience. He made the treasurer a trustee, with no duty or control over the fund except to receive the money and immediately pay it over in the proper shares to each donee. It is harmless, if the executor pursue this course; and he will be justified in ignoring the trust, and paying directly to the beneficiaries the share of each.

By the third item of the will the testator devised his machine and blacksmith shop, and the land on which they stand, with the water rights, to three societies, in differing proportions, subject to the occupancy by the copartnership, under its continuance as contemplated by the testator. By his codicil he revoked the devise to the three societies, and devised the whole to the American Home Missionary Society absolutely. The provision for the continuance of the firm being void, it is the opinion of the court that the devise to the Home Missionary Society is valid, and vests the fee in it, which it is competent for the society to convey.

The residuary clause in the will gives all the remainder of the testator's estate to the American Home Missionary Society. As the testator manifestly intended to dispose of his entire estate, it follows that under this clause the society takes all real and personal estate, including testator's interest in the firm, not required for the payment of debts and expenses of administration, and not otherwise bequeathed or devised. No reason is perceived why such interest is not assignable by the society.

The bequest of the income from partnership business, in article 4 of the will, fails, and is inoperative, because the firm business cannot be continued.

The firm having been dissolved by the death of the testator, and the provisions of the will for its further continuance being inoperative and void, it becomes the duty of the surviving partners to close up its affairs, under the provisions of the statute. If they fail to do this, the like duty will devolve upon the executor.

Bill sustained. Decree in accordance with this opinion.

DYER v. CITY OF BELFAST.

(Supreme Judicial Court of Maine. June 18, 1895.)

LAND TAKEN FOR HIGHWAY—RIGHT OF APPEAL—CONSTRUCTION OF STATUTE—RETROSPECTIVE LAW.

1. Chapter 297, Laws 1893, which provides that, "when any person aggrieved by the esti-

mate of damages for his land taken for a town or private way, honestly intended to appeal therefrom and has by accident or mistake omitted to take his appeal within the time provided by law, he may at any time within six months after the expiration of the time when said appeal might have been taken, apply to any judge of the supreme judicial court in term time or vacation, stating in his said application the facts of his case and said judge after due notice and hearing may grant to such petitioner permission to take his said appeal to such term of said court as said judge shall direct," does not apply to a case where the right of appeal from an estimate of damages, under the law then in force, had been fully barred before its enactment.

2. Where a statute is so worded as to admit of a construction which would render it retrospective as well as prospective, a prospective operation only is to be given, unless the legislative intent to the contrary is declared or necessarily implied.

(Official.)

Exceptions from supreme judicial court, Waldo county.

Action by David W. Dyer against the city of Belfast. Judgment for plaintiff, and defendant excepts. Exceptions overruled.

Joseph Williamson and Joseph Williamson, Jr., for petitioner. J. S. Harriman and R. F. Dunton, for the city.

WISWELL, J. On the 5th of September, 1892, the city council of the city of Belfast laid out a street in that city across the land of the petitioner, and awarded him \$500, as the damages sustained thereby.

The statute in force at that time (Rev. St. c. 18, § 18, as amended by chapter 359, Pub. Laws 1893) provided, in substance, that any person aggrieved by the estimate of damages might have them determined by a written complaint to the supreme judicial court, "returnable at the term thereof next to be held within the county where the land lies, after sixty days from the date of the laying out, alteration or discontinuance of such way by the town." Under this statute, the petitioner should have made his complaint returnable at the January term, 1893, of this court in Waldo county; and, having failed to do this, his right to appeal was barred.

But an act of the legislature approved March 29, 1893 (chapter 297, Laws 1893), provides that: "When any person aggrieved by the estimate of damages for his land taken for a town or private way, honestly intended to appeal therefrom and has by accident or mistake omitted to take his appeal within the time provided by law, he may at any time within six months after the expiration of the time when said appeal might have been taken, apply to any judge of the supreme judicial court in term time or vacation, stating in his said application the facts of his case and said judge after due notice and hearing may grant to such petitioner permission to take his said appeal to such term of said court as said judge shall direct," etc.

Within the time limited by this act, the petitioner applied to a justice of this court for permission to take his appeal from the

assessment of damages of the city council to such term of the court as said justice should direct. The justice ruled that the act above quoted applied to this case, and granted the permission requested, to which ruling exception is taken.

The question presented, then, is whether or not the act of March 29, 1893, passed after the right of appeal had become barred by limitation, applied to this case, so that the petitioner, after his right had once been barred, but within the six months' extension allowed by the act, could apply to a justice of this court for permission to take an appeal.

It is unnecessary to decide whether or not the legislature has the power to make a remedial act of this nature retroactive. It may be argued with much force that no person has a vested right in a statute of limitation, unless, by virtue of such statute, he has acquired the title to real or personal property (see *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209), although courts have often held otherwise; and this court, in *Atkinson v. Dunlap*, 50 Me. 111, held that, after all existing remedies had been exhausted and rights had become permanently vested, all further interference is prohibited, and that a statute designed to retroact on a case by reviving the right of review, after the time for a review had expired, was unconstitutional and void.

We think the decisive question in this case is whether, applying the universally adopted rules of construction of statutes, the legislature intended that this statute should have a retroactive effect. Statutes are always to have a prospective operation unless the intention of the legislature is clearly expressed, or it is clearly to be implied from their provisions that they shall apply to past transactions. *Bryant v. Merrill*, 55 Me. 515. In *Rogers v. Greenbush*, 58 Me. 397, it is said: "There is no language in the new statute which indicates any intention in the legislature to make it retrospective, or to apply it to past transactions, or to interfere with actions pending. We never hold an act to be retrospective unless it is plain that no other construction can be fairly given." See, also, the case of *Appeal of Deake*, 80 Me. 50, 12 Atl. 790.

"And the general rule is laid down, as one not subject to any exception, that they [statutes] are never to be allowed to have a retroactive operation where it is not required either by the express command of the legislature, or by an unavoidable implication arising from the necessity of adopting such a construction in order to give plenary effect to their provisions." *Gerry v. Stoneham*, 1 Allen, 322; *Garfield v. Bemis*, 2 Allen, 445.

The case of *Garfield v. Bemis*, supra, is very much in point. The legislature of Massachusetts passed an act to the effect that, whenever any one has a claim against

the estate of a deceased person which had not been prosecuted within the time limited by law, he might apply to the supreme judicial court, by bill in equity setting forth all the facts; and, if the court shall be of opinion that justice and equity require it, it may give him judgment for the amount of his claim against the estate of the deceased person. The court held that this act did not apply to claims which were barred by the statute of limitations at the time of its passage.

In *Wright v. Oakley*, 5 Metc. (Mass.) 400, the court held that a provision in the Revised Statutes to the effect that the time of a party's absence and residence out of the state should not be taken as any part of the time limited for the commencement of an action against him did not apply to a case in which the action was barred by the statute of limitations that was in force before the Revised Statutes went into operation.

In *Loring v. City of Boston*, 12 Gray, 209, it was held that a statute did not revive a claim for damages for land taken to widen the street, which claim was barred by limitation of time before its passage.

In *Kinsman v. Cambridge*, 121 Mass. 558, it was held that a statute very similar to the one now under consideration, which extended the time for a landowner to file his petition for a jury to assess his damages sustained by the laying out, widening, altering, relocating, or discontinuance of any street, under certain circumstances, did not revive a right of action which was barred by limitation of time before the passage of the statute.

And in *Atkinson v. Dunlap*, *supra*, this court held that a statute of similar purpose, in that case extending the time for commencing a petition of review, must be construed as intended to be prospective, and that otherwise it would be unconstitutional.

Applying these rules, in the light of the decided cases, to the statute under consideration, we do not find any express command or necessary implication that it should have a retroactive effect, or that it should revive a right of appeal which had once been effectually barred by limitation of time, under the statute then in force. It is true that the language is sufficiently broad and comprehensive to embrace all cases, and to apply to the past as well as to the future, but this is not sufficient to give it a retroactive effect. *Garfield v. Bemis*, *supra*. Where the statute is so worded as to admit of a construction which would render it retrospective as well as prospective, a prospective operation only is to be given, unless the legislative intent to the contrary is declared or necessarily implied. See cases cited in 23 Am. & Eng. Enc. Law, p. 448.

This case is clearly distinguishable from that of *Berry v. Clary*, 77 Me. 482, 1 Atl. 860, in which it was held that Rev. St. c. 82, § 116, providing that no party who re-

ceives any money or valuable thing as a consideration for a contract made and entered into on Sunday shall be permitted to defend any action upon such contract until such consideration has been restored, applies to actions arising before as well as after its enactment. In the opinion in that case it is said: "It [the statute] in no way operates upon the contract or renders it valid. It exists precisely as it did before. The statute applies only to future remedies, and merely requires the defendant to restore the consideration received by him in the participation of an unlawful act as a condition upon which he may make his defense."

If the statute now under consideration be given a retroactive effect, it would revive a remedy once completely barred by lapse of time. This can only be done by legislative enactment, in clear and unmistakable language.

It must be presumed that, in the passage of all acts, the legislature has in view these well-understood rules of construction, and that they are framed in conformity therewith. If the legislature intends to make any statute retroactive, it can very easily give it such effect either by express language or necessary implication; and, in the absence thereof, it must be presumed that no such intention is contemplated. Full force and effect may be given to this enactment by making it apply only to cases arising subsequent to its passage.

Exceptions overruled.

FOGG v. HOLBROOK, Executor.
(Supreme Judicial Court of Maine. June 19, 1895.)

ADMINISTRATORS AND EXECUTORS—BURIAL EXPENSES.

1. The estate of a deceased person is liable for all such reasonable expenses as are properly incurred in providing a decent burial.

2. The law implies a promise, from the peculiar necessities of the situation, upon the part of the executor or administrator, to pay the reasonable funeral and burial expenses of the deceased, out of the estate, as far as he has assets.

(Official.)

Agreed statement from superior court, Cumberland county.

Action by Norman W. Fogg against Samuel A. Holbrook, executor, to recover for a burial casket and services as undertaker rendered at the funeral of defendant's testatrix. Judgment for plaintiff.

Declaration: "Also, for that the estate of said Sarah M. Stetson, and the said Samuel A. Holbrook, as executor thereof, at said Freeport, to wit, at said Portland, on the day of the purchase of this writ, being indebted to the plaintiff in the sum of one hundred forty-nine dollars and sixty cents, for so much money before that time had and received by the said estate, and by the said Samuel A. Holbrook as executor as

aforesaid, and with the knowledge and consent and at the special request of said executor, to the plaintiff's use, in consideration thereof, then and there, by force of statute in such case made and provided, the defendant, in his said capacity, and the estate of Sarah M. Stetson, in his hands, became liable to pay the same sum to the plaintiff; and thereafterwards, on the same day, in consideration thereof, the said estate being so liable and holden, the said defendant, as executor thereof as aforesaid, promised the plaintiff to pay him that sum on demand.

"And the plaintiff avers that said Samuel A. Holbrook is the duly-appointed executor of the will of the said Sarah M. Stetson, deceased, and that within two years after notice given by said executor of his appointment, and at least thirty days before this action was commenced, the said claim was presented in writing to said executor, and payment thereof demanded, to wit, a claim for one casket and box furnished by said plaintiff for the necessary purpose of burial of Sarah M. Stetson, on April 23, 1892, of the value of one hundred and twenty-five dollars; also, for one robe furnished as aforesaid, and for the purpose aforesaid, of the value of seven dollars and fifty cents; and also one wheat furnished as aforesaid, and for the purpose aforesaid, of the value of three dollars and fifty cents; being all of the value of one hundred and thirty-six dollars.

"And the plaintiff further avers that such action was taken by the said Samuel A. Holbrook, as executor as aforesaid in the premises, that two commissioners were duly appointed by the judge of the probate court for said Cumberland county, by virtue of the statute, to hear and pass upon said claim; that said claim so committed was duly proved before them, and that said commissioners, after hearing, duly made their report in the premises to the probate court aforesaid; and that the said plaintiff, being interested, and being aggrieved at the decision of the said commissioners in the premises, duly filed his written notice of appeal from their decision, in said probate court, within twenty days after said report was made.

"And the plaintiff avers that this action is commenced within three months after said report was made, and in accordance with the statute in such case made and provided, and that a schedule of his claim, stating the nature of them, was duly annexed to this writ before service.

"And the plaintiff avers that at least thirty days before commencement of this suit, and within two years after notice given by said executor of his appointment, said claim was presented to said executor in writing, and payment thereof demanded."

The case is stated in the opinion.

A. F. Moulton and John Howard Hill, for plaintiff. A. W. Coombs and W. K. Neal, for defendant.

WISWELL, J. This is an action of assumpsit, brought against the defendant, in his capacity as executor of the will of Sarah M. Stetson, to recover for a casket and other articles furnished by the plaintiff, an undertaker, for the burial of the testatrix.

The articles were selected and ordered by a brother of the deceased, her nearest relative, and others, without the personal knowledge, consent, or subsequent ratification of the defendant, the executor, who, although he knew of her death, and that he was named as executor in her will, gave no directions and made no arrangements in regard to the funeral.

The only questions raised are whether the estate of a deceased person is holden for the reasonable and proper burial expenses, neither ordered nor ratified by the subsequently appointed executor or administrator, so that a suit may be maintained against an executor, in his representative capacity, to recover for such reasonable expenses; and, if so, how much of the expenses incurred, and sought to be recovered in this case, are reasonable, in view of all the circumstances.

It is urged by the counsel for the executor that under these circumstances the law implies an individual promise upon the part of the executor to pay reasonable expenses, and that he is personally liable therefor, for which he may reimburse himself out of the estate, but that the estate is not directly holden, and that this suit, which is against the executor in his representative capacity, and in which, if there is judgment for the plaintiff, it must be *de bonis testatoris*, cannot be maintained. They cite various authorities to this effect. But we think that it is the more reasonable rule to hold that the estate of a decedent should be liable for all such reasonable expenses as are properly incurred in providing a decent burial. When such expenses are incurred, necessarily after the death of a person, there is no one legally authorized to represent the estate. The services must be rendered, and necessary articles furnished, immediately. It is better that these things should be done upon the credit of the estate, than that there should be hesitation and inquiry as to who is liable to pay.

Reliance is had upon the cases in this state of *Davis v. French*, 20 Me. 21, and *Baker v. Fuller*, 69 Me. 155, which cases hold that an executor or administrator can create no debt against the estate of the deceased. It is argued that, if an executor or administrator cannot create a debt against the estate, certainly the brother of the deceased, who ordered the articles of the undertaker, could not do so. There is no question of the soundness of the doctrine laid down in these cases. But, under the circumstances which we are considering, neither the executor, nor the person who orders necessary articles for the burial, creates the debt. The law does so. The law implies a promise, from the peculiar

necessities of the situation, upon the part of the executor or administrator, to pay the funeral and burial expenses out of the estate, so far as he has assets.

This is the rule which was early adopted in Massachusetts, and has since been followed. *Hapgood v. Houghton*, 10 Pick. 154; *Luscomb v. Ballard*, 5 Gray, 403; *Sweeney v. Muldoon*, 139 Mass. 304, 31 N. E. 720.

In *Luscomb v. Ballard*, supra, it is said: "In this commonwealth an exception is made in the case of funeral expenses of the deceased. For these the executor may be charged in his representative character, and judgment be rendered *de bonis testatoris*. But the case stands on its peculiar ground, and is to be limited to it." This court has decided in the recent case of *Phillips v. Phillips*, 87 Me. 324, 32 Atl. 963, that "the law pledges the credit of the estate of the deceased for a decent burial immediately after the decease, and for such reasonable sums as may be necessary for that purpose, even though such expenses may have been incurred after the death, and before the appointment of an administrator."

The sum sued for, at the market prices for the articles furnished, amounts to \$136. Were these expenses reasonable? The following facts are admitted: The testatrix owned a house and about 2½ acres of land in Freeport village, unencumbered. It was generally known that she had money at interest, and she was considered to be in comfortable circumstances. Her nearest relatives were a brother and nephews and nieces, to neither of whom were there any bequests or devises in the will. These articles were selected by the brother and other relatives. The whole estate, when converted into money, amounted to \$1,061, and she was indebted to the amount of \$78.

In view of all these circumstances we do not think that the burial expenses were so unreasonably large as to be disallowed.

Judgment for plaintiff for \$136, and interest from the time of demand upon the executor, against the goods and estate of the testatrix in the hands of the defendant.

GREER et al. v. VAN METER et al.

(Court of Chancery of New Jersey. Feb. 10, 1896.)

APPURTENANCES—LIGHT AND AIR—OBSTRUCTION.

1. When a parcel of land held in common is severed into two tracts by quitclaim deeds simultaneously interchanged by the tenants in common, and there is a store on one of the two lots, with a window through which light and air is received across the other lot, such window cannot be closed by the owner of the latter lot if the influx of light and air is reasonably necessary to the beneficial enjoyment of the store.

2. By reason of the apparent and continuous quality of this enjoyment of light and air, the right to enjoy them will, upon severance of the title to the store from the title of the adjoining property, become an appurtenance of the former.

3. The maxim, "*Expressio unius est exclusio alterius*," excludes only those matters which are so germane to those expressly mentioned as to raise a presumption that the former were in the mind of the parties when the express grant, contract, or limitation was executed.

4. A court of equity will enjoin the obstruction of an easement of light and air unless the threatened interference is so slight as to be compensatable by the payment of a small amount of damages.

(Syllabus by the Court.)

Bill by Sarah O. Greer and others against Caroline W. Van Meter and others for injunction. Decree for complainants.

This bill is filed to enjoin the defendants from closing a window in a building belonging to the complainants. The complainants own a lot of land in Salem, on the corner of Market street and West Broadway. On it is a building known as the "Starr Building," entirely covering the surface of the lot. In dimensions the building is 15 feet in width on Market street, and runs back the same width along West Broadway, a distance of 54 feet. The east front of the building is therefore 15 feet on Market street, and the south front is 54 feet on West Broadway. Defendants' lot also fronts on Market street, and runs back along complainants' lot the same distance, viz. 54 feet. Upon this lot there is also a building, but it does not entirely cover the surface of the plot. In the rear of this lot, and next to complainants' lot, there is an open quadrangle. Looking out upon this open space there is a window in the wall of complainants' building. It is this window which the defendants propose to entirely close by the extension of the rear portion of their building. An injunction against this proposed act is asked for, upon the ground that the complainants are invested with the right to the influx of air and light through this window; that there is therefore imposed upon the adjoining property the burden of keeping unobstructed a space adjoining. It is sufficient to say that in 1864 these two tracts, with others, were held in common by Robert and Richard Greer, and Edward Van Meter, the two Greers owning one undivided half interest in the two lots, and Van Meter owning the other undivided half interest. In 1864 the two properties thus held under one title were voluntarily partitioned by deeds interchanged between the tenants in common. By deed of quitclaim dated September 3, 1864, Van Meter conveyed to the Greers the lot now owned by the complainants; and, by a similar deed, the Greers conveyed to the defendants the lot now owned by them. It is admitted that, at the date when these deeds were interchanged, the window already mentioned, although since altered in some respects, was substantially in size and location as it now is, and as it has been maintained for the past 30 years.

W. P. Hilliard, for complainants. M. H. Stratton, for defendants.

REED, V. C. (after stating the facts). The question propounded in this case is whether the complainants are entitled to a perpetual injunction restraining the defendants from building against the window of the complainants. The deeds to the predecessors of the present parties, as has been already observed, were cross conveyances. Both parties to them were grantors and grantees. The unity of estate was severed by an act which transferred the title in portions of the large parcel in severalty at the same moment. This, however, cannot affect the import of these deeds, for, as the law now stands in this state, their effect in respect to the claimed easement would be exactly similar whether it springs from an implied grant in the one deed or from an implied reservation in the other. *Blakely v. Sharp*, 9 N. J. Eq. 9, 10 N. J. Eq. 207; *Seymour v. Lewis*, 13 N. J. Eq. 439; *Railroad Co. v. Valentine*, 29 N. J. Law, 561; *Fetters v. Humphrey*, 18 N. J. Eq. 260; *Denton v. Leddell*, 23 N. J. Eq. 64. Nor does the fact that the conveyances were simultaneous, and that they were made for the purpose of effecting a voluntary partition of property theretofore held by a single title, change the rule. *Seymour v. Lewis*, 13 N. J. Eq. 439-444; *Kilgeur v. Ashcom*, 5 Har. & J. 82; *Blakely v. Sharp*, *supra*.

Now, the presence of a window in use for the purpose of admitting light and air at the time of the conveyances was an apparent easement, as well as an easement which in its quality was continuous. But it is not every apparent and continuous use of light and air in a building which will become an appurtenance of such building by reason of a severance of the title to the building from the title to its adjoining property. Such an easement must be reasonably necessary to the beneficial enjoyment of the building in which the windows are placed. *Blakely v. Sharp*, *supra*; *Hayden v. Dutcher*, 31 N. J. Eq. 217; *Tooth v. Bryce*, 50 N. J. Eq. 589-608, 25 Atl. 182. In ascertaining whether the window was reasonably necessary to the beneficial enjoyment of the complainants' building, the condition of the premises at the time of the severance of the title is the point to be kept in view. Now, as the store was lighted at the time when the deeds were interchanged, this window seems to have been a very useful feature in carrying on the tailoring and clothing business, which was then conducted therein. The store was lighted by windows on Market street. But on the Broadway side there was no window, and the only aperture for the admission of light was a small opening over one of the doors. So, the material reliance for the admission of light at the rear of this room, 54 feet in length, was this window on its north side. The test of a reasonable convenience I take to be whether the presence of the window was so useful to the store and the business conducted therein that it is reason-

able to assume that its continued presence was in the mind of the parties, and influenced the purchaser in arriving at the amount of the consideration paid at the time of the interchange of properties. Applying this test, in my judgment, the presence of this window was a substantial element in the transaction, and the window must be regarded as one reasonably convenient for the use of complainants' property.

But it is claimed by the defendants that if these deeds would have operated to convey to the complainants, as an appurtenant, the right of access of light and air through this window, yet that this right, in this instance, is defeated by a stipulation contained in the deed made by Van Meter to the Greers. This stipulation appears in the following language: "It is specially understood and agreed between the parties, and this conveyance is made upon the express condition, that the eaves of the said Starr Hall Building, as well as the projection of the upper wall on the northern side thereof, which are over the line of Edward Van Meter aforesaid, are not to be disturbed or interfered with in any manner by the said Edward Van Meter, his heirs and assigns, whilst the present Starr Hall walls on that side shall remain in the position they are now; but if, at any time hereafter, the Starr Hall Building shall be taken down, and a new building put up, in that event the wall on the north side next to E. Van Meter's line must go up perpendicularly from the foundation, and no privilege of eaves." The defendants insist that the effect of this clause is to exclude the Greers and their assigns from all privileges over the Van Meter lot, save those privileges expressly granted by this stipulation. In support of this insistence is invoked the maxim, "Expressio unius est exclusio alterius." It is claimed that the agreement in regard to the right to still project the walls and eaves of the Starr Building over the lot retained by the Van Meters impliedly negatives any grant of any other right, corporeal or incorporeal, over or upon the Van Meter lot. I am unable to yield my assent to this view. The maxim quoted embodies an obvious rule of logic, viz. that, when parties have set out specifically the things for which they have bargained, it is a logical inference that they completed their contract in respect to all matters relating to the one concerning which there is an express agreement, and therefore it is entirely reasonable to assume that the agreement was the final expression of the parties, limiting their rights and obligations. Now, it seems entirely plain that the maxim can only apply to those express provisions which are so related to the one implied that the latter must be regarded as in the minds of the parties at the time when the agreement was executed. If the express stipulation concerns one matter, it cannot be presumed that it excluded another matter entirely dis-

distinct. I think an illustration of the distinction in mind is afforded by the application of the maxim to the warranty of chattels. It must be kept in mind that the maxim is not only one of construction, but also one of evidence. Now, in respect to an express warranty of quality Justice Maule, in delivering judgment in the case of *Dickson v. Zizina*, 10 C. B. 602-610, remarked: "If a man sell a horse, and warrant it to be sound, the vendor knowing at the time that the purchaser wants it for the purpose of carrying a lady, and the horse, though sound, proves to be unfit for that particular purpose, this would be no breach of the warranty. So, with respect to any other kind of warranty, the maxim, 'Expressum facit cessare tacitum,' applies to such cases. If this were not so, it would be necessary for the parties to every agreement to provide in terms that they are to be understood not to be bound by anything which is not expressly set down, which would be manifestly inconvenient." Broom, *Leg. Max. marg.* p. 658. But, I imagine, no legal gentleman would contend that an express warranty in respect to quality would tacitly exclude an otherwise implied warranty of title. The reason is that the two kinds of warranty are not so related that, because one was expressly bargained for, it must be presumed that the other was in the mind of the parties; and therefore it follows that, because they did not choose to include it, they intended to exclude it. If the stipulation under consideration had dealt with the matter of light and air, and had fixed the extent of that right; if it had provided that no obstruction excluding such light or air should be erected within 20 years; if it had restricted the distance from this window at which any building should be placed upon the lot; or had it expressly bargained for the influx of light and air through some other window or windows in the north side of the Starr Building,—it might be conceded that the maxim invoked is pertinent. In such case the express agreement in respect to this matter would carry with it the implication that it contained the entire measure of the complainants' rights. Thus, the extent of an easement to flood lots with backwater, which easement would pass by a conveyance, is limited by an express reservation fixing the extent of the right. But the clause in question does not deal with the right to receive light and air at all, but it stipulates for an entirely different right, viz. a right to have the walls and eaves, so long as the present Starr Building shall stand, project over the land of the defendants, just as they obtruded at the time of the execution of the conveyances. And, as the agreement in respect to the noninterference with the walls and eaves was entirely distinct from the matter of the reception of light and air, it can no more raise a presumption that the right to the latter was abandoned than if the deed had contained a

clause stipulating for the right to stretch clothes lines over the adjoining roof, and attach the cord to one of defendants' chimneys. Nor does the implied right, which seems to be contained in the stipulation, to build as near to the Starr Building as will not interfere with the projecting walls and eaves, carry with it the extinction of the right to light and air through this window, on the theory that the exercise of this implied right would necessarily obstruct the window; for it is perceived that the right to build does not necessarily include the right to build along the entire length of the Starr Building. The present building can be raised or a new building erected without interfering with the present window in any degree greater than at present. My conclusion, therefore, is that the right to the reception of light and air through this window over the rear of defendants' lot resides in the complainants.

The only remaining question concerns the right of the complainants to invoke the aid of this court to enjoin the proposed obstruction. The general power of the court to interpose to prevent the destruction of easements of this kind is too well settled for discussion. It is true that, when the threatened obstruction of light and air will entail an injury so slight in degree as to be compensated for by a small amount of damages, courts of equity have declined to interfere. The amount of damages likely to result necessary to confer jurisdiction upon a court of equity to use its injunction powers, is discussed in the case of *Dent v. Auction Mart Co.*, L. R. 2 Eq. 238, by Vice Chancellor Wood, and by Sir George Jessel in *Aynsley v. Glover*, L. R. 18 Eq. 544. These deal with instances where there is threatened, not an entire darkening of lights, but only a partial obscuration. In this case the building which the defendants intend to erect will result in an entire closure of complainants' north window.

I will advise a decree for the complainants.

BURR v. BURR.

(Prerogative Court of New Jersey. Feb. 5, 1896.)

PROBATE OF WILL—COSTS.

1. Where, in a cause respecting the probate of a will, the validity of the will is not questioned, but probate is resisted on other grounds, and probate is granted, the costs and expenses of the litigation cannot be charged upon the testator's estate.

2. Where a contestant resists the probate of a will upon an immaterial issue, under misapprehension of the law, which is not disabused by the court, and is shared in by the proponent, the contest will not be deemed, upon admission of the will to probate, to have been with reasonable cause, so as to justify the charge of the costs and expenses of the litigation to the testator's estate.

(Syllabus by the Court.)

Appeal from orphans' court, Camden county.

Adele Boyer Burr filed a caveat to the probate of the will of Edward E. Burr, deceased. From an order directing payment of the cost and expenses of the contest out of the estate of testator when the will was admitted to probate, Charles H. Burr appeals. Reversed.

Edward E. Burr, who had theretofore been a resident of Camden, in this state, in November, 1890, in pursuit of health, moved to Asheville, N. C., where, after a sojourn of a little more than two years, he died. At the time of his death he was the owner of both real and personal estate in Camden. He left a widow and a child by a former wife surviving him, and also a will, dated in 1889, while he was unquestionably domiciled in Camden, in and by which, after directing the payment of his debts, he provided that his widow should have such interest in his estate, real and personal, as she would be entitled to under the laws of this state were he to die intestate, and then devised and bequeathed the residue of his estate to his mother for her life, and, at her death, to his brother in fee, and made the brother the executor of the will. The will was offered by the executor for probate in Camden county, and the widow there caveated against its admission to probate, first, generally, and, later, by a supplemental caveat, which specifically alleged as a ground for the denial of probate in that county that the testator was domiciled at his death in Asheville, N. C. Prior to the filing of the supplemental caveat, the proponent procured the appointment of a commissioner to take the testimony of witnesses in Asheville, and, after giving due notice, proceeded to prove the laws of North Carolina relative to the distribution of personal property and the formalities with which wills must be executed in that state, and to show that the decedent had not, during his sojourn at Asheville, the animus to make that place his domicile. On the conclusion of the taking of those depositions, the caveatrix likewise took depositions at Asheville, upon the question of domicile, to show its change from Camden to Asheville; and thereafter the taking of testimony upon that issue was continued without objection that it was immaterial being sharply and distinctly insisted upon, until just prior to the proponent's rebuttal, and the taking of proofs were almost concluded, when the proponent's counsel raised the objection, and expressed the desire to be heard upon it. The taking of testimony, however, having gone so far, the court directed that it should be concluded before the argument offered should be heard. Pending the taking of the testimony, in *Gordon's Case*, 50 N. J. Eq. 397, 26 Atl. 268, it was decided, in this court, that a will might be proved in this state, even though the testator, at his

death, was domiciled elsewhere, and the will had not been first proved at the place of the domicile. Controlled by the *Gordon Case*, and there being no other ground of contest, the orphans' court admitted the will to probate, and thereafter, by subsequent order, directed that the costs of the contest and a counsel fee to each party thereto be paid out of the decedent's estate. It is from the latter order that the appeal now considered is taken.

Henry I. Budd, for appellant. James E. Hays, for respondent.

McGILL, Ordinary (after stating the facts). The will appears to have been executed with due formalities, and to be a valid instrument, under the laws of both New Jersey and North Carolina, and hence it is difficult to perceive what advantage would have accrued to the respondent if probate in this state had been defeated on the ground urged by her. It is certain that no advantage which can justify so expensive a litigation as this has been has been pointed out to me. It is prescribed by statute (Revision, p. 791, § 177) that in causes respecting the probate of wills, if probate be granted, the court shall order the contesting party to pay the costs and expense of the litigation, unless it shall appear to it that such party had reasonable cause for contesting the validity of the will, or shall not have offered other testimony than that of the subscribing witnesses, and that, if such reasonable cause shall appear, the court may throw the costs and expense of the litigation upon the estate of the testator. The statute is but an emphatic declaration of the previously existing law upon the subject of such costs and expense, save in the particular that it renders it obligatory upon the court, in case of the grant of probate, to order the contestant to pay the costs and expense of the litigation, unless he shall show reasonable ground for disputing the validity of the will, or shall have confined his contest to the testimony of the subscribing witnesses. *Perrine v. Applegate*, 14 N. J. Eq. 531. It is observed that the saving clause relating to reasonable cause is limited to contests where the validity of the will is drawn in question. It does not apply where the issue made is as to the court's jurisdiction, which does not deny the validity of the instrument. Such literal construction appears to me to be not only the interpretation of the statute which will harmonize and retain all its language, but also that which accords with the legislative purpose, which was to rebuke and limit a therefore, in several of our orphans' courts, habitually unjust exercise of judicial discretion. *Perrine v. Applegate*, supra. Under this construction, the costs and expense of the contest upon the question of domicile must be charged to the contestant, and not upon the testator's estate.

But it is not necessary to the decision of the present matter that I shall rest alone upon the construction of the saving clause stated. Taking that clause to permit the costs and expense of any contest against probate founded upon reasonable cause to be thrown upon the testator's estate, I reach the same conclusion. The practical advantage of this contest, looking at it in light of every possible event it may have, is not apparent. The will was unquestionably valid both in New Jersey and North Carolina. It specified what the contestant should take, and disposed ultimately of all other property of the testator. It is not perceived how the place of probate would affect the contestant's interest a particle. If, after probate, the contestant should dissent to the provisions of the will in her behalf, the question of the domicile of her husband might become important, but until that event it would be unimportant. Why, then, as a practical question, should she propose and litigate the question of domicile? But, more than this, although, when the will was offered for probate, the question whether it might be admitted to probate in this state in the first instance, the domicile being elsewhere, had not been directly settled by adjudication in New Jersey, that question was so well determined by the current of adjudication elsewhere that it could hardly be considered open even in this state, and it certainly was not a question which would justify a contest from which no substantial benefit could accrue to the contestant.

I find, then, that there was no reasonable cause for the contest. The orphans' court should have ordered the contestant to pay the costs and expense of the litigation; that is, of the contested issue in the case. But the costs and expense so charged should not extend to the petition for probate, nor to the expense of taking the testimony of the subscribing witnesses, nor to expense or costs by reason of other matters, if any, not involved in the trial of the contested issue. No counsel fees on either side should be allowed. The proponent should not be given a counsel fee from the estate because of the litigation, although he be executor of the will, because, at the outstart, by taking the initiative in the production of evidence concerning domicile, he was instrumental in inviting and encouraging contest on that ground, for which reason it would be unjust, he, as well as the contestant, being a beneficiary of the will, to give him the advantage of having his counsel fees paid out of the estate, while the contestant, who has been but little more guilty than he, is charged with the whole costs and expense of the litigation, besides her own counsel fees. Costs not chargeable to the respondent, as stated, should be paid out of the estate. The order appealed from will be reversed, with costs.

STATE ex rel. LYNCH v. POTT, Overseer of Poor.

(Supreme Court of New Jersey. Nov. 7, 1895.)
**BASTARDY PROCEEDINGS—DISAGREEMENT OF JURY
 —VENIRE DE NOVO—SMALL CAUSES.**

1. If the jury disagree in a trial under the bastardy act, the justice may issue a venire de novo.

2. If the proceedings under the bastardy act are taken in the court for the trial of small causes, they are void for want of jurisdiction in that court, and the defendant may be proceeded against under that act before a justice of the peace.

(Syllabus by the Court.)

Certiorari, on the relation of Daniel Lynch, against George Pott, overseer of the poor. Proceedings set aside.

Argued before VAN SYCKEL and LIPPINCOTT, JJ.

Wm. A. Stryker, for plaintiff. Henry S. Harris, for defendant.

VAN SYCKEL, J. The proceedings certified for review were taken before a justice of the peace under the bastardy act and the supplement thereto of 1889, authorizing one justice to hear the case. The jury disagreed at the trial, whereupon motion was made before the justice to dismiss the proceedings. He denied this motion, and issued a venire de novo. Prior to the passage of the forty-first section of the small cause act, if the jury disagreed, the suit abated, and it was necessary to commence the action anew. *Gulick v. Van Tilburgh*, 16 N. J. Law, 417. The bastardy act gives no express power to the justice to issue a venire de novo, but it differs in some respects from the small cause act, as it stood prior to the passage of the forty-first section, which expressly provided for a venire de novo in case the jury disagreed. Under the bastardy act, the putative father is arrested; and, if he denies the paternity of the child, it requires the justice to issue a venire to summon a jury to try the case. The trial is to be adjourned to any time not exceeding six weeks, for appearance at which time the person charged must give bond or be committed to custody. The jury is to decide whether the person so charged is the father of the child. He is to be discharged if the verdict is in his favor, but is to be committed if the verdict is against him, unless he enters into another bond, as required by the act. The statute contemplates a trial and a verdict and makes no provision for beginning the proceedings de novo. There can be no complete trial until the verdict is rendered. The proceeding being instituted on behalf of the public, the act should be liberally construed, to effectuate the purpose for which it was manifestly enacted. In order to indemnify the public from loss, in cases where a jury is demanded, it is necessary to have the ver-

dict of the jury. The justice cannot perform the duty imposed upon him by the act unless he has authority to issue a new venire in case of disagreement. I think it may reasonably be implied that his power to do what is necessary to obtain a verdict continues, and is not spent, until a verdict is rendered. The ninth section of the bastardy act, which provides "that the accusation shall be tried as in cases in courts of common law before such jury," gives some support to this view. In courts of common law a venire de novo may be awarded.

The second reason assigned for reversal is that the transcript shows that the trial below was in the court for the trial of small causes, and that there was no jurisdiction in that court to entertain such a case. At the head of the transcript of the proceedings certified into this court are the words, "Court for the Trial of Small Causes, before Edward W. Sharp, Esq., Justice of the Peace." The transcript says that the constable returned the prisoner into court, and that the jury reported to the court; and the transcript is certified to be a true and correct copy from the justice's docket, and is signed and sealed by him as justice of the peace. Under the bastardy act, there is no docket of the proceedings kept. They are reduced to writing, and signed by the justice. There is nothing in the record before us to show that the proceedings were not taken in the court of small causes, and this distinguishes it from the case of *Bayles v. Newton*, 50 N. J. Law, 549, 18 Atl. 77, and same case in error, 51 N. J. Law, 553, 19 Atl. 174, where the record in its material parts did not show that the case was in the court of small causes, but that it was before a justice of the peace.

The record must be accepted as decisive. The proceedings below having been taken in the court of small causes, which had no jurisdiction of the case, the status of the case is the same as if no proceeding had been taken under the bastardy act. The proceedings certified must be set aside, and the party charged may be proceeded against under the bastardy act.

STATE (HARRIS et al., Prosecutors) v. NEW JERSEY CENT. R. CO.

(Supreme Court of New Jersey. Nov. 7, 1895.)

CARRIERS—FAILURE TO PAY FARE—ACTION FOR PENALTY.

The prosecutor purchased tickets from Trenton Station to Dunellen, and entered the car with the intention of going to Dunellen, being informed that the train stopped there. In a suit to recover the penalty prescribed by the eighteenth section of the act concerning railroads and canals (Revision, p. 912), the complaint charged that they traveled, or attempted to travel, in a carriage of the railroad company, without having previously paid their fare, and with intent to avoid payment

thereof. The train was one which did not stop at Dunellen, and they refused to pay the additional fare from Dunellen to Plainfield, the next station beyond. *Held*, that the complaint was fatally defective in failing to set forth that the prosecutors paid their fare from Trenton to Dunellen, and knowingly and willfully proceeded in the railroad car beyond Dunellen, without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof.

(Syllabus by the Court.)

Certiorari to city court of Plainfield.

Action by the New Jersey Central Railroad Company against George T. Harris and others. From a judgment for plaintiff, defendants bring certiorari. Judgment reversed.

Argued June term, 1895, before VAN SYCKEL and LIPPINCOTT, JJ.

Craig A. Marsh, for plaintiff. Wm. A. Barkalow, for defendants.

VAN SYCKEL, J. This suit was instituted before the city judge of Plainfield against George T. Harris and Frederick J. Harris to recover penalties under the eighteenth section of the act respecting railroads and canals (Revision, p. 912). That section provides: (1) That if any person shall travel, or attempt to travel, in any carriage of any railroad company, without having previously paid his fare, and with intent to avoid payment thereof; or (2) If any person, having paid his fare for a certain distance, knowingly and willfully proceed in any such carriage beyond such distance without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof; or (3) If any such person knowingly and willfully refuse or neglect, on arriving at the point to which he has paid his fare, to quit such carriage,—every such person shall forfeit, for every offense, to such company, a sum not exceeding five dollars. The complaint charges that the prosecutors did travel in a certain carriage of the Central Railroad Company without having previously paid their fares, and with intent to avoid payment thereof, from Dunellen to Plainfield, and did knowingly and willfully proceed in said carriage from Dunellen to Plainfield without paying their car fare, although the same was duly demanded of them.

This being a penal statute, it must be strictly construed. It is clear that the complaint does not charge the offense secondly or thirdly denounced by the statute, and the prosecutors could not legally be found guilty of either of those offenses, if the evidence would support such a finding. The question is whether the case shows that the prosecutors are guilty of what the statute in the first place declares shall constitute a violation of the act; that is, that they traveled, or attempted to travel, in any carriage of the company, without having previously paid fare, and with intent to avoid payment thereof. The offense charged is that they did travel from Dunellen to Plainfield without

having paid their fares, and with intent to avoid payment thereof; but the undisputed evidence and the admitted fact are that they purchased tickets from Trenton to Dunellen, and entered the car at Trenton with the intention of going only to Dunellen. They were informed at Trenton Station that the train would take them to Dunellen, and they had no intention or desire to go beyond that point. It was contrary to their wish that they were carried beyond Dunellen. That the first member of the statute was not intended to apply to such a case appears from the language of the second member, which expressly provides for the case of a person who pays his fare to a certain distance, and knowingly and willfully goes beyond it without paying his fare, and with intent to avoid payment. If they paid fare to Dunellen, and went beyond that point with intent to avoid payment for the additional distance, it was necessary so to charge the offense, and to prove it, to subject them to the penalty of the act. It is that provision of the statute which they violated, if they are guilty of an infraction of it. If the prosecutors were informed when at Boundbrook that the train did not stop at Dunellen, and they remained in the car with the intention of being carried to Plainfield without paying the additional fare, they were guilty of the offense secondly specified in the statute. But of that they could not lawfully be convicted, because it is not charged in the complaint. If they remained in the cars at Boundbrook without knowing that the train did not stop at Dunellen, they are liable to pay the additional fare to Plainfield, but are not liable to the penalty of the statute. The offense charged in the complaint is that of a person who enters a train of cars without paying his fare, and with intent to avoid payment of it. The undisputed evidence shows that there is no support for such a charge. For this reason the conviction before the city judge was illegal, and it is therefore not necessary to consider the other alleged infirmities in the proceedings. Reversed, with costs.

BRECKINRIDGE v. DELAWARE, L. & W. R. CO. et al.

(Court of Chancery of New Jersey. Dec. 31, 1895.)

CONSTRUCTION OF DEED — NATURE OF ESTATE — RAILROAD COMPANIES — TITLE TO CROSSINGS.

1. A conveyance of land by the words, "give grant, bargain, sell, convey, and confirm" to a railroad corporation, and to its successors and assigns, forever, for the purpose of extending its railroad, and as part of the route thereof, creates in the grantee a fee, limited to the purpose and use indicated.

2. Where a railroad company takes title in fee to land, for the purpose of extending its tracks thereon, thereby severing the lands of the grantor, and provides in the conveyance that it will establish a wagon road or crossing under its tracks, that the grantor may pass from one parcel of his land to the other, the fee where such

crossing is made remains in the company, subject only to the right of passage from one parcel to the other, and a person who digs trenches in such wagon road or crossing, and lays pipe for the purpose of conducting oil from another state through the lands of this state, and so through the lands conveyed to the company, beneath the surface of this crossing, is a trespasser, notwithstanding he first takes title to portions of land at either end of said crossing; and a threat by the railroad company to remove the pipe so laid will not be enjoined.

(Syllabus by the Court.)

Bill by Harry W. Breckinridge against the Delaware, Lackawanna & Western Railroad Company and others for injunction. Denied.

Henry S. Harris and Joseph M. Roseberry, for complainant. J. Frank Fort, for defendant.

BIRD, V. C. The complainant in this case in effect states that he is the agent or representative of the United States Pipe-Line Company. Such company was organized under the laws of the state of Pennsylvania, and is desirous of establishing a subway pipe line to the Atlantic coast, for the purpose of carrying its oil to that coast. In order to make a suitable connection throughout its entire route, it is found desirable to cross the lands owned or occupied by the defendant, the Delaware, Lackawanna & Western Railroad Company, the lessee of the Morris & Essex Railroad Company. The complainant has succeeded in laying, under the surface of the soil, two lines of pipe—one four inches in diameter, and the other five—across the lands which the defendant claims the title to. The defendant threatens to take up and remove these pipes, so far as they are through and across the land which it claims. The prayer of the bill is that the defendant may be restrained from executing its threat.

The bill shows the title under which the defendant makes its claim of ownership. This title is a deed of conveyance made by Cornelius Stewart and wife, dated the 26th day of March, 1864, the granting part of which is in these words: "Have given, granted, bargained, sold, conveyed, and confirmed, and by these presents do give, grant, bargain, sell, convey, and confirm, unto the said the Morris & Essex Railroad Company, and to their successors and assigns, forever, the above-described tract of land and premises, with full power to make use of the same in all lawful ways for the purposes of the said extension of the said railroad, and as part of the route thereof." And, as some evidence of the estate which was intended to be conveyed, the habendum clause may be cited, which is in these words, viz.: "To have and to hold the said above-described tract of land and premises, with the appurtenances, unto the said Morris & Essex Railroad Company, and their successors and assigns, forever, for all the purposes mentioned in the said act of incorporation, and the several supplements thereto passed and to be

assed." The land so conveyed is a portion of a larger tract, and severs it. In consequence of such severance, a provision was made in the deed for access from one to the other, in the following words: "That said company shall erect, and forever maintain, under the rails of the said railroad that shall be constructed on said granted premises, at a point near where the same shall cross the land line between the lands of said Stewart and Duffield, a suitable wagon road or crossing, which shall be at least thirteen feet wide by thirteen feet high, and, if the construction of said road will reasonably allow, fourteen feet high, so to enable said Stewart to travel and cross freely between his lands on each side of said granted premises." In order to be established in the rights of Stewart and his grantees, Breckinridge purchased of them a parcel of land on either side of his wagon road or crossing, and immediately facing it, so that he could have access to the road or crossing, and pass directly over the same from the one parcel to the other, so purchased. Thus fortified, Breckinridge entered upon the wagon road or crossing, dug his trenches, and placed the pipes for conveying the oil of the company. The defendant threatens to remove these pipes, insisting that Breckinridge is a trespasser, and has invaded its legal rights. Breckinridge alleges that if the defendant were permitted to carry out its threats, the mischief to the oil company would be irreparable. Hence, he prays an injunction restraining the defendant from any such interference.

The rights of these parties were fixed by the deed of conveyance above referred to, made by Stewart to the Morris & Essex Railroad Company. In my judgment, a fee simple absolute passed to the company, qualified only by the use indicated by the words contained in that grant. 2 Bl. Comm. 100; see citations below. It was to it, its successors, and assigns, forever. See *Ang. & Corp.* §§ 172, 173; *Elph. Interp. Deeds*, p. 86. A fee passes to a corporation aggregate without the use of the word successors. *Ang. & A. Corp. supra*; and *Elph. Interp. Deeds, supra*; *Wilcox v. Wheeler*, 47 N. H. 88; *School Dist. v. Everett*, 52 Mich. 214, 17 N. W. 926. But, while the grantee took the fee, it was subject to the provisions contained in the instrument, which required it to construct and maintain a wagon road or crossing, so as to enable said Stewart to travel and cross freely between said lands. His secured to Stewart nothing more than a right of way over the surface of the soil, at the place named, from the one parcel of his land to the other. His use was limited to the surface of the soil. No other or greater right was provided for, reserved, or excepted. Hence, the law respecting such rights of way by one over the land of another must control in this case. It is universally established that the rights of the owner of the fee in such cases are only qual-

ified or limited by the right of passage over the surface, by the person entitled to the right of way, together with the right to repair. Says Chief Justice Shaw, in *Atkins v. Bordman*, 2 Metc. (Mass.) 457: "The owner of the soil has all the rights and benefits of ownership consistent with such easement. All that the person having the easement can lawfully claim is the use of the surface for passing and repassing, with a right to enter upon and prepare it for that use." It thus appearing that the owner of the dominant estate, or of the right of way, being limited in his use to the surface of the soil, and the owner of the servient estate, or of the fee, enjoying all other rights of ownership, two legal and well-settled principles seem to stand in the way of granting the prayer of Breckinridge against the defendant. The one is that in disturbing the soil for the purpose of laying his pipe he has already committed a trespass, and the other is found in the allegation of his bill that he intends to use this pipe for conveying his wares, not from the one parcel to the other which he has purchased, but from a foreign jurisdiction, over other territory in this state, to one of the parcels which he has purchased, and so, through the land the fee of which is in the complainant, to the other parcel which he has purchased, and thence beyond to the seaboard. The act already committed is a trespass, and a continuing one, and the act which he proposes will, if committed, manifestly be a trespass. The right of way secured to Stewart by the deed of conveyance is a surface way, and not a sub way, and it is limited to the purposes of passing from one parcel of the land severed to the other parcel. The authorities which support this view are found in *Washb. Easem.* pp. 168, 184-186. On page 186 it is said that if a way be granted from black acre to green acre, and he pass from one to the other and goes beyond, he is then a trespasser. Than this nothing could be plainer in principle. In *United Land Co. v. Great Eastern Ry. Co.*, L. R. 17 Eq. 167, *Mallins, V. C.*, says: "I quite agree. The law is perfectly settled that if a man has a right of way over the land to go to a particular place, he cannot use it for the purpose of going to that place and a place beyond it, because the servient tenement is only subject to a certain use and a certain inconvenience. He has agreed that it shall be used for a particular purpose, and, having so agreed, he is not bound to submit to its use for any other purpose." If these general principles do not control the case in hand, because it is expressed in the grant that it was made to the grantee for the purpose of constructing and operating a railroad, yet, according to the following authorities, if it should be held that it is restricted to such use, it is no limitation upon its rights as owner of the fee as against all the world. *State v. Brown*, 27 N. J. Law, 13; *McKelway v. Seymour*, 29

N. J. Law, 321; *Fitzgerald v. Faunce*, 46 N. J. Law, 536; *New Jersey Zinc & Iron Co. v. Morris Canal & Banking Co.*, 44 N. J. Eq. 398, 15 Atl. 227. In this case it was held that, "under a deed granting only a qualified fee the grantee has, while his estate continues, the same right to the exclusive possession and enjoyment of the land granted, and as absolute dominion over it for all purposes, as though he held it in fee simple absolute." See *Fitzgerald v. Faunce*, 46 N. J. Law, 597.

The order to show cause why an injunction should not issue was granted because the complainant had succeeded in laying his pipe in the soil of the land claimed by the defendant, thereby acquiring actual possession, with the right to go from the one parcel which he had purchased to the other, and upon the impression, created by the argument of counsel, that the grant under which the company claimed title might reasonably be considered to convey only a right of transit. But, when the views of text writers of the most acknowledged ability, and of judges in our own courts whose opinions are of the greatest weight, are considered, it seems to be impossible to sustain the prayer of the complainant in this case, however desirable it may be, in the interests of trade and commerce, so to do, or however imaginary the damage to the railroad company may be. When property rights are established, and certain rules have long been laid down as a guide for the courts in protecting such rights, both the rights and rules must be respected by the courts. Hence, it seems to be my plain duty to deny the motion for an injunction, and to discharge the order. The costs will abide the final result.

MANNING v. PORT READING R. CO.

(Court of Chancery of New Jersey. Jan. 10, 1896.)

EASEMENT—ACTION FOR OBSTRUCTION—EFFECT OF JUDGMENT—CESSER—CHANGE OF LOCATION—ESTOPPEL.

1. Where an action in tort was brought for damages for the obstruction of an easement, and, upon a plea of not guilty, recovery was had, it is held that the plaintiff's right to the easement at that time was established between the parties to the suit.

2. Also, that such recovery is prima facie evidence of the continuance of the plaintiff's right.

3. An easement is not lost by mere cesser of use for two years.

4. The owner of land subject to an easement of way cannot, without the consent of the person having easement, change its location.

5. Where a person having an easement of way stands by while a railroad company, without knowledge of his right, erects an expensive railway embankment over the place of the way, he will not be allowed a decree for the abatement of the obstruction until the railroad company shall have a reasonable opportunity to condemn the right of way.

(Syllabus by the Court.)

Bill by Samuel R. Manning against the Port Reading Railroad Company to remove an obstruction. Decree for complainant on conditions.

The bill alleges that, in the year 1835, Mefford Runyon conveyed to the complainant the timber growing, and thereafter to grow, upon a piece of land in Middlesex county, and in the year 1867 conveyed to him in fee a parcel of land adjoining the first-mentioned property; that the complainant took possession of the parcels of land, and fenced them in one inclosure, and yet retains that possession; that the properties could be reached only by means of a private way, running from a public highway over lands lately belonging to one John L. Brewster; that such private way, as a means of access to the lands aforesaid, conveyed to the complainant, has existed from time without memory; that it existed when the land of Brewster belonged to Ephraim L. Runyon, who, in 1861, conveyed it to Ephraim D. Boice, who, in turn, in 1867, conveyed it to John L. Brewster and Herbert Murphy. Murphy subsequently conveying his interest to Brewster; that, in the year 1891, Brewster conveyed a strip of his land, which crosses the private way nearly at right angles, to the defendant, in order that that company might construct thereon its railway, the defendant agreeing to take the land by conveyance upon the same terms as it would have it if it had condemned it by proceedings for that purpose under authority of the general railroad law; that, among other things, the defendant agreed with Brewster to maintain a crossing over the railway between the portions of Brewster's lands remaining in his ownership and possession; that the defendant fenced the strip purchased of Brewster on both sides, and built its railway upon an embankment erected on the strip it purchased, which, at the point of crossing the private way, is 10 feet in height; that in July, 1893, the complainant commenced an action in tort against the defendant in the Middlesex county circuit court for damages because of the obstruction of his easement by the railway embankment from the time of the erection thereof to the commencement of that suit, which suit was removed to the court of common pleas for trial, and was there resisted by the defendant, under a plea of not guilty, after notice to Brewster, who had conveyed it with a covenant of warranty, to the end that he might defend the suit; that the trial of the issue resulted in a verdict of guilty against the defendant, and the complainant's damages were assessed at \$95, besides costs of suit, upon which verdict judgment was duly entered; that upon such judgment the defendant sued out a writ of error to the supreme court, which was subsequently dismissed. The bill prays, among other things, that the defendant may be required by decree to abate and remove the obstruction to the private way.

or, at its own expense, provide and maintain for the complainant's use a proper and convenient passage through its embankment and under its railway, at the place where it intersects the private way. In its answer, the defendant denies that the complainant has the right of way claimed by him; alleges that, if he ever had it, he has lost it by non-user; admits that it erected its embankment in 1891, and that in 1893, the complainant sued it in tort for obstruction of the private way aforesaid, and that it pleaded the general issue in the suit, and the suit resulted as is alleged in the complainant's bill. It avers that since the suit at law aforesaid, upon each side of the strip of land purchased by it from Brewster at the point where the private way crosses the same, it has constructed a gate in its fence, from which northeasterly it has built two roadways parallel with each other, one on each side of the railway embankment, running a distance of about 250 feet, and gradually rising until a grade crossing of the railway is reached, its purpose being by that means to provide a method of crossing the railway without going through the railway embankment; that a crossing through the railway embankment would cost \$5,000 or \$6,000, while the yearly damage to the complainant from the obstruction which the railway embankment occasions will not exceed \$25.

Alan H. Strong, for complainant. Robert Adrain, for defendant.

MCGILL, Ch. (after stating the facts). Two questions present themselves: First, whether the existence of the right of way claimed by the complainant is established by the pleadings, taking the answer as true; and, second, whether the defendant can require the complainant to accept the substitute it offers for the complainant's original crossing over the strip conveyed to it by Brewster.

1. We have, in the bill and answer, this posture of allegation: The complainant asserts an easement in the private way in himself, and the defendant denies it. The complainant adds that in 1893 he sued at law in tort for damages because of the obstruction to the identical easement claimed, and, upon issue raised by the defendant's plea of not guilty, he recovered damages. The defendant admits this to be true. To so recover, the complainant had to show (a) the existence of a right to himself in the easement, and (b) the obstruction of the easement. Failing in either particular, the judgment must have been against him. I think that his recovery in that action against the virtual owner of the land establishes the existence of his right to the easement at the time when that suit was brought, and is *prima facie* evidence of the continuance thereof. *Parker v. Standish*, 3 Pick. 288. Now, the answer avers that, if the complainant ever had the easement, he has lost

it by nonuser, the specification of which manner of loss impliedly excluding claim of loss in any other way. If the complainant had the easement in 1893, as his recovery establishes, his loss by nonuser must have occurred since that time. It is not alleged that circumstances indicative of an intention to abandon the easement accompanied the nonuser, so that a presumption of release arises. The allegation is of mere cesser of use, which could not have continued more than two years. The easement cannot be thus easily lost. *Godd. Easem.* 406. So understanding the allegations of the answer, I think that the complainant's right is, in effect, admitted.

2. I am also satisfied that the defendant is without power to change the location of the complainant's right of way, and substitute another way for it. *Jennison v. Walker*, 11 Gray, 423; *Bannon v. Angler*, 2 Allen, 128; *Smith v. Lee*, 14 Gray, 473; *Chandler v. Aqueduct Corp.*, 125 Mass. 550.

3. In determining what relief the court should afford the complainant, it is considered that he stood by while the defendant, so far as appears, without knowledge of his right, erected its railway embankment, and built its railroad thereon, permitting it to make expenditures which a timely assertion of his right might have enabled it to save; and, on the other hand, that his right is established, and, unless this court shall interfere, it is apparent that repeated lawsuits must be resorted to in order to secure him from time to time compensation for the damages which he will continually suffer. Under the circumstances, it will be equitable, I think, to allow the defendant six months within which to condemn the complainant's right of way; and if within that time, or within such further time as, upon application, the court may think proper to allow, the right of way shall not be condemned, it will be decreed that the defendant shall remove the obstruction.

NATIONAL SHOE & LEATHER BANK OF
CITY OF NEW YORK v. AUGUST et al.
(Court of Chancery of New Jersey. Feb. 4,
1896.)

CHattel Mortgage—Failure to Record—Sale
BY MORTGAGOR.

The mortgagor and owner in possession of chattels subject to a mortgage, which is void as to creditors for want of registry and possession taken under it, but is good as between the parties, may sell and dispose of the goods, with the consent of the mortgagee, and pay the proceeds to the mortgagee on account of the mortgage debt, and the mortgagee may retain such proceeds of sale, as against a judgment creditor of the mortgagor who has failed to make a levy.
(Syllabus by the Court.)

Suit by the National Shoe & Leather Bank of the City of New York against Simon August and others. Bill dismissed.

The suit was commenced by a creditors'

bill framed under the eighty-eighth and subsequent sections of the chancery act. Revision 1878, p. 120. An order for discovery was made therein; and the defendants were examined, and subsequently a new bill was filed, based, in part, upon the result of the said discovery. The complainant is a judgment creditor of the defendants Simon, Jacob, and Abraham August. The debt is that of Jacob and Abraham, who were doing business, when it was contracted, under the name of August Bros. Simon August, the other defendant, appears to occupy the position of indorser. The object of the bill is to obtain a decree against Henrietta August, who is the wife of Simon, and mother of Jacob and Abraham, for the payment by her, on account of complainant's judgment, of certain moneys received by her from her two sons, proceeds of the sale of personal property belonging to them as composing the firm of August Bros. Complainant recovered judgment, in New York, on the 5th day of December, 1893, and, suit having been brought on that judgment in the Essex county circuit court, judgment was there recovered on the 9th of December, 1894, and execution thereon returned unsatisfied. The firm of August Bros. failed in August, 1893, and on the 24th day of that month they executed to their mother, the defendant Henrietta, a paper in these words: "Whereas, we, August Brothers, composed of Jacob S. August and Abe. S. August, are indebted to Henrietta August in the sum of twenty-seven thousand two hundred and fifty-eight dollars and seventy-six cents (\$27,258.76): Now, we, the said August Brothers, do hereby grant, bargain, sell, and transfer unto the said Henrietta August all the goods, wares, merchandise, stock in trade, and three cutting machines belonging to us, and now stored in the sub-cellar of the premises No. 8 West 3rd street, in the city of New York, together with all policies of insurance thereon, to have and to hold to the said Henrietta August, as security for the payment of the said indebtedness to her, with authority to her to hold and sell the same at public or private sale, with or without notice to us, and, after the payment of the expenses of such sale and the said indebtedness, with interest in full, to render the overplus, if any, to us or our assigns. Witness our hands and seals, this 24th day of August, 1893. August Brothers. [Seal.] Jacob S. August. [Seal.] Abe. S. August. [Seal.] Acknowledgment dated August 24, 1893." This document was never filed or recorded in any public office, as a chattel mortgage or otherwise. At the time it was made, the goods covered by it were on storage in the subcellar of a warehouse in New York City in the possession of a firm (Bernheim, Bauer & Co.) who were friends of August Bros., and who permitted them to use their subcellar for the purpose of storing and selling these goods. No manual or other possession

of them was ever taken by Mrs. August, unless the possession of her sons can be deemed her possession. They sold of the goods more than sufficient to pay complainant's judgment, and either paid the proceeds directly to their mother, or placed them to her credit in bank, or with business houses in New York City. The disputed question of fact in the case is whether August Bros. were, at the time, indebted to their mother in the sum mentioned in said instrument, or in any other sum. And the disputed questions of law are (1) whether, if the firm was so indebted, the instrument executed by them to their mother was, in substance, a chattel mortgage; and, if it be a chattel mortgage, then (2) whether its existence, under the circumstances, renders Mrs. August liable to account for the moneys received by her from her sons as the proceeds of the sale of said goods. It was agreed that the state of the law in New York might be arrived at by a consideration of the adjudged cases as reported, and from the statutes, a copy of which, relating to chattel mortgages was offered in evidence.

Mr. Bishop and Joseph F. Randolph, for complainant. Frederic W. Stevens, for defendants.

PITNEY, V. O. (after stating the facts).

1. A reading of the instrument in question leads me to the conclusion that it is, in its essential features, a mortgage, and not, as was contended by counsel for defendants, a mere conveyance absolute, with power of sale for the purpose of paying, pro tanto, a debt. The use of the words, "To have and to hold to the said Henrietta August, as security for the payment of the said indebtedness to her," and the provision for rendering the surplus to the grantors, seem to me to render it a mortgage, rather than an absolute conveyance. A right of redemption upon payment of the indebtedness is clearly implied, it seems to me, from the use of the language quoted.

2. The statute of New York relating to chattel mortgages is substantially the same as ours, and instruments of that nature are absolutely void as against creditors, unless recorded, or unless immediate and actual possession is taken under them. Here I find, as a matter of fact, that no sufficient possession was taken. There was proof offered of authority for the sons, or one of their clerks or salesmen, to take possession in the name of their mother; but it was so clearly colorable, and contrary to the spirit of the act, that I conclude, as above stated, that there was no possession taken. The result is that the instrument is absolutely void, as against the complainant, who, it was admitted, was a creditor at the time the instrument was executed, for the very debt on which its judgment is founded.

3. These propositions having been resolv-

ed in favor of the complainant, its counsel take the position that, having executed such a paper, and having purported to act under it, the moneys which were the proceeds of the sales of the goods covered by it may be followed by a judgment creditor into the hands of the mortgagee of the void mortgage. This position is taken in the face of the admitted proposition that it was entirely lawful for August Bros. to prefer their mother as a creditor, by selling the goods in the ordinary way, and paying her the proceeds.

The difficulty with the complainant's position is apparent at once. It claims, in one breath, that the mortgage is absolutely void, and that, at the same time, it may derive a benefit from it—so to speak—negative existence. There is a line of cases decided in New York, cited and relied upon by counsel, which hold that where the mortgagee of a chattel mortgage, which is void by reason of not having been recorded, and immediate possession not having been taken under it, subsequently, and without the concurrence of the mortgagor, takes possession under it, and, by virtue of it, sells the goods and receives the money, a judgment creditor who recovers judgment subsequent to the sale of the goods, founded upon a debt existing at the time, may recover from the mortgagee the moneys so by him received. Such was, in effect, the cases of *Mandeville v. Avery*, 124 N. Y. 376, 28 N. E. 951, and *Stephens v. Perrine*, 143 N. Y. 476, 39 N. E. 11. In the first case, the defendant, Avery, was the holder of two chattel mortgages executed by one Beck,—one to Avery directly, and the other to a bank, of which he was president, and by the bank assigned to him. The mortgage to the bank was the elder of the two, and was not recorded, and no possession was taken under it until the later mortgage was executed. When immediate possession was taken under both by Avery, who sold the goods. And it was held—reversing the supreme court—that the receiver appointed under a judgment recovered by one Ross, a creditor of Beck, could recover against Avery so much of the proceeds of the sale of the goods as were appropriated by him to the payment of the mortgage of the bank. At the bottom of page 385, 124 N. Y., and page 51, 28 N. E., the learned judge, speaking for the court of appeals, says: "The general term based its decision [in favor of the bank] upon the ground that, the debt to the bank having been a valid one, and having been paid out of the mortgaged property before any lien was obtained thereon, another creditor could not compel the mortgagee to refund the money, on the ground that, as against creditors generally, the mortgage given to secure the paid debt would have been adjudged void. Two classes of cases are cited by the supreme court to sustain this conclusion [omitting

the first class]. Second. That the objection that a chattel mortgage is void is not available when, before any creditor had questioned its validity, the mortgagor delivered the chattels to the mortgagee, and authorized an immediate sale thereof by him. * * * As to the second [class], there is no doubt as to the right of a debtor to prefer any creditor, and to pay his debt in full, either in money or property, to the exclusion of all others. But to apply that principle to this case is to ignore completely the facts pleaded and found by the court. There was no claim that the property sold was turned over by Beck [the debtor] to Avery in payment of the debt. The complaint alleged that the property was sold by Avery under the mortgage, and this fact was not denied by the answer. The court also found that Avery, by virtue of both mortgages, took possession of the mortgaged property, and, as such mortgagee, caused the same to be advertised at public sale, and sold under said mortgages. There is nowhere any suggestion in the evidence or findings that the mortgage was waived or abandoned, or that the debtor had voluntarily delivered the property to Avery with authority to sell it. Everything that was done was pursuant to and under the mortgages. Avery could not, and did not, claim to have received the property or the proceeds of the sale in payment of his debt as the voluntary act of the debtor, but as mortgagee. He cannot, therefore, assert against the claim of other creditors the honesty of his own debt. The mortgage being void, all proceedings under it were void, and, although he may possess an honest claim, he cannot retain property obtained by him under a fraudulent mortgage against a pursuing creditor. The proceedings taken to collect the debt are unlawful." It will thus be seen that the decision was put upon the distinct ground that the claim of Avery rested upon the mortgage, and not upon a voluntary payment by the debtor. In the next case (*Stephens v. Perrine*) the falling debtors, Aldrich & Co., had given a chattel mortgage to the defendant in the action, Mrs. Perrine, to secure her for money due her, but it was not recorded until a month after it was given, and the omission to file was intentional, and there was no immediate change of possession. On the day the mortgage was filed, the mortgagee took possession, and, after advertisement, sold the property, and bought it as the highest bidder at the auction sale. Other creditors obtained judgments subsequent to the sale under the chattel mortgage, and, upon executions being returned unsatisfied, a receiver was appointed. He brought this action to set aside the mortgage and recover the property, or its value. Judgment was rendered for plaintiff in the court of first instance, not on the ground that the mortgage was not given to secure an actual indebtedness, but that it was absolutely void,

because it had not been recorded as soon as made. It was held on appeal—reversing the supreme court—that the receiver, under the judgments, was entitled to recover, on the ground that the mortgagee claimed under the mortgage, having taken possession under it, there being no evidence that it was done by the consent or concurrence of the mortgagor. The case was put substantially on the same ground as that of *Mandeville v. Avery*, as will be seen by an examination of the opinion of Judge Peckham, on pages 480-482, 143 N. Y., and pages 11-13, 39 N. E. At page 481, 143 N. Y., and page 11, 39 N. E., he says: "If, before any lien had been acquired by the creditors, the mortgagors had delivered the property to the mortgagee in payment of her debt, she could have then held it, because it would have been, in such a case, a transfer of property by them in payment of their debt; and, although it would have been, in fact, preferring such debt, yet it would have been a preference which the mortgagors then had the right to make. But in this case there was nothing of the kind done. The mortgagee acted under and by virtue of her mortgage, all the time. The mortgagors did not deliver the property to her in payment of her debt. She took it under the assumed right given by the mortgage." He then refers to the opinion of Judge Earl in *Tremaine v. Mortimer*, 128 N. Y. 1, 27 N. E. 1060, where that learned judge says that "the mortgagor in a mortgage which has not been filed may, as between himself and his creditors, treat the mortgage as if it did not exist, and, before the creditors obtain a lien on the property, he may deal with it in any honest way. He may sell it, or assign and transfer it and give an absolute title, or he may deliver the property to the mortgagee in payment of his debt." And, again, in distinguishing two other cases, he says: "It will be seen, upon a perusal of the facts, that it was the act of the mortgagor by his general assignment, in each of the cases made subsequent to the making of the mortgage, which transferred the title, and caused the decisions in those cases." The language of Judge Earl, above quoted, is quite in point. None of the cases cited by counsel go further than the two just referred to, and the radical difference between those cases and that in hand is that in the New York cases possession was taken and title claimed under a mortgage absolutely void at the moment when possession was taken. Here, whatever change, actual or constructive, of possession took place, occurred at the moment when the mortgage was executed; so that it was always either absolutely void or absolutely good. Here it is plain that Mrs. August claimed and got nothing under the mortgage. The mortgagors remained in possession, and sold the goods, and voluntarily paid the proceeds to their mother.

In answer to the very able and ingenious argument of the counsel for complainant upon this point, I make this general remark: It seems to me that the complainant is in this dilemma: If Mrs. August did not take possession under the mortgage, as is alleged,—and as I find,—then it was absolutely void. She claims nothing under it; and her sons had the right, as against complainant, to sell the property, and pay her her debt out of the proceeds. If, however, the sons, or any other person acting as her agent, took possession of the goods, it being admitted that whatever possession was taken was taken immediately, then the mortgage was perfectly good; and I do not see how the complainant can say, in this case, that it was void for one purpose and good for another. In other words, the two sons were in the actual possession of the goods, and such possession was either in their own right, as owners and mortgagors, or in the right of their mother, as mortgagee, as her agents and representatives. In either case, they had the right to sell the goods, and she had the right, if her claim was just, to receive and hold the proceeds of sales, as against their creditors not having actual liens. As between mother and sons, this mortgage was good, though void as to creditors; and the right of the mortgagor and owner, while in possession and before levy made, to sell and dispose of the chattels, with the consent of the mortgagee of a mortgage void as to creditors, and to pay the proceeds to the mortgagee, is conceded, not only by the two cases relied upon by the complainant, and above mentioned, but by other New York cases,—notably *Kitchen v. Lowery*, 127 N. Y. 53, 27 N. E. 357. It follows that this last question of law I must decide against the complainant, and hold that if August Bros. did, in good faith, owe their mother the moneys claimed, they had a right to sell the goods and pay the proceeds to her, and thereby prefer her as a creditor.

The argument that the instrument in question was actually made use of to hinder creditors has not escaped my attention. The evidence indicates that the bulk of the goods was sold after complainant recovered judgment in New York. No proof was offered to show that the mortgage was at any time used to prevent the sheriff from making a levy. No proof was offered that he ever attempted to make one. The law governing the case being well known to complainant, it follows that the instrument could not stand in the way of the sheriff's making a levy, except when set up by some one in the actual possession of the goods, as the agent and representative of Mrs. August, the mortgagee; for, in order to satisfy the statute, the possession must not only be actual, but continued. Now, there is no proof of any such claim made to the sheriff. On the other hand, it appears that the defendant Jacob was examined upon supplemental proceed-

ings upon complainant's judgment, in New York, on the 15th of February, 1894. He then disclosed the whereabouts of the stock of goods, and the fact that it had been transferred to his mother, in payment, or attempted payment, of her claim against the firm, and that he and his brother were in actual possession, and engaged in selling the goods, and were paying the proceeds over to their mother. The general nature of the deed of transfer was stated by the deponent from memory, and its present possession and custody by his mother's counsel in New York frankly and freely stated. Whether an effort was made at that time by complainant to see and ascertain its true nature does not appear. But it does appear that it was produced by some person, and seen by counsel for complainant at the examination of the defendants held under the bill for discovery before a master in May, 1894, and the true situation of affairs, and the legal rights of the parties, were then fully developed and made plain. There was no concealment. At that time, only about \$7,000 of goods had been sold, while the total sales reached \$19,000. Complainant's judgment is less than \$7,000. It thus appears that complainant had ample opportunity to issue an alias execution in New York, and levy upon goods enough to pay its debts, after it had complete information as to the situation of affairs and the rights of the parties. Why such proceeding was not taken does not appear. No point was made that the complainant obtained a lien under the laws of New York, upon the goods, by the mere delivery of the execution to the sheriff without actual levy.

4. This brings me to the question of fact in the cause, was there an actual debt due from August Bros. to their mother? The answer to this question requires us to go back to the original formation of the firm of August Bros., in the year 1878, and to the situation of the family at that time. Simon August, the father, who has died pending this suit, and before the hearing, was for many years a merchant in the clothing trade in the city of New York, being the head of the mercantile house of August, Bernheim & Bauer, which was continued, after his retirement, under the name of Bernheim, Bauer & Co. The uncontradicted evidence of his wife and children is that he was, at one time, a man of considerable means, and of good commercial standing. They had four sons, whose names, stated in the order of their ages, are Elias, Jacob S., Abraham S., and Charles. Elias and Jacob formed the first partnership of August Bros., in 1878. They had some little money of their own, and other moneys were given to them by their father and mother, to use as capital. In addition to out and out gifts, their father and mother, as they allege, also loaned them money. The books of August Bros. show a credit to Henrietta August, on September 17, 1878, of \$6,000 cash. She is af-

terwards credited regularly with interest on that sum, and charged with some small payments, apparently on account of interest. The first question is as to the origin of that \$6,000. She says that it was the proceeds of a mortgage which she had, and which she sold, and the origin of the mortgage debt was money which her husband gave her, from time to time, for the support of the family, and for her own use, and that, being of a saving disposition, she saved it up and accumulated it. She certainly had money in savings banks, prior to 1878, to the amount of several thousand dollars, as shown by the bank accounts. The father's account is also credited, at the same time, on the books, with \$30,000 or more cash loaned. On the 2d of January, 1880, the third son, Abraham S. August, was admitted as a partner into the firm of August Bros., although he was not yet quite of age, and on that day his mother, as the defendants all swear, made him a present of \$6,000, and his father made him a present of \$4,000, to put in as capital, and his mother's account on the books of the firm is, on that day, charged with \$6,000, and his father's account with \$4,000, and both sums credited to Abraham S. August. Then, on the last day of that year (1880), the account of Simon August on the books is charged with \$10,000, and the account of Henrietta August is credited with \$10,000 transferred from the account of Simon. This, the defendants swear, was a present from the father to the mother, perfected by a transfer by debit and credit from the father's to the mother's account, and this is the real commencement of her claim. She is credited with interest on that sum, from year to year, up to the 31st of December, 1884, and charged with some payments made on account. She is further credited, on the 19th of September, 1884, with the sum of \$4,692.03. This sum, the sons explain, was not paid in to the firm at that time, but was the accumulation of a series of loans in smaller sums, previously from time to time made by their mother to the firm, and carried on the petty cash book, and then, on September 19, 1884, by her direction, transferred in a lump from that book to her general account; so that, on the 31st of December, 1884, she stands credited with a balance of \$15,372.58. She is credited with interest, from time to time, on that sum, and on the 17th of June, 1886, she is credited with the sum of \$6,758.14, which, like the previous sum of \$4,692.03, under date of September 19, 1884, was composed, as her sons swear, of items of money previously deposited by her with them from time to time, and entered on the petty cash book, and then transferred, by her direction, in a body, to her ledger account. Afterwards, interest is added, and charges made for moneys paid, so that the balance on the 31st of October, 1887, was \$23,864.50. That balance is found on ledger No. 3 of August Bros. Ledger No. 4

of August Bros., and the accompanying journal, are missing. They covered the period from 1887 to the fall of 1890. On January 1, 1890, Elias August left the firm, and the business was continued, under the same name, by the two brothers, Jacob and Abraham, the defendants herein. Their ledger, called "Ledger No. 1 of the new firm," shows a credit to Henrietta (there called Henrietta S. August, meaning Henrietta, the wife of Simon, to distinguish her from another Henrietta August, the wife of another man of that name), January 6, 1891, of \$481.22; October 31, 1891, interest and discount, \$28.87; November 1st, cash, \$1,500, and, on the same day, of \$25,000, it being alleged and sworn to by the defendants that that \$25,000 was the balance due her upon the last ledger, No. 4, of the previous firm of August Bros., their evidence being that, on the last day of the year 1890, there was due her \$25,481.22 on the missing ledger, and of that sum \$481.22 was carried forward to the new firm ledger, on the 6th of January, 1891, and the even money, \$25,000, stood to her credit on the old ledger, until the 1st of November, when it was transferred to the new ledger,—the reason for this delay being that the old firm was in liquidation, and these and similar accounts were not carried forward to the new firm ledger until the solvency of the old firm was proven by its liquidation. They swear that it was so proven, and that the old firm's debts were all paid, and the stock of goods taken, by the new firm, and that the mother directed that her account should be transferred to the new firm. She is further credited with interest and discounts, and with divers items of cash, so that the balance on the 5th of December, 1892, was \$27,258.76. The firm fell into difficulties early in 1893, and attempted to liquidate. They paid a great many of their debts, aggregating a large majority of their indebtedness, moved away from their former place of business, and placed their remaining stock of goods in the subcellar of the firm of Bernheim, Bauer & Co., and sold them out, as before stated, and paid the proceeds to their mother, in payment of this debt. The original books of the firm were produced in court, having been taken possession of by a receiver appointed under supplemental proceedings to judgment in the city of New York, and were inspected by the court. In addition to the entries on the books themselves, Mrs. August produced seven statements, purporting to be transcripts of the ledger, made from time to time, in the handwriting of some bookkeeper or member of the firm, which she said were sent to her from time to time for her satisfaction. They are dated, respectively, January 1, 1885, January 22, 1886, January 1, 1887, November 1, 1887, October 31, 1888, November 1, 1890, and November 1, 1891. A comparison with the ledgers produced shows them to be true transcripts, so far as the

books are produced. They have the appearance of being genuine, and of having been made at the time they respectively bear date. No promissory note was ever given, or other evidence of indebtedness, except these statements. She swears that she trusted her sons to take care of her money, and pay her interest on it, and that the statements of account which she received from time to time were all the evidence that she required or desired. There is no room for doubt as to the authenticity of the books, or the genuineness of the entries found therein. The statements of account produced by Henrietta supply documentary evidence of the existence of the balance in her favor on the missing ledger No. 4. If these facts are reliable, then the indebtedness is established.

Their reliability is attempted to be met and overthrown by the preliminary examinations, taken under the creditors' bill, of the three defendants Henrietta, Jacob, and Abraham. I have read those examinations with great care, and have compared them with the evidence of the same persons given orally at the hearing of the cause, and with the entries on the books, and I find that, while there are some apparent inconsistencies raised from the casual reading of the preliminary examination, upon closer examination most of them disappear or are otherwise satisfactorily accounted for. Mrs. August never saw the books of account, knew nothing about them, except as she was furnished with statements. I think it quite manifest that, when she was first examined, she had not looked at the statements for a long time,—in fact, had not prepared herself at all for the examination. She is of foreign birth, and speaks and understands our language pretty well, but not perfectly. She is somewhat advanced in years. The most suspicious thing in her evidence is that she at first had forgotten that her husband had given her \$10,000 to loan to the firm; but I think, taken altogether, her evidence is clearly consistent with the evidence of her sons and the books, including the transcripts from the savings bank books which have been put in evidence; that she was a saving woman, and did put by money, from time to time, as she received it; and that her money was put to her account with her sons, from time to time, in comparatively small amounts. There is no dispute but that her husband was, at that time, a man of considerable means, in good mercantile standing up to a very recent date; and there is nothing improbable in the statement that he made her presents from time to time of money, and that she saved considerable of what was given her for her personal use, and what may be termed "house money." The conclusion that I have reached on this part of the case is contrary to my first impressions, and is made in full consciousness of the duty of the court to scrutinize these

family accounts with great care. Notwithstanding these considerations, I am forced to the conclusion that the debt to Henrietta was a real one, in one sense of the word,—that is to say, it was not in any sense fictitious; the money was originally had and used by the old firm.

It is urged that, even if that be so, and the old firm did actually have their mother's money to the extent claimed, still it does not sufficiently appear that the debt was not, in fact, paid by the old firm in the course of its liquidation; that there are circumstances tending to show that such was the fact. In the first place, it is urged that the absence of the last ledger, No. 4, of the old firm, and the corresponding journal, is suspicious, and not well accounted for. So far as relates to the accounts given by the members of the firm, under oath, of the loss of those books, I cannot say that there was anything suspicious in the manner in which that evidence was given. The remarkable circumstance is that two large books like these should have disappeared, and not reveal themselves upon the careful search which appears to have been made. All the books were moved with and at the same time as the stock of goods was moved from the store formerly occupied by August Bros. to that of Bernheim, Bauer & Co. and these two books in question were first missed after that removal. The brothers swear that diligent search was immediately made for them, without success. The only probable theory that suggests itself to my mind, as to their loss, is that they were separated from the larger mass for the purpose of the liquidation of the old firm, and were never restored to their proper place, and were overlooked. Another circumstance relied upon as suspicious is that the entry on the ledger of the old firm of \$25,481.22 as of November 1, 1890, to the credit of Mrs. August, appears to have been made at two sittings,—the figures "25" at one time, and the figures "481.22" at another time. How long apart the sittings were the expert was unable to state. I have already referred to the separation of these two component parts of the whole sum of \$25,481.22 on the ledger of the later firm. The ledger upon which this difference was found by the expert was an extra ledger, called a pocket ledger, kept by the firm as a transcript of their regular ledger, and deposited each night in a neighbor's safe for safety in case of fire. The one in question covered but a few of the last entries of the year 1890, which was the last year of the existence of the old firm of August Bros. They seem to have made up their accounts each year to November 1, 1890, and it may well be that the figures "25" were written first, and then, after exact calculations of interest were made to ascertain the precise odd dollars and cents due, the figures "481.22" were added,—it may be half an hour, or an hour, or 24 hours, later. While I am pretty

well satisfied that the expert's evidence is reliable, I am not satisfied that they indicate any fraudulent manufacture of a debt. The circumstances do not reveal any occasion that the firm had, at that time, to indulge in any such fraudulent entries. The other books of the firm,—the check books, bank pass books, and others,—showing their daily transactions, were preserved. The complainant had access to them while they were in the possession of August Bros., and they were subsequently taken away by the receiver, and produced at the trial by the complainant. They had every opportunity to ascertain whether they disclosed any evidence of payment of this large sum to Mrs. Henrietta August. No such evidence is pointed out. I find myself unable to infer a payment of this loan from the circumstances referred to.

But counsel for complainant take the further point that these family accounts, including one not before mentioned,—to Minnie August, the wife of Jacob,—were so arranged and carried on the books as to work a fraud on the creditors, and should not be paid until after the creditors are paid, they being, in point of fact, as against creditors, mere contributions to the capital, and subject to the payment of all the debts. I am unable to find anything in the evidence to warrant that conclusion. It does not appear that representations were ever made by the firm, as to their capital, in which a fraudulent use was made of these loans, or that their indebtedness to their relatives was ever denied or concealed. The fact that persons so engaged in business are liable to owe confidential debts is notorious, and creditors inquiring into the financial standing of their debtors, or proposed debtors, always make inquiries on that subject. These credits to their relatives were kept openly, upon their regular ledgers, and I am unable to perceive upon what principle it can be held that they were capital, and not debts. I think the bill should be dismissed, and will so advise.

PENNSYLVANIA R. CO. et al. v. UNITED STATES PIPE-LINE CO. et al.

(Court of Chancery of New Jersey. Feb. 5, 1896.)

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE
—LACHES—BONA FIDE PURCHASER.

In case a railroad company enters into an agreement with the owner for the purchase of certain lands; takes possession of such lands; erects an embankment thereon 20 feet high, with an arch or culvert over a highway crossing said lands; lays its tracks and runs its trains over said embankment and culvert, with the knowledge and acquiescence of the vendor for 9 years, and his heirs at law and legal personal representatives for over 30 years,—such company, having been in open and notorious possession of the premises for at least 40 years, is entitled to a decree of specific performance against one who took title from the executor of the vendor to said company, and is entitled to an in-

junction against an individual or a private corporation who threatens to open trenches and lay iron pipes in such highway, where such highway crosses the land so agreed to be conveyed. Lapse of time, in such case is no bar, unless the vendor takes steps to make it so. Nor can any one claim to be a bona fide purchaser. Such subsequent purchaser takes with notice, and holds the legal title for the first vendee, who is the owner of the equitable title.

(Syllabus by the Court.)

Bill by the Pennsylvania Railroad Company and others against the United States Pipe-Line Company and others for specific performance. Decree for complainants.

Allan H. Strong and Chas. Gummere, for complainants. Henry S. Harris and Joseph M. Roseberry, for defendants.

BIRD, V. C. The Pennsylvania Railroad Company, one of the complainants, is the lessee of all the franchises, rights, and interests of the Belvidere Delaware Railroad Company, the other complainant, and is in the undisputed possession of the road constructed by the latter company in the years 1854 and 1855, and from thence until now the road has been in constant operation. The defendant is a corporation under the laws of the state of Pennsylvania, and through the agency or instrumentality of one Breckinridge, who is also a party defendant, is about to lay pipes to conduct its oil from the state of Pennsylvania, under the surface of the earth, to tide water on the New Jersey coast. In order to complete the connection of its pipes, it is about to open a trench in the public highway over which the tracks of the complainant company are laid. The defendants have written consent of the township committee of the township through which the road runs to dig such trench within the line of the road, upon certain conditions, for the purpose of laying its pipes. The railroad company object to any interference with the premises in question by the pipe lines, and have filed this bill, asking for an injunction prohibiting the defendants from proceeding to effect any such purpose. The complainants first claimed title in fee simple to the premises in question by virtue of a deed of conveyance from one Thomas Lomason, subject only to the easement of the public road. The defendants answered, and set up title to the said premises in Breckinridge, one of the defendants, by virtue of several deeds of conveyance which passed said title from one William P. Robeson. Upon the hearing on the order to show cause why an injunction should not issue, the complainants produced the articles of agreement hereinafter set forth, entered into between the said William P. Robeson and one John M. Sherrod and the Belvidere Delaware Railroad Company, by Ashbel Welch its agent, in and by which the said Robeson and Sherrod agreed to convey certain lands, among which was the lot in question, to the Belvidere Delaware Rail-

road Company. The object of the bill being the restraint of the defendants from interfering with the premises in question by laying their pipe, it was believed that it was within the constant practice of the court to permit such amendments as would make the allegations harmonize with the proofs. The bill was amended accordingly. The complainants' chief reliance is upon the allegation in their amended bill that the equitable ownership of the fee, and the right of absolute control, of the soil, for all purposes, except the use of the surface for a public highway, is in them. They claim such equitable ownership by virtue of the agreement referred to, of which the following is a copy: "Articles of agreement entered into this twenty-fifth day of June, Anno Domini 1851, between William P. Robeson and John M. Sherrod, Esquires, of the town of Belvidere, in the county of Warren and state of New Jersey, and the Belvidere Delaware Railroad Company, by Ashbel Welch, an agent duly authorized by the board of directors. Said Robeson and Sherrod, for and in consideration of the sum of one dollar to be paid to each of them by said company, and in consideration of the benefits which the Belvidere Delaware Railroad, if constructed, will produce to their property, hereby agrees to convey in fee simple, each, so much of the land as belongs to himself separately, and, both, so much of the land they now hold in common, lying on the route of the said railroad, in the township of Oxford and county of Warren aforesaid, anywhere between the farm of William White (below Thomas Lomason's farm) and the land of John Hoff, Jr. (above Abraham McMurtie's land), as may be sufficient for the construction of said railroad, with its ditches and appendages, and for procuring materials, reserving the timber on said land, also the buildings, and the following rights, to wit: The right of passing with teams or otherwise across the said railroad on the strip of land or lane lying between lands of Abraham McMurtie, Jr., and John Hoff, Jr.; the right of crossing over said railroad, with teams or otherwise, at such points as shall be necessary for full and convenient access to their mills or other works erected or to be erected; also, the right of passing their shafts, belts, or contrivances for transmitting power from water wheels near the river to buildings above said railroad, through openings under the same, provided said railroad shall be constructed. And the said company agree to pay the said sum of money for said land, and to make crossings for teams or otherwise at such places as shall be necessary for the purposes of said Robeson and Sherrod, with good approaches to said crossings, and to make, when necessary, openings under their railroads for the passage of belts, shafts, or other contrivances for the transmission of power, and to pay the increased expense which said Robeson and Sherrod

shall incur in constructing their water-power canal, over and above what would be the expense if said railroad had not interfered with the location of said water-power canal, and to remove all buildings on the route of said railroad through said land to a proper distance. This agreement shall apply to the lot now owned by Miss Allan Mowry, if purchased by any of the parties hereto. Witness our hands the day & year first above written. J. M. Sherrod. Wm. P. Robeson. Ashbel Welch, Agent Bel. Del. R. R. Co. Present, Martin Coryell." As the said agreement was executed in 1851, the Belvidere Delaware Railroad Company, lessors of the complainant, completed the construction of its road in the year 1855, and at once commenced the running of its trains over the route so constructed. This it continued until 1874, when it leased all its rights to the Pennsylvania Railroad Company, which has continued in the possession and actual use of said route until the present time. It is not disputed but that the former company took possession of the parcel of land in question by virtue of this agreement. The complainants claiming to have the equitable title under this agreement, they now seek the conveyance of the legal title from said Breckinridge, as well as an injunction protecting them, in such title, from said Breckinridge, who claims the right to lay the pipe in question by virtue of his legal title, and of an agreement entered into between him and the township authorities who have the supervision of the highways.

It is well settled that when a vendee enters into possession under an agreement for the title, and performs such agreement upon his part, he not only has the equitable title, but is entitled to a specific performance of such an agreement, whereby he shall have the legal title also. See *Bridge Co. v. Vreeland*, 4 N. J. Eq. 157, approved in *Lawrence v. Lawrence*, 21 N. J. Eq. 321, and many cases cited below. In *Van Blarcom v. Kip*, 26 N. J. Law, 351, 361, and cases cited, it plainly appears that protection in many cases will be afforded even at law. The possession in this case has continued full 40 years. There is no pretense but what such possession was not taken with the full knowledge of William P. Robeson the owner, or at least the owner of the undivided three-fourths part. He then lived at Belvidere, on the line of the railroad, and within two miles of the land in question. An embankment about 20 feet high was raised across this parcel, to secure the proper grade for the tracks of the railroad, which embankment was about 50 feet wide at the base and 20 at the top. The public road was spanned by a culvert or passageway 12 feet wide, supported by stone abutments. William P. Robeson died in 1864. Therefore, if he did not openly acknowledge the right of the railroad company to take possession and erect and maintain its structure, he acquiesced

therein for at least nine years. And since his death no one claiming under him has raised any question respecting the title of the company, until the year 1895. This being the condition for all these years, under the cases cited, a court of equity would support the claim of the complainants, they having performed all the conditions upon their part to be performed, as against William P. Robeson, or any one claiming under him, except a bona fide purchaser.

Has the railroad company so performed its part of the agreement as to justify it in speaking to the conscience of a court of equity? Up to and at the time of entering and taking possession, there was but one condition for it to perform, and that was the payment of the one dollar consideration money. There is no evidence of actual payment. Counsel insists that the presumption is that payment was made, from the lapse of time. Doubtless, an action upon the part of William P. Robeson, or his legal representatives, would be controlled by the statute of limitations. I think that, when the other considerations named in the agreement are taken into the account, it will be quite convincing that the naming of the sum of one dollar to be paid was merely nominal, and more for the purpose of form than of any valuable significance. There are other stipulations in the agreement which the railroad company was under obligations to perform. In determining whether or not the company has complied with its undertakings in this behalf, so as to protect it in its claim of title, we must first learn whether the conditions have been created by the act of the other parties to the agreement which requires of the company such action upon its part as is stipulated for. The agreement shows that Robeson and Sherrod reserved, not only the timber and buildings, but also "the right of passing, with teams or otherwise, across the said railroad, on the strip of land or lane lying between the lands of Abraham McMurtrie, Jr., and John Hoff, Jr.; the right of crossing over said railroad, with teams or otherwise, at such points as shall be necessary for full and convenient access to their mills or other works, erected or to be erected; also, the right of passing their shafts, belts, or contrivances for the transmission of power; and to pay the increased expenses which said Robeson and Sherrod shall incur in constructing their water-power canal, over and above what would be the expense if said railroad had not interfered with the location of said water-power canal; and to remove all buildings on the route of said railroad through said land, to a proper distance." These are all important stipulations, and show what the real consideration for the engagement upon the part of Robeson and Sherrod was. The bill alleges performance of all that was required of the railroad company under the agreement. So far there has been no proof to show that any crossing has been required

that was not constructed. Nor does it appear that any buildings, mills, or other works, of any kind, have been constructed above the said railroad by either the said Robeson or said Sherrod, or any one claiming under them, to operate which it was necessary to construct flumes, canals, or other channels or communications, by water or otherwise, under said railroad, which, beyond question, the railroad company obligated itself to construct, or to pay the additional expense of construction because of the existence of said railroad. The consideration of this branch of the case brings us to the inducements which moved Robeson and Sherrod to execute this agreement. They were clearly other than the mere nominal payment of one dollar to each of them. They were increased opportunities for the development of their joint and several estates. It is clear that they are entitled to the improvements contemplated, within any reasonable time when their interests may prompt them to move for their construction after the conveyance. See *Williams v. Hart*, 116 Mass. 513. These things being so, it would certainly be highly inequitable for the court to emasculate the contract of its mutuality, and to say that, "Notwithstanding it is true you have constructed your road at great expense, relying upon your agreement, yet, as to this one parcel of land, you have no right or title other than that of a naked trespasser; and yet you will be obliged to perform all conditions stipulated in that agreement, when required so to do." This may be said of every other parcel of land included in this agreement.

But is the defendant Breckinridge a bona fide purchaser? The general rule undoubtedly is that where a purchaser by virtue of a written agreement enters into possession with the consent of the vendor, and performs his part of the agreement, and such possession is open, notorious, and unqualified, no person can claim title from his vendor, in disregard of such possession, and enjoy the benefits of a bona fide purchaser. The possession of such vendee is notice to all the world. And every person dealing with such property is chargeable with such notice as he might reasonably be expected to obtain upon inquiry of such vendee. One of the first cases upon this subject in our own state is that of *Diehl v. Page*, 3 N. J. Eq. 143, in which it was declared: "A party who purchases from one not in possession of the bargained premises cannot claim to be a bona fide purchaser without notice, for possession in another is notice sufficient to put the party on inquiry." The same principle was recognized in *McCall v. Yard*, 11 N. J. Eq. 58; in *McDavit v. Pierrepont*, 23 N. J. Eq. 43; and in *Johns v. Norris*, 27 N. J. Eq. 487, 488. And in *Wanner v. Sisson*, 29 N. J. Eq. 141, it was declared, "Possession by a man or his tenant is notice of the title, equitable as well as legal, un-

der which he claims the property." In *Cooke v. Watson*, 30 N. J. Eq. 345, where partners who were the owners of certain real estate agreed to convey such real estate to a company, of which the partners were members, and such company went into possession of such real estate, and made improvements, but took no deed of conveyance, and a judgment was afterwards obtained against one of the partners, it was held that such judgment was not a lien upon the real estate so agreed to be conveyed. See, also, *Purcell v. Enright*, 31 N. J. Eq. 74; 2 *White & T. Lead. Cas. Eq.* 133; *Water-Power Co. v. Veghte*, 21 N. J. Eq. 463, 478; *Williamson v. Brown*, 15 N. Y. 354, 360; *Turnpike Co. v. Conover*, 34 N. J. Eq. 364. Where a purchaser of real estate takes title with a knowledge of such facts as deprive him of the rights of a bona fide purchaser, and which show that the equitable title is in another than his vendor, he holds the title for the equitable owner. *Lamont v. Cheshire*, 65 N. Y. 42; *Morrison v. Wilson*, 13 Cal. 494; *Hoagland v. Latourette*, 2 N. J. Eq. 254; *Downing v. Risley*, 15 N. J. Eq. 93; *Haughwout v. Murphy*, 22 N. J. Eq. 547. In *Young v. Young*, 45 N. J. Eq. 41, 16 Atl. 921, Chancellor McGill affirmed this doctrine. *Pom. Cont. § 493*. However technical these principles may be, when applied to certain isolated cases like the present, yet they are of such universal application, and appear to be so well fortified by both reason and authority, that they may well be considered as being as firmly established as any other rules respecting the rights of property. Hence, when the character of the possession and use is considered, one is not required to spend time to show that no person could treat respecting title to property in ignorance of such possession and use. It would seem, therefore, that no person claiming title by, from, or under William P. Robeson is entitled to protection, in a court of equity, as against the complainants.

Breckinridge having the legal title, if the complainants have the equity which they claim, it can only be asserted and maintained in this court; and, this court having jurisdiction, it is eminently proper, in a case like the present, that it should take all proper precautionary steps to protect the complainants in their property rights. The trespass which is threatened is a continuing one; it is a permanent appropriation of the property of the complainants to the defendants' own use; and this is increased in importance by the insistence that it is under the protection of the public authorities. Such application was made of the power of a court of equity in *Sterling's Appeal*, 111 Pa. St. 35, 2 Atl. 105. The court said that a gas company, "under its charter, has no right to lay its pipes upon the public road traversing the lands of a party objecting to the imposition of such additional servitude on his lands, and may be restrained by injunction

from so doing." The court said: "We are satisfied that the appellee has no more authority to do the acts complained of than any unincorporated association of individuals would have. It follows, therefore, that appellee is, at best, a trespasser on the public highway." So much stress was given to the slight additional burden which would be imposed by the mere use of the soil for the laying of the pipes and the transmission of oil, that it seems quite proper that I should use still further the language of the court in the *Sterling Case*, supra: "As owner of the land traversed by the public road, he has a right to use it, and the land on which it is located, for any purpose that will not impede or interfere with the public travel. By appropriating the land for the specific purpose of a common highway, the public acquires a mere right of passage, with the powers and privileges incident to such right. The fee still remains in the landowner, notwithstanding the public have acquired a right to the free and uninterrupted use of the road for the purposes of passing and re-passing, and he may use the land for his own purposes in any way that is not inconsistent with the public easement. He may, for example, construct underneath the surface passageways for water and other purposes, or appropriate the subjacent soil and minerals, if any, to any use he pleases, provided he does not interfere with the rights of the public. * * * Laying and maintaining a pipe line at the ordinary depth under the surface necessarily imposes an additional burden on the land, not contemplated either by the owner or by the public authorities when the land was appropriated for the purposes of a public road." These principles were expressed with equal emphasis in the New York court of appeals, in *Gaslight Co. v. Calkins*, 62 N. Y. 386, 388. In *Goodson v. Richardson*, 9 Ch. App. 221, 8 Eng. R. 835, the court said: "Where water pipes had, without the consent of the owner of the soil, been laid in the soil of a highway, an injunction to restrain the continuance of the pipes was granted; the owner of the soil not being left to his remedy at law, and not being required to establish his right at law. The facts that the soil under the highway was of no value to the owner, and that his motive for applying to the court was not connected with the enjoyment of his land, were held not to be reasons against the granting of the injunction." On the question of jurisdiction, see, also, *Broome v. Telephone Co.*, 42 N. J. Eq. 141, 7 Atl. 851, and *High, Inj.* § 697. I do not think that the agreement of the township authorities with the defendant Breckinridge is of the slightest support, by way of defense. Whatever control the legislature has given to them over the highways of the state, it certainly has not conferred upon them the right to confer special favors upon strangers, as against the owners of the fee in such highways.

Upon the argument it was urged that the lapse of time in this case was such a manifestation of negligence as to bar the complainant from every claim to consideration in a court of equity, in support of which a great multitude of cases was cited. So far as I have been enabled to examine them, I do not find any which bear the slightest analogy to the case in hand, except that of *Lawrence v. Lawrence*, supra, which expressly cited and approved the case of *Bridge Co. v. Vreeland*, supra. In a case like the present, it seems to me that the negligence or delay, if any one be charged therewith, is chargeable to the vendor, and that, the longer the delay, the greater the equity in favor of the complainant, who has gone into possession, and, at enormous expense, constructed a public work of great magnitude. Nothing would be more inequitable than to allow the vendor to stand by for 40 years, witnessing such possession, improvements, and expenditure of money, and then to sustain him in an assertion of a claim of property against such vendee. Surely a second vendee, in such a case, is estopped by every equitable consideration. Nor is equity content with setting up a bar against an aggressor. In such case it will not only repel, but will affirmatively declare and maintain the rights of the first vendee. In the language of the chief justice in the case of *Erie R. Co. v. Delaware, L. & W. R. Co.*, 21 N. J. Eq. 289, "Fair dealing and good conscience obviously required Robeson and Sherrod to assert their right at the outset, if it was designed ever to do so." If they, or either of them, ever intended to repudiate the agreement, or to resist the claims of the railroad company under that agreement, conscience and fair dealing required them to act with promptness. The chief justice again observes: "From the conduct of the complainants, the defendants could fairly infer that there was no intention to object to the course they were pursuing; and after action has been based on this fair presumption, and great expense has been incurred, it is altogether too late for opposition to be tolerated from the party so having acquiesced and encouraged. This is an equitable rule, which is applied to a great variety of cases." Fry, *Spec. Perf.* p. 426, § 738, thus states the rule: "Where a contract is substantially executed, and the complainant is in possession of the property, and has got the equitable estate, so that the object of his suit is only to clothe himself with the legal estate, time either will not run at all, as laches, to debar the plaintiff from his right, or it will be looked at less narrowly by the court; for the plaintiff has not been sleeping on his rights, but relying on his equitable title, without thinking it necessary to have his legal title perfected." In speaking of this rule, Prof. Pomeroy, in his work on Contracts (section 403), says, "The party who desires to maintain an objection founded up-

on the other's laches must show himself, in the language of many judges, to have been 'ready, desirous, prompt, and eager.'" In *Leaird v. Smith*, 44 N. Y. 618, the court of appeals said: "Equity will sometimes refuse specific performance on the ground of laches and great delay, but not when the delay is by common consent, and has occasioned no injury to the party complaining." Prof. Pomeroy, in his work on Contracts (section 404), declares the doctrine to be as it is expressed by Fry, and adds that the vendee's right to relief, in case he has possession, "will not be cut off until the vendor places a limit to the lapse of time by a demand of payment at or before a specified day." This same learned author (section 404) further says: "Where the contract is substantially executed, the purchaser has obtained possession, and, of course, is vested with an equitable title, but the legal title is yet held by the vendor, the vendee's delay in bringing a suit to compel a conveyance, however long continued, will not defeat his remedy, of a specific performance, unless, perhaps, the situation of the vendor, and his relations to the land, have been so altered in the meantime that a specific execution of the agreement will be inequitable." In *Shepherd v. Walker*, L. R. 20 Eq. 659, a decree for specific performance was made, after 14 years, against a lessee who was in possession under an agreement for a lease. In *Williams v. Lewis*, 5 Leigh, 686, a delay from 1774 until 1822 did not bar the vendee's right to enforce a conveyance, he having been in possession during the whole period. See, also, *Miller v. Bear*, 3 Paige, 466; also, *Pom. Cont.* § 406.

It was said that this bill must fail for uncertainty as to the premises agreed to be conveyed. The agreement is that so much is to be conveyed as will be necessary for the road, its ditches, and appendages. If, at any time before the construction of the road, the rule as to uncertainty could be applied, there is no ground for its application, since the road has been constructed and maintained in the presence of the vendor for so many years. The bill not only sets out the contract, but expressly gives the width of the embankment over the premises in question. The complainants also produce in evidence a map on which the route is clearly delineated by courses and distances. With these allegations and this proof, it would seem that the objection, if it be worth serious consideration, is met by the case of *Carskaddon v. Kennedy*, 40 N. J. Eq. 259, which case, on page 278, provides for the settlement of boundaries by a master. I conclude that the right is with the complainants, and that they were justified in coming to this court for relief. I will advise a decree directing the specific performance of the contract according to the prayer of the bill, with costs.

STATE (SIMPSON, Prosecutor) v. MAY-BAUM et al.

(Supreme Court of New Jersey. Nov. 15, 1895.)

PAUPERS—REMOVAL TO PLACE OF SETTLEMENT—SUFFICIENCY OF ORDER.

Under the twenty-fifth section of the act entitled "An act for the settlement and relief of the poor" (Revision, p. 834), it must appear upon the face of the order made by two justices of the peace, for the removal of a poor person to his or her place of legal settlement, that the application for such order was made by an overseer of the poor. It is defective and insufficient if it recites that the application was made by an acting overseer of the poor. The mayor of a borough has no authority, by virtue of his office as mayor, to make such application.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of Alexander Simpson, against Alexander Maybaum and another, to remove an order. Writ granted.

Argued June term, 1895, before VAN SYCKEL, MAGIE, and LIPPINCOTT, JJ.

Adrian Riker, for prosecutor. Timothy E. Scales, for defendants.

LIPPINCOTT, J. This certiorari is brought to remove the order of two justices of the peace of the county of Essex, made April 1, 1895, for the removal of one Charles Miminster, an alleged poor person, from the borough of Vailsburg, in that county, to the township of Milburn, in the same county. This order of removal was made upon the application of Alexander Maybaum, the mayor of the borough, who claimed to be the acting overseer of the poor, and authorized to make such application. The order was evidently intended to be made in accordance with the provisions of the twenty-fifth section of the act entitled "An act for the settlement and relief of the poor." Revision, p. 834. This section provides that if any overseer or overseers of the poor of any city, town corporate, or township, within this state, shall have reason to believe that any person or persons within such township, city, or town corporate, who have not obtained a legal settlement therein, is chargeable, or likely to become chargeable, thereto, such overseer or overseers may apply to any two justices of the peace of the county, and inform them thereof, who are then empowered to apprehend and examine such person or persons relating to his, her, or their last place of legal settlement, and make an order for the removal of such person or persons to the place of legal settlement. In this case the return to the writ and the evidence discloses that Maybaum was the mayor of the borough of Vailsburg at the time of his application to the two justices of the peace for the order of removal, and that by virtue of this office he assumed the right to act as an overseer of the poor of the borough. There existed no authority whatever in him to act as an overseer of the

por. There is no statute of this state relating to boroughs, to the officials of boroughs, or otherwise, which confers any such right or power upon the mayor of a borough to serve in the capacity of an overseer of the poor. The mayor was possessed of no greater or other authority than was vested in him by the statute under which the borough was incorporated. The fact that the borough, up to the time of the application for the order of removal, had neither elected nor appointed an overseer of the poor, cannot alter the case. The absence of such an official conferred upon the mayor no legal authority to make this application. The proceedings of the two justices in making such an order of removal must be strictly according to the statute, and everything necessary to be done to give jurisdiction must appear upon the face of their order; and the defect cannot be supplied by proof on appeal, or on the certiorari. It is jurisdictional, and must appear upon the face of the order of removal that it was made upon the application of the proper overseer of the poor. *Overseers of Princeton v. Overseers of South Brunswick*, 23 N. J. Law, 169. This order is defective in this respect. It also appears, in the matter of fact, that the applicant was not an overseer of the poor, but mayor of the borough, assuming to act as an overseer of the poor. The order recites that the order was made upon his application as acting overseer of the poor. This order cannot be sustained, and is set aside, with costs.

STEELMAN et al. v. BAKER.

Court of Errors and Appeals of New Jersey.
Jan. 10, 1896.)

RAILROAD BONDS—VALIDITY.

Bonds of a railroad, issued in excess of the amount of stock actually paid in, are invalid in the hands of one who was a director at the time of such issue.

(Syllabus by the Court.)

Appeal from court of chancery; Pitney, Vice-Chancellor.

Suit by Anthony Steelman and others against Philip P. Baker. From the decree, Steelman and others appeal. Affirmed.

S. W. Beldon, for appellants. Howard Carrow and M. P. Grey, for appellee.

GARRISON, J. The decree appealed from could be affirmed. The carefully compiled statement of facts prefixed by the learned county judge to the conclusions upon which he recommended this decree shows that these appellants were directors of the railroad company at the time the bonds claimed by them were issued, and that said bonds were to a greater amount than the amount at the time such issue actually paid up on the capital stock of the railroad. These facts being clearly sustained by the proofs, the transaction is thereby brought under the ban of the

original law (P. L. 1878, p. 20), and can vest no title to the bonds in the wrongdoers. *Waterworks Co. v. Read*, 50 N. J. Law, 665, 15 Atl. 10.

This result is the outcome of an accounting in which labor done and material furnished are applied as if they might constitute the "actual payment" required by the statute. The decree therefore rests upon the fact that upon the ground most favorable to the bond claimants there had not been any payment for the stock upon which the issue of bonds could be supported. In view of this determination of fact no further or more stringent construction of the written law is demanded by, or necessary to the decision of, the pending controversy.

PHYSICK et al. v. BAKER.

(Court of Errors and Appeals of New Jersey.
Jan. 10, 1896.)

CORPORATIONS—BOND ISSUES—LEGALITY.

A bill was filed by a receiver to have a corporation mortgage declared void. Strictly responsive answers were filed by certain bondholders. The mortgage was declared to be valid as to all bondholders save those who took their bonds charged with knowledge that they were issued in excess of the amount of stock actually paid in. The first issue of bonds was on a bona fide full-paid stock basis, and certain of the bonds became the property of the appellants, who, as directors, subsequently became charged with knowledge that a later issue of bonds was not upon a paid-up stock basis. *Held*, that the first issue was valid, and that the bonds constituted property in the hands of the appellants which could not, in a suit thus framed, be taken from them either as a penalty or as a contribution to the general dividend fund for the holders of the subsequent issues.

(Syllabus by the Court.)

Appeal from court of chancery; Pitney, Vice-Chancellor.

Bill by Emlen Physick and others against Philip P. Baker. From a decree for defendant, plaintiffs appeal. Reversed in part.

Thomas B. Harned, for appellants. Howard Carrow and M. P. Grey, for appellee.

GARRISON, J. This appeal is from the same decree that was affirmed in the preceding case (*Steelman v. Baker*, *ubi supra*) as to the appellants therein. In the present case an insuperable obstacle prevents the affirmance of the decree in its entirety. The difficulty referred to lies in the fact that the decree in effect takes from two of the appellants certain legally issued bonds, their property, and adds the same to a fund in which they do not participate. The broad ground upon which the case below was decided and the decree affirmed in the preceding case was that in the hands of a director of a railroad company, or other person charged with knowledge of the fact, bonds issued in excess of the amount of stock actually paid in are invalid, and worthless.

The proofs, however, showed conclusively

that some money was paid for stock issued, of which \$70,000 in cash was deposited with the state treasurer before the road was begun. Upon the cash stock basis thus established seventy bonds, numbered from 1 to 70, inclusive, were issued to one Wood under a building contract in payment for labor and material at least equal in value to the face of the bonds. With respect to these bonds the vice chancellor who heard the testimony thus speaks:

"The proofs shew clearly that all bonds issued, except the first one hundred or thereabouts, were so issued in excess of the amount at the time of their issue paid in directly on account of capital stock." And again: "The result is that all the Wood issue, except the first one hundred, were overissues, and invalid."

This finding was correct, and established the fact that certain of the bonds were not open to the charge of being in excess of cash-paid stock. A further fact established is that Wood, the owner thereof, had transferred three of these bonds to Boney and seventeen to Physick, both of whom were directors, and knew the valid cash basis on which the bonds stood, and the valuable consideration given the company for them.

That the owner of these bonds could give them away or otherwise dispose of them, if he chose, is too plain to admit of discussion. There is no question, therefore, but that the bonds were lawful property in the hands of the appellants.

Upon these uncontroverted facts the treatment of these bonds by the chancery decree is not, in my opinion, in accordance with any doctrine of that court. In fine, they were treated precisely as if open to the very infirmity which it was admitted they did not share. They were simply nullified. "At first," says the equity judge upon this point, "I was inclined to think that as to seventeen of the bonds,—Nos. 54-70,—delivered to Physick by Wood, he [the appellant] was entitled to claim that they were not, in fact, overissues, being part of the first issue of seventy bonds to Wood which were legalized by the early payments of cash on account of stock, and therefore intrinsically good and valuable in everybody's hands. But upon reflection I am unable to adopt that view as between Dr. Physick and other innocent holders of the bonds." The final conclusion of the vice chancellor is that, notwithstanding these bonds were thus legally issued and valid property in the hands of Physick and Boney, they must be deemed void because of a subsequent infraction of the law by the corporation with respect to an overissue of later bonds at a time when the appellants were in the directorate of the company.

It should be remarked that these bonds were not issued directly to these appellants so that they became charged with any trust with respect thereto, and, further, that there

is not a scintilla of proof that at the time the property in these bonds vested in Boney and Physick they contemplated, still less that they had conspired, a subsequent overissue of bonds repugnant to the statute. The naked proposition therefore is that a director of a railroad company that issues bonds in excess of its paid-up stock must contribute to the assets of the company whatever property therein he had acquired previous to the overissue. Had the legislature annexed this penalty as an incident to such corporate existence, I can readily see how, in a suit brought for that purpose, the forfeiture must be enforced. But, in the absence of such legislation, and when no such suit has been or can be brought, I am unable to recall any principle of law or of equity by which property once established in an owner may compulsorily change hands because of the owner's subsequent infraction of a statutory duty. Whether this change of ownership be regarded as the infliction of a penalty, the enforcement of a forfeit, or the application of personal property to the equalization of the losses of others, it appears to me to rest upon no known juridical foundation. In addition to this, it was wholly outside the equitable action in which it was decreed. The bill was filed by a receiver, who prayed to have a mortgage declared void. The answers are simply responsive to this bill. The proofs and the decree treat the mortgage as valid, save only as to bonds that, to the knowledge of their holders, were issued in excess of stock fully paid. Under these circumstances a decree directing that certain bonds of an established validity be denied to their owners, and go to swell a fund to be divided among the subsequent takers of later bonds, is certainly a taking of private property under conditions not aptly described in the term "due process of law." The rules under which private property is acquired and held require that a change of ownership, however circuitously brought about, must be in legal effect a direct adjudication to that end, in a suit where such an issue is pending between the successful and the despoiled claimant. If the doctrine contended for by the respondents be accorded, it must follow that, if the appellants, on receiving their valid bonds, had exchanged them for real estate, they might, in a suit by the receiver to set aside the trustee mortgage, be decreed to convey such real estate to the receiver to be distributed among the later bondholders.

Property, whether real or personal, when once legally vested in an owner, cannot, in my judgment, be divested in this off-hand manner.

Every principle of law, as well as widespread commercial interests, requires that property once legally acquired shall not be divestible, save in an action that frames such an issue, and upon considerations that

attack the legality of the acquisition. Such alone is due process of law, as I understand it. Whatever is beyond is extrajudicial, however parallel it may lie to a rugged sense of natural justice.

The practical result is that the decree below should be reversed, and so modified as to permit the appellant Boney to participate in the fund as to three bonds numbered 45, 40, 47, and the appellant Physick as to seventeen bonds numbered 54 to 70, both inclusive.

The other appellant, Conway, was at no time a director. He is a creditor pure and simple. To the extent of one-half of the amount of his cash claim he should be admitted to a dividend. That is to say, of the cash he advanced, one-half will be deemed to have been paid for the stock on which the other half will represent bonds valid in his hands. To this extent he should share in the fund. His claim appears to be \$7,000, on which basis his dividend-bearing fund would be \$3,500. If there is controversy over these figures, there should be a reference to establish the sum.

The decree is reversed.

KOUNTZE v. PROPRIETORS OF MORRIS AQUEDUCT et al.

(Court of Chancery of New Jersey. Dec. 31, 1895.)

PRELIMINARY INJUNCTION—DENIAL OF AVERMENTS OF BILL.

Where, upon an order to show cause why an injunction shall not issue, the facts upon which the equity invoked must rest are explicitly denied by responsive answers, a preliminary injunction, except in cases of peculiar hardship, will be denied.

(Syllabus by the Court.)

Action by Luther Kountze against the proprietors of the Morris aqueduct and others. Heard on order to show cause why an injunction should not issue to stay proceedings in condemnation, on bill, maps, and affidavits, and answers. Application denied.

The bill alleges that the complainant owns and occupies several hundred acres of land in Morris and Passaic townships, in Morris county, which he designs to improve and use for country residences; that a portion of his land adjoins property of the proprietors of the Morris aqueduct, and upon it exist springs and streams of water, which are capable of being used to beautify his property and enhance its value; that the aqueduct company, to aid it in its duty of supplying the town of Morristown with water, desired to acquire the water of those streams, and utilize springs upon its own lands by conducting them into the streams of the complainant, and through and by those streams to its settling basins and reservoirs; that, with this object in view, it deliberately entered upon the lands of the complainant, without his permission, and at points dug

out and completely filled up portions of the beds of his streams, conducting the water through covered tile drains, and thus destroyed the natural appearance of his land, which clearly manifested its fitness for the purposes aforesaid, to which he designed to devote it; that, after those trespasses, the aqueduct company applied to a justice of the supreme court for the appointment of commissioners in condemnation proceedings under the statute entitled "An act for the construction, maintenance and operation of waterworks for the purpose of supplying cities, towns and villages of this state with water," approved April 21, 1876 (Revision, p. 1865), to appraise the value of a designated portion of the complainant's land to be taken, and the damages to other parts of his land which would be occasioned by laying and maintaining a tile drain, not more than six inches in diameter, four feet below the surface of the land, protected by a surface drain on each side of it, designed to prevent surface water from reaching the drain and contaminating the spring water flowing through it; that commissioners were appointed, and viewed the premises, in obedience to the statutory requirement, before making their award, and found there the changes wrought by the defendant's trespassers, which were of such character that the commissioners were unable to ascertain the original appearance of the land and the advantages of the natural watercourses to it; that the defendant company denies having made certain changes, which the complainant insists that it did make; and that the commissioners cannot, by the testimony of witnesses, obtain a satisfactory conception of the natural appearance of the complainant's land. The bill prays that the defendant company may be enjoined from further prosecution of its condemnation proceedings, and that the commissioners may be restrained from making their award until the complainant's premises shall be restored by the defendant company to their natural condition, and be viewed in that condition, and that the defendant company may be restrained from continuing to maintain its pipe drains and the altered streams upon the complainant's land which divert the waters from their natural courses.

By its answer, supported by several affidavits, the defendant company avers that the complainant's land, in question, lies at an outskirt of his domain, a mile and a half from his dwelling house, a half mile from any other dwelling on his land, and a quarter of a mile from a public highway, and that it is a deep hollow and swamp, covered with briars, brush, and trees, and has never been put to any beneficial use by the complainant, and is at least a mile from any beautifying improvements made by him; that the defendant company is the owner of land on the east, south, and west of the land in question; that, upon its land to the east, there are several springs, which, in a state

of nature, yielded a small rivulet, which ran upon the complainant's land for a short distance, and then out of its southerly boundary upon the defendant company's land, and then back to the complainant's land again, and, further on westerly, again upon the defendant's land; that, in order to secure a full flow from its springs on the east, uncontaminated by surface drainage, the defendant company dug down to them, and by means of several covered tile drains, laid 4 or 5 feet below the surface of the earth, conveyed the water to the bed of the rivulet in the complainant's land, and, the drain at that point being some 3 feet below the surface of the bed of the rivulet, entered upon the complainant's land, and deepened the bed of the rivulet there, which descended, as it ran westerly, from 3 feet at the boundary of complainant's land to nothing at 75 feet westerly from that boundary, and, finding that the sides of the excavation, by reason of the depth for the first 20 feet, through the influence of frost or surface wash, were apt in time to fall in, for that distance continued its tile drain upon the complainant's land, and filled in the bed of the stream over it; that, for 400 feet, the rivulet, being constantly enlarged by tributaries, ran through the complainant's land southwesterly in its natural state, until it crossed the boundary into land of the defendant company; that, upon its land south of the complainant's property, the defendant company, by other drains, from springs upon its land there, increased the volume of the stream, and, to facilitate the running of the water, straightened and deepened the channel, until, in a straight line, it again entered the complainant's land, and by that straightening process it may have cut off from the complainant a few feet of the stream, as the complainant insists, made by a bend running into his land easterly of the point where the straightened stream now enters it; that, at the extreme southwesterly corner of the complainant's premises, a small rivulet from the defendant company's land, the water of which can be discharged through a pipe one inch in diameter, entered the complainant's property, and ran northerly 50 or 60 feet to the main stream, and, by means of a tile drain, in part constructed across a corner of the complainant's land, the rivulet was entirely diverted from the complainant's property; that, otherwise than in the particular stated, the complainant's property was undisturbed; that all these changes are readily discernible upon the ground, except, perhaps, the cutting off of the bend, and whether a bend was in fact cut off the defendant company doubts, but nevertheless admits, and, prior to the filing of the bill, at the time of the view by the commissioners, did admit to the commissioners, for the purposes of the condemnation, according to the complainant's assertion of the fact; that all these changes were made in the summer

of 1893, nearly two years prior to the commencement of the condemnation proceedings, when the relations between the complainant and the defendant company were amicable and they were negotiating for a sale of the rights which the company now seeks by condemnation, and in the presence of the overseer and workmen of the complainant, and not clandestinely; that the changes were not made in contemplation of condemnation proceedings, nor with intent to embarrass those proceedings; that the changes are visible, and were readily ascertainable by the commissioners when they viewed the premises, and they have benefited the complainant in the proceedings in condemnation by adding to the volume of the water in the stream; that, until the bill in this case was filed, and until after the commissioners' view was had at the expense of the defendant company, the complainant failed to indicate any desire that the property should be restored to its former condition; that such restoration would be expensive, and would not be productive of any practical use in the condemnation proceedings; that, if made in good faith, it is doubtful whether the complainant would be satisfied with it, and would not dispute its accuracy in a prolonged litigation.

The three commissioners in condemnation, who are made defendants, answer that their view of the lands was satisfactory to them; that they understood that they were to regard the change in the stream at the bend referred to as having been made by the defendant company in manner insisted upon by the complainant; that the changes in the bed and course of the stream "were very slight, and that they had no difficulty in seeing and understanding just how and where the stream ran in its natural condition, and the quantity of water naturally running, and the natural appearance of the ground"; that the changes will not create any difficulty in their reaching a proper estimate of the value of the land and rights taken, and the damage caused by the proposed works to the complainant.

Thomas N. McCarter and Cortlandt Parker, for complainant. John O. H. Pitney and Henry C. Pitney, Jr., for defendants.

McGILL, Ch. (after stating the facts). The relief which the complainant seeks by his bill is from the effect of deliberate trespasses, which, he claims, is the transformation of the appearance of his land, so that it misleads, and will mislead, those who officially view it in course of condemnation proceedings, as to the real value of the property and rights to be taken. The implication from the bill is that the trespasses immediately preceded the proceedings in condemnation, as though designed to prejudice him and give the aqueduct company an undue advantage; but that feature is eliminat-

ed by the explicit statement, in the company's answer, that the trespasses preceded the condemnation nearly two years, and were committed while friendly negotiations were pending for the purchase of the rights and property desired by the company. The company admits that its trespasses were deliberate, but it denies that the effect of the trespasses was or is to transform the appearance of the complainant's land, so that its natural condition and advantages, as discernible by view prior to the trespasses, are not now manifest on view, and, by particular description of the character and extent of the trespasses, demonstrates the probable truth of its denial. In this denial it is also supported by the answer of the defendant commissioners. It is needless to discuss the merit of the equity claimed, for, by this denial, so far as the present application is concerned, the case is reduced to one of mere trespass, without feature to invoke the interposition of a court of equity. The facts upon which the equity must rest being explicitly denied by responsive answers, a preliminary injunction will not ordinarily be issued. The exception to that rule is where withholding the injunction will deprive the party of all relief in case he be finally successful, or subject him to some irreparable injury or peculiar hardship. I do not perceive danger of such a result in this case; for, if the damages in the condemnation should be affected injuriously to the complainant by fraud of the defendant company, which cannot be defeated in those proceedings, I have little doubt as to the power of this court, on final hearing, to ascertain what the just sum to be paid should be, and to compel the defendant company to pay its excess over the commissioners' award. But the danger of such an event in the present condemnation proceedings is reduced to a minimum by the conditions that the complainant is alert to detect fraud and the commissioners are empowered, by the law under which they act, to hear the parties interested, and take evidence, and are not required to depend alone upon their view of the premises. Upon this consideration I will discharge the order to show cause, and deny the application for a preliminary injunction.

NEW YORK BAY CEMETERY CO. v.
BUCKMASTER et al.

(Court of Chancery of New Jersey. Feb. 4, 1896.)

TRUSTS—ACCOUNTING—CEMETERY ASSOCIATION.

1. Complainant, a cemetery association, had control and right of sale of all lots in the cemetery, of which defendants, as original owners of the site, owned a large number. On a reference for an accounting between the parties, in ascertaining the amount properly chargeable by complainant to defendants for maintenance and improvement of the cemetery, *held*, that the burden rested on complainant not only to prove its expenditures, but the purpose for which each was made; an affidavit made by its officers al-

leging in general terms that the expenditures were for improvements or maintenance being insufficient.

2. Defendants, having been charged with a proportionate share of all expenditures for wages paid employes, were entitled to a credit for an equal proportion of all earnings of such employes, including profits on work done for others.

Action by New York Bay Cemetery Company against John W. Buckmaster and others, wherein a reference was ordered. 24 Atl. 2. A report was made by the master, to which the defendants filed exceptions. Overruled in part, and in part sustained.

R. L. Lawrence, for complainant. E. P. Wheeler and Charles Meyer, of New York, for defendants.

PITNEY, V. C. The proper execution of the order of reference in this cause required much labor, and the solution by the master of difficult and delicate questions. It is not remarkable that his results have not proven satisfactory to all the parties. The order required him to ascertain the whole number of lots owned by the defendants in the complainant's cemetery. This has been done to the satisfaction of all the parties, with the slight exception hereafter to be noticed. It further directed him to ascertain the amount received by complainant from the sale of burial lots belonging to the defendants between January 1, 1878, and January 1, 1892. This sum he has ascertained at \$14,480. Little criticism was made upon this finding. The master was further directed to take an account of the expenses of managing the complainant corporation, and maintaining the fences, grounds, walks, and paths of the cemetery in proper order, including a fair compensation to the officers of the company during the same period, and to charge the defendants with a portion of the same, to be ascertained by taking the proportion which the number of lots owned by the defendants bore to the whole number in the cemetery. The master found this sum to be \$95,061.67, and that one-fifth thereof (\$19,012.33) should be charged to the defendants, thereby bringing them in debt to the complainant \$4,532.33. The proportion of one-fifth is admitted to be correct, but the total of \$95,061.67 is attacked on several grounds covered by the exceptions. The complainant produced and handed to the master an itemized account (Exhibit C, 1) of its total disbursements during the period in question, amounting to \$98,376.32, all of the items of which it claimed were properly classed as going to maintaining the fences, grounds, walks, and paths of the cemetery, and paying the officers of the company. In addition, it claimed an allowance for salaries for officers actually earned, but not paid because the complainant was too poor to pay its officers a compensation. The master allowed and added on account of unpaid salaries \$22,975, but deducted from the schedule of general expenses \$400 for counsel fees paid

counsel in this cause, making the total expenses of maintaining complainant's organization and the cemetery grounds, etc., and compensation to officers, \$120,951.32, for the 14 years from May 1, 1878, to January 1, 1892. From this sum he made certain deductions for moneys received by complainant for the labor and service of its workmen and officers on various accounts amounting to \$25,880.65, which, deducted from \$120,951.32, leaves the sum of \$95,061.67, above stated, fixed as the amount of net cost of maintenance of the cemetery, a share of which was, under the order, chargeable to defendants. The defendants except to both branches of this finding. They say (1) that many of the items making up the sum total of \$95,376.32 should not have been allowed; (2) that the additional compensation to the officers was excessive; and (3) that the credits or offsets against the total charges were not large enough. These objections give rise to the serious questions in the cause. Before taking them up, I will consider two or three of a general character.

1. The statement or list of lots found by the master as being owned by the defendants omits a few lots covered by an avenue called "Maple Avenue," laid out after the death of Thomas H. Buckmaster, the ancestor of defendants, and during the life tenancy of his widow, by one of his sons, who at that time managed the cemetery. See 24 Atl. 6. The claim of complainant is that this was a dedication of the land to the general use of the cemetery, and binds defendants. They, on the contrary, deny that any binding dedication was or could be made under the circumstances. I do not think it proper to decide this question, for two reasons: (1) The proper materials are not before me; and (2) it is a question of law, and not proper for decision by this court, and not necessary for its determination. The decree will be declared to be without prejudice to defendants' claim to these lots.

2. It is claimed that the whole matter of the expense of maintaining the cemetery was brought into an accounting between the parties had in 1887, and settled up to that date. In support of that contention, defendants show that Clara Buckmaster, one of the heirs of Thomas H. Buckmaster, procured a partition between herself and her brothers and sisters of certain lots in the cemetery owned by their father, known as the "Zabriskie Lots," and not included in those here in question, and then brought ejectment for her share of them against the complainant, in which she succeeded, as reported in *Cemetery Co. v. Buckmaster*, 49 N. J. Law, 449, 9 Atl. 591. After that decision the parties settled the controversy so far as those Zabriskie lots were concerned, and the defendants conveyed those lots to the complainant at a price which was arrived at by deducting \$25 a lot from the selling price. This deduction was made on account of the cost

of maintaining the cemetery, etc., and defendants contend that it included all the cost properly chargeable to defendants on account of their ownership, not only of the lots then conveyed, but also of those here in controversy. I do not think the evidence sustains that contention, and agree with the master that the deduction in question was made on account of the share of expense properly chargeable to the lots then conveyed, and to no others.

3. Further objection was made to the refusal of the master to credit defendants with certain sums (amounting, in the aggregate, to \$2,853) received by complainant for the use of a receiving vault belonging to defendants. His refusal was put upon the ground that those moneys were not within the scope of the order of reference. The defendants moved to amend in that regard, and I think the amendment should be allowed, in order that a full settlement may be had between the parties.

This brings us to the serious exceptions. And, first, as to the exceptions taken and objections made to the items of charges amounting to \$98,376.32, contained in a schedule marked "Exhibit C, 1." The complainant produced vouchers for most of those items, which were submitted to the inspection of defendants' counsel. Objection was made to many of them orally, and noted by the stenographer. Later on, defendants presented and filed with the master a paper containing written objections to most of the items composing the great sum in question. Little notice was taken of these written objections by either party, and little or no evidence was given beyond the vouchers in support of the items contained on Exhibit C, 1. At the final argument before the master, each party insisted that the burden of proof was on the other. Defendants claimed that the burden of proof was on the complainant to prove and show that each item in its list of charges was a proper charge for the maintenance of the cemetery as provided in the order of reference. On the other hand, complainant contended that the burden was on the defendants to show that any particular item was not so chargeable; and, further, that defendants' so-called "objections" were not sufficiently specific, in that they did not point out how and why any particular item was not properly so chargeable. The master ruled upon all those questions in favor of the complainant, holding that whatever burden in that regard rested on complainant was overcome by the general affidavit of its officers that the expenditures in question were all made for the purposes mentioned, and allowed all the items except those for fees paid counsel in this cause, as above stated. Plainly, the burden was on the complainant to show, first, that the particular sums of money were, in fact, paid; and this burden was sustained by the production of either the vouchers or canceled

checks, or, in their absence, by proper entries on the books of the company, or other secondary evidence. About this part of the proof, I presume, there was no difficulty. This being done, the burden still remained upon the complainant to show, in the second place, that the payments in question were properly applicable to the particular purposes mentioned in the order; for, obviously, the complainant was not necessarily entitled to credit for all disbursements made by it, but only such as were applicable to the particular purposes mentioned in the order of reference. This last burden might be sustained, and undoubtedly was in some instances, by a mere inspection of the vouchers. I have not seen the vouchers. The greater part of the expenses were for payments on pay rolls of laborers in the employ (steadily, as I infer) of the complainant in and about the cemetery grounds. The burden as to those payments would be sustained by showing generally that the work was done for the specific purpose mentioned in the order. But there appear on Exhibit C, 1, a number of items of charges, some of which seem to me to be clearly not chargeable to those purposes, and many others which do not indicate the purpose for which they were made, and which require other evidence to support them. For instance, all the charges for costs, counsel fees, and expenses of the suit with Clara Buckmaster were, in my judgment, clearly not chargeable to defendants; and, in fact, it is difficult to see what lawsuit the complainant had or could have had the expenses of which were so chargeable. Indeed, as to all charges for legal services, it seems to me a heavy burden was cast on complainant to show how they could possibly be considered as within the scope of the inquiry. There are numerous other items of payment which, as before observed, should not be allowed without proof that they were within the scope of the inquiry, and the mere general oath of one of the officers of the company that they were expended for the purpose named would not, generally speaking, be sufficient, for the reason that it would be a mere expression of opinion or deduction made by the witness from facts not disclosed. In short, it must affirmatively appear by consideration of the nature and character of the payment itself that it was made for the purpose in question. It does not appear that the master acted upon such consideration. I think there has been a serious miscarriage with regard to the proof of the items found on Exhibit C, 1, which was due, however, in part at least, to the failure of the defendants to properly specify the grounds of their numerous objections thereto.

The next exception relates to the allowance for salaries of officers beyond what was actually paid. This allowance was inserted in the order on the ground that the class of lot owners who had purchased for burial

purposes when they organized and assumed control of the corporation found the treasury empty, and the officers were obliged to work for years for little or nothing, and that the defendants had the benefit of their work, and ought to pay for it. The treasurer and acting secretary of the complainant corporation during the first three years of the period in question was a Mr. Van Sann, and from January 1, 1881, was Mr. Haskins, cashier of a bank in Jersey City. The performance of the duties of secretary and treasurer of the complainant corporation did not prevent the performance of his duties as cashier. Mr. Van Sann during his incumbency appears to have been paid \$1,000 a year. Mr. Haskins was paid at first \$100 a year, then his salary was increased to \$300 a year, then to \$400, then to \$650, then to \$750, and at last fixed at \$800 a year, at which sum it appears to have stood. The master fixes his compensation at \$1,000 a year; finds the amount already paid him during the 11 years of his service up to January 1, 1892, to be \$2,025; and adds to that \$8,975, which sum he adds to the amount found on Exhibit C, 1. I have not before me the table by which the master made up the sum of \$2,025 as having already been paid. I make the amount \$3,375. I think the amount allowed (\$1,000 a year) is liberal enough, and would have been better satisfied if the master's estimate in this and in the other cases had been made up by personal inspection of the amount of work actually done by the secretary and treasurer, instead of relying upon the estimate of the treasurer himself as to what his services were worth. The evidence of the other witnesses who estimated the value of this officer's services I consider of no value whatever. The treasurer himself swears that for the first years of service the labors were light, and increased as his salary was increased. Upon the whole, I am satisfied to permit this allowance to stand.

The next officer dealt with was the president. He, as well as the cashier, was engaged in other business, and did not devote his whole time to the business of the cemetery. He never made any charge and never received any compensation for his services. The master allowed him \$1,000 a year, or, in all, \$14,000. The president is now dead, and the amount allowed is not fixed on the basis that, when recovered from the defendants, it will be paid to him or his representatives, but as being what defendants, who were having the benefit, in a commercial point of view, of the services rendered, ought to pay. The same remark applies to the case of the treasurer. Taking all the evidence together, I think the allowance by the master for president's salary was too great, and that \$500 a year, or \$7,000 in all, was sufficient for his services.

The next objection relates to the amount credited by the master against the cost of

general maintenance, for moneys received by complainant for interment fees, and for the labor of its men for work done for individual lot owners on their lots and for the proprietors of an adjoining cemetery. The amount of interment fees in the complainant's cemetery was \$51,597.50. There were also interment fees in an adjoining cemetery, called the "Bay View Cemetery," where the work was done by the same laborers, amounting to \$2,722.75. There were other receipts from the labor of the same men for individual lot owners, amounting to \$17,132.81. These fees were earned, confessedly, by the labor of the men whose names were on the pay roll, working under the supervision of the superintendent, whose pay was charged as part of the expenses, using tools, implements, buildings, etc., the cost and wear and tear of which were also charged in the expenses, all of which went to make up the sum total of \$98,376.32, before mentioned. The master went into an accounting of what was the actual net cost of the labor which produced these results, and credited to expense account only the net sum which he ascertained upon the evidence of the superintendent to be the net cost. Thus, for interment fees in the complainant's cemetery, instead of crediting the sum actually received, \$51,597.50, he credited one-quarter of that amount, \$12,899.37; for the interment fees in the Bay View Cemetery, instead of crediting the whole, viz. \$2,722.75, he credited one-half, \$1,361.37; for the other receipts, \$17,132.81, instead of crediting the whole, he credited one-half, or \$8,566.40. The ground on which this division was made was that all above the net cost was profit, and he was informed that the court had, on an interlocutory motion, decided that the complainant was entitled to all profits that it made by its operations. In that he was misinformed. The decision referred to was made under these circumstances. It appears, as set out in the original opinion (24 Atl. 2), that, when the cemetery speculation was first launched (1850-60), in order to exploit the enterprise a large number of plots or lots were given away or sold at a nominal price to benevolent societies, Odd Fellows, Free Masons, and the like; and when the Buckmaster management was overthrown, and the persons who had bought lots for burial purposes associated themselves under the charter, ousted the Buckmasters, and took possession of the cemetery, as it was held they were entitled to do, they found themselves without means to put it in order, and cast about for sources of revenue, and bought up cheaply, in the market, those lots which had been sold or given away years before, and retailed them out at a large profit to persons who wished to buy for burial purposes. And the question propounded to the court on the interlocutory motion was whether or not the complainant, in the present accounting, should be charged

with those profits; and it was decided that it should not, for the simple reason that the care and attention which produced them were not within the scope of the duties of complainant's officers, and, as officers, they were not paid, or supposed to be paid, by complainant to do that work, and, if they chose to turn profits made in an outside enterprise in for the benefit of the company, it was a pure gift, in which the defendants, as owners of unimproved lots, had no interest. But I do not think that the decision so made applies at all to the case of the product of the labor of the pay roll workmen of the complainant. They apparently were at work by the month, with, as before remarked, tools and implements provided by the complainant, and under the supervision of a paid superintendent. They opened, filled, and sodded graves, and placed headstones and monuments, as the demand for that work arose. Necessarily, as in all such cases, in order to make both ends meet at the end of the year, there must be an apparent profit on each transaction, else there would be nothing left out of which to pay the expenses of maintaining the establishment, with the superintendent and all the tools, implements, etc., and to cover the fractions of time when the men must, for various reasons, necessarily be idle. The charge for opening a grave and filling it, and removing the surplus dirt, was \$5, and the superintendent swore that the net cost of that was \$1.25, and the master allowed only one-quarter of the amount collected. As a jurymen, I believe this estimate is grossly erroneous, and that the work could not, taking it from one year's end to another, be done for any such money. The amount for interment fees received from the adjoining Bay View Cemetery was \$2,722.75, one-half only of which was computed as profit and allowed. And so, in the case of other receipts amounting to \$17,132.81, only one-half of these were allowed against expenses. So that out of \$71,453.06, the aggregate of the items just mentioned, there was allowed only \$22,827.15, or less than one-third of what was received by the complainant for the labor of the men and the use of the implements and buildings and grounds, all of which had been charged against the defendants. I am unable to approve of that result or perceive upon what principle it can be sustained. Whatever profit there was in it was the result of the business management of men whose salaries are charged against the defendants, making use of offices, buildings, and implements, the cost of which was charged against the defendants. I am unable to see how the cost of taking care of and maintaining the fences, roads, paths, etc., can be properly arrived at without crediting against the outgo the income from those several sources.

The application here of the so-called "rule" that the defendants are not to have the benefit in this accounting of profits made upon

he work of the laborers of the complainant seems to me to work gross injustice. The idea upon which the order was made charging the defendants with their share, according to the number of lots owned by them, of the cost of general maintenance of the cemetery, was that each lot in the cemetery should bear its equal share of that cost. But the plan adopted by the master seems to me not to produce that result. If defendants are to be charged with \$19,012.83, actual cash paid into the treasury by reason of their holding one-fifth of the whole number of lots, then the other lot owners owning the other four-fifths should be charged with \$76,493.41 in actual cash paid into the treasury. Now, there is no pretense that any such sum has been paid by such lot owners. On the contrary, the proofs show that such payments during the period in question amounted to only a few hundred dollars a year, when they should have amounted to as many thousands if each lot owner had paid at the rate above fixed. The result is that the cemetery has been maintained largely from the proceeds of the sales of defendants' lots, amounting to \$14,480, and from fees from the use of defendants' receiving vaults, amounting to \$2,853, making a total of \$17,333. An examination of the figures will show that this sum covers nearly the whole cost of maintaining the cemetery. The total cost during the period in question (including several thousand dollars expended in litigation) was, as we have seen, \$98,376.22. The amount received from all sources except from sales of defendants' lots and vault fees was as follows: Burial fees, \$51,597.50; Bay View cemetery work, \$3,062.50; Bay View Cemetery burial fees, \$2,722.75; other receipts for work done by complainant's laborers upon individual lots, \$19,985.81,—making a total of \$77,368.56, which, deducted from \$98,376.22, leaves \$21,007.66, for the actual cost of maintenance (including costs of litigation), of which sum the defendants contributed, by sale of lots, \$14,480; and vault fees, \$2,853, total, \$17,333, which deducted from \$21,007.66 leaves \$3,674.66 as the actual sum coming from all other sources except that contributed by the defendants. And the master's report not only appropriates all the proceeds of the sale of defendants' lots and use of defendants' vault, but brings them still in debt: \$532.33—\$2,853—\$1,679.33. This has the appearance of confiscation.

Further, in opposition to the contention that defendants are not entitled to the benefit of what are called "profits," defendants contend that the result of the opinion heretofore filed in this cause is to place the complainant in the position of a trustee of the defendants in the management of the affairs of the cemetery, and that the relation thus established forbids the trustee from making a profit out of the business of its cestui que trust. It will be remembered that the theory of the opinion on this part

of the case is that the legal title to the lots was in the defendants, and that the right of disposition of them by sale for burial purposes was vested in the complainant corporation, but that the complainant was bound to account to the defendants for the proceeds thereof. This seems to me to create the position of trustee and cestui que trust. The defendants contend that the general rule that a trustee is not entitled to make a profit out of the cestui que trust's business should be enforced without relaxation in this case, because the defendants have no voice, according to complainant's theory, in choosing the officers of complainant, or otherwise in its management. I think this position is well taken. The theory of the opinion was that the actual sales for burial purposes created, under the terms of the corporate act, two classes of lot owners, one including the original proprietors, now represented by defendants, and the other the owners of lots purchased for burial purposes, and that the latter class composed the membership of the corporation proper. That class first asserted it in organization, and assumed control in 1878, and have since exercised exclusive control of the affairs of the corporation, including, as before observed, the right to dispose of the legal title to the defendants' lots, by selling the same for burial purposes. Hence their position is that of trustee, with all its incidents.

Finally, each party charges the other with conduct which, it is contended, ought to influence the court in dealing with the present questions. Complainant says that it was driven to assume control of the cemetery by the neglect of the defendants to keep the grounds in decent order. On the other hand, defendants complain, first, that complainant denied their right in the premises, and drove them to an action at law to establish it, and, when the complainant was therein defeated, it set up in its bill herein an unfounded title in equity; and, further, that, in the management of the cemetery by complainant's officers, they have discriminated against defendants' lots, have purposely avoided selling them, have not given them the benefit of the general improvements of the grounds, and have fenced a portion of them out of the grounds, and have promoted the sale of lots in an adjoining competing cemetery. I think each of these contentions has some solid ground. The evidence indicates that many of the defendants' lots are not favorably situated, and are not naturally available or desirable, and do not command so ready a sale as those already disposed of; that one portion of the cemetery in which they lie is in a state of nature, covered with trees and brush, and is not included in the inclosure. These circumstances certainly make the application of the principle of the decree to these lots somewhat harsh, but I have not taken it into account in arriving at the result above intimated.

The result is as follows: The first, second, and third exceptions are overruled. The fourth to the twelfth, inclusive, have not been examined, and are not passed upon. The thirteenth is overruled. The fourteenth is sustained in part. The fifteenth is sustained in part. The sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, and twenty-fourth are sustained. The twenty-second and twenty-third are overruled. The report should be set aside, and the account annexed is referred back to the master, to be restated in accordance with the principles hereinbefore set forth. I will so advise.

**LEHIGH VAL. TERMINAL RY. CO. v.
CURRIE et al.**

(Court of Chancery of New Jersey. Jan. 18, 1896.)

**RAILROAD BRIDGE—CONSTRUCTION—OBJECTION OF
LANDOWNER—COMPROMISE—CONTRACT—
DAMAGES.**

1. An ordinance changing the grade of a street was passed to enable complainant to construct a railroad bridge. Said ordinance was removed to the supreme court on certiorari by defendant landowners, and work under the ordinance was stopped. Pending the litigation it was agreed that the suit should be discontinued, that all parties should consent to said change of grade, and that complainant should pay to defendants a certain sum; and an additional sum was to be deposited, to be paid to defendants if the ordinance was not set aside on any other writ of certiorari, or if, pending any certiorari, the road should be actually constructed at the grade established by said ordinance. Otherwise, the money deposited should be returned to complainant. Afterwards, and before the road was constructed, the ordinance was set aside on certiorari. After complainant sued out a writ of error, an agreement was made whereby the grade fixed by the ordinance, except immediately under the bridge, was changed, other alterations were made, and all litigation between the parties discontinued. *Held* that, as the ordinance was set aside before the road was constructed, and as the road was constructed, not under the ordinance, but by virtue of such agreement, defendants were not entitled to the additional amount deposited with said trustee.

2. The fact that defendants were damaged to the total amount fixed in the contract, and that complainant obtained the advantages for which the money was to be paid, did not entitle defendants to the fund under the contract.

3. As said fund was not stated, in the contract, to be compensation for damages, sustained by defendants, and as the contract provided that, if any assessments were made against defendants for benefits, amounting to more than the award to them, complainant should pay the excess, and as complainant had agreed to make said change in grade and all improvements at its own expense, defendants are not entitled to claim said fund as damages.

4. After said ordinance had been set aside, complainant, fearing that it would have no right to construct, under land belonging to defendants, a sewer which it had agreed with the city to construct, in order to drain the street under said bridge, and that substantial damages would be assessed for change of grade, proposed to defendants to pay the fund in controversy in satisfaction of all damages resulting from the change of grade, and to prevent their interference with the construction of said sewer. *Held*, in a suit to

determine the title to said fund under the original contract, that said proposition was inadmissible as evidence of any liability on the part of complainant.

Suit by the Lehigh Valley Terminal Railway Company against Ellen Currie, executrix, and others, to determine the title to a certain fund deposited in trust. Decree for complainant.

The object of the bill is to establish the right of the complainant to, and to obtain, the sum of \$5,000 deposited by it with two trustees, under a written agreement and circumstances as follows: Complainant is a corporation organized under the general laws of the state of New Jersey, and is formed by the consolidation of certain other railway companies with the Jersey City, Newark & Western Railway Company, and by that means is the successor to all the rights of that company, and for present purposes may be considered as identical with it. It is the proprietor of, and operates, a railway running from the city of Newark to the waters of New York Bay, crossing Newark Bay and Bergen Neck upon a course of about northwest and southeast. Bergen Neck, at that point, is crossed by a series of parallel streets, which are designated by numbers, having a course identical with that of the railway, and is traversed, northeast and southwest, by other streets, which are designated as Avenues A, B, C, etc., within the limits of the city of Bayonne. For purposes of a railway route, complainant and another railway company purchased, or acquired by condemnation, all the land between Fifty-Ninth street and Sixtieth street, and, prior to 1889, laid out its route parallel with those streets, and between the two. The first avenue which its route crosses after leaving Newark Bay is Avenue A; and its plan of crossing the bay, approved by the secretary of war, was such as required that it should cross that avenue at an elevation of a few feet above the natural level of the surface of the avenue at the point of crossing, and a little above the grade which had been adopted for Avenue A by the authorities of Bayonne. The avenue had never been worked to the city grade, and there were very few buildings in the neighborhood, although the land was laid out into building lots. This plan of the complainant required that the grade of the avenue between Fifty-Ninth and Sixtieth streets, and for some considerable distance northeast of Sixtieth street and southwest of Fifty-Ninth street, should be altered, and the grade of the street lowered, so that the railway could cross on a bridge over the avenue. In September, 1890, the complainant caused an application to be made to the common council of the city of Bayonne for the desired change of grade, and an ordinance to that effect was adopted or passed in that month. That proceeding was removed to the supreme court by a certiorari issued at the instance of the defendants, who owned most of the land fronting on both sides of Av-

enue A, to the north of Sixtieth street and to the south of Fifty-Ninth street, and which would be affected by the proposed change of grade. The company, being satisfied that that ordinance could not endure the test of judicial examination, induced another party interested to bring a certiorari to hasten the proceeding, so that it was set aside in November, 1890. A fresh application, which was supposed to be free from the objections which were urged against the first one, was made in November, 1890, with the result that the city council passed an ordinance, on the 16th of December, 1890, changing the grade as requested. That ordinance was vetoed by the mayor on the 27th of December, 1890, and passed over his veto on the 13th of January, 1891. Upon the passing of that ordinance, the complainant entered into a written contract with the common council by which it agreed to do all the grading of Avenue A in conformity with the grade established by the ordinance of December 16, 1890, and to construct a main sewer on the center line of West Fifty-Ninth street, from Avenue A to Newark Bay, for the use of the public, and to be connected with receiving basins, to be constructed as designated by the city, and to pave with Belgian block or Macadam pavement, and properly curb the roadway and flag the sidewalks of Avenue A, from Fifty-Ninth to Sixtieth streets. It also provided for the lowering of the grade of Fifty-Second, Fifty-Third, Fifty-Fourth, Fifty-Fifth, Fifty-Sixth, Fifty-Seventh, Fifty-Eighth, Fifty-Ninth, Sixtieth, Sixty-First, and Sixty-Second streets where they intersected with Avenue A. It also provided that it should carry its railway across the avenue on a bridge giving an underclearance of at least 18 feet, to be supported on piers 100 feet apart, the width of the avenue being 70 feet, "for the purpose of encouraging the laying out and constructing of a county road or boulevard at this point." It also provided that the complainant should pay all the expenses and costs of the improvement pursuant to section 62 of the charter of the city. A second writ of certiorari was allowed, upon the prosecution of the defendants, to remove to the supreme court this ordinance of January 16, 1891, and the litigation under that certiorari was pending on the 2d of October, 1891, all work under the ordinance and contract between the complainant and the city being, in the meantime, stopped.

On the 2d of October, 1891, the parties to this suit entered into a contract under seal in these words:

"Agreement, made this second day of October, eighteen hundred and ninety-one, between the executors and trustees of the estate of James Currie, deceased, and Jeanette Imbrie and William M. Imbrie, her husband, of the one part, and the Lehigh Valley Terminal Railway Company, of the other part.

"(1) The sum of thirteen thousand dollars shall be forthwith, upon the execution hereof, deposited by the company in the New Jersey

Title Guarantee & Trust Company to the credit of W. D. Edwards and C. L. Corbin, trustees, to be drawn only on their joint check.

"(2) A consent to discontinue the pending suit on certiorari in New Jersey supreme court, between said executors, as prosecutors, and the city of Bayonne, to review the ordinance for change of grade of Avenue A, shall be at once procured from the attorneys of record of the prosecutors, and a rule to discontinue obtained from the judge and entered in the minutes, whereupon eight thousand dollars of said fund on deposit shall be paid to said executors or their attorneys.

"(3) All the parties hereto assent and agree to the change of grade of Avenue A, as ordained by ordinance, passed January 13, 1891, by the council of Bayonne, and to the contract made between the city of Bayonne and the Jersey City, Newark & Western Railway Company (now merged in the Lehigh Valley Terminal Railway Company), dated February 2, 1891, which contract the railway company will forthwith proceed to carry into effect upon the discontinuance of said suit.

"(4) If no further writ of certiorari shall be allowed before the 1st day of January, 1892, and if no application for a writ shall be then pending, said railway company shall pay to said executors the balance of five thousand dollars on deposit, with the interest earned thereon, and with a further sum sufficient to make the total interest thereon six per cent. per annum from this date. If there is then pending any writ of certiorari or application, payment shall be deferred until the determination thereof. If the ordinance for change of grade shall be set aside, then the said fund on deposit shall be returned to the said railway company. Should the ordinance be sustained, then the said fund shall be paid to the said trustees and executors with a sufficient additional sum to make the total interest earned thereon the sum of six per cent. per annum from the date hereof. If, however, the roadbed, pending any certiorari, shall be actually constructed, and rails laid for traffic, at a grade accommodated to that established by the ordinance of January 13, 1891, and not to the prior established grade, in such case the payment of said deposit shall be made to the executors upon such construction.

"(5) The company agrees that, in case any assessments for said change of grade shall be made upon the lands of the estate of James Currie or Jeanette T. Imbrie, over and above the awards which may be made to them for said change of grade, the said railway company will pay such excess of assessments.

"In witness whereof, the said parties have executed these presents the day and year first above written."

Pursuant to that agreement the complainant forthwith deposited \$13,000 to the credit of Messrs. Edwards & Corbin, and they at once paid to the defendants the sum of \$8,000, and the suit of certiorari was discon-

tinued and dismissed by order of the supreme court, entered by consent of parties on the 3d of October, 1891. The complainant then commenced the active work of changing the grade of the street, and the erection of abutments for the bridge, but were stopped before they had made much progress by the intervention of a new litigant. On the 31st of October, 1891, a third writ of certiorari was allowed and issued out of the supreme court, on the prosecution of the board of chosen freeholders of the county of Hudson, by which the same ordinance was removed to the supreme court, and work thereunder was stopped. In fact, the board of chosen freeholders had formally adopted Avenue A as a county boulevard, and made it 100 feet wide instead of 70 feet. Litigation followed under that certiorari, and on the 18th of February, 1892, the supreme court (54 N. J. Law, 293, 23 Atl. 648) set aside the ordinance, with the result that all authority for the complainant to reduce the grade of the street, and build its bridge at the desired height, was destroyed. The complainant removed the judgment of the supreme court, setting aside the ordinance in question, by writ of error, to the court of errors and appeals, and then, on the 24th of March, 1892, made a settlement whereby it dismissed its writ of error and entered into an agreement with the board of chosen freeholders by which the grade fixed by the ordinance of the common council of Bayonne of January 16, 1891, was changed. The grade immediately under the railroad crossing was left substantially the same as that fixed by the common council, but the approaches to the railway bridge from each side were made a little steeper, so that, for a considerable portion of the distance on one side, there was about 3 feet less cut, and on the other side from 1 to 2 feet less cut, in front of the lands of defendants. The width of the excavation, however, was 100 feet instead of 70; and provision was made for some sewers to be built at the expense of the complainant, in addition to those provided for in the contract with the city. Provision was also made for supporting columns of iron under the bridge, to be placed at the edge of the sidewalks, so that the actual span, instead of being 100 feet was 60 feet. The paving and flagging were substantially the same as in the contract between the complainant and the city. All the work was to be done by the complainant at its expense. The complainant also agreed to indemnify the county against all damages that it might be required to pay by reason of the adoption of the new grade, and construction of the road thereon. Under statutory proceedings taken by the county to ascertain the damages resulting to the landowners by such change of grade, and the taking of 30 feet of land for additional width, the defendants appeared and claimed damages by reason of the alteration of the grade, and also for the additional land

taken, with the result that the commissioners appointed to ascertain such damages awarded them only nominal damages. Thereupon the complainant demanded the sum of \$5,000 standing in the name of the trustees, and, the trustees not being agreed as to its right thereto, this suit was instituted. The trustees were made parties defendant, but took no part in the litigation.

The defendants Currie, executrix, and Imbrie and wife answer, and combine with their answer a cross bill, in which they set up that the sum of \$13,000 deposited was fixed upon as the amount of damages which would be actually inflicted upon the defendants' land by the change of grade, and that \$8,000 of it was paid them on that account, and that \$5,000 was retained simply to insure the complainant against any further certiorari being issued by the defendants or any landowners similarly situated. It further states that, at the time the agreement between the parties hereto of October 2, 1891, was made, it was understood that the authorities of Hudson county might object to the grade thereby established; and, further, that the complainant was not hindered by the certiorari of the board of freeholders, but continued the construction of its road without interruption; and that the agreement of October 2, 1891, has been practically fulfilled by defendants; and that the work which the complainant was obliged to do under the contract with the county was no greater than that which it agreed to do under the previous contract with the city; and that it was not hindered and delayed in the prosecution of its work by the certiorari of the city, and has derived all the benefit, under the contract of March 2, 1892, that it ever expected to derive under that of October 2, 1891. Hence, in equity (so they argue), the defendants' right to the fund is clear. The defendants rest their legal right to the \$5,000 under this clause of the agreement: "If, however, the roadbed, pending any certiorari, shall be actually constructed, and rails laid for traffic, at a grade accommodated to that established by the ordinance of January 13, 1891, and not to the prior established grade, in such case the payment of said deposit shall be made to the executors upon such construction."

C. L. Corbin, for complainant. W. D. Edwards, for defendants.

PITNEY, V. C. (after stating the facts). By the fourth paragraph of the contract made October 2, 1891, the fund of \$5,000 now in controversy was to be paid to the complainant, in case the ordinance of the city changing the grade of Avenue A should be set aside on certiorari, unless, pending the certiorari, the complainant's roadbed should be actually constructed and rails laid for traffic. It is admitted that the ordinance was set aside on certiorari at the February term, 1892, and that the roadbed had not then been constructed across the avenue, and that no rails

d been laid for traffic, and, in fact, that no ls at all were laid or could be laid across enue A until some months afterwards, en they were laid, not under the protec- n of the ordinance and agreement of the y, but under a new agreement made by the plainant with the county freeholders. By e express terms of the contract between the rties, therefore, the complainant's right to e fund is established.

The defendants contend that they should re- ve this sum of \$5,000 because they have ually suffered the damages, and the com- ainant has obtained the advantages, for ich this \$5,000 was to be paid. If this re the case, it would not establish the claim defendants, or impair that of complainant this fund. The defendants can have no im at law or in equity, upon the fund, ex- pt by the contract under which it was de- sited. Apart from the contract, the rela- n of defendants to the complainant is mere- that both parties own land abutting on the ne highway. The complainant applied to e chosen freeholders of the county, who con- dled this highway, for a change of grade, d the chosen freeholders made the change. fendants allege that they have been dam- ed by the change. If so, their remedy, if y, must be against the county, unless the nplainant has, by its agreement, placed it- f under some liability for the damages to fendants. If such liability had been cre- ed, defendants could, of course, resort to an ppropriate remedy to enforce it; but that ould not establish their right to this fund. e money was put in the hands of the trus- s, not in trust to satisfy damages from ange of grade, but to pay on certain con- gencies. The contingency has happened ich required the payment to complainant. e trustees can only pay the money strict- as the contract requires, and the court can- t divert it to other purposes however mer- rious. The trustees are mere depositories. ey hold the money on a special trust, to y as the agreement stipulates; and, under h a special trust, the rule stated by Lewin

"The duties thus prescribed to him, the stee is bound strictly to pursue, without erving to the right hand or to the left." win, *Trusts*, 572. If, however, the fund re placed at the full discretion of the trus- s, and of the court, to dispose of accord- g to equity, as between these parties, the ult would not be different.

It seems to me that the circumstances nega- e the allegation of defendants that the sum osited with the trustees represented dam- es which the defendants would actually ffer by the proposed change of grade. It not so stated in the contract, and the indica- ns are the other way; for the fifth section ovides that, if any assessments are made ainst the defendants for benefits by reason the proposed change of grade, over and ove the awards to be made to them for mages, the complainant shall pay such ex-

cess. Moreover, the complainant, in its con- tract with the city, had undertaken to pay all the expenses of the improvement under the sixty-second section (P. L. 1872, p. 717) of the charter of the city. I am satisfied, from all the circumstances, that the payment was made simply to buy off the defendants' oppo- sition. They were able to seriously embar- rass and delay, if not to actually defeat, com- plainant's plan to so depress the avenue at the point in question as to enable it to build its road at the grade it desired, and to avoid crossing the avenue at grade. Any consider- able delay was a serious matter, resulting, as it must, in loss, in the meantime, of the use of the other parts of the road. The \$5,000 here in dispute was retained as a guaranty, not only against any further interference by cer- tiorari on the part of the defendants, or other persons similarly situate, who might be in- fluenced by the defendants, but also against the interference of the board of chosen free- holders of Hudson county, the danger of which, I am satisfied, was present in the minds of the parties when the contract was executed. The avenue was little more than a paper street. The amount of travel upon it was but trifling. It had never been grad- ed or curbed, and no buildings had been erect- ed upon it in that neighborhood. Under these circumstances, it is not surprising that the commissioners appointed under the proceed- ings of the board of chosen freeholders award- ed defendants nominal damages. Moreover, the supposed injury to the defendants' prop- erty was considerably less under the grade adopted by the board of freeholders than un- der that adopted by the city; and the de- fendants had the benefit of having a sewer constructed, which would drain most of their land, without being subjected to assessments for the cost of it. The act of April 7, 1888 (P. L. p. 397), under which the freeholders proceeded, provides, in its sixth, seventh, and tenth sections, for the ascertainment and pay- ment of all damages caused by reason of changes of grade such as were here made. The language of the tenth section is: "In case any grade shall be changed, compensa- tion shall be made to the person injured, if any there shall be, by such altered grade, such injury to be ascertained in the same manner hereinbefore (sections 6, 7) provided in the case of land taken." With this provision in full view, complainant stipulated, in its con- tract of March, 1892, with the freeholders, to pay all damages which might be awarded to be paid by the county to any persons injured by the change of grade therein provided for. The evidence shows that complainant feared that substantial damages might be awarded to defendants under this proceeding; also, that it was liable to be disturbed in its work of constructing the sewer it had agreed to build in Fifty-Ninth street, outside the juris- diction of the county, and which was neces- sary in order to drain the boulevard at the low point immediately under the proposed

bridge. The land on each side of that part of Fifty-Ninth street, under which the sewer was to be laid, belonged to defendants; and counsel for complainant feared that 'it had no right, as against defendants, to construct that sewer, after the ordinances in question, which sanctioned that construction, had been set aside. 'To provide against these two matters, viz. the possible award in favor of defendants, and their interference with the construction of the sewer, counsel for complainant, shortly after the execution of its contract with the county, approached defendants for a new contract with them, and submitted a draft of one which its counsel thought it would enter into. This proposition was declined by defendants, but the unexecuted and unaccepted draft was set up by defendants in their answer, and relied upon at the hearing, as an admission by complainant of defendants' right to the fund in question. I do not think it is competent evidence for that or any other purpose, and admitted it subject to the objection of the complainant, and with the remark that I thought it was incompetent. But, upon looking at it, I find in it no more than an offer to pay the fund here in question to the defendants in full satisfaction of all damages which might be awarded to the defendants by reason of the change of grade provided for in the contract with the freeholders, provided that no further interference, by certiorari or otherwise, should be made with the work of complainant. I can find in this offer no admission of defendants' equity. It was, as before remarked, declined by defendants, and they afterwards went before the commissioners appointed under the act last cited and claimed damages.

An attempt was made to prove, at the hearing, that the defendants' claim for damages was so framed and pressed as only to ask for damages over and above the sum named in the agreement of October 2, 1891, and that the nominal sums awarded were, in fact, just so much over and above that sum. I think the attempt failed. Notice was given, in writing, to the commissioners, by the defendants, that they did not waive their contract rights by their appearance; but there was no waiver by defendants of their right to damages from the county, and there is nothing on the face of the awards, which are in evidence, to indicate that any such matter was considered by the commissioners. Nor does it appear that this notice was brought to the attention of complainant, or that the commissioners could have taken into consideration the contract of October 2, 1891, or that it was ever produced before them. The statute under which the commissioners were appointed prescribed their duties, and conferred no power to pass upon this contract.

The principal reliance of defendants was upon the last clause in the fourth section of the contract which provided as follows: "If, however, the roadbed, pending any certiorari, shall be actually constructed, and rails laid

for traffic, at a grade accommodated to that established by the ordinance of January 13, 1891, and not to the prior established grade, in such case the payment of said deposit shall be made to the executors upon such construction." The purpose of this clause was, probably, to provide for the contingency that the apprehended new writ of certiorari might be allowed without a stay, or that some fresh statutory authority might be obtained, and that, therefore, the complainant might be able to construct its bridge across the street, and might venture to do so without suffering the delay apprehended from the pendency of a certiorari suit. It is contended by defendants that the work of complainant was not seriously interfered with by the successful certiorari, and that it was able to prosecute its work with as much speed and dispatch as if the certiorari had not been brought and allowed. That is true as to some parts of their road, but not as to the 100 feet in length which included Avenue A, and this is the very point where the complainant apprehended the delay which its contract was made to escape. At that point it could not place its bridge, without first excavating the street, and reducing the grade, so as to permit the travel to pass under; and it could not reduce the grade without municipal authority. It commenced the work of excavation at that point immediately after the dismissal of defendants' certiorari, on October 3, 1891, but was stopped, promptly, by an injunction at the suit of the county, and then, on October 31st, finally stopped by the allowance of the certiorari prosecuted by the county. At that time only a trifling amount of excavation had been effected, and the work at that point stood in that condition until after the agreement with the freeholders of March 24, 1892, when it was pushed, and progressed so rapidly that the bridge was placed on the piers in June. Prior to that, of course, no rails were or could be laid across Avenue A, and none were laid for some distance on either side of it. These facts, of course, exclude the idea of any literal or substantial fulfillment of the condition of the contract now under consideration. Defendants say that the spirit of the clause is that, if there is no substantial delay caused by the certiorari, then the \$5,000 should be paid over. But the certiorari suit not only delayed, but wholly defeated the change of grade which the contract was made to protect, and the delay caused by the certiorari would have been (presumably) perpetual, but for the compromise with the county, and the contract with it of March, 1892, by which the complainant procured a different change, causing less excavation in front of the lands of defendants, and came under new obligations, varying from those contained in the contract with the defendants. The completion of the road was not, in fact, accomplished, pending the certiorari, and in spite of it. Hence, the case is not brought within the proviso in question.

The contract of March, 1892, between the complainant and the county, provided for the discontinuance of all suits between the parties; so that the certiorari could not be considered as still pending, even if a writ of error could be considered as reviving the ordinance, during the suit, after the final judgment of the supreme court February 18, 1892. The result is that the evidence introduced by the defendants to show that complainant prosecuted its work after the certiorari with industry, and without interruption, makes against the defendants, rather than in their favor, since it shows the good faith of complainant in prosecuting its work as rapidly as possible. The difficulty in the way of defendants is that proceedings under the certiorari did not continue long enough to fulfill the terms of the clause in question. The roadbed was not actually constructed, and the rails laid for traffic, pending any certiorari.

I think the complainant is entitled to the fund. The trustees have each answered, and must be paid their costs. Such costs were rendered necessary by the refusal of the real defendants to consent to the payment of the fund to complainant. The trustees may retain their several costs out of the fund, and the defendants Currie's executors and Imbrie must pay complainant its costs, including the amount so retained by the trustees. I will so advise.

MORRILL v. PALMER.

(Supreme Court of Vermont. Orleans. July 7, 1895.)

COMMON-LAW MARRIAGE—VALIDITY—SECOND MARRIAGE WITHOUT OBTAINING DIVORCE—FRAUD—EFFECT OF SUBSEQUENT DIVORCE FROM FIRST WIFE—ACTION BY SECOND WIFE FOR DECEIT—LIMITATIONS—CONTINUING FRAUD—EVIDENCE—DAMAGES—REMARKS OF COUNSEL—WITNESS—CROSS-EXAMINATION.

1. Since marriage was regulated by statutes passed at the first session of the general assembly (1778), and at the session in February, 1784, and has from that time been under statutory regulation, Act 1779, establishing common law in the state, and Act June, 1782, adopting "so much of the common law of England as is not repugnant to the constitution or any act of the legislature," did not govern marriages, and the doctrine of common-law marriage was never in force in Vermont.

2. Under Act Feb., 1784, requiring publication of intention to marry, and prohibiting officials other than those named therein from performing the ceremony, a marriage solemnized in any other manner than that prescribed was void.

3. In an action for deceit against one who induced plaintiff to marry him while he had a wife living, it will not be presumed, in the absence of proof that defendant had not been divorced before marrying plaintiff, that he was so divorced, where defendant admitted in his brief that he had a wife living at the time of the second marriage.

4. Where defendant induced plaintiff to marry him by false representations that he was then unmarried, and to live with him as his wife for over 30 years until she discovered the fraud, defendant's acts after the marriage, consisting in a continuation of the relation and fraudulent

statements as to the legality of the marriage, constituted a continuing fraud; so that limitations against an action for deceit based on wrongfully obtaining plaintiff's services, and placing her in a false and degrading conjugal position, for the whole of such period, began to run from the discovery of the fraud. Rowell and Munson, JJ., dissenting.

5. In an action for deceit against one who induced plaintiff to marry him by false representations that he was single, it appeared that, prior to the marriage, plaintiff was informed that defendant had a wife and child living, and told defendant, who disarmed her suspicion by denying the fact, and offering to take her to the city where they were alleged to be living, and that afterwards, when plaintiff was informed that a certain child was defendant's, and that he had been married before, but had been divorced, but was not informed that the divorce was granted after her marriage, defendant told her that the story about his being previously married was a fraud, and that his marriage with her was valid. *Held*, that defendant could not assert that plaintiff was not deceived by his denials, and had knowledge of sufficient facts to put her on inquiry.

6. In an action for deceit against one who induced plaintiff to marry him by false representations that he was single, where it appeared that defendant was not divorced from his wife until after the second marriage, plaintiff could testify in her own behalf, since the parties were not husband and wife.

7. In such action, where recovery is sought for the insult and injury caused by inducing plaintiff to live in adultery for over 30 years, and rear illegitimate children, and to be subject to prosecution for felony, evidence of defendant's wealth is admissible to enhance damages.

8. In an action for deceit against one who induced plaintiff to marry him by false representations that he was single, and to live with him thereafter for over 30 years as his wife, where the complaint alleged that during such time defendant, with the aid of plaintiff's services, accumulated considerable property, evidence of defendant's wealth was admissible to show the value of such services.

9. Objections to evidence are waived if not made in the trial court.

10. Where defendant testified as to the value of his real estate, including improvements, it was proper cross-examination to ask him the cost of the buildings and the value of a portion of the real estate, for the purpose of showing that the value of a portion was greater than the amount given on direct examination as the value of the whole.

11. In an action for deceit against one who induced plaintiff to marry him while he had another wife, and to live many years as his wife, where there was evidence that plaintiff's sister had lived with the parties, and, after plaintiff left defendant, had remained with him, and had loaned money to him without taking any evidence of debt, a remark of plaintiff's counsel that this "sister, a whitened sepulcher, caused this trouble," was not ground for reversal.

12. Where it was shown that defendant, in an action for deceit for inducing plaintiff to marry him before he was divorced from a former wife, paid the expenses of a subsequent divorce procured by such wife while he was in Canada, and that he had crossed the line for the purpose of being served, and had returned "as a person afraid and ashamed to be seen," a remark of counsel that defendant came across the line, and "sneaked back," was justified.

13. A remark of counsel, in an action for deceit practiced by defendant in inducing plaintiff to marry him when he had a wife living, that "I think there is enough evidence, as the case shows, to hang a man," being merely an opinion on the weight of the evidence, was not ground for reversal.

14. Where the testimony of defendant, in an

action for deceit in procuring plaintiff to marry him when he had a wife living, established the illegitimacy of a daughter of the parties, it was not ground for reversal for counsel to remark that "he does not recognize this daughter, that bears his image, and has no rights but what come through this wronged woman. He repudiates her."

15. A general exception to an instruction as a whole is insufficient if any part of the charge is correct.

16. Where defendant induced plaintiff to marry him by false representations that he was then unmarried, and to live with him as his wife for over 30 years, when she discovered the fraud, a cause of action accrued to plaintiff on the date of the marriage, and continually recurring causes of action arose during the existence of the relation, when defendant was continually obtaining plaintiff's services wrongfully, and placing her in a false conjugal position, so that recovery could not be had for injury suffered further back than the period of limitations. Per Rowell, J., dissenting.

Exceptions from Orleans county court; Tyler, Judge.

Action by Jane D. Morrill against A. W. Palmer for deceit. Judgment for plaintiff, and defendant excepts. Affirmed.

C. A. Prouty and Theophilus Grout, for plaintiff. Dickerman & Young, for defendant.

TAFT, J. 1. The defendant married Calista Adams in 1856, and cohabited with her at Newport, Orleans county, in this state, until 1859, at which time and place he left her. She continued her residence at Newport, and obtained a divorce in Orleans county, in August, 1862. After the defendant left his wife, in 1859, he went to Massachusetts, resided there for a time, and on the 7th day of November, 1860, a marriage was solemnized between him and the plaintiff at Salem, in that state. Under our statute (R. L. § 2309), and under the laws of Massachusetts, the marriage in November, 1860, was void.

It is insisted by the defendant that the conduct of the parties after the divorce, in 1862, made them legally husband and wife, upon the ground that, although the marriage was not solemnized according to the laws of the place where the contract was made, it constituted what is called a "common-law marriage,"—that is, a consummated agreement to marry between a man and woman per verba de præsenti, followed by cohabitation; and that such common-law marriage was a valid one, under the laws of this state. Such marriages have been held valid in some jurisdictions. The question before us is, are they valid in this state? It is claimed that this court in *Newbury v. Brunswick*, 2 Vt. 151, adopted the doctrine, and its language lends sanction to the claim. In that case it was held that a marriage contract per verba de præsenti was valid. The parties had contracted matrimony in Canada, before a justice of the peace, who had no authority to solemnize marriages. The legislative assembly of that

province afterwards passed an act declaring valid all such marriages which had been theretofore solemnized. The court said it was unnecessary to pass upon the question of what effect the act declaring such marriages valid had upon the case. Although they say there was no doubt but that its effect was to legalize the marriage before the justice to every intent, they held that it was valid from the beginning, as a common-law marriage. We think it must be conceded, and that it is beyond question, that the effect of the act made the marriage a valid one, and therefore the case was correctly decided, the court giving the wrong reason. The case, in another respect, was overruled in *Landgrove v. Pawlet*, 20 Vt. 309. The question of a common-law marriage is referred to in *Northfield v. Plymouth*, Id. 582. Although it was not necessary to the disposition of the case, we think the law is correctly stated by Redfield, J., in speaking of certain cases in which the question was involved, who said: "In these and other New York cases stress is laid upon the fact that a marriage per verba de præsenti is valid in that state, and also at the common law if followed by cohabitation. That, I think, could hardly be regarded as law in this state without virtually repealing our statutes upon that subject." It will be observed that in this reference to the question no notice is taken of the prior case of *Newbury v. Brunswick*, supra.

At the first session of the legislature, in 1779, it was enacted "that common law, as it is generally practiced and understood in the New England states, be and is hereby established as the common law of this state." In June, 1782, it was further enacted "that so much of the common law of England as is not repugnant to the constitution or of any act of the legislature of this state be and is hereby adopted, and shall be and continue to be the law within this state." Although the common law of England was thus early adopted, it did not control a subject regulated by statute, if we had a statute upon the subject. The statute superseded the common law. The reason of the adoption of the common law is seen by the preamble to the act of 1782, in which it is stated that "it is impossible at once to provide particular statutes adapted to all cases wherein laws may be necessary." The subject of marriage was early regulated by statute, and the common law in respect to it was never in force. At the first session of the general assembly, in March, 1778, a bill was pending, for the regulation of marriages, and we infer one was passed. What it was is not known, as the acts of that session are not preserved, but the records of the assembly show that a bill relating to marriages was pending. At the session in February, 1784, the subject of marriage was again considered and regulated. The act required the publication of the intention of the parties,

and that no persons whatsoever, other than certain officials or ordained ministers of the gospel, should solemnize marriages, nor presume to marry any man and woman. Although the statute did not declare that a marriage solemnized in any other manner than the one required by the statute was void, we think such was the effect. It is clear to us that this is the proper construction to be given the statute, from the fact that marriages celebrated by the Quakers, in a mode not within the statute, were made legal; and this view is also confirmed by the fact that, by statute (now R. L. § 2310), marriages solemnized before a person professing to be a justice of the peace or a minister of the gospel shall be valid, provided the marriage is in other respects lawful, and consummated with the belief on the part of either person that they were lawfully joined in marriage. If a common-law marriage was valid, there was no necessity for such statutes.

We hold, therefore, that what the learned commentator Kent calls the "loose doctrine of the common law" in relation to marriage was never in force in this state. The law is the same in Massachusetts, the place in which the contract was made.

The defendant insists in respect to this marriage that the court should presume it valid, there being no proof that the defendant had not been divorced from his first wife prior to his marriage with the plaintiff, and cites authorities to support such claim. It is probable that, in favor of morality, innocence, and the legitimacy of children, such presumption might be made, nothing else appearing in the case; but it should not be permitted here, for, quoting from the defendant's brief, "the case shows that at that time (the time of the marriage between these parties) the defendant had a wife living." If he had obtained a divorce from her, prior to that time, she was not then his wife, and he had none living. The defendant testified upon the trial, and, if he had been divorced prior to his pretended marriage with the plaintiff, he did not act in good faith to the court in suppressing that fact, and no presumption of the kind claimed should be entertained in his favor. The case shows the defendant testified that when he heard of the divorce, in 1862, "he supposed the divorce made his marriage with the plaintiff legal." It would be inconsistent in connection with this testimony to presume that he had obtained a divorce prior to the one in 1862. The point is evidently an afterthought of the counsel, being added in penmanship to the printed brief, and is not before us, for it was not raised upon the trial below, and is only noticed here to show that we have the point in mind in considering the main question.

No question is made but that the action can well lie if the case is properly established. This would logically result from Pollock v.

Sullivan, 53 Vt. 507, in which it was held that an action could be maintained by a single woman against a married man for deceiving her into making a marriage contract.

2. The most important question in this case is that of the statute of limitations. Question is made whether the statute began to run from the commencement of the fraud and the marriage in November, 1860, or from the time the plaintiff discovered the fraud, in April, 1894; and, if the cause of action was complete at the time of marriage, what effect the concealment of the fraud had upon the rights of the plaintiff in respect to the statute of limitations. To determine from what time the statute began to run, it is necessary to consider the cause of action upon which the plaintiff seeks to recover. It is alleged that at the time of, and previous to, the marriage, the defendant represented to the plaintiff that he was a single man, and might lawfully contract said marriage; that, during all the years subsequent to said marriage, he represented to her that at the time of said marriage he was a single man, the marriage a valid one, and the plaintiff in all respects his lawful wife. It is also alleged that the plaintiff relied upon the representations; that they were false, and that she was ignorant of their falsity until suit; that, in consequence of such fraudulent representations, the plaintiff married the defendant, bore him children, rendered him much and valuable service during all the time,—i. e. from November, 1860, until April, 1894,—and assisted him in the accumulation of a large amount of property. It is claimed by the defendant that "this action accrued, if ever, immediately on the performance of the marriage ceremony, November 7, 1860, in Massachusetts." Is this claim correct? It is true, she, at that time, had a cause of action against the defendant, but it was not the one she is now seeking to enforce, which is for his defrauding her out of 33 years of service, and having, as a result of his fraudulent acts, caused her to live for that length of time in a false conjugal position. It is error to assume that the cause of action for these wrongs accrued at the time of the marriage. The representations of the defendant were continuous. He perpetrated a most gross, willful, and deliberate fraud upon the plaintiff, not only by his statements that he made prior to his marriage, but by the act of marriage itself, and his continuing to live with the plaintiff as her husband for a generation. It was a continuing fraud. He made these fraudulent and deceitful representations at the time the contract was negotiated, at the time the marriage was solemnized and consummated, and he continued by his conduct to make them daily, "from the rising of the sun until the going down of the same."

The defendant maintained, at the beginning and subsequently, that their relations were legal, and the fact of his living with

her as her lawful husband was a constant repetition of such representation, and amounted to a daily assertion that their relations were legitimate. In this respect the case is similar to the Berkeley Peerage Case, 4 Camp. 417, in which the legitimacy of a son was in question, and it was said that, if the father was proved to have brought up the son as legitimate, this was sufficient evidence of his legitimacy, until impeached; and it is added: "Indeed, it amounts to a daily assertion that the son is legitimate." In a note to *Imperial Gaslight & Coke Co. v. London Gaslight Co.*, 10 Exch. 39, it is said, in speaking of the time the statute begins to run, that it is not from the time of the commencement of the fraud, "at all events in those cases in which the concealment of the wrong is in effect a continuance of the wrong itself, and the whole forms but one cause of action." Although the point was not involved in *Clark v. Hougham*, 2 Barn. & C. 149, the remarks of Best, J., upon the question whether concealment of the fraud prevented the running of the statute, are much in point, viz.: "I do not mean to disturb any of the cases which have been read. In them the fraud was complete more than six years before the commencement of the action; but, according to the evidence in this case, there was a continuance of the fraud within six years. If that had been properly stated in the replication, I think it would have been an answer to the plea of the statute." No single act of the defendant, like the marriage alone, can be carved out, and said to constitute the plaintiff's cause of action. The gist of the plaintiff's claim is that as the result of the defendant's fraudulent representations, extending over a period of 33 years, she has been wronged out of her services for that time, and placed in a false and degrading position for the whole period. We think the plaintiff, being ignorant of the fraud, was not barred by the statute until six years had elapsed after the fraudulent representations had ceased, which was in April, 1894, and had a right to recover whatever damages she had sustained which were the result of such fraudulent acts, from the beginning until the end thereof.

It may be observed that the plaintiff's counsel forcibly contends that the active concealment of the fraud subsequent to the marriage is an answer to the plea of the statute. While we think this claim is tenable in case the cause of action accrued in November, 1860, we must bear in mind that the plaintiff insists that the representations of the defendant, with his subsequent conduct, constituted a "continuing representation, which continued to deceive the plaintiff." We think, in this view of the case, the representations of the defendant constituted one continuous act, beginning in 1860, and ending in 1894, and that the cause of action did not accrue until the latter date. After the

plaintiff had knowledge of the falsity of the representations, she was not, of course, deceived by them; and, to recover, it was incumbent upon her to bring her action within six years from the time she discovered their falsity. It was in this view that the cause was submitted to the jury, and they were told, if the case was in other respects established, the plaintiff could recover, if she did not discover the fraud until 1894. Holding that the statute did not begin to run until the discovery of the fraud, in April, 1894, there is no occasion to consider the effect of the concealment of the fraud to defeat its running, nor the want of a replication to the plea.

3. The defendant insists that the plaintiff had full knowledge of the fact that he had been married prior to November 7, 1860, or, at least, full opportunity of knowledge. Conceding this to be true, the point is, did she know at the time of her marriage, in November, 1860, that he was then a married man. The plaintiff was informed prior to their marriage that the defendant had a wife and child then living at Newport, Vt. She told him of such information, and released him from his marriage engagement to her; but he denied the fact of marriage, said he was a single person, at liberty to marry, and offered to take the plaintiff to his mother's, in Newport, thus, by his boldness and audacity, disarming the suspicion of her and her father, who was called in to advise; and, upon consultation with the latter, she came to the conclusion that the defendant was honest in his statements, and the marriage was solemnized soon thereafter.

The defendant further claims that the plaintiff should have been put upon inquiry when she visited the defendant's father's family, in 1864, and was informed that a little girl then there was the defendant's child; that the defendant's mother told the plaintiff that the defendant had been married before, but that he had been divorced. She was not informed as to when the divorce was granted, and we think had a right to presume that it was prior to her marriage, for she was told by her husband that his marriage with her was legal. To whom should the plaintiff have applied in order to ascertain the truth of these rumors if not to the defendant himself? When she did make such application, he said this story about his having been married before was all a fraud; that she was his legal wife; and that the child seen by the plaintiff was not his daughter; and that he had a legal right to marry the plaintiff as and when he did. The defendant is not justified now in claiming that the plaintiff was not deceived in consequence of his repeated declarations, upon the occasions named, that he was a single man, and had a right to marry, and that the plaintiff ought not to have been deceived by what he said upon the subject. The plaintiff had a right to rely upon

the positive and repeated statements of the defendant that he was single.

We hold that the defendant's claim that the plaintiff had full knowledge of the matter, or such opportunity of knowledge as would amount to actual knowledge, is not tenable. The plaintiff was not called upon to act as having knowledge of the matter prior to the spring of 1894, when the facts were first made known to her.

4. As we hold the parties were not husband and wife, the plaintiff was a competent witness.

5. One question raised upon trial is shown by this extract from the exceptions, viz.: "Subject to defendant's exceptions, plaintiff was allowed to introduce evidence as to the value of defendant's property." Nothing further appears in the record relative to this question. To justify us in sustaining the exception, it must appear that this testimony was not pertinent to any question involved in the trial. We cannot say, upon the record before us, that the testimony was not relevant to some pending issue. The point is dismissed by the defendant's counsel with only this remark: "We insist it was error." We have no desire to avoid this question, and it may well be dismissed for the reasons stated. But we think it apparent from the declaration, which is always a part of the record, that the testimony was properly admitted upon the question of actual damages. The acts of the defendant, if true, as alleged, resulted in a serious injury to the character of the plaintiff, and an insult to her person, in that she lived for years in a state of adultery, reared illegitimate children, and was subject to a conviction for felony, with the further result of a loss of much and valuable service without compensation, in assisting the defendant in the accumulation of a large amount of property. Such facts are charged in the declaration, and testimony to prove them was properly admitted, for two reasons: (a) Its admission was within the rule that, so far as the cause of action rests upon an injury to character or an insult to the person, compensatory damages may be increased by proof of the wealth of the defendant, upon the ground that wealth is an element in man's social rank and influence, and, the greater the wealth, the higher the rank, and therefore the greater the injury or insult. (b) It was also admissible in support of the allegations in respect to the value of the plaintiff's services and the property acquired by the joint labors of herself and the defendant. The greater the wealth acquired, the greater the value of the services. The testimony was properly admitted upon the question of actual damages. Whether it was legitimate upon that of exemplary damages it is unnecessary to pass upon, and we do not consider it.

It is now insisted that it was error to admit testimony tending to show the defend-

ant's declarations of the value of his property without fixing any date; that, while he might have had such property at some earlier period, they were not evidence that he had that amount at the time of the trial. This point was not made upon trial. The objection to the testimony was general, and it is too late now to raise the question of remoteness. Whether the testimony was too remote or not was a question that should have been called to the attention of the trial court. It does not appear that it may not have been within a few months of the time of the trial, and so not remote. We infer that it was near enough to justify its admission.

6. The defendant testified as to the value of his farm, including a tenement house thereon, and a wood lot which forms part of the farm. The plaintiff, in cross-examination, was permitted to inquire as to the cost of buildings and value of a portion of the real estate detached from the rest. This was not error. It was legitimate cross-examination. Such testimony might tend to show a portion of his premises worth more than what he testified the value of the whole of it was. It was certainly a legitimate mode of inquiry to test the value of his statements, and enable the jury to determine what credit they would give to his testimony.

7. During the arguments of Mr. Grout for the plaintiff, he made these statements: Referring to the plaintiff's sister, he said: "This sister, a whitened sepulcher, caused this trouble;" and further said: "That the defendant came across the line for the service of the writ for the divorce, and sneaked back." "I think there is evidence enough, as the case shows, to hang a man." "I knew that in the New York case¹ they gave the woman \$9,000." "Another thing, he does not recognize this daughter, that bears his image, and has no rights except what come through this wronged woman. He repudiates her." The defendant objected, and was allowed exceptions. It is stated in the exceptions that "there was no evidence tending to establish either of the statements of the above facts."

(a) Was it reversible error to state that the "sister, a whitened sepulcher, caused this trouble"? How did it injure the defendant? There was evidently serious trouble between these parties, and it must have been caused by some one,—by their own or by the acts or conduct of some other party; if some outside person caused it, such facts might tend to relieve the defendant to some extent, and be some excuse for his conduct, and so the remark would not harm him. This sister resided in the family for many years, remained with the defendant after the plaintiff left him, and was living with him at the time of trial; and the testimony tended to show she loaned the defendant money, taking no evidence of the obligation.

Notwithstanding the general statement in the bill that there was no evidence tending to establish the fact, we think, from the facts stated in the record, there was evidence from which it might be inferred. It would bring the jury system into great disrepute, and be a reproach to our jurisprudence, if we reversed judgments for such remarks of counsel in commenting upon testimony.

(b) The evidence upon the subject of the divorce petition and service is referred to, and we think it fully justified Mr. Grout in making the statement he did. It is fairly inferable from the testimony that the defendant's visits this side of the Canadian line between the spring of 1861 and 1865, while he resided in Canada, were few and far between; that he was cognizant of the divorce proceedings, paid the expense of them, and came over the line that the petition might be served upon him; in fact, that he came and went as a person afraid and ashamed to be seen, which is one definition of the verb "to sneak."

(c) The next remark of Mr. Grout was a mere expression of opinion upon the weight of the evidence; and, although it was a violation of the rules of advocacy, it is a practice so common that it would be unjust to set aside a verdict for such remark.

(d) The reference to the New York case was ruled improper, and was in effect withdrawn. Nothing appears to cause us to think that Mr. Grout did not act in good faith in supposing it was proper to refer to the case, as it, in part, had been read upon trial.

(e) The effect of the defendant's own testimony, as stated in the exceptions, established the illegitimacy of the plaintiff's daughter, and was in law a repudiation of her, and well might have been termed so by counsel. We do not in the least vindicate counsel in making erroneous statements of facts, but the quicker and better way of correcting them is for the trial court to act in the matter, and if the rule is violated in such a manner that the court cannot control it, as the presiding judge cannot always tell what a person is about to say in time to check it, if improper, to set aside the verdict, if obtained by such means. This would cause counsel to be more circumspect in their arguments, and undoubtedly correct the evil.

8. The remaining question arises upon the charge of the court. The portion of the charge given, as set forth in the exceptions, is upon the questions whether the plaintiff knew, or was chargeable with knowledge, of the defendant's having a wife living at the time of the marriage, in November, 1860; of the statute of limitations; and the subject of damages, both actual and exemplary,—three important questions, which were fully stated and explained by the trial judge. This part of the charge covers $3\frac{1}{2}$ pages of the printed

exceptions. The exception taken was in the words "to all which defendant seasonably excepted." No error was pointed out, and no definite exception taken. We think so general an exception should not be sustained. One object of an exception is to call the attention of the trial judge to the precise point as to which it is claimed he has erred, that he may then and there consider it, and correct any error therein if, in his judgment, he is in fault. A general exception in the form we are considering entirely defeats that object. *Goodwin v. Perkins*, 39 Vt. 598; *Rowell v. Fuller's Estate*, 59 Vt. 688, 10 Atl. 853. If a general exception is allowed, the party may have the right to have the same considered; but the correct rule in such case seems to be that if the entire charge of the court, or a series of propositions contained in it, is excepted to in gross, and any portion excepted to is sound, the exception cannot be sustained. *Beaver v. Taylor*, 93 U. S. 46; *Beckwith v. Bean*, 98 U. S. 284; *Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 5 Sup. Ct. 119; *Burton v. Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. 960. Tested by this criterion, a majority of the court hold that the exception to the charge must be overruled, for it must be conceded that the part of the charge reading as follows: "That if the plaintiff knew of the facts of the former marriage, or if, with ordinary diligence, she might have discovered the fact of the former marriage, six years or more before she brought the suit, she cannot recover,"—was correct, as well as the charge that exemplary damages might be awarded.

The questions made by the motion to order a verdict are included in those hereinbefore discussed and disposed of. No other questions are made by the defendant's counsel, and the judgment is affirmed.

ROWELL and MUNSON, JJ., dissent on point 2.

ROWELL, J. (dissenting, with whom agrees MUNSON, J.). It is held that the fraudulent marriage, although it gave the plaintiff a cause of action at once, is not the cause declared upon, but that she is seeking to recover for the defendant's "defrauding her out of 33 years of service, and having, as a result of his fraudulent acts, caused her to live for that length of time in a false conjugal position"; that it is error to assume that the cause of action for these wrongs accrued at the time of marriage, because the defendant's fraud was continuous; that he perpetrated a fraud upon her, not only by his statements before marriage, but by the act of marriage itself, and by his continuing to live with her as her husband for a generation; that the cause of action declared upon did not accrue till the fraud ceased, which was in April, 1894, when she discovered it; and that, therefore, she

having been ignorant of it, the statute did not begin to run till that time. In this view it is said to be unnecessary to consider the effect of the concealment of the fraud by the defendant, and of the want of a replication to the plea of the statute. The case discloses that never but once after their marriage was anything said between the parties about his former marriage, and that was in 1864, when he told her that he had never been married before, that she was his lawful wife, and that he wished her never to mention the subject to him again. So, from this time on, the defendant's fraud consisted, not at all of false verbal declarations, but wholly of the concealment of the fact of his former marriage, and of a continuous assertion by conduct only of the lawfulness of his marriage with the plaintiff.

It is worthy of note that the ground taken by the court in this question was not suggested by the plaintiff in argument, and so was not discussed at all at the bar. The plaintiff's position as stated in her brief was this: "The claim of the plaintiff upon the trial below with reference to the statute of limitations was, and now is, that she acquired a cause of action against the defendant in virtue of his representations that induced the marriage; that, in less than six years after the accruing of that right of action, the defendant perpetrated a distinct and substantive fraud, for the purpose of preventing her from ascertaining her said right of action, and continued this fraud down to a period within less than six years before the commencement of her suit; and that she did not discover, and ought not to have discovered, the original fraud, because of the subsequent fraud of the defendant." It would seem from the opinion that the plaintiff did suggest in argument the ground the court takes, for the opinion says that "one must bear in mind that the plaintiff insists that the representations of the defendant, with his subsequent conduct, constituted a continuous representation, which continued to deceive the plaintiff." But this was said not as a suggestion of that ground, but in connection with, and as a part of, the claim made and the position taken in what I have quoted from the brief, as will be seen if the brief is reported with sufficient fullness. That it was not intended as a suggestion of that ground is clear from what is subsequently said in the brief, thus: "Let it be clearly observed what the question is. It is not, does the statute begin to run from the discovery of the fraud out of which the right of action grows? but, is the subsequent concealment of the fraud an answer to the statute?" The brief then goes on to say, that the latter question ought to be answered in the affirmative, and has been in a majority of instances; that it should be particularly observed that, in so answering it, most judges have assumed that the former question should be answered in the negative,

as it has been by this court; that is, that want of knowledge of fraud is no answer to the statute, but that active concealment is.

Although the court says it is unnecessary to consider the effect of the want of a replication to the plea of the statute, yet it makes the question the same as it would have been had the plea been traversed, namely, whether the cause of action accrued within six years. So the question for discussion is not whether the fraud is an answer to the statute, as Best, J., thought it would have been if replied to in *Clark v. Hougham*, referred to in opinion, but whether the cause of action accrued within the statutory period. Inasmuch as the defendant's fraudulent representations were continuous, the court considers them indivisible in point of time, and, therefore, that they must be taken as a whole, and hence altogether constitute but one cause of action, which did not accrue until they ceased in discovery, which was a third of a century after they began, and a short time before suit, and consequently that recovery may be had for the whole time. I cannot accede to this proposition. The marriage itself was as much a part of the defendant's continuous fraud as any of his subsequent representations. Indeed, it was the first act of the drama of fraud that followed from that moment. Why, then, is it divisible from that as constituting a separate cause of action if all that followed is not indivisible? But all that followed is indivisible in my judgment. The plaintiff was constantly being wronged out of her services, and constantly being placed in a false and degrading conjugal position, and therefore was constantly suffering special damage by reason thereof for the recovery of which I think she has an equally constantly accruing right of action, of which she could have availed herself by suit at any time had she known of her wrong, and that her ignorance of it did not prevent the right from accruing any more than it did the damage from arising. I think the case comes within the rule applied to continuing torts generally, and especially to those of a permanent nature, like trespasses of that character, consisting of a series of acts connected together, but extending over a considerable period of time, which are distinguishable from repeated trespasses not of a permanent nature. Although permanent trespasses may be laid with a *continuando*, as they used to be, instead of on divers days and times, as the practice now is, and declared for in one count, to avoid the necessity of bringing separate actions or of inserting separate counts for each day's trespass, yet, in law, they are considered as several trespasses on each day, and therefore the continuance must be answered as well as the first act. *Saund. 24*, note 1. See *Monkton v. Pashley*, *Salk. 638*. This is so because the acts of which such trespasses consist are divisible in point of time. Thus, staying and continuing in a house aft-

er breaking and entering is as divisible in point of time, as a trespass on land is in point of space, for it is a fresh trespass every day, and therefore the entire continuance must be justified. *Loweth v. Smith*, 12 Mees. & W. 582. So every continuance of a false imprisonment is a new imprisonment every day, and therefore a recovery therefor during its continuance is no bar to further recovery for its subsequent continuance. *Le-land v. Marsh*, 16 Mass. 389.

There are cases of continued wrong with fresh violence, and therefore in their facts more like the case at bar, for the defendant's continuous fraud may be regarded as having been committed afresh every day; but continuous wrongs without fresh violence, whether remediable in trespass or case, are precisely analogous in principle, I think. Thus, where the trustees of a turnpike road built buttresses to support it on the land of A., who thereupon sued them and their workmen in trespass for the erection, and accepted money paid into court in full for the trespass, it was held that after notice to the defendants to remove the buttresses, and a refusal to do so, A. might bring another action of trespass against them for keeping and continuing the buttresses on the land, and that the former recovery was no bar. *Holmes v. Wilson*, 10 Adol. & E. 503. See, also, *Hudson v. Nicholson*, 5 Mees. & W. 437; *Thompson v. Gibson*, 7 Mees. & W. 456; *Bowyer v. Cook*, 4 C. B. 236. So, the wrongful and continuous diversion of the water of a spring is a continuing injury and affords a constantly accruing cause of action, so that the statute cuts off recovery back of the statutory period. *Colrick v. Swinburne*, 105 N. Y. 503, 12 N. E. 427. The same is true of the wrongful continuous flowing of land by means of a draw. *Baldwin v. Calkins*, 10 Wend. 166; *Reed v. State*, 108 N. Y. 407, 15 N. E. 735; *Wells v. New Haven & Northampton Co.*, 151 Mass. 46, 23 N. E. 724. In *Wilkes v. Market Co.*, 2 Bing. N. C. 281, the plaintiff, a bookseller, having a shop by the side of a public thoroughfare, suffered loss in his business in consequence of the diversion of customers from the thoroughfare by the defendant's unnecessary continuance of an obstruction across it for an unreasonable time. The statute under which the defendant caused the obstruction provided that no action should be brought against any person for anything done thereunder until notice, nor after six months after the cause of action arose. The grievance began April 2d, and ended July 2d, and the action was commenced December 30th. The court held that the cause of action began with the grievance, but that each successive day gave a new cause of action, and that, therefore, the suit having been commenced within six months of two days only before the cesser of the cause of action, recovery could be had for only those two days; that no other construction could be put upon the statute.

I would not, therefore, the question being as I have stated it, give the cause of action declared upon the scope in point of time that the court gave it.

**BATH SAV. INST. v. HATHORN, Adm'r,
et al.**

(Supreme Judicial Court of Maine. June 7, 1895.)

EXPRESS TRUST—GIFT—SAVINGS-BANK DEPOSIT.

1. A gift must be executed by delivery; a trust, by declaration.

2. An express trust of personal property may be created or declared by parol. Its terms must be clearly established, and show an executed gift, so that the equitable title shall have passed effectually to the donee, as in the case of a gift *inter vivos*.

3. In such a trust, the real title vests in the donee, while the legal title, perhaps carrying the control, may be placed elsewhere; but it is necessary that the donor, who declares the trust, should create an estate for his cestui that is no longer his own. The donor may retain the legal title, giving him the control, but for the benefit of his cestui according to the terms of the trust. The trustee thereby becomes merely an agent to administer the trust, and is subject to the directions of a court in equity.

4. An entry on the books of a savings bank in the name of a donor, "in trust for the donee," is not conclusive evidence, by itself, of an absolute, indisputable gift; but extrinsic evidence is competent to control its effect.

5. *Held*, in this case, that all the declarations, acts, and conduct of the donor are consistent with the presumption arising from the entry itself, and show a completed trust in favor of the donee.

(Official.)

Report from supreme judicial court, Sagadahoc county.

This was a bill of interpleader brought by the Bath Savings Institution against the defendant Hathorn, as administrator of the estate of Henry Walker, deceased, and against Alice B. Files, to determine the title to a certain deposit in that institution.

The course of procedure adopted by agreement between all parties was this: Each defendant filed an answer, and then, by agreement, a decree of interpleader was filed, and by further agreement it was stipulated that the answers should be taken as the pleadings in the case, and the cause set down for hearing on bill, answers, and proof, and that Miss Files be regarded as plaintiff in the continuance of the suit. It thus became, practically, a suit in equity by Alice B. Files against the administrator of Henry Walker's estate. The facts in the case were practically undisputed.

It appears that Henry Walker died October 2, 1891, leaving neither wife nor children, his wife having died nearly six years before. Their home was in Woolwich, opposite Bath, and Miss Files, who was a second cousin of Mrs. Walker, frequently visited there, and Mr. and Mrs. Walker often visited the Files family in Winslow, the two families being in close and intimate relations. On July 1, 1882, Mr. Walker deposited the sum of \$700

n the Bath Savings Institution in his own name, but "in trust for Alice B. Files," and took out a depositor's book in that form. At the time of making the deposit he had a conversation with the treasurer of the bank as to its form, and the treasurer told him that if he put the book in any one's name, a trust for any one, it would go to that person at his decease; and Mr. Walker said he wished it to, that he wished it to go to Miss Files. In accordance with his direction, the signature book, which all depositors are required to sign, was signed by Mrs. Potter, then a clerk in the bank, in the same form, Henry Walker, in trust for Alice B. Files, of Woolwich." Mr. Walker retained the bank book in his possession ever after, but never drew any part of the principal or interest therefrom, but took the book to the bank occasionally to have the accrued dividends added. On one occasion, very soon after the deposit was made, Miss Files' sister, now Mrs. White, was visiting at his house, and saw the book, among some other papers that he happened to be examining. He took it up, and looked at it, saw the form of entry, and he told her then, "Yes, that is for Alice at my decease, and the next will be for you," and Mrs. White communicated this information to Alice, her sister, immediately on her return home from the visit, who expressed her satisfaction thereat. Mrs. Trott, who was in the family as housekeeper for about six years, going there before Mrs. Walker's death, saw the book on three different occasions, and Mr. Walker explained to her, also, when she spoke of its being in trust, that the book was for Alice; and again, just a few months before his death, after he had the July dividend added, he was examining the book, spoke of it as Alice's bank book, and asked Mrs. Trott to guess how much it had gained. She told him she supposed it was between ten hundred and eleven hundred dollars, and his reply was: "You are pretty good for guessing. You guessed pretty nearly right; and that will be a great help to Alice, won't it, Mrs. Trott?" Decree against estate.

Orville D. Baker and Leslie C. Cornish, for Alice B. Files. Charles W. Larrabee, for defendant Hathorn.

HASKELL, J. Henry Walker, of Woolwich, died, solvent and intestate, October 2, 191, leaving brothers and sisters and nephews and nieces, but neither wife nor children. His wife died January 1, 1836. She was a cousin to the father of plaintiff, Alice B. Files, of Winslow, who knew the old people well, and seems to have been always welcome at their house and a favorite with them.

On July 1, 1882, Mr. Walker deposited in the Bath Savings Institution \$700 "in trust for Alice B. Files," saying, in substance, that he wished it to go to her at his decease.

That deposit remained intact during Mr. Walker's life, and at his death amounted to something over \$1,000. He always retained the book, and it was found among his papers by his administrator, the defendant, who now claims the deposit as a part of his estate. The evidence shows that Mr. Walker intended the deposit for Alice at his decease, but never communicated his intention to her.

The authorities all say that a gift inter vivos must be complete. The donor must divest himself of all dominion over the thing given, and the title to it must pass absolutely and irrevocably to the donee. *Northrop v. Hale*, 73 Me. 66; *Dale v. Lincoln*, 81 Me. 420; *Robinson v. Ring*, 72 Me. 140; *Bank v. Fogg*, 82 Me. 538, 20 Atl. 92.

A voluntary trust is an equitable gift, and, like a legal gift inter vivos, must be complete. A declaration of trust as effectually passes the equitable title of the fund to the cestui as a gift inter vivos passes the legal title to the donee. The distinction between them is of a technical nature. In a trust, the real title vests in the donee, but the legal title, perhaps, carrying control of the property, may be placed elsewhere; while in a gift both the real and legal title instantly fall to the donee. It is not necessary, therefore, that he who declares a trust should divest himself of the legal title, if, perchance, he so does it as to transfer the real or equitable title to the cestui; for then he creates an estate really no longer his own. He may retain the legal title, giving him the control, but for the benefit of the cestui, according to the terms of the trust. His control becomes subject to the direction of courts of equity, that always supervise the administration of trusts. They are the children of equity. They spring from it, and cannot survive without its aid and control. The trustee is merely an agent to administer them, and nothing more.

An express trust of lands can only be created by some writing signed by the party or his attorney (Rev. St. c. 73, § 11), but a trust of personal property may be created or declared by parol. It is necessary, however, to clearly establish the terms of it, and show an executed gift, so that the equitable title shall have passed to the donee as effectually as a gift inter vivos. *Gerrish v. Institution*, 128 Mass. 159; *Dresser v. Dresser*, 46 Me. 48.

Says Lord Cranworth: "If a man chooses to give away anything which passes by delivery, he may do so, and there is no doubt that, in the absence of fraud, a parol declaration of trust may be perfectly good, even though it be voluntary. If I give any chattel, that of course passes by delivery; and if I expressly or impliedly say I constitute myself trustee of such and such personal property for a person, that is a trust executed. — and this court will enforce it, in the absence of fraud, even in favor of a volunteer." * * * The authorities all turn upon the question whether what took place was a

laration of trust, or merely an imperfect attempt to make a legal transfer of the property. In the latter case, the court will afford no assistance to volunteers; but when the court considers that there has been a declaration of trust, it is a trust executed, and the court will enforce it, whether with or without consideration." *Jones v. Lock*, 1 Ch. App. 25.

In this case, the deposit is in the name of the donor, "in trust for the donee." Standing alone, this entry does not work an absolute, indisputable gift in the form of a dry trust,—that is, a trust without limitation or condition, that may be terminated at the will of the cestui; but extrinsic evidence is competent to control its effect. *Brabrook v. Bank*, 104 Mass. 228; *Clark v. Clark*, 108 Mass. 522; *Powers v. Institution*, 124 Mass. 377; *Stone v. Bishop*, 4 Cliff. 593, Fed. Cas. No. 13,482; *Northrop v. Hale*, 72 Me. 275.

The evidence discloses that, at the time the donor made the deposit, he expressed a desire that the donee should have the money at his death. That certainly shows no intent to part with the legal title at an earlier day. He is said to have subsequently made talk of the same purport; but he neither informed the donee of the deposit, nor made any effort or did any act to apprise her of it, or of his intention concerning it. The deposit on his part was both voluntary and secret. Information of it may have been communicated to her by others, but never at his request or with his knowledge. What evidence, then, operates to pass the equitable title in the deposit to her? He had consummated no contract with her. His intentions were kept in his own breast. He could have withdrawn the money at any time, and have made a new disposition of it, and she may not have been the wiser, so far as he knew. It is just as essential, to establish the trust sought to be set up here, to prove some act on the part of the donor that shall operate to pass the equitable title to the donee, as it is to prove delivery in a gift inter vivos. Both require the same essentials. In both, some title must pass from the donor, differing only in degree. A gift must be executed by delivery; a trust, by declaration.

In *Bank v. Fogg*, 82 Me. 538, 20 Atl. 92, the donor deposited a sum of money in the name of the donee, subject to his own order, with intent that, at his death, it should go to the donee. No trust was claimed or shown. It was an unexecuted purpose, an ineffectual attempt at testamentary disposition.

In *Parcher v. Institution*, 78 Me. 470, 7 Atl. 266, a depositor caused to be entered upon the bank ledger words, in substance, "Payable also to Mrs. Leavitt in case of my death," and it was held no gift.

In *Curtis v. Bank*, 77 Me. 151, the entry of "Subject also to" the donee was held to constitute no gift, but that a subsequent delivery of the bank book completed the gift.

In *Barker v. Frye*, 75 Me. 29, a deposit in the name of the donee, subject to the order of the donor during life, afterwards changed by erasing words giving the donor any control of the fund, and after notice to the donee of the change and that the bank book would be delivered to him the first time they met, and after his reply requesting that the book be sent to him, which the court says "was an acceptance of the gift," it was held that the gift was complete.

The same doctrine is held in *Northrop v. Hale*, 73 Me. 66; *Robinson v. Ring*, 72 Me. 140; *Drew v. Hagerty*, 81 Me. 231, 17 Atl. 63; *Parkman v. Bank*, 151 Mass. 218, 24 N. E. 43.

All of our cases require something more than a mere intention to give, a promise to give, or an expectation to give. Benevolence alone will not do. There must be beneficence also. The mystery sometimes supposed to exist about a trust cannot change the nature of a transaction. A voluntary trust is a gift, and requires all the essentials of a plain gift to sustain it.

In *Dresser v. Dresser*, *supra*, a writing specifying the terms of a voluntary trust, and a delivery of the trust property so that the dominion of the donor over it was thereafter lost, is a good example of a trust of this sort.

In *Alger v. Bank*, 146 Mass. 418, 15 N. E. 916, the donor made a deposit similar to the one under consideration. It was in his own name, as trustee for the donee, his housekeeper, who claimed the deposit as a payment for her services. It was shown that, shortly before his death, he told her, "I put it in for you;" "that money is yours;" and the court held that the judge, who tried the case, was authorized to find a perfected gift, if he chose to do so.

Some of the cases are in conflict concerning the question now under consideration, more in the application of the law to the ever-varying facts in the numerous cases than otherwise; but our own cases are all consistent, and squarely hold to the doctrine that a trust in personal property may be created by parol, and that a deposit in bank in the name of another may be explained or controlled by evidence outside the written terms of the deposit. In this case, the terms of the deposit clearly show an intended trust in favor of the donee, but may be controlled or limited by extrinsic evidence. This evidence confirms the trust, showing that it should cease at the death of the donor, and that the legal title should then pass to the cestui. When the deposit was made, the treasurer of the bank told the donor that, at his decease, the money would go to the donee, and the donor replied that was his wish. All the subsequent acts and declarations of the donor show the same intent. The gift cannot be upheld as an absolute gift inter vivos, nor as a gift causa mortis, for these gifts require a delivery of the res, a

complete transfer of title. They differ from a gift in trust in that they purport to, and must, pass the whole title, so that the donor can have no dominion or control over them. But a gift in trust withholds the legal title from the donee. It may be transmitted to a third person, or it may be retained by the donor, but in either case the equitable title has gone from him, and unless the declaration of trust contains the power of revocation, or the wide discretion of chancery attaches (Counts v. Acworth, L. R. 8 Eq. 558; Wollaston v. Tribe, L. R. 9 Eq. 44; Everitt v. Everitt, L. R. 10 Eq. 405; 7 Ch. App. 244; 15 Ch. Div. 570; Lister v. Hodgson, L. R. 4 Eq. 30; Sharp v. Leach, 31 Beav. 491; Anderson v. Elsworth, 3 Giff. 154; Toker v. Toker, 31 Beav. 629; Phillips v. Mullings, 7 Ch. App. 247; Smith v. Iliffe, L. R. 20 Eq. 666; Welman v. Welman, 15 Ch. Div. 570, 578, 579; Prideaux v. Lonsdale, 1 De Gex, J. & S. 433), it leaves him powerless to extinguish the trust. Of course, the trust must be established by proof, and the fact that no evidence of a voluntary trust once created remains, or can be shown, does not alter the principle. Many rights fall of enjoyment from the lack of evidence that might once be adduced. So, a secret trust may be valid when it can be proved; but if the donor conceals the evidence of it, and later appropriates the fund to his own use, it is simply a wrong on his part, that prevails because of his perfidy, and goes unpunished and unnoticed because unknown. The cestui's rights are the same, although his remedy may have been destroyed.

In the case of *In re Smith's Estate*, 144 Pa. St. 428, 22 Atl. 916, a lad of 3 years went to live with his uncle. When the lad was 12 the uncle placed \$13,000 in bonds in an envelope, on which he had written and signed a declaration that he held them for his nephew. The bonds remained in the uncle's possession until his death, and the court held a completed gift in trust for the nephew.

In *Bank v. Albee*, 64 Vt. 571, 25 Atl. 487, the court says: "A completed trust, although voluntary, may be enforced in equity. It is not essential that the beneficiary should have had notice of its creation or have assented to it. The owner or donor of personal property may create a perfect or complete trust by his unequivocal declaration in writing, or by parol, that he himself holds such property in trust for the purposes named. The trust is equally valid whether he constitutes himself or another person the trustee."

In that case a father deposited money in a savings bank in the name of his son, naming himself trustee. It appeared that one motive of the father was to avoid taxation; but, said the court, "that fact does not negative the idea that he also intended to create a trust for the benefit of his son. It is perfectly consistent with it, and the retention of the pass book is not inconsistent with such a purpose. He must have retained it as trustee."

Ray v. Simmons, 11 R. I. 206, is in point. One Bosworth deposited money in a savings bank in his own name as trustee for a step-daughter. He did not tell her what he had done, nor show her the pass book. He kept that himself. After his death, the court held that the stepdaughter was entitled to the money,—that the transaction constituted a trust in her favor.

So is *Martin v. Funk*, 75 N. Y. 134. Susan Boone deposited \$500 in a savings bank "in trust for Lillie Willard." Susan kept the pass book, and Lillie had no knowledge of it until after Susan's death. Want of notice to Lillie, and the retention of the pass book by Susan, were urged in defense; but the court held a gift in trust complete. This is an exhaustive case, and contains a review of authorities by Chief Justice Church prior to 1878.

So is *Minor v. Rogers*, 40 Conn. 512. A widow deposited \$250 in her own name, "as trustee of William A. Minor," the child of a neighbor. The child knew nothing of the deposit until after the depositor's death, and meantime did not have possession of the pass book; and the court held the trust complete, and allowed a recovery of the money from the depositor's executor.

So is *Re Gaffney's Estate*, 146 Pa. St. 49, 23 Atl. 163. It appeared that Hugh Gaffney deposited \$560 in his own name, as trustee for Polly Kim, and the court held the entry itself *prima facie* evidence of the trust and, unexplained, sufficient to uphold it.

In *Gerrish v. Institution*, *supra*, the court says: "No particular form of words is required to create a trust in another, or to make the party himself a trustee for the benefit of another; that it is enough for the latter purpose if it be unequivocally declared in writing,—or orally, if the property be personal; that it is held in trust for the person named; that when the trust is thus created, it is effectual to transfer the beneficial interest, and operates as a gift perfected by delivery."

The same case holds that notice to the beneficiary is unnecessary where the transaction is clear; but when ambiguous, or susceptible of different interpretations, it removes the doubt, and is decisive of the purpose of the donor. Some of the earlier Massachusetts cases seem to hold notice to the beneficiary essential to the validity of a trust, but, when considered in the light of this case, rather consider the notice a controlling than an essential element in the creation of a voluntary trust. The prevailing doctrine now is that notice is unnecessary, but, when shown, has controlling effect.

In this case, the entry "in trust for" is of clear and unmistakable import, and sufficient to create a *prima facie* trust. It might have been controlled by evidence that would have shown a contrary intention, but such evidence is wholly wanting. Moreover, all the declarations, acts, and conduct of the donor

are consistent with the presumption arising from the entry itself, and show that it expresses the true import of the transaction, and creates a completed trust in favor of the donee.

Decree accordingly, with costs against the estate.

NORWAY SAV. BANK v. MERRIAM et al.
(two cases).

(Supreme Judicial Court of Maine. June 19, 1895.)

TRUST—GIFT—SAVINGS-BANKS DEPOSIT.

1. The important difference between a gift and a voluntary trust is that in the one case the whole title, legal as well as equitable,—the thing itself,—passes to the donee, while in the other the actual, beneficial, or equitable title passes to the cestui que trust, while the legal title is transferred to a third person, or is retained by the one creating it, to hold for the purposes of the trust. But a gift of the equitable or beneficial title must be as complete and effectual in the case of a trust as is the gift of the thing itself in a gift *inter vivos*.

2. To create a trust, the acts or words relied upon must be unequivocal, implying that the person creating the trust holds the property as trustee for another. There must be an executed gift of the equitable title, without any reference to its taking effect at some future time.

3. While courts of equity will enforce a perfect and completed trust, although purely voluntary, they will lend no assistance towards perfecting a voluntary agreement for the creation of a trust, nor regard it as binding so long as it remains executory. Nor will courts enforce as a trust a transaction which was intended as a gift, but is imperfect for that purpose.

4. On April 27, 1892, Mrs. Esther S. Reed, having at that time a deposit in the Norway Savings Bank of \$1,901.23, standing in her own name, surrendered her pass book, and had the whole of her deposit transferred to two new accounts. By her direction, the sum of \$950.62 was entered upon the books of the bank and upon a pass book as follows: "Norway Savings Bank, in Account with Esther S. Reed and Harry Q. Millett, or Their Survivor, in Joint Tenancy." And the sum of \$950.61 was entered by her direction upon the books of the bank and upon a pass book as follows: "Norway Savings Bank, in Account with Esther S. Reed and Myra J. Millett, or Their Survivor, in Joint Tenancy." Both of the pass books were delivered to Mrs. Reed, and were always afterwards kept by her among her private papers, where they were found after her death by her executor. She never in any way notified either Myra J. or Harry Q. Millett of the transaction at the savings bank, nor did either of them have any knowledge of it from any source until after her death. Mrs. Reed never drew any portion of the principal or interest of the deposit, and the accounts were in no way changed, except that the semiannual interest was placed to their credit. Myra J. Millett was an adopted daughter of Mrs. Reed, and Harry Q. Millett is the son of Mrs. Millett. Evidence was introduced of statements and declarations made by Mrs. Reed, tending to show an intention upon her part that these deposits should take the place of certain provisions in favor of Mrs. Millett and her son in Mrs. Reed's will, made several years prior to the transaction at the savings bank, and that she intended to change her will by striking out the bequests in their favor. She died without ever having made any change in her will. *Held*, that the acts and declarations of Mrs. Reed were not sufficient to constitute a completed gift or to create a voluntary trust.

5. *Held*, that she did not intend, by the

transfer of her deposit to the new accounts, to make at that time fully executed gifts of either the legal or equitable title to the new deposits, but that her intention was to make a testamentary disposition of the deposits, so that the persons named should each take, in case he or she survived her, what might be left of each sum after her death.

6. *Held*, that such an attempted disposition is void, because contrary to the statute of wills. (Official.)

Report from supreme judicial court, Oxford county.

Separate bills of interpleader by the Norway Savings Bank against Milton H. Merriam and others. Decree rendered.

J. A. and Ira S. Locke, for executor of the will of Esther S. Reed. A. R. Savage and H. W. Oakes, for Harry Q. and Myra J. Millett.

WISWELL, J. On April 27, 1892, Mrs. Esther S. Reed, having at that time a deposit in the Norway Savings Bank of \$1,901.23, standing in her own name, surrendered her pass book, and had the whole of her deposit transferred to two new accounts. By her direction, the sum of \$950.62 was entered upon the books of the bank and upon a pass book as follows: "Norway Savings Bank, in Account with Esther S. Reed and Harry Q. Millett, or Their Survivor, in Joint Tenancy." And the sum of \$950.61 was entered by her direction upon the books of the bank and upon a pass book as follows: "Norway Savings Bank, in Account with Esther S. Reed and Myra J. Millett, or Their Survivor, in Joint Tenancy."

Both of the pass books were delivered to Mrs. Reed, and were always afterwards retained by her. They were found after her death by her executor among her private papers. She never in any way notified either Myra J. or Harry Q. Millett of the transaction at the savings bank, nor did either of them have any knowledge of it from any source until after her death.

Mrs. Reed died October 26, 1892, leaving a will, dated August 13, 1893, nearly nine years before the time of making the deposits above referred to, in which she made a bequest of \$1,000 in favor of Harry Q. Millett, and of \$500 in favor of Myra J. Millett. Myra J. Millett is an adopted daughter of Mrs. Reed, and Harry Q. Millett is the son of Mrs. Millett. Mrs. Reed never drew any portion of the principal or interest of the deposits, and the accounts were in no way changed except that the semiannual interest was placed to their credit.

Evidence was introduced of statements and declarations made by Mrs. Reed tending to show an intention on her part that these deposits should take the place of the pecuniary provisions of her will in favor of Mrs. Millett and her son, and that she intended to change her will by striking out the bequests in their favor. She died without having made any change in her will.

Both of these deposits being now claimed

by the executor of Mrs. Reed's will as belonging to her estate, and by Mrs. Millett and Harry Q. Millett, respectively, the Norway Savings Bank has brought these two bills of interpleader to have the title to the same determined. The cases come to the law court upon report, the facts being the same in each.

That the acts of Mrs. Reed were not sufficient to constitute a gift of each of these deposits must be and is conceded. To constitute a valid gift *inter vivos*, the giver must part with all present and future dominion over the property given. He cannot give it, and at the same time retain the ownership of it. There must be a delivery to the donee or to some one for the donee; and the gift must be absolute and irrevocable, without any reference to its taking effect at some future period. *Dole v. Lincoln*, 31 Me. 428; *Carleton v. Lovejoy*, 54 Me. 446; *Robinson v. Ring*, 72 Me. 140; *Northrop v. Hale*, 73 Me. 66.

Here there was no delivery, either actual or constructive; no surrender by Mrs. Reed of the control over the deposits. Whatever Mrs. Reed's intentions may have been, intention alone is not sufficient to constitute a valid gift. "The intention to give is often established by most satisfactory evidence, although the gift fails. Instruments may be ever so formally executed by the donor, purporting to transfer title to the donee, or there may be the most explicit declaration of an intention to give or of an actual present gift, yet, unless there is delivery, the intention is defeated." *Beaver v. Beaver*, 117 N. Y. 421, 22 N. E. 940.

For the same reasons, as well as for others, these were not gifts *causa mortis*.

But it is claimed that these acts of Mrs. Reed were sufficient to create voluntary trusts in favor of Myra J. and Harry Q. Millett.

The only important difference between a gift and a voluntary trust is that in the one case the whole title, legal as well as equitable,—the thing itself,—passes to the donee, while in the other the actual, beneficial, or equitable title passes to the *cestui que trust*, while the legal title is transferred to a third person, or is retained by the person creating it, to hold for the purposes of the trust. But a gift of the equitable or beneficial title must be as complete and effectual in the case of a trust, as is the gift of the thing itself in a gift *inter vivos*. "It is just as essential, to establish the trust sought to be set up here, to prove some act on the part of the donor that shall operate to pass the equitable title to the donee, as it is to prove delivery in a gift *inter vivos*." *Institution v. Hathorn*, 88 Me. 122, 33 Atl. 836.

The creation of a trust is but the gift of the equitable interest. But, on account of the difference in the form and purposes of the two transactions, it necessarily follows that different acts are essential in the two

cases. While delivery and a surrender of all present and future dominion over the property given is absolutely necessary in a gift these would be inconsistent with the very purposes of a trust where a person creates himself as the trustee. Possession and control in such a case remain in him who has the legal title, subject to the direction of courts of equity.

But while delivery and surrender of possession are not necessary in the creation of such a trust as is here sought to be maintained, there must be other acts which are so far equivalent as the nature of the transaction will permit. A perfect or completed trust is created where the donor makes an unequivocal declaration, either in writing or by parol, that he himself holds the property in trust for the purposes named. He need not in express terms declare himself trustee, but he must do something equivalent to it, and use expressions which have that meaning. To create a trust, the acts or words relied upon must be unequivocal, implying that the person holds the property as trustee for another. There must be an executed gift of the equitable title without any reference to its taking effect at some future time.

While courts of equity will enforce a perfect and completed trust, although purely voluntary, it is certainly true that equity will lend no assistance towards perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. In order for such a trust to be valid and enforceable, it must always appear from the written or oral declaration, from the nature of the transaction, the relation of the parties, and the purposes of the gift, that the fiduciary relation is completely established. Nor will the court enforce as a trust a transaction which was intended as a gift, but is imperfect for that purpose, "for then every imperfect instrument would be made effectual by being converted into a perfect trust." If such a trust is otherwise sufficiently created, its validity is not affected by the fact that the donor reserved the right to modify the purposes or revoke the trust, nor that he reserved the income of the trust fund during life.

The foregoing is the general doctrine in relation to voluntary trusts as laid down by many authorities. *Martin v. Funk*, 75 N. Y. 134; *Young v. Young*, 80 N. Y. 422; *Beaver v. Beaver*, *supra*; *Stone v. Hackett*, 12 Gray, 227; *Davis v. Ney*, 125 Mass. 590; *Gerrish v. Institution*, 128 Mass. 159; *Sherman v. Bank*, 138 Mass. 581; *Pope v. Savings Bank*, 56 Vt. 284; *Bank v. Albee's Estate*, 64 Vt. 571, 25 Atl. 487; *Marcy v. Amazeen*, 61 N. H. 181; *Taylor v. Henry*, 48 Md. 550; *Robinson v. Ring*, *supra*; *Institution v. Hathorn*, *supra*.

Applying these general principles to the facts in the cases under consideration, it be-

comes necessary to determine whether Mrs. Reed, by any unequivocal language or act, showed her intention to create an executed voluntary trust with respect to these deposits, in favor of the persons named, so that whatever legal rights she retained were to be thereafter held by her as trustee for the donees.

We do not think that any acts or language of hers can admit of such interpretation. She never made a declaration of trust, formal or otherwise. She never notified the persons named as joint tenants of the transaction at the savings bank; and, while this may not be necessary if the creation of the trust is clearly established, it is a circumstance of greater or less weight, according to the facts of each case, upon the question of intention. It seems to us that she purposely retained possession of the pass books, and withheld all knowledge of the transaction from the persons named in the entries upon the books, in order that she might retain the control of the deposits for her own purposes, if necessary. We cannot see that she ever by act or word constituted herself a trustee of these sums of money for others.

In the recent case decided by this court of *Institution v. Hathorn*, supra, in which a voluntary trust was sustained, the deposit was made "in trust for Alice B. Files." The court held that the words "in trust for" were sufficient to create a prima facie trust, and that the declaration, acts, and conduct of the donor were consistent with the presumption arising from the entry.

In *Barker v. Frye*, 75 Me. 29, a deposit was made in a savings bank in the name of the donee, subject to the order of the donor during her lifetime. Subsequently the donor notified the treasurer of the bank that she desired to make such a change as would give the donee the full and absolute control over the deposit from that time, and that her right to control the same should cease, and at her request the original entry, "subject to the order of" the donor, was erased. She immediately notified the donee by letter of what had been done, and that the bank book would be delivered to him the first time that they met. The donee accepted the gift. The court held that the gift was complete. The important and controlling facts in these cases do not exist in the cases now under consideration.

This court has held that where A. deposited money in a savings bank in the name of B., without a declaration of trust at the time or subsequently, and retained the deposit book until his death, it was not sufficient to constitute either a gift or a trust. *Robinson v. Ring*, 72 Me. 140.

Where A. deposited in a savings bank money in the name of B., but without the knowledge of B., with the entry on the books of the bank and on the pass book, subject to A., and A. received the dividends and such portion of the principal as she required

for her own use, and held the pass book always in her possession, these facts did not constitute either a gift or a trust in favor of B., and, if there was any trust, B. was the trustee for the depositor. See, also, *Parcher v. Institution*, 78 Me. 470, 7 Atl. 266; *Curtis v. Bank*, 77 Me. 151; and *Drew v. Hagerty*, 81 Me. 231, 17 Atl. 63.

It is, of course, true that the transaction at the savings bank in April, 1892, had some significance, and that by the change that Mrs. Reed had made at that time she intended to do something for the benefit of the persons whose names, by her direction, were, respectively, entered upon the books as joint tenants with her. But we think it is clear from the nature of the transaction that she did not intend by this transfer of her deposit to the new accounts to make at that time fully executed gifts of either the legal or equitable title to the new deposits, or to part with all control over the same, except such as she might retain as trustee for the benefit of others, but rather that her intention was to make a testamentary disposition of these deposits, so that the persons named should each take, in case he or she survived her, what might be left of each sum after her death. Such an attempted disposition is inoperative, because contrary to the statute of wills. *Bank v. Fogg*, 82 Me. 538, 20 Atl. 92; *Sherman v. Bank*, 138 Mass. 581; *Smith v. Speer*, 34 N. J. Eq. 336; *Towle v. Wood*, 60 N. H. 434.

In *Sherman v. Bank*, supra, A. made a deposit with the following condition annexed: "Interest to be paid on order of A. Principal to be drawn by B. after decease of A." It was held that this was not a perfect gift; that the intention of the donor was that the gift should not take effect until after his death, and was therefore void. In this case the intention of the depositor was similar in effect. It cannot be claimed that the persons named as joint tenants could draw any portions of the funds until after the death of Mrs. Reed; until that time she intended to retain possession and control, not merely as trustee. It was only after her death that the survivor should have the benefit of the money deposited; until that time the attempted gift was not to take effect. There is a well-recognized distinction, and one upon which may depend the validity of the transaction, between a fully executed gift or trust in which the donor reserves the right to the income or even to such part of the principal of the fund as may be needed, as in *Davis v. Ney and Stone v. Hackett*, supra, and an unexecuted trust which is not to take effect until the death of the donor.

Our conclusion, therefore, is that there was no perfected gift of either the legal or equitable title to the sums deposited by Mrs. Reed in the Norway Savings Bank, and that these deposits consequently belong to her estate.

We think, however, in view of all the circumstances, that the taxable costs of each of the parties should be paid out of the estate.

Decree accordingly.

EAST JERSEY WATER CO. v. SLINGERLAND.

(Supreme Court of New Jersey. Feb. 20, 1896.)

TRESPASS—RIGHTS OF WRONGDOER TO MAINTAIN
—DAMAGES.

1. A girl of 18 was accustomed to help her father in the business of his farm. The father said that he left her in charge of his farm on the day in question, as he left for a few hours. *Held*, that the daughter was not thereby empowered to resent by force an entry upon a part of the farm that had legally been condemned for public use.

2. In making such resistance the daughter was a wrongdoer, and must bear the consequences to herself legally resulting therefrom.

3. Excessive damages found by the verdict.

(Syllabus by the Court.)

Action by Alitha B. Slingerland against the East Jersey Water Company. Verdict for plaintiff. Rule to show cause why it should not be set aside. Rule made absolute.

Argued November term, 1895, before BEASLEY, C. J., and MAGIE and LUDLOW, JJ.

Riker & Riker and H. C. Pitney, for plaintiff in error. Coult & Howell, for defendant in error.

BEASLEY, C. J. This verdict cannot stand. The gravamen of the action was this: The father of the plaintiff, Alitha B. Slingerland, was the owner of a certain farm, which it was necessary to use for the purpose of laying pipes to supply the city of Newark with water. The city had contracted with the defendant, the East Jersey Water Company, to do this work, as a part of the system that had been adopted, who subcontracted with one Gillespie to do the work. Inasmuch as the father of the plaintiff refused to sell the necessary right of way for the water pipes, the city of Newark, in conformity to the statute, condemned a strip 33 feet in width over the lands in question, and, after the sum assessed had been tendered, and an injunction which had been obtained dissolved, the defendant notified Gillespie, who contracted to enter upon the premises and proceed to lay the pipes. The entry thus directed was admittedly in all respects legal. The plaintiff had been in the habit of assisting her father in the business which was carried on by him upon his farm, and on the 24th day of —, 189—, when he left home in the morning, he said he left his farm in the care of his daughter, who was 18 years of age, and who had no other authority to represent her father than such as is to be inferred, from the declaration just stated. Soon after her father left in the morning of the day just designated, the subcontractor, Gillespie, with his men, entered upon the tract which had been con-

demned, and marked out and superficially excavated a trench therein, and then, thus being in possession of the premises, began the introduction of the heavy water pipes, the same being about 24 feet in length, laying them lengthwise along the excavation so made. It was at this juncture that the plaintiff made her appearance, and she at once ordered the men to desist, and, as they refused, and continued their operations, telling her the injunction which her father had obtained had been dissolved, and which was true, she put herself in front of the heavy pipe that the men were rolling into position. As she refused to make way, she was removed, but immediately returned, and resumed her former attitude. This procedure was repeated several times; on one occasion one of the pipes pressing upon her, but without causing her any injury. In the course of these removals she made a merely formal resistance, not being bruised or hurt in any degree whatever. This ended the affair, and the jury have awarded her \$5,000 for the wrong thus inflicted by the defendant. The damage alleged is that she sustained a nervous shock that has impaired her health, although a physician was not consulted until a year and four months after the occurrence. To the verdict founded on this transaction there are three prominent objections:

First. The plaintiff, in her conduct on this occasion, was a pure and simple wrongdoer. She had no authority from her father to interfere in the affair. She was not his agent for that purpose, and he was not responsible for her acts. But, even if she had been specially empowered by him to do what she did, it would have been of no avail, for this subcontractor, having taken possession of the strip of land which had been condemned, had the right to defend that occupancy, even against the landowner himself. Under the circumstances mentioned, if the proprietor of the farm had interposed his person so as to be an obstacle to the laying of the pipes, it is plain that he could have been lawfully pushed aside, by the use of all the force needful for that end. The rule of law upon that subject is not open in this state to any question. Nor will the pretense set up at the trial, "that the plaintiff on at least one occasion was pushed against by one of the water pipes while she was standing on her father's land, outside of the strip of 33 feet," be of any avail. The claim was that in rolling some of the pipes they extended onto the contiguous property, and one of the plaintiff's witnesses says that at one of the times in question the plaintiff was at least two feet beyond the line of the condemned tract. If this be so, she was still there committing a trespass, for her purpose and attempt were to prevent by force this contractor from the exercise of his legal right. There is no testimony that even tends to show that she had been commissioned by her father to defend by violence, or by any other means, an intrusion, no matter how wrongful, into any part of his lands. The result is that the

court concludes that the contractor under the defendant was in lawful possession of the premises in dispute, that he had the right to use the necessary force to maintain such occupancy, and that the plaintiff herself was the wrongdoer in the occurrence forming the basis of the suit.

In the second place, admitting a cause of action, the defendant would not be the party to be implicated. Gillespie was an independent contractor to do this work in behalf of the East Jersey Water Company. It is true that Gillespie testified that there was a legal question between himself and the corporation whether his contract had not previously been completed, but it is entirely plain that in laying the pipes at the time mentioned he was acting under and in performance of his agreement. Under such conditions of the case the defendant could not be held liable for the wrongdoings of the contractor in putting the water pipes in place. In such cases the principal is exempted from all responsibility if the act contracted to be done be legal. This rule has always been enforced by the courts of this state, as will appear by reference to the case of *Cuff v. Railroad Co.*, 35 N. J. Law, 22. It is true that at the trial an effort was made to connect the company itself with the doing of the alleged tort. But the theory had no basis, either in law or fact. The defendant informed the contractor that the injunction had been dissolved, and that he could enter upon the premises. This was true, and thus the defendant had performed its entire duty in this respect to its contractor. The company was not bound to do anything more, and it had no concern with the methods which should be adopted by the contractor in entering into possession of the land. And it is further obvious that, even if it could be properly predicated that in going upon the property Gillespie acted in behalf and under the immediate order of the company, the root of the difficulty would not be reached, for it would be quite inadmissible to claim that thereby the defendant became a participator in the act of laying the pipes in place, which was plainly the function of the contractor as such. The court has failed to see in the facts as presented in this record any solid ground for calling this defendant into court with respect to the matter at issue.

Lastly, the verdict is so excessive with respect to damages that it would be necessary to set it aside even if otherwise unobjectionable. The sum is \$5,000, and for what mischief done by this defendant is this amount awarded? It is said that the plaintiff's nervous system was morbidly affected by the occurrences above narrated. But the question is, how much had the defendant (regarding Gillespie as its agent) contributed to produce this unfortunate result? What it had done was this: when the plaintiff had placed herself before the slowly rolling pipes, to remove her from the danger, if any, so incurred. This was done considerably and kindly, and so far

was this from disordering her nerves, that on one occasion she laughed as she was led away. It appears absurd to insist that if the plaintiff received a nervous shock on the occasion in question it was occasioned by the conduct of the contractor and his assistants. When a girl of 18 entered upon the extravagant enterprise of placing her body as an obstacle in the way of over 50 laborers in the prosecution of their work, it is plain that she must have been wrought up to the highest point of nervous excitement, and, if disease in that line ensued, the cause is obvious. This principal factor in this branch of the case has been obviously overlooked by the jury. Let the rule be made absolute.

HARRIS v. STATE.

(Supreme Court of New Jersey. Feb. 20, 1896.)

FALSE PRETENSES—VARIANCE.

A conviction for false pretenses cannot be sustained when the indictment charges that the fraud was perpetrated by the offer of an existing mortgage, and the proof was that the money was parted with on a promise to make a mortgage in the future.

(Syllabus by the Court.)

Error to court of quarter sessions, Camden county; Vroom, McDowell, and Gaunt, Judges.

John Harris was convicted of obtaining money by false pretenses, and brings error. Reversed.

Argued before BEASLEY, C. J., and MAGIE and LUDLOW, JJ.

Albert D'Unger and J. J. Crandall, for plaintiff in error. Wilson H. Jenkins, for defendant in error.

BEASLEY, C. J. The defendant was convicted before the Camden sessions of the offense of obtaining money by false pretenses. The charge was thus expressed in the indictment, viz.: That the defendant "did unlawfully, knowingly, and designedly falsely pretend and represent to the said William F. Lord (prosecutor) that a certain mortgage, bearing date June 13, A. D. 1891, made by the said John Harris and Gerlie, his wife, to the said William F. Lord, was a genuine, bona fide, good, and valuable mortgage on the house and lands of him, the said John Harris, at Mount Ephraim, Centre township, Camden county, New Jersey, and was a good security for the sum of fifteen hundred and fifty dollars; and the said William F. Lord, then and there believing and relying upon the said tokens and false pretenses and representations so made as aforesaid by the said John Harris, and being deceived thereby, was induced, by reason of the said tokens and false pretenses and representations so made as aforesaid, to give, advance, and deliver to the said John Harris the sum of fifteen hundred dollars," etc. After these averments follows a negation of the truth of the alleged

tatements. From the foregoing recital it appears that the prosecutor was defrauded of his money by the use of a designated mortgage as a false token, fortified by the assurance that it was genuine, and a good security for the sum loaned. How such a categorical statement as this appears upon the face of this indictment it is difficult to understand, when we find the transaction as described to be partly exploded by the testimony of the prosecutor himself, as well as that of all the witnesses. The unquestioned proofs show that at the time of the reputed fraud, so far from there being a mortgage used as a false token, there was then no such instrument in existence. The exception consisted of a promise to make the prosecutor a mortgage having a certain efficacy in the future. The prosecutor then describes the affair, viz.: "He [defendant] asked me if I had money to spare. I told him I did. He said he would give me a first-edge mortgage if I would lend him the money. He said the property was all clear except the money he was getting from me; that he was going to pay it off—the mortgage on it—with my money, the money he was getting of me. He said he would give me the mortgage in a day or two." He further says that he never got the mortgage. From this collation of the facts stated in the record with those narrated in the testimony, it is clear that the transactions referred to are essentially variant. The fraudulent inducements that led the prosecutor to part with his property was the promise of the defendant to execute a mortgage in a day or two after the loan and payment of the money to him, with a promise that such money should be used to pay off an incumbrance on the premises, which, in substance and legal effect, is radically different from the offer of a mortgage already made, accompanied by the assurance that the property, under then present conditions, was a genuine and sufficient security. There is no doubt with respect to the rule of criminal pleading applicable to this subject. It is the requisition that the corpus of the crime must be in all matters of substance truly stated in the record; in other words, that the allegata and probata must correspond; and it would be superfluous to cite authorities in support of a principle so familiar and rudimentary. Without noting the other alleged errors, it is sufficient to say that, by reason of the glaring imperfection in the procedure just pointed out, this judgment must be reversed.

incident to the liability in respect to the carriage of the passenger himself, and arises from the relation of passenger and carrier.

2. A carrier of passengers is not liable to a firm for injuries done to an article belonging to the firm, but carried by the carrier as the personal baggage of a passenger, although the passenger was a member of the firm.

(Syllabus by the Court.)

The return to this writ shows a judgment of the common pleas of Essex county, affirming a judgment of the First district court of the city of Newark, in favor of Walter J. Knight and Herbert W. Knight, as partners, and against the Pennsylvania Railroad Company. The action was in debt. The state of demand showed the action of the plaintiffs, the Knights, to be for the recovery of damages resulting from injury to a typewriting machine, belonging to them as partners, while in transit as baggage in the custody of the railroad company from Trenton to Newark. The state of the case on which the appeal was heard by the common pleas showed that the machine, which belonged to the plaintiffs, and was used by them in their partnership business, was taken by Herbert W. Knight (who held a ticket, issued by the railroad company, entitling him to ride as a passenger from Trenton to Newark) to the baggage room of the company, in Trenton, and delivered to the baggage master, who received it, and gave a check for it to said Knight. It was found to be injured when it arrived at Newark. Reversed.

Argued June Term, 1895, before VAN SYCKEL, LIPPINCOTT, and MAGIE, JJ.

N. T. Rosenberg, for prosecutor. Herbert W. Knight, for defendant.

MAGIE, J. (after stating the facts). The argument in this case was addressed solely to the question whether a typewriting machine was an article of personal baggage, for the loss of which, or for injury to which, the carrier of a passenger would be liable. In my judgment, the question thus argued is not presented, and cannot be considered. It is well settled that the liability of carriers of passengers, in respect to the carriage of what is called passengers' personal baggage, arises out of and is incident to their liability in respect to the carriage of the passengers themselves. While it is true that the liability of such carriers for injuries received by passengers only arises when such injuries result from the carriers' negligence, and their liability for injuries to passengers' baggage is that of common carriers of goods, and as insurers against all perils except those proceeding from an act of God or of the public enemy, yet the liability is single, and arises solely from the relation of passenger and carrier. Hutch. Carr. § 678; Story, Bailm. § 499. If the relation of passenger and carrier is considered as founded on contract, the payment of the passenger's passage money is the single consideration for the contract to carry both the

TATE (PENNSYLVANIA R. CO., Prosecutor) v. KNIGHT et al.

Supreme Court of New Jersey. Nov. 7, 1895.)

CARRIERS—INJURIES TO BAGGAGE.

1. The liability of a carrier of passengers, in respect to the carriage of passengers' baggage, is

passenger and his personal baggage. If that relation is considered as raising a duty independent of contract (*Railroad Co. v. Trautwein*, 52 N. J. Law, 169, 19 Atl. 178), it is a duty owed to the passenger to carry him and his personal baggage. The case shows no misconduct on the part of the railroad company, occasioning the injury to the machine, on which an action of trespass could be maintained. Upon the facts shown, I think it obvious that the plaintiff below had no enforceable right of action against the railroad company. The contract of carriage was made by it with Herbert W. Knight, and the firm is not in privity therewith. The duty arising from its reception of said Knight as passenger was owed to him, and not to his firm. There is nothing on which the railroad company can be charged with any liability to the plaintiff below. Upon similar facts, this conclusion has been elsewhere reached. *Weed v. Railroad Co.*, 19 Wend. 534; *Stimson v. Railroad Co.*, 98 Mass. 83; *Dunlap v. Steamboat Co.*, Id. 371; *Alling v. Railroad Co.*, 126 Mass. 121; *Becher v. Railroad Co.*, L. R. 5 Q. B. 241. Whether Herbert W. Knight could maintain an action against the railroad company, upon these facts, is a question not before us, and on which no opinion can be expressed. This objection to the judgment below is substantially presented by the reasons filed. The result is that the judgment must be reversed, with costs.

STATE (ANDERSON et al., Prosecutors) v.
CITY COUNCIL OF CITY OF
CAMDEN et al.

(Supreme Court of New Jersey. Feb. 20, 1896.)

MUNICIPAL CORPORATIONS—ENACTMENT OF ORDINANCE—STATUTES—UNITY OF SUBJECT AND TITLE—CONSTRUCTION.

1. The city council of Camden have power, by virtue of the seventeenth section of the city charter, to establish the office of "transcribing clerk in the office of the collector of delinquent claims," and to prescribe the duties of such office. By virtue of such power, the said council passed an ordinance creating said office, and fixing the duties to be performed by the incumbent. Said ordinance was introduced at a special meeting, called by the president, at the written request of more than one-fourth of the total membership of council, and was finally passed at the same meeting by a vote of more than two-thirds of the members of that body, after having been read three times, twice at length, and once by its title. *Held*, that such ordinance is valid.

2. It is only in perfectly plain cases that courts are justified in vacating statutes on the ground that they do not comply with the constitutional provision which requires the object of every act to be expressed in its title, and the fact that the object of another act might, with propriety, be expressed more specifically in its title than the legislature has seen fit to do, is no reason for declaring it void, so long as the title fairly points out the subject of the legislation.

3. Where a statutory provision of doubtful import has been incorporated into a subsequent statute, after it has received a long-continued practical construction, the interpretation given to such provision will be considered to have been adopted, as well as the words.

(Syllabus by the Court.)

Certiorari, on the prosecution of Abraham Anderson and others, against the city council of the city of Camden and another, to review an ordinance. Writ dismissed.

Argued November term, 1895, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

E. G. C. Bleakly and D. J. Pancoast, for prosecutors. J. Willard Morgan, for defendants.

GUMMERE, J. The writ in this case brings up for review an ordinance of the city of Camden, establishing the office of transcribing clerk in the office of the collector of delinquent claims, passed June 6, 1895, at a special meeting of the city council held on that day. The validity of this ordinance is attacked by the prosecutors upon numerous grounds, which will be considered in their order.

The first ground relied upon is that the city council of Camden had no legal power or authority to pass the ordinance. Section 17 of the charter of the city of Camden (Pamph. Laws 1871, p. 220) empowers the city council to elect and appoint, and also to prescribe the duties of, all the subordinate officers of the said city, as well those who are named in the charter as those who are not named therein, but who may, in the opinion of council, be necessary for the better ordering and government of the city. The office which has been created by the ordinance under review is a subordinate one. Whether its creation was necessary for the better ordering and government of the city was a question which the legislature left to be determined by the city council. That body, by the passage of this ordinance, has declared that, in its opinion, it was necessary, and its decision must be accepted as finally settling the question.

But it is said that council has overstepped the authority conferred upon it by the charter: (1) Because the ordinance provides that the incumbent of the newly-created office shall hold the same for a term of two years; and (2) because the duties imposed by the ordinance upon this new official are imposed by the city charter upon certain other officials.

As to the first of these reasons, the contention is that the city council, being a yearly body, cannot regulate the appointment of its officers for more than one year; that to hold otherwise would be to detract from the power of future city councils. This contention is without force. While it is true that one council cannot by ordinance bind a subsequent council, it is not true that, for that reason, an ordinance which, by its terms, continues in force after the council which passed it has ceased to exist, is invalid. On the contrary, every such ordinance is valid and effectual until it expires by its own limitation, or is repealed either by the council which passed it or by a subsequent council.

Nor is there anything in the objection made to the validity of the ordinance because it imposes upon the new official, created by it, duties which the charter requires to be performed by other officials; for an examination of the charter, and a comparison of it with the ordinance under review, will disclose that the objection rests upon a misapprehension of facts. The charter does not impose upon other officials the duties which the ordinance requires to be performed by the transcribing clerk in the office of the collector of delinquent claims.

The next objection urged against the ordinance is that it was introduced at a special meeting of council, which, it is insisted on behalf of the prosecutors, was not called in the manner required by law; and, further, that it was finally passed at the same meeting, in violation of the city charter, which, it is said, forbids the passage of an ordinance at the same meeting at which it was introduced. The return to the writ shows that the meeting was called in accordance with the provisions of an act of the legislature entitled "An act concerning cities," approved March 22, 1895 (Pamph. Laws 1895, 646). That act provides that, in all cities

this state, it shall be the duty of the president of the city council, board of aldermen, or other governing body, on the request of one-fourth of the total membership of such body, in writing, addressed to him, to call a special meeting thereof. The meeting in question was called by the president of council upon the written request, addressed to him, of 5 of the members of the city council out of a total membership of 19; and it is not denied that this was a compliance with the requirement of the act of 1895, but it is contended that this statute is unconstitutional, and that the only method by which a special meeting of the city council can be legally called is in the manner specified in the city charter, which authorizes the president to call such meeting only when requested, in writing, to do so by at least eight of the members. The objection made to the law of 1895 is that it fails to comply with the constitutional requirement that "every law shall embrace but one object, and that shall be expressed in the title," because the title of the act fails to express its object. In the case of *State v. Hammer*, 10 N. J. Law, 435, decided in this court, it is stated that it is only in perfectly plain cases that it is proper for the courts to vacate statutes on the ground now in question; and this declaration is quoted with approval in the court of errors and appeals in *Payne Mahon*, 44 N. J. Law, 216. The criticism on the title is that "An act concerning cities" expresses nothing definite, and could embrace any one of a thousand or more different subject-matters connected with the affairs of cities. But the fact that the object of the act might with propriety be expressed more specifically in its title than

the legislature have seen fit to do is no reason for declaring it void, so long as the title fairly points out the subject of the legislation. *State v. Town of Union*, 33 N. J. Law, 350; *State v. Township of North Plainfield*, 43 N. J. Law, 349; *Bumsted v. Govern*, 47 N. J. Law, 368, 1 Atl. 835. It seems to me, instead of its being perfectly plain that the title to this act does not express its object, that the contrary is the case, and that its title fairly indicates the general object of the law. The objection to the constitutionality of the act of 1895 cannot prevail. Nor is there anything in the objection that the ordinance was finally passed at the same meeting of council at which it was introduced, in contravention of the city charter; for the charter (title 3, § 20), in terms, permits the final passage of an ordinance at the same meeting at which it was introduced, by a vote of two-thirds of the members of the council (Pamph. Laws 1871, p. 224), and the record in the case shows that this ordinance was passed by the vote of 16 members out of a total membership of 19.

The next ground upon which the ordinance is assailed is that council failed to comply with that requirement of the city charter which directs every ordinance to be read three times before its final passage; and it is insisted that nothing less than a complete reading, section by section each time, is a compliance with this requirement. If this be so, then this provision of the charter was disregarded, for the ordinance, on its third reading, was not read in full, but only by its title. But I do not think that it is necessary that every ordinance must be read three times at length, in order to satisfy this charter requirement. The constitution of this state (article 4, § 4, par. 6) directs all bills and joint resolutions to be read three times, both in the senate and general assembly, before the final passage thereof; yet it has always been considered by both houses of the legislature that a reading of a bill or resolution by the title thereof, for at least one of the three readings, was a compliance with the constitutional mandate. An examination of the senate journal and the minutes of the assembly will disclose that this is the inveterate practice in both the upper and the lower house. The charter provision now under consideration is taken almost verbatim from the section of the constitution which has been quoted, and the construction which had been put upon that section by the lawmaking power, for so many years previous to the passage of the Camden charter, determines the meaning to be given to the charter requirement in question. It is a well-settled rule that where a statutory provision of doubtful import has been incorporated into a subsequent statute, after it has received a long-continued practical construction, the interpretation given to such provision will be considered to have

been adopted, as well as the words. *Fritts v. Kuhl*, 51 N. J. Law, 199, 200, 17 Atl. 102. The mandate of the Camden charter that every ordinance shall be read three times before its final passage was not disregarded when this ordinance was read by its title, and not in full, for its third reading.

One other objection remains to be considered, and that is that the ordinance was not duly published, as required by law. The contention of the prosecutors is that, by the terms of the ordinance, it took effect immediately, notwithstanding the fact that, by the first section of an act of the legislature entitled "An act concerning the publication of ordinances, financial statements and other public notices," approved March 25, 1895 (Pamph. Laws 1881, p. 295), it is enacted that no ordinance passed by the city council of any city of this state shall become operative and binding until it shall have been published in at least one newspaper printed and published in such city for at least two insertions. But this statutory provision merely nullifies that portion of the ordinance which ordains that it shall go into effect immediately. The ordinance is not rendered void by the attempt of the city council to put it in force at a time earlier than the statute of 1881 permits; it only remains inoperative until after its publication as required by law. *Bowyer v. Camden*, 50 N. J. Law, 87, 91, 11 Atl. 137. The second section of the act of 1881, above referred to, is in these words: "That the said city councils shall publish the annual financial statements of such cities in at least one newspaper printed and published in the city for which said financial statement is made, for at least two insertions; and all other public notices, required by law to be published in any manner shall be published in at least one newspaper in said cities for at least two insertions: provided, that in any case where such publication is made in two newspapers, said papers shall not be of the same political party." The ordinance which is attacked by the prosecutors was published in the *Post*, the *Courier*, and the *Telegram*, three of the newspapers of the city of Camden, all of which belong to the same political party; and it is urged that such a publication is in direct violation of the act of 1881, and cannot have the effect of rendering the ordinance operative. The act of 1881 does not prohibit the publication of ordinances in two newspapers of the same political party. It deals with the publication, not only of ordinances, but of financial statements and of all other public notices. By its first section, it regulates the publication of ordinances only; by its second section, it regulates the publication of annual financial statements and all other public notices; and then, by a proviso, directs that in any such case, where such publication is made in two newspapers, said papers shall not be of the same political party. Manifestly, this proviso has no reference to the matters dealt with in the first sec-

tion, but relates solely to the publication of annual financial statements and other public notices. But even if it had been considered that this proviso regulated the publication of city ordinances, as well as of other matters, it would not have availed the prosecutors; for by an act approved April 8, 1892, entitled "An act in relation to city printing and official advertisements in cities of the second class in this state" (Pamph. Laws 1892, p. 414), the common councils of cities of the second class, with the consent of the mayor, were each of them authorized to designate by resolution, and without limitation as to the political complexion thereof, the official newspaper or newspapers in which should be solely published all official notices, ordinances, advertisements, and official proceedings relating to the municipal affairs of any such city. Camden is a city of the second class, and on the 21st of February, 1894, in pursuance of the authority conferred by the act of 1892, it designated the *Post*, *Courier*, and *Telegram* as its official papers. The act of 1892 was intended to prescribe a different method for the publication of ordinances, advertisements, and official proceedings relating to the municipal affairs of cities of the second class from that prescribed by the act of 1881, and to that extent repealed the prior act; for it is a well-settled rule, in the construction of statutes, that, even if the subsequent statute be not repugnant in its provisions to a prior one, yet, if it was clearly intended to prescribe the only rule in the case provided for, it repeals all prior acts which regulate the subject. *School Dist. v. Whitehead*, 13 N. J. Eq. 290; *State v. Commissioner of Railroad Taxation*, 37 N. J. Law, 228; *Bowyer v. Camden*, supra. The publication of the ordinance under review was therefore rightly made in those newspapers which had previously been designated by the city of Camden as its official papers.

In my opinion, no infirmity has been shown in the ordinance brought up by this certiorari; and the writ should be dismissed, with costs.

STATE (McMAHON, Prosecutor) v.
O'BRIEN.

(Supreme Court of New Jersey. Feb. 20, 1896.)

CONTINUANCE—DISCRETION OF COURT.

In landlord and tenant proceedings, a judgment in favor of the claimant, regularly obtained, will not be disturbed at the instance of a stranger to the proceedings, whose only grievance is that the trial judge refused to adjourn the proceedings at his request, upon being informed that the prosecutor was in possession of the premises.

(Syllabus by the Court.)

Certiorari to Jersey City district court: Custer, Judge.

Certiorari on the prosecution of Michael McMahon against Patrick O'Brien to review a judgment against prosecutor in a landlord and tenant proceeding. Writ dismissed.

Argued November term, 1895, before LIP-PINCOTT and GARRISON, JJ.

J. A. McGrath, for prosecutor. Willard C. Fisk, for defendant.

GARRISON, J. By the return to this writ of certiorari it appears that a landlord and tenant proceeding was instituted by Patrick O'Brien before the judge of a district trial court, and a summons to show cause issued to and served upon Michael J. McMahon, demanding the possession of certain premises, with respect to which the relation of the parties as lessor and lessee was established, in the jurisdictional affidavit, by a copy of a written lease. Michael J. McMahon did not require the claimant to prove the facts that authorize the removal of a tenant, but one Michael McMahon—a different person, and not a party to the proceeding—appeared by attorney, and stated that he was in possession of the premises, and requested an adjournment. Judgment for possession was entered in favor of the claimant, but warrant of removal was not issued, whereupon Michael McMahon obtained this writ of certiorari.

It was the evident purpose of the prosecutor to raise here the construction of the district court act (and, for that matter, of the landlord and tenant act) in cases where there is any person in possession of the demised premises other than the original lessee, and to discuss whether such person may lawfully be removed by a warrant issued in a proceeding to which he was not made a party. No such question, however, is raised by the proceeding returned before us, which is simply a judgment for possession by a claimant upon undisputed facts entitling him to it.

The only grievance the prosecutor has (if we assume his right to be heard here) is that an adjournment was not accorded him,—a matter of mere discretion, where no special reasons exist, and one that cannot be taken advantage of by a volunteer, who made no offer of proof to the court below of any state of facts that would, if established, permit him to intervene. The depositions taken upon notice, and annexed to the certiorari, form no part of the return, and, at most, merely tend to vindicate the prosecutor's standing to sue out the writ. From these affidavits, it is to be gathered that the prosecutor sought to intervene, not merely because he was in possession, but because he had, as assignee of the term, made payments of rent, under circumstances that constituted him the tenant, contemplated by the landlord and tenant act. The situation thus presented would have differed essentially from that respecting which Mr. Justice Van Syckel spoke in *Brahn v. Forge Co.*, 38 N. J. Law, 74. There was, however, no offer before the district court to prove this state of facts, and they are not, even now, in lawful proof before us.

The question must, therefore, be relegated to some occasion when it may legitimately be decided, merely guarding against any impression that it has been here met or passed upon.

No error appearing by the return before us, the writ is dismissed, with costs.

STATE (OCEAN CASTLE, NO. 11,
KNIGHTS OF THE GOLDEN
EAGLE, Prosecutor)
v. SMITH.

(Supreme Court of New Jersey. Feb. 20, 1896.)

BENEVOLENT ASSOCIATIONS—SUBMISSION OF GRIEVANCES—VALIDITY OF AGREEMENT.

Members of fraternal benevolent associations may lawfully agree, as part of their scheme of organization, to submit their domestic grievances in the first instance to the internal tribunals of their order, and, having so agreed, cannot, against the protest of the association, maintain a civil action against it, until the condition precedent has been, in legal contemplation, complied with.

(Syllabus by the Court.)

Certiorari to court of common pleas, Atlantic county; Thompson, Senseman, and Byrnes, Judges.

Action by William B. Smith against the Ocean Castle, No. 11, Knights of the Golden Eagle. Judgment for plaintiff, and the defendant brings certiorari.

Argued November term, 1895, before LIP-PINCOTT and GARRISON, JJ.

Godfrey & Godfrey, for prosecutor. W. M. Clevenger and C. L. Cole, for defendant.

GARRISON, J. William B. Smith was a member of Ocean Castle, No. 11, Knights of the Golden Eagle, in good standing, and in receipt of weekly benefits on account of illness, under a beneficial provision of the castle. The castle stopped its payments of benefits upon a mistake in its method of bookkeeping. The facts found by the court of common pleas to whom this certiorari was directed establish the right of Smith to the arrears of benefits, the only question being whether he can maintain this suit in the civil courts without first having had recourse to the tribunals of the association itself.

The constitution of the supreme castle of the United States incorporates in the constitution of each subordinate castle the following provisions (article 9, on appeals):

"1. All appeals from the action of the grand and subordinate castles, or by the members thereof to the supreme castle, shall be received and passed upon in its capacity of a court of last resort. Said appeals, in proper form, shall come up without any intervention or prevention of grand or subordinate castles; and, when presented for certification by their official seal, the same shall be done.

"Sec. 2. Before a brother, his representative, counsel, or assignee, can seek redress in the case of appeal to the civil courts, he or

they must exhaust the laws of the order by an appeal to the castle, grand castle, and supreme castle."

The appeals thus provided for are not limited to matters of discipline, as is shown by the word "assignee." They are in terms not meant to be finally conclusive, but are, if lawful, obligatory conditions precedent to the maintenance of a civil action.

The association is what is known as a "fraternal benevolent organization," whose constitution, upon familiar principles, becomes incorporated in all the contractual relations of the members inter se, and with the association. If the provision above cited from the constitution is a lawful regulation, it enters into the contract of each member as much as does the correlative duty of the castle to respond in sick benefits under prescribed conditions. The naked question, therefore, is whether the members of these associations may lawfully agree that they will not draw their affairs into the public courts until after the tribunals erected by themselves for that purpose shall have heard the dispute in the manner designated by the associated members.

The wisdom of such a provision is not up for argument; and, inasmuch as it cannot be said to be so unreasonable as to be invalid, the only question is as to the lawfulness of the regulation. This question does not appear to have two sides.

Whatever conflict of opinion there may be as to the legality of provisions that prohibit actions at law altogether, there appears to be no reasonable ground for denying that these organizations may provide methods for hearing the controversies of their own members, and that the members may bind themselves to have recourse thereto in the first instance, and before invoking the civil courts. The cases that deny most strenuously the public policy of permitting the establishment by these associations of tribunals of conclusive decision admit that there is no valid reason why their members may not lawfully agree not to sue at law until after the method of redress provided by themselves has first been invoked. *Bauer v. Sampson Lodge*, 102 Ind. 262, 1 N. E. 571.

Other authorities place no limit upon the right of subscribers to waive their recourse to civil courts. *Independent Order v. Schmidt*, 57 Md. 98; *Society v. Vandyke*, 2 Whart. 309.

In our own state, the case of *Zelliff v. Grand Lodge*, 53 N. J. Law, 536, 22 Atl. 63, concerns cases of discipline only; but the distinction therein suggested is of force only when conclusive effect is sought to be given to the special tribunal in cases involving property rights.

We think the reasonable rule is that members of these associations may agree to submit their grievances in the first instance to an internal tribunal of their own; and that, having so agreed, they may be held to it, and cannot, against the protest of the associa-

tion, maintain a civil action against it, until the condition precedent has been, in legal contemplation, complied with.

At the close of the plaintiff's case, the court of common pleas was requested to nonsuit the plaintiff, upon the ground, among others, that he had not performed the conditions precedent provided by the laws of the defendant association. This request was refused. In our opinion, it should have been granted. The judgment rendered by the pleas should be reversed, the record remitted, and a judgment of nonsuit entered.

STATE (JOHNSON, Prosecutor) v. MAYOR, ETC., OF BOROUGH OF ASBURY PARK.

(Supreme Court of New Jersey. Feb. 20, 1896.)

TITLES OF ACTS—CONSTITUTIONAL LAW—LOCAL LEGISLATION—TAXATION—MUNICIPAL CORPORATIONS—ORDINANCE.

1. The provisions of P. L. 1895, p. 490, empowering boroughs to pass ordinances to license the owners of vehicles used for the purpose of soliciting orders or delivering goods, to fix the fees therefor which may be imposed for the purpose of revenue, and to prescribe penalties for a violation of any such ordinance, are sufficiently expressed in the title, "An act respecting licenses in the boroughs of this state."

2. P. L. 1895, p. 490, empowering boroughs to pass ordinances to license the owners of vehicles used for the purpose of soliciting orders or delivering goods, does not violate the constitutional provision which forbids special or local legislation, though such power is not granted to other classes of municipalities.

3. Const. art. 4, § 7, subd. 12, requiring property to be assessed for taxation by uniform rules, according to its true value, does not apply to the legislative power of indirect taxation on franchises, trades, and occupations, by exacting license fees for the privilege of transacting business, though such power be exercised for revenue purposes.

4. An ordinance passed in pursuance of a statute authorizing boroughs to license the owners of vehicles used for the purpose of soliciting orders or delivering goods is not unreasonable because it imposes a fee of \$15 on two-horse wagons, and only \$10 on those drawn by one horse.

Certiorari, on the relation of George C. Johnson, against the mayor and council of the borough of Asbury Park, to remove an ordinance providing for licensing certain trades and occupations.

Argued February term, 1896, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

R. T. & W. B. Stout, Claude V. Guerlin, and Alan H. Strong, for prosecutor. Hawkins & Durand and Collins & Corbin, for defendant.

DEPUE, J. This writ brings up for review an ordinance of the borough of Asbury Park relating to licenses, approved May 7, 1895. The first section ordains that it shall not be lawful for any person to pursue any occupation or business therein mentioned within the limits of Asbury Park unless he shall first obtain a license for such privilege, and pay a license fee therefor as therein

after mentioned. The prosecutor is a butcher, carrying on business within the limits of Asbury Park, soliciting orders, and delivering meat with a wagon drawn by one horse. The section of the ordinance which relates to his business is section 5, which is in these words: "That the owners of each and every grocer, butcher, baker, oyster, fish, clam, milk, kindling wood, photographer, dry goods, furniture, lumber, brick, coal, bullder, stone, cabinet maker, hawking, or peddling wagons, and 'all other soliciting or delivery wagons not herein particularly specified,' engaged or used within the limits of the borough of Asbury Park for the purposes of soliciting orders, or for delivering goods, wares, or merchandise of any kind, drawn by two horses, shall pay to the mayor and council a license fee for said privilege of fifteen dollars for each and every wagon so used and employed; and a license fee of ten dollars for each and every butcher, grocer, baker, oyster, fish, clam, milk, kindling wood, photographer, dry goods, furniture, lumber, brick, coal, bullder, stone, cabinet maker, hawking, or peddling wagons drawn by one horse, so used and employed; and any person or company violating the provisions of this section or any part hereof shall on conviction thereof forfeit and pay to this borough the sum of one hundred dollars."

The language used in drafting this section and the collocation of words and sentences in it are not felicitous, but the object and purpose of the ordinance are sufficiently expressed. The object of this section is to subject to the payment of license fees the owners of the vehicles named for the privilege of transacting their business within the borough limits. The ordinance fixed the license fees at such a sum as to indicate a taxation for revenue purposes. It was adopted in virtue of an act of the legislature entitled "An act to amend an act respecting licenses in the boroughs of this state." P. L. 1895, p. 490. This act in express terms empowers the municipal authorities of boroughs to pass ordinances "to license and regulate the owners or drivers of all vehicles used in connection with any business or occupation for the purpose of soliciting orders or delivering goods within the limits of the municipality," and to fix the license fees therefor which may be imposed "for the purpose of revenue," and also to fix and prescribe penalties for the violation of any such ordinance in a sum not less than \$10 nor more than \$100. It is unnecessary to discuss the limitation on the amount of license fees that may be exacted by ordinances adopted under the police power of regulation. *North Hudson Co. Ry. Co. v. City of Hoboken*, 41 N. J. Law, 71-78. The act above referred to expressly authorizes ordinances imposing license fees for revenue purposes, and legalizes ordinances adopted for that purpose. *Flanagan v. Treasurer*,

44 N. J. Law, 118; *Morgan v. Orange*, 50 N. J. Law, 389, 13 Atl. 240; *Haynes v. City of Cape May*, 52 N. J. Law, 180, 19 Atl. 176. The penalty named in the ordinance for transacting business without taking out a license is also within the power conferred by the act. *Haynes v. City of Cape May*, supra.

The title of the act of 1895 sufficiently expresses its object, in compliance with the constitutional requirements. The title is "An act respecting licenses in the boroughs of this state." The object sought in the end which the legislative act purposes to accomplish, and not the details provided to reach that end, is all that is required in the title of the act. *Walter v. Town of Union*, 33 N. J. Law, 350. Nor does the act violate that constitutional provision which forbids special or local laws, in that it applies only to boroughs. The act of 1878 (P. L. p. 403) which authorizes the formation of boroughs, is a general act for the formation of a minor form of municipal government, which may be resorted to by the inhabitants in any locality throughout the state having the area of territory and population designated by the act. The powers conferred upon these municipalities by the act are different from the powers possessed by other municipalities, such as cities, towns, and townships; and in almost every department of local government a different scheme of government is provided for. The classification which puts boroughs into a class by themselves for the purposes of legislation has been decided to be a legitimate classification; and the act of 1878, which authorizes the formation of boroughs and prescribes the powers of government to be exercised by such municipal bodies, has been held to be constitutional. *State v. Borough of Clayton*, 53 N. J. Law, 277, 21 Atl. 1026. The act of 1895 is, in legal contemplation, only an amendment of the twelfth section of the act of 1878, which gives power to pass ordinances for licensing or prohibiting certain trades, occupations, and business. Cities of the first class are authorized to exact license fees for cars run on street railroads,—a power which is not granted to other cities or other municipalities; and the power to demand such license fees is given by an act which expressly authorizes such license fees for the purpose of increasing the revenues of the city. P. L. 1882, p. 247. In all cities power is given to require a license by bill posters, with license fees which the act declares may be levied and collected for the purpose of revenue,—a power withheld from towns, townships, and boroughs (P. L. 1882, p. 24; P. L. 1894, p. 221); and cities, as a class, are authorized to exact license fees for shows and athletic exhibitions, which could not be justified under mere police powers (P. L. 1890, p. 360). An examination of the many statutes relating to cities of the several classes, towns, townships, and boroughs will

disclose diversities in the power granted to these several municipal bodies, which, if tried by the criterion proposed by counsel in this case, viz. that no reason can be given for granting certain special powers to one class of municipalities and withholding them from other classes, would operate disastrously upon the system of municipal government in force in this state. The division of municipalities into cities, towns, townships, and boroughs, being a classification permitted by the constitution for the purposes of local government, the powers to be conferred upon these bodies, severally, which pertain to the ordinary functions of local government, must rest in legislative discretion. The act of 1882 (*supra*), which authorizes cities of the first class to license the running of street cars, and exact therefor license fees for revenue purposes, was declared to be unconstitutional; but the decision was placed expressly upon the ground that the ratio of population adopted was to be ascertained by the last preceding census of the United States. *Pavonia Horse R. Co. v. Jersey City*, 45 N. J. Law, 297. But the power to legislate for cities as a class, and therefore for towns, townships, or boroughs as a class, in such matters as usually pertain to local municipal government is too well settled to admit of dispute at this time. *Fitzgerald v. New Brunswick*, 47 N. J. Law, 479-487, 1 Atl. 496; same case on error, 48 N. J. Law, 457-486, 8 Atl. 729; *Randolph v. Wood*, 49 N. J. Law, 85-92, 7 Atl. 286; *In re Cleveland*, 52 N. J. Law, 188, 19 Atl. 17; *State v. Borough of Clayton*, *supra*.

It was also contended that the act of 1895 was in violation of that constitutional provision which requires property to be assessed for taxation by uniform rules, according to its true value. Article 4, § 7, subd. 12. The franchises of a corporation, which are quite a different thing from the right of an individual to carry on business, are taxable as property; and, when subjected to that form of taxation, the method by which the tax is laid must conform to the constitutional mode of taxing property. But this constitutional prescription does not apply to the legislative power of indirect taxation upon privileges, franchises, trades, and occupations by exacting license fees for the privilege of transacting business, though such power be exercised for revenue purposes. *Standard Underground Cable Co. v. Attorney General*, 46 N. J. Eq. 270-273, 19 Atl. 733; *Line Co. v. Berry*, 53 N. J. Law, 212, 21 Atl. 490; *State Board of Assessors v. Central R. Co.*, 48 N. J. Law, 347, 4 Atl. 578. The penalty prescribed by the ordinance for transacting business without obtaining a license is within the sum named in the act of 1895, and may be lawfully exacted. *Haynes v. City of Cape May*, *supra*. Nor is the ordinance unreasonable in its discrimination, in the amount of the license

fees, between business transacted with a wagon drawn by one horse, and with a wagon drawn by two horses. There being no legal infirmity in the ordinance, it should be sustained.

**STATE (SHIMER et al., Prosecutors) v.
INHABITANTS OF TOWN OF
PHILLIPSBURG.**

(Supreme Court of New Jersey. Feb. 20, 1896.)

TOWNS—LEASE OF LANDS.

To authorize a lease of the real estate owned by the town of Phillipsburg to be made to a private person, the common council must first pass an ordinance directing such lease to be executed; it cannot be done by resolution.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of Joseph R. Shimer and others, against the inhabitants of the town of Phillipsburg, to review a resolution passed by the common council. Resolution held void.

Argued November term, 1895, before DE-PUE, GUMMERE, and VAN SYCKEL, JJ.

S. C. Smith and J. Blair Riley, for prosecutors. Geo. M. Shipman and Wm. H. Walters, for defendant.

VAN SYCKEL, J. The common council of Phillipsburg, by resolution, granted a lease of a tract of land owned for the term to one Jacob B. Smith, for business purposes. The object of this writ is to set aside the action of the common council. The charter of the town gives the "inhabitants of the town of Phillipsburg, by their corporate name, the right" to purchase, receive, hold, and convey any estate, real or personal, for the public use of said corporation. The power given to common councils is that it shall be lawful for the common council, by a majority of votes, to pass and enforce by-laws and ordinances "to regulate, manage, and control the finances and property, real and personal, of the town."

A lease is a conveyance of real estate, and the power to convey is vested in the inhabitants of the town in their corporate name. The management and control of the real estate is lodged in the common council, and the only mode pointed out for exercising that power is by ordinance. This excludes the right to proceed by resolution. *State v. City of Hoboken*, 35 N. J. Law, 205; *Halsey v. City of Newark*, 54 N. J. Law, 102, 23 Atl. 284. It is necessary that the common council shall, before any conveyance is made, authorize it to be done by ordinance passed in due form. That is a right which belongs to the council under the authority given to manage and control the real estate of the town. The proceedings taken to lease the land in question did not conform to the requirements of the town charter, and must therefore be set aside, with costs. In *State v. Jersey City*, 34 N. J. Law, 390, this court, on *certiorari* prosecuted by a taxpayer, set aside the reso-

ution of the board of aldermen of Jersey City directing the purchase of real estate. Mr. Justice Depue, who delivered the opinion of the court in that case, said that a certain contract entered into with a municipal corporation in violation of the provisions of its charter as to the mode of entering upon the contract is void, although it relates to a subject-matter with respect to which the corporate authorities have capacity to contract.

STATE (FRANCIS, Prosecutor) v. MAYOR, ETC., OF NEWARK et al.

Supreme Court of New Jersey. Feb. 20, 1896.)

REMOVAL OF GOVERNMENT OFFICER—HONORABLY DISCHARGED SOLDIER—DOCUMENTARY EVIDENCE.

1. F., who held the position of clerk in the auditor's office in the city of Newark, was removed by the common council, without cause, and without a hearing first had. He claimed that his removal was in violation of the act of March 4, 1895 (P. L. 1895, p. 317), which prohibits the removal of an honorably discharged Union soldier from a position under the government of any city of this state, except for good cause shown, and after a hearing upon written charges preferred against the incumbent. *Held*, that in order to entitle him to the benefit of that act it was necessary for F. to show that he was an honorably discharged Union soldier, and that the evidence produced by him for that purpose failed to establish the fact of his discharge. *Held*, further, that a soldier of the war of the Rebellion who deserted from his regiment, but who afterwards received his discharge, under an order of the war department, which authorized such discharge to be issued to him upon his furnishing a substitute, is not an honorably discharged Union soldier, within the meaning of the act of 1895, and is not entitled to its benefits.

2. The certificate of a public officer that a certain fact appears of record in his office, without the production of a duly-authenticated copy of such record, is not evidence of the existence of the fact.

3. A copy of a record in the office of the adjutant general, duly certified by him under the seal of his office, as provided by the act of March 1, 1870 (Revision, p. 694), is without probative force in a judicial proceeding.

(Syllabus by the Court.)

Certiorari on the prosecution of Ebenezer Francis against the mayor and common council of Newark and others to review the action of the common council and finance committee in removing prosecutor from office. *Crit discharged*.

Argued November Term, 1895, before DEPUÉ, VAN SYCKEL, and GUMMERE, JJ.

Joseph A. Beecher, for prosecutor. Sherard Depue and Chandler W. Riker, for defendants.

GUMMERE, J. The prosecutor in this case seeks, by this proceeding, to have reviewed the action of the common council of the city of Newark, and of the finance committee of that body, on May 15 and 17, 1895, removing him, without cause and without a hearing, from the position of clerk in the office of the auditor of said city, which he had held since July 1, 1892. The prosecutor

claims to be an honorably discharged Union soldier, and as such insists that the action of the common council and its finance committee, in removing him from his position, was in violation of the provisions of the act of March 14, 1895, entitled "An act regarding honorably discharged Union soldiers, sailors and marines," and therefore void. This act prohibits the removal of an honorably discharged Union soldier from any position or office under the government of any city of this state the term of which is fixed by law, except for good cause shown, and after a hearing upon charges regularly preferred against him.

In order to entitle him to the benefit of this act, it was necessary for the prosecutor to show, at the outset of his case, that he was an honorably discharged Union soldier. The usual method of proving that fact is by the production of the certificate of discharge itself. *Fitchburg v. Lunenburg*, 102 Mass. 358; *Hanson v. South Scituate*, 115 Mass. 338. The prosecutor, however, did not adopt this method of proving his status, but, instead, attempted to do so by other evidence. He in the first place offered a certificate of the adjutant general of this state, which reads as follows: "Trenton, April 30, 1895. It is certified, that the records of this office show that Ebenezer Francis was enrolled as a private in Company I, first regiment, New Jersey volunteer militia, on the 30th day of April, 1861, and was mustered into the United States service as such for the period of three months from the 30th day of April, 1861, and that he was discharged July 31, 1861, with the regiment, at Newark, New Jersey, expiration of term of service. William S. Stryker, Adjutant General." This certificate has no probative force whatever. It is not a certified copy of a record, but merely a statement of what, in the opinion of the certifier, that record shows. The worthlessness of such a certificate as evidence is apparent. *Owen v. Boyle*, 15 Me. 147. Nor would the prosecutor have been in any better position if he had produced a certified copy of the records of the adjutant general's office; for such a copy is not receivable in evidence except in those cases where its reception is enjoined or permitted by statute. *Starkie*, Ev. 154; *State v. Board of Public Works*, 57 N. J. Law, 313, 30 Atl. 581. The third section of the supplement to the national guard act, approved March 1, 1870 (Revision, p. 694), directs the adjutant general to "procure an appropriate official seal, and affix an impression of the same to all certificates of record issuing from his office," but no statutory warrant can be found for the reception of such certificates of record in evidence in judicial proceedings.

Prosecutor, to further substantiate his claim to be an honorably discharged Union soldier, produced another paper from the adjutant general's office, purporting to be the muster-out roll of the company in which he

enlisted; but there was no proof offered of its execution by the parties who were required to sign it in order to make it a valid muster roll. This, it seems to me, was necessary to be done in order to give this paper any value as evidence in this case, and the failure to produce such proof renders it of no avail in establishing the prosecutor's status. The prosecutor next offered another certificate of the adjutant general, in the following words: "Trenton, May 23, 1895. It is certified, that the records of this office show that Ebenezer Francis was enrolled as a private in Company I, first regiment, New Jersey volunteer cavalry, on the 11th day of September, 1861, and was mustered into the United States service as such for the period of three years from the 14th day of September, 1861, and that he was discharged January 13, 1865, per paragraph 29, Special Orders No. 435 (war department, adjutant general's office, Washington, D. C., dated December 8, 1864). William S. Stryker, Adjutant General." This certificate, like the previous one, has no evidential force, for the reason already stated. Moreover, it appears, from the testimony of a clerk in the adjutant general's office, that the records in that office originally showed that the prosecutor was a deserter from the service of the United States, and that those records had been altered by one of the clerks in the office, since this suit was instituted, so as to make it appear that he was discharged. No comment is necessary to show the worthlessness of such a record as evidence.

Another certificate, offered by the prosecutor to prove his status as an honorably discharged Union soldier, was that of the chief of the record and pension office, a branch of the war department of the United States. It reads as follows: "To All Whom It may Concern. This is to certify that Ebenezer Francis, who was enrolled on the 14th day of September, 1861, to serve three years, was discharged on the 13th day of January, 1865, by paragraph 29, Special Orders No. 435 (war department, A. G. O., dated December 8, 1864), while holding the grade of private in Company I, first regiment, N. J. cavalry Vol. This certificate is given upon evidence that the original discharge has been lost or destroyed, and in all cases upon the conditions imposed by act of congress, approved March 3, 1875, that it shall not be accepted as a voucher for the payment of any claim against the United States for pay, bounty, or other allowance, or as evidence in any other case." It seems to me that, with the condition annexed to it, this certificate could not be received in evidence in this case, even if it was otherwise unobjectionable. But, be that as it may, this paper amounts to nothing as evidence. It states as a fact that the prosecutor was discharged; but what that statement is based upon, whether upon the personal knowledge of the certifier, or upon an exam-

ination of the records in his office, does not appear. If upon his personal knowledge, his statement is not competent unless made under oath; and if upon an inspection of the records in his office, a copy of those records, duly authenticated, should have been offered to prove the fact of discharge.

Another certificate of the chief of the record and pension office was also offered by the prosecutor, which reads as follows: "Washington City, May 31, 1895. Pursuant to section 882 of the Revised Statutes, I hereby certify that it appears from the records of the record and pension office of the war department that the annexed statement of the military service of Private Ebenezer Francis, Company I, first New Jersey cavalry volunteers, and copy of paragraph 29 Special Orders No. 435 (December 8, 1864, war department, Adj. Gen.'s office), are true." Then follows this statement: Ebenezer Francis was enrolled as a private in Company I, first New Jersey cavalry volunteers, September 14, 1861, to serve three years, and was discharged the service, as of said grade and organization, January 13, 1865, pursuant to the provisions of paragraph 29, Special Orders No. 435 (December 8, 1864, war department, adjutant general's office), of which the following is a copy: "29. Private Ebenezer Francis, Jr., Company I, first New Jersey cavalry, will be discharged the service of the United States, upon producing satisfactory evidence to the commanding officer of the corps or department in which he may be serving of his having furnished an acceptable substitute, not liable to draft, to serve three years. Upon the presentation of the substitute to any United States mustering officer, he will muster him (the substitute) into the service of the United States, and give a certificate of the muster to the person presenting the substitute, in order that the principal may receive the order for his discharge from the corps or department commander upon his presentation. By order of the secretary of war. E. D. Townsend, Assistant Adjutant General." This certificate is under the seal of the war department, and it is insisted that it is therefore evidence, by force of section 882 of the Revised Statutes of the United States. That section provides that copies of any books, records, papers or documents in any of the executive departments of the government, when authenticated under the seals of such departments, shall be received in evidence equally with the originals thereof. By force of this statute, a transcript from the war department, duly authenticated by the certificate of the officer who is the custodian of the original paper, document, or record, and the seal of the department, is plenary proof of the subject-matter contained in it. *Hawthorne v. Hoboken*, 35 N. J. Law, 247. It will be seen, however, by an examination of this certificate, that the only transcript of a record, paper, or document contained in it

is that of paragraph 29 of Special Orders 435, and that document proves nothing more than that the prosecutor was entitled to be discharged the service of the United States, upon complying with certain conditions. That he furnished a substitute after this order was issued appears in the case; but there is nothing in the case to show that such substitute was not liable to draft, or that the prosecutor produced to the commanding officer of the corps or department in which he was serving satisfactory evidence of the furnishing of such substitute, or that he ever received from such commanding officer an order for his discharge. The production of paragraph 29, Special Orders No. 435, does not establish the fact that the prosecutor is an honorably discharged Union soldier. The rest of the certificate is not authorized by the provision of the United States statute above referred to. It is a mere statement by the certifying officer of what, in his opinion, the records of his office show; and this, as was said in discussing the effect of the certificates made by the adjutant general of this state, is without evidential value.

This comprises all the evidence produced by the prosecutor to show his right to the enjoyment of the privileges bestowed by the act of 1895 upon honorably discharged Union soldiers, and it seems to me that it fails to demonstrate the existence of such right. The prosecutor did not offer himself as a witness in his own behalf, but he was called by the defendants, and, on their examination, testified that he enlisted as a soldier in the fall of 1861 for three years, and served until February 1, 1862, at which time he left his regiment, without the permission of his superior officers, so far as his testimony shows, and never returned to it, or took any further part in the war of the Rebellion. The corporal of his company was examined as a witness, and testified that the prosecutor left his company on the date last mentioned, without leave, with two or three other members of the company, and was subsequently reported as a deserter. Now, assuming that all the facts contained in the various certificates offered by the prosecutor have been proved, and taking them in connection with the prosecutor's own statement, the situation is this: He enlisted as a soldier in the war of the Rebellion on September 14, 1861, for three years, and served until February 1, 1862, when he deserted, and never afterwards returned to his regiment, or took any further part in the war. In January, 1865, by furnishing a substitute, he was relieved from the stigma of being recorded in the archives of the war department as a deserter, and was recorded as having been "discharged the service." Such a discharge as this is clearly not the honorable discharge which the legislature of this state had in mind as entitling the veterans of the late war to special consideration at its hands, and as justifying it in providing

for their retention in our civil service during good behavior. The writ should be discharged, with costs.

STATE (BENSON et al., Prosecutors) v. INHABITANTS OF TOWNSHIP OF BLOOMFIELD et al.

(Supreme Court of New Jersey. Feb. 20, 1896.)
SPECIAL LAWS—GLEN RIDGE BOROUGH—TAXATION.

1. The act in relation to borough commissions passed March 7, 1882, the act for the formation of boroughs passed in 1890, and the act for the formation of boroughs passed in 1891, are of doubtful constitutionality, and, if valid, supplements to the borough act of 1878 are not unconstitutional because they do not apply to local governments organized under either of those three acts.

2. By force of the supplements of March 6, 1888, March 23, 1888, and March 7, 1895, to the borough act of 1878, all taxes to be assessed and collected in the borough of Glen Ridge, except school taxes, are to be assessed and collected by the borough assessor and collector. The supplement passed April 24, 1888, does not change the law in that respect.

3. Supplements to the borough act of 1878 are not unconstitutional because they do not apply to boroughs incorporated by special charters before the constitutional amendments prohibiting special legislation were adopted.

4. Glen Ridge still constitutes part of Bloomfield school district, and school taxes cannot be assessed by the borough assessor.

(Syllabus by the Court.)

Certiorari, on the prosecution of one Benson and others, against the inhabitants of the township of Bloomfield and others, to review an assessment. Proceedings set aside.

Argued November term, 1895, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Riker & Riker, for prosecutors. Gallagher & Richards, for defendants.

VAN SYCKEL, J. The writ brings before the court certain taxes assessed by the assessor of the township of Bloomfield against the prosecutors, who are residents of the borough of Glen Ridge, the property assessed being also in the said borough. The reasons relied upon for reversal are substantially: (1) That by reason of the supplements to the borough act passed April 5, 1878 (P. L. 403), under which said borough is incorporated, the power to levy and collect said taxes is lodged exclusively in the assessor and collector of said borough. (2) That Glen Ridge is a separate school district, and is entitled to assess and collect its own school tax.

In *State v. Borough of Clayton*, 53 N. J. Law, 277, 21 Atl. 1026, this court held the borough act of April 5, 1878, to be valid and constitutional. Under various supplements passed to said act up to the year 1888, the township assessed and collected all taxes within the borough. The borough was subject to all township taxes except road tax, and, in addition thereto, was subject to a borough road tax and a tax for borough purposes, not to exceed 50 cents on the \$100 of

valuation. A supplement to the borough act of 1878 was passed March 6, 1888 (P. L. 140), which has been construed by this court to give boroughs formed under the act of 1878 power to assess and collect their taxes for borough purposes, but not the county and township taxes within said boroughs. *Wainwright v. Craig*, 51 N. J. Law, 462, 17 Atl. 955. A further supplement, passed March 23, 1888 (P. L. 226), has been held by this court to authorize and require the borough assessor and collector to assess and collect all taxes which are to be assessed and collected in said borough. *Maxson v. Segoine*, 53 N. J. Law, 339, 25 Atl. 963; *Morrill v. Simpkins*, 53 N. J. Law, 582, 22 Atl. 57. The power and duty of the borough assessor and collector under this legislation to assess and collect all taxes to be raised within the borough, except school taxes, are indisputable.

It is claimed, however, by the defendants, that a further supplement to the act of April 5, 1878, passed April 24, 1888 (P. L. 539), restores to the township the right to assess and collect the borough taxes. This supplement provides that the supplement of March 15, 1881 (P. L. 115), shall be amended to read as follows: "That it shall and may be lawful for the council of every borough organized and formed under the act to which this is a supplement to order and cause to be assessed and raised by tax every year such sum or sums of money not exceeding fifteen hundred dollars in any one year as they shall deem expedient for the current expenses of such borough, which sum so designated being certified to by the mayor and clerk shall be assessed and collected the same as provided for and directed in the act to which this is a supplement." A proviso follows, authorizing the mayor and council of the borough to exempt from municipal taxation certain manufacturing corporations. The supplement of 1881 is in no respect changed except by the addition of said proviso. The supplement of 1881, as well as the amendatory supplement of 1888, relates only to the sum raised exclusively for borough purposes, and the utmost effect that under any interpretation can be claimed for it is that it deprived the borough of the previously existing right to assess and collect the taxes for borough purposes, but left in the borough the duty to assess and collect the county and township taxes for which it was liable. Such could not have been the legislative intent, nor is it the correct construction of this enactment. This amendatory act is a supplement to the act of April 5, 1878, and the provision in it that the taxes to be assessed under it "shall be assessed and collected the same as provided for and directed in the act to which it is a supplement" means in the manner provided for in the act of 1878 as it stood on the 24th of April, 1888; that is, the act of 1878 as amended up to that date. The act of 1878 had then no existence except in its amended form. There is no repealing clause in the last-named supplement, nor is

there any indication of an intention to repeal the two before-mentioned supplements passed at the session of 1888. This act of April 24, 1888, so far as it amends the act of 1881, is in conformity with the constitutional requirement, the section amended being set out at length; but it cannot have the effect to revive the provisions in the act of 1878, which before then had been repealed, giving the township the right to assess. That part of the act of 1878 is not set out in this act of 1888, as required by article 4, § 7, subsec. 4, of the constitution. If this interpretation is not adopted, the result is not affected. The right of the borough to assess and collect is recognized and guaranteed by a further supplement to the act of April 5, 1878, passed March 7, 1895 (P. L. 210). This supplement provides "that all boroughs existing within the limits of the townships of this state incorporated under the act to which this is a supplement shall hereafter be entirely separate and independent in all matters of local government from the townships out of which said boroughs have been created." By force of the acts of March 6, 1888, March 23, 1888, and March 7, 1895, if valid, the borough was disconnected from the township, and vested with the power of assessing and collecting its own taxes.

The defendants insist that there is one unconstitutional feature common to all these acts. The alleged infirmity is that, in terms, they apply only to boroughs created under the law of April 5, 1878, and do not apply to boroughs previously existing under special charters; nor to borough commissions formed under the act of March 7, 1882 (P. L. 49); nor to boroughs formed under the act for the formation of boroughs passed in 1890 (P. L. 58); nor to boroughs formed under the act for the formation of boroughs passed in 1891 (P. L. 280). By the borough act of April 5, 1878, the inhabitants of any township or part of a township in this state, embracing an area not to exceed four square miles, and containing a population not exceeding 5,000, may become a borough in the manner prescribed by the act. The act of March 7, 1882, provides for the incorporation of borough commissions with an area not exceeding two square miles, and a population not exceeding 3,000. The act of 1890 provides for the incorporation of boroughs with an area not exceeding two square miles, and a population not less than 200. The act of 1891 provides for the incorporation of boroughs with an area not exceeding two square miles, and a population not less than 200. These acts contain no repealing clause, and it is manifest that neither one was intended to repeal or in any wise to modify the act of April 5, 1878. It has been so adjudged by this court in *Green v. Clarke*, 56 N. J. Law, 62, 27 Atl. 924. The act of 1878 provides a mode for incorporating boroughs which may be adopted by those localities which are empowered to incorporate under either of the

did three acts passed since that time. If the classification of boroughs and borough commissions by the three acts last named is founded upon substantial differences, then local governments organized thereunder constitute classes separate and distinct from boroughs formed under the act of 1878, and supplements to the latter act would not be appropriate to, and need not include, them. But, the classification is illusory, then the acts of 1882, 1890, and 1891, although general in form, are in fact special and local, and therefore void. Supplements to the act of 1878 could not legally extend to unconstitutional acts. The act of 1878 is general, and may be applied to the cases for which the subsequent laws were framed. The populations prescribed in the three later acts are within the classification adopted in the act of 1878, and there does not appear to be anything distinctive in their character or circumstances

to constitute a legal basis for such legislation. It is difficult to conceive how four several laws, providing different modes of organizing boroughs for the same class of population, can be general. Each of these three acts passed since 1878, in its turn, creates diversity, and destroys the generality which the act of 1878 created. If these acts are valid, there is no limit to the number of like acts which may be passed to add to the bewildering confusion and uncertainty which now exists in this branch of our statute law.

Multiplicity of acts have been passed apparently without regard to, and certainly without any correct understanding of, previous legislation upon the same subject, so that it is not possible for the courts to assert with great confidence what is their true interpretation and effect. If, in the laws affecting the controversy between us, the constitutional guaranties have been disregarded, it is not in the legislation supplemental to the act of 1878, but in multiplying laws subsequent to that act, which in their operation and effect are special and local, and productive of that diversity which is inimical to the organic law.

The question whether the aforesaid supplements to the act of 1878 are unconstitutional because they do not apply to boroughs previously existing by special charters remains to be considered. At the time of the adoption of the amendments to our constitution prohibiting special legislation, there was great diversity in the special charters of the various boroughs, as well as in those of towns and cities in the state. Without recalling all special charters, it was not possible to legislate so that all cities should have uniform government and that all boroughs could have a uniform government. It has never been suggested that legislation would not be general unless that result was attainable. Legislation providing a scheme for the organization and government of new municipalities is general, and not special and local, if the contemplation of the constitution, if

the law applies to all of a class of municipalities created thereunder after the adoption of the constitutional amendments. A general law for the formation of new cities could not be made applicable to all cities previously existing under special charters without creating the greatest confusion. If the supplements of 1888 and 1895 to the act of April 5, 1878, must, to be valid, be made to include previously existing boroughs under special charters, how can the original act of 1878 be upheld, as it has no application to such boroughs? In my judgment, the test is whether the act of 1878 would be valid if the provisions contained in the acts of 1888 and 1895 had been incorporated in it when it was originally passed. I can see no reason why the legislature could not have included those provisions in the act of 1878. The framers of the constitution did not intend to disturb the past. They exacted uniform and general legislation for the future. The law was general in providing that all boroughs created under it should conform to its provisions. Such boroughs constituted a class for legislation to which boroughs under special charters do not belong. If the supplements under consideration had in terms been extended to boroughs under special charters, they would have been unconstitutional, as that would not have been within the title of such acts. In my opinion, the legislation upon which the borough rests its authority to assess and collect its own taxes is valid and constitutional.

In the case of *Alsboth v. Philbrick*, 50 N. J. Law, 581, 15 Atl. 579, the infirmity was that the act applied only to seaside resorts; other boroughs having all but that one feature were not made subject to the act. The school taxes are affected by other legislation. The reason relied upon in regard to those taxes is that Glen Ridge is a separate school district, and is required to raise money for school purposes through its own taxing officers. The act of May 25, 1894 (P. L. 506), is relied upon to establish this proposition. The twenty-fourth section of that act provides "that each city, borough and incorporated town shall be a school district separate and distinct from the township school district." This language, if unaffected by other legislation, would make a separate school district of every borough. The act of March 22, 1895 (P. L. 503), § 3, provides that each city, town, borough, and incorporated town which contains 400 or more children between the ages of 5 and 18 years shall be a school district separate and distinct from the township school district, but, if less than 400 such children, it shall be a part of the township school district. It is provided, however, that nothing in that act contained shall be construed as abolishing any school district legally constituted at the time the act was passed, and, further, that nothing in said act contained shall apply to any city, borough, or incorporated town where pro-

ceedings are pending for the incorporation of the same when said act was passed. It is admitted that Glen Ridge has less than 400 children between the ages of 5 and 18 years, and that the board of education was appointed and the district organized in June, 1895, after the act of March 22, 1895, had taken effect. It has been judicially determined that the borough of Glen Ridge became incorporated February 13, 1895. Glen Ridge is not within the second proviso of the act of March 22, 1895. There were no proceedings pending for incorporation, so far as appears when said act was passed. Nor does the act of May 25, 1894, affect or apply to the Bloomfield school district, because that was a district acting under a special charter (P. L. 1849, p. 200, and subsequent amendments). Section 23 of the act of May 25, 1894, provides that said act shall not apply to any school district acting under a special charter. Bloomfield school district, therefore, is not affected by the act of May 25, 1894, and Glen Ridge cannot upon that act support its claims to be a separate school district. *Conover v. Parker* (N. J. Sup.) 31 Atl. 769. The object of the legislation referred to was to prevent the dismemberment or dissolution of school districts in operation, and which had acquired property rights.

The result is that all the taxes certified except the school tax were illegally assessed by the assessor of the township of Bloomfield. If any irregularities were committed in making the assessment of the school tax, it will be the duty of this court, on proper application, to correct them, under the act of 1881 (P. L. 194).

STATE (BOROUGH OF GLEN RIDGE,

Prosecutor) v. STOUT et al.

(Supreme Court of New Jersey. Feb. 20, 1896.)

SPECIAL LAWS — LEGISLATIVE POWERS — DELEGATION — MUNICIPAL CORPORATIONS — CREATION.

1. The act entitled "An act for the incorporation of cities," approved March 22, 1895, is not unconstitutional because it excepts from its operation territory already within the limits of any incorporated city or town, and does not except territory within the limits of boroughs. Cities and towns constitute substantial classes.

2. The act, in providing that the township committee in which the district to be incorporated lies may determine what territory shall be included in or excluded from the proposed city, does not illegally delegate legislative functions.

3. The fact that the legislature has created a municipality without bestowing upon it all the powers necessary for its government will not authorize the court to declare that the municipality has not a legal existence.

4. The borough of Glen Ridge, incorporated under the act of 1878, is a municipality separate and distinct from the township of Bloomfield, and cannot be included in a city formed under the act of March 22, 1895, by a petition which describes the city to be incorporated as lying wholly within the township of Bloomfield.

(Syllabus by the Court.)

Certiorari, on the prosecution of the borough of Glen Ridge, against C. Lee Stout and

others, to review proceedings taken to incorporate the city of Bloomfield. Proceedings set aside.

Argued November term, 1895, before DE-PUE, VAN SYCKEL, and GUMMERE, JJ.

Riker & Riker and Joseph Coult, for prosecutor. Richards & Gallagher and Thos. N. McCarter, for defendants.

VAN SYCKEL, J. This case involves the legality of the proceedings taken to incorporate a city to be called the "City of Bloomfield," under the act entitled "An act for the incorporation of cities," approved March 22, 1895 (P. L. 551). The act provides "that the inhabitants of any district lying wholly in one county, having a population exceeding five thousand, not including any territory already within the limits of any incorporated city or town, may become a body corporate by the name and title of the city of —," etc.

Reasons 1 and 5 relied upon for reversal are that the territory taken for the new city includes lands already in the borough of Glen Ridge, which is claimed to be a "town," within the meaning of the act of 1895; and that, if said borough is not regarded as a town, then the act is local and special, because it excepts only cities and towns. The classification in the act is alleged to be illusory. The word "town" is used in our legislation in various senses, but a reference to the borough act will show conclusively that, in legislation upon that subject, "boroughs" are not included when the word "town" is used. In the supplement of April 22, 1886, to the borough act of 1878, under which Glen Ridge is incorporated, it is provided "that a borough government may be formed under this act and the act to which it is a supplement, by the inhabitants of any portion of this state, now subject to the government of commissioners, or a police and sanitary board, or any other form of municipal government other than that of an incorporated city or town." Supp. Revision, p. 53, § 1. This shows the distinction in the legislative mind between boroughs and towns. Boroughs cannot be formed out of territory already part of a city or town. The word "town," in the act of 1895, does not include boroughs. By the act of 1888 (P. L. 483), for the formation of towns, boroughs may be incorporated as towns, showing that the legislature regards towns as a higher grade of municipality than boroughs, and they are given all powers necessary to conduct local government as fully as cities in most respects. Boroughs which are of an inferior class are prohibited by the supplement of 1886 to the borough act to appropriate the territory of cities and towns which constitute a higher class; but cities and towns may absorb boroughs, for thereby they would be elevated to a higher plane. The power of the legislature to enact general laws providing for the transition from a lower to a higher grade of municipality is rec-

ognized by the court in *State v. Borough of Clayton*, 53 N. J. Law, 277, 21 Atl. 1026. There is therefore a substantial reason for withdrawing towns from the operation of the act of 1895 which does not apply to boroughs. The exclusion of towns and the inclusion of boroughs is not arbitrary or illusory. If this is not true, it is difficult to perceive how the act for the incorporation of boroughs and the act for the formation of towns can both be constitutional. Cities and towns constitute substantial classes. Boroughs and territory subject to the government of commissioners, or of a police and sanitary board, or other local boards, are not within either class. It is competent for the legislature to pass a law for the formation of cities authorizing the inclusion of boroughs, and excluding towns, provided all boroughs are included and the law is made applicable to all counties. Such a law is general, and not special. It provides for the cities so constituted a uniform system of government, and prevents the diversity to which the constitution is inimical. These reasons cannot prevail.

Reason 2 is that said act attempts to delegate the legislative power in contravention of the constitution. It provides that the township committee in which the district to be incorporated lies shall meet for the purpose, among other things, of hearing complaints that territory has been unreasonably included or excluded, and of changing boundaries of the proposed city at their discretion. In *re Ridgefield Park*, 54 N. J. Law, 288, 23 Atl. 674, is relied upon to support this proposition. That case decided that the power to determine and adjudge within what territory the resident voters should be permitted to assume municipal existence and authority cannot lawfully be committed to a justice of the supreme court. The principle which underlies the case does not apply here. The learned justice who delivered the opinion of the court in that case also delivered the opinion in the late case of *McLaughlin v. Mayor, etc., of City of Newark*, 30 Atl. 543, in which the act of May 16, 1894 (P. L. 387), giving mayors of cities of the first class power to appoint a commission to divide cities into wards, was held to be constitutional. This case was subsequently affirmed by the court of errors and appeals, and disposes of the question now raised. See 34 Atl. 18.

The third reason for reversal is that the act of 1895 is inoperative and void, because it fails to provide a system of government for the proposed city. The seventh section provides that there shall be a mayor and city council consisting of a councilman from each ward, and that all cities incorporated under said act shall be governed by the laws of this state "relating to and regulating the government of cities," passed April 24, 1894 (P. L. 75). The city may be legally constituted by one act, and the legislature, by another act, may give it the needed powers of government. *Lakewood v. Township Com-*

mittee, 55 N. J. Law, 275, 26 Atl. 91. The powers given in this case may be inadequate. If so, subsequent legislation will remedy the defect, or the city may accept the provisions of the act of 1894 above referred to. In *re Cleveland*, 52 N. J. Law, 189, 19 Atl. 17. The fact that the legislature has created a municipality without bestowing upon it all the powers necessary for its proper government will not authorize this court to declare that the municipality has not a legal existence.

The fourth reason for reversal is that the petition for the formation of said city incorrectly states that the territory included in the boundaries set forth therein lies wholly within the township of Bloomfield, whereas, in fact, it embraces all of the borough of Glen Ridge, except a small portion, which contains only seven of its inhabitants and three legal voters. This raises the question whether the borough of Glen Ridge still forms a part of the township of Bloomfield, to such an extent that, in the petition for the proposed new city of Bloomfield, it was correctly described as lying wholly within the township of Bloomfield. A borough formed under the borough act of 1878, before that act was amended, undoubtedly constituted part of the township out of which it was carved. Supplements to that act have been passed from time to time diminishing the control of the township in respect to the affairs of the borough, until by force of the acts of March 6, 1888, March 23, 1888, and March 7, 1895, boroughs incorporated under the act of 1878 are entirely separate and independent in all matters of local government from the township out of which they are created. That these acts are constitutional, and that such is their effect, is adjudged by this court in *Benson v. Inhabitants of Township of Bloomfield* (decided at the present term of this court) 33 Atl. 855. Glen Ridge, however, is not entitled to elect a member of the board of chosen freeholders, because its population is less than 2,500. It also appears that, under an act passed in 1894 (P. L. 254), the township of Bloomfield entered upon the construction of a sewer system for the entire township, under which large obligations had been incurred before Glen Ridge was incorporated. "The act of 1894, still in force, authorizes assessments to be made for the cost of these sewers. The borough of Glen Ridge, therefore, may be subject to certain duties and obligations by reason of the fact that it was formed out of the township of Bloomfield, but, nevertheless, it has a separate entity as a political subdivision of the state, and the city which it was proposed to incorporate was not properly described as being wholly in the township of Bloomfield. Both the petition and notices given thereunder were misleading and defective. The territory of Glen Ridge may, for some purposes, be dealt with as part of the township; so the township, for some purposes, is part of

the county, and the county part of the state; yet that does not change the fact that Glen Ridge is a separate municipality, and the notice and petition were bound to recognize that fact in order to be a basis for extinguishing the borough existence. It might with equal propriety and reason be claimed that under a petition for the formation of a city wholly out of the township of Amwell, in the county of Hunterdon, the town of Lambertville could be included, because it had once been a part of the township. The township of Bloomfield consisted of the territory remaining in it, after Glen Ridge was taken out of it, and nothing more. In the cases cited in the able and elaborate brief of counsel for the defendants on this question, there is no support, in my judgment, for the certified proceedings as against this objection. For the reason last discussed, the certified proceedings must be vacated and set aside, with costs.

NATIONAL DOCKS & N. J. J. C. RY. CO. v. PENNSYLVANIA R. R. et al.

(Court of Chancery of New Jersey. Jan. 22, 1896.)

RAILROAD COMPANIES—CONDEMNATION FOR CROSSING—TENDER—PLAN OF CROSSING.

1. The attorney who represented in condemnation proceedings the lessor and the lessee of a railroad across which another railroad company had condemned land for a crossing is a proper person to whom to make tender of the sum awarded for damages.

2. The general railroad act (Revision, p. 929, § 101), relative to condemnation proceedings, provides that if the party entitled to receive the amount found by the jury shall refuse to receive the same, then the payment of said amount into the circuit court shall be deemed a legal payment. *Held*, that a tender of the principal sum with interest, followed, after a refusal to accept the same, by payment into court, stops the running of interest on an award for land taken by condemnation.

3. Interest on the sum awarded for land taken by condemnation should be computed from the entry of judgment, and not from the rendition of the verdict.

4. Though complainant railroad's proposed plan to cross defendant railroad's yards by tunneling under the tracks in said yards, will necessitate the elevation and cutting of several of defendant's tracks at a time, and thereby temporarily subject defendant to inconvenience and increased expense in the management of its road, but it appears that by the exercise of skill in adjusting its yard operations to the new conditions it will be able to carry on its business, and that any other plan of crossing, while possible, would entail great expense, danger, delay, and inferior work, complainant will be permitted to execute said plan, and in so doing will be protected by injunction.

Bill by National Docks & New Jersey Junction Connecting Railway Company against the Pennsylvania Railroad and others to enjoin defendants from interfering with its construction of a passage for its road across the route of defendants. Decree for complainant.

The bill is filed by the National Docks &

New Jersey Junction Connecting Railway Company to procure an injunction restraining the Pennsylvania Railroad Company and the United New Jersey Railroad & Canal Company, from obstructing the complainant in its work of constructing a passage for a railroad across the route of the defendants, according to a certain plan of crossing annexed to the bill, and from placing and maintaining cars upon certain tracks in the yard of the defendants in such manner as to prevent the cutting of those tracks. The cutting of the tracks mentioned is involved in the plan of crossing adopted by the complainant. This plan was adopted by the complainant in the trial of the appeal from the report of the commissioners in the proceedings for condemnation of the right to cross the yard of the defendants. The locality where the road of the complainant proposes to cross that of the defendants is a yard known as the "Waldo Avenue Yard." This yard is a short distance from the elevated terminal station of the defendants at Jersey City. It has been operated as presently used for about five years. The locality was originally an elevated tract of land, with an irregular surface, lying on the north side of a street known as "Railroad Avenue." This surface, by excavation and by filling, was brought to a grade requisite for its use in connection with the main tracks of the defendants, as those tracks were placed upon the elevated iron structure which now supports them and the terminal station. The surface of this yard is covered with a network of tracks, and these tracks are connected with the terminal passenger station by two other tracks. The yard is used for the purpose of distributing the cars of the trains arriving at Jersey City. When a train reaches the terminal station and discharges its passengers, it is seized by a yard engine, and drawn up to this yard. The train is then broken up, its several cars are put upon different tracks in the yard, where, with other cars already there or to be placed there, they, by new combinations, form new departing trains. The cars are there cleaned, the air brakes tested by compressed air produced in a boiler house and carried by pipes through the yard. The cars are there tested and heated with steam generated in boilers and carried by pipes along the southerly tracks in the yard. The cars are there watered, viz. with drinking water from pipes running from a reservoir through the yard. The train, when so prepared, is, when needed, pushed into the terminal station, ready for its departure. It is thus perceived that a yard of this character somewhere in the vicinity of the terminal yard (the terminal yard admittedly not having the capacity for this work) is an indispensable feature in the operation of defendants' road. As already observed, across the property of the Pennsylvania Railroad Company, upon which this yard is placed, the complainant claims that

has condemned a route for itself. Over his route of crossing so condemned there are now in place, and used by the defendants, a large number of tracks; the three most northerly being those over which the passenger traffic of the Pennsylvania Railroad Company passes to and from the terminal station, and the next southerly being the west-bound engine track leading to the roundhouse located within the yard; then a short distance to the south of these there is the east-bound engine track, leading from the roundhouse to the terminal station; then there are two short tracks leading to the coaling platform. To the south of these tracks, and at some distance from them, is the first of a series of 21 tracks used for the purposes already indicated. These 21 tracks are located side by side, as closely as they can be operated, and with no space to the north or south of the group to which the northerly or southerly tracks can be shifted. The manner of crossing the defendants' property upon which these tracks are placed, as proposed by the complainant, involves the permanent elevation of these tracks at the point of crossing. The elevation of track No. 1, the extreme southerly track, above its present position, is to be 16 inches. The extent of the elevation diminishes slightly for each until the northerly track is reached, when it will be raised about 7 inches above its present position. The plan of crossing proposed also involves the disuse of 3 of the 21 tracks during the time required to complete the structure which the crossing company proposes to build. In detail, the method of the proposed crossing declared by the complainant is this: The complainant will excavate across the yard a trench 54 feet in width, upon each side of which a wall is to be built, and resting upon these an arch was to be sprung, upon which the tracks of the Pennsylvania Railroad Company are to be supported. The crown of this arch will be on such a grade as to compel the elevation of these tracks in the manner and to the extent just indicated. The method by which this work is to be executed was declared at the trial of the appeal from the award of the commissioners, and upon this declaration the damages were measured. The connecting company declared that they will begin the work of excavation and construction of the arch at the southerly side of the yard, and will progress with the same in sections northerly from the point of beginning. They declared that the connecting company will remove from their right of way the three southerly yard tracks of the Pennsylvania Railroad, being tracks Nos. 1, 2, and 3, upon the commencement of their work, and hereafter will keep open, during the progress of their work across said yard tracks, a free of the yard tracks of the said Pennsylvania Railroad crossing the route of the connecting company, which tracks shall be adjacent to each other; and the connecting com-

pany will complete their arch in sections, so that when yard tracks of the Pennsylvania Railroad Company in excess of three in number shall be removed from the route in the course of construction, an opportunity should be afforded concurrently therewith to the Pennsylvania Railroad Company to relay and restore to use a like number of those previously removed across the completed section of the arch; so that said Pennsylvania Railroad Company, during the construction of said arch, may at all times have the opportunity to maintain and use all the yard tracks except three. It was further declared that the connecting company will support the sides and the north end of each section of their excavation, and for the further protection of the yard tracks next north of and adjacent to each section excavated will, upon beginning excavation in such section, place stringers under such track across the route of the connecting company, commencing with yard track No. 4, and when that track is taken up will shift the stringers to the track crossing the route next north of the second section excavated, and so on across the yard; such stringers to be placed in the manner usual in such construction, and so that trains may be run over the track, until such tracks may be removed by the connecting company as above set forth; which stringers shall be placed under each track in such manner as to leave it substantially at the elevation at which it may be found at the time the stringers are put in place. It further declared that the connecting company will locate the northerly line of the most northerly section but one of their excavation at least 16 feet south-westerly from the nearest point of the south-westerly rail of the west-bound engine track, so that the east-bound engine track may be operated over the side space left between the excavation and the west-bound engine track; the center line of the east-bound engine track to be located not more than 14 feet distant from the center line of the west-bound engine track across the route of the connecting company during the progress of the excavation in said section. And the connecting company will not remove said east-bound engine track from said location until the arch shall be constructed so far northerly that the east-bound engine track can be shifted and used by the owners across the completed part of the arch, if they desire so to do.

The complainant has already prosecuted its work nearly to the line of track No. 1, and has made an excavation for the foundation. The bill charges that after notice to the defendants that track No. 1 would soon be required to be cut, its superintendent replied that he was instructed to protect their possession of all tracks in the Waldo avenue yard; and its attorney replied that they intended to maintain their tracks at all hazards. This is not denied. It appears also that at that time there were cars standing

on tracks Nos. 1, 2, and 3, none of which were removed, save temporarily, to be replaced by other cars; that defendants caused a large number of gondola cars, containing ashes and cinders and other refuse to be thrown upon the slope and upon the workmen engaged in the excavation below, and that on the next day they brought a number of cars loaded with stones, which stones were disposed of in the same manner. The prayer of the bill is that the defendants may be enjoined from obstructing the complainant in its construction of its railroad upon the plan and in the manner stated, and from placing and maintaining any cars within the route upon tracks Nos. 1, 2, and 3, until complainant shall have completed its arch across said tracks; and from maintaining cars or other obstructions upon any other tracks within complainant's route, under which they desire to excavate in the progress of its construction.

Charles D. Thompson and Charles L. Corbin, for complainant. James B. Vredenburg and R. V. Lindabury, for defendants.

REED, V. C. (after stating the facts). The defendants at the start raise a question which lies at the threshold of complainant's right to an injunction. This question does not involve the manner by which the complainant proposes to cross the property of the defendants, but it denies the existence of any right whatever in complainant to come within the limits of defendants' property. The defendants deny that the complainant has perfected its condemnation proceedings by a legal tender of the amount awarded by the jury, or by the payment into court of the entire amount of the sum due to the defendants by force of such award. The facts upon which those insinuations are based are these: The verdict on the trial of the appeal from the award of the commissioners was rendered on July 26, 1895, for the sum of \$130,000. Judgment was entered upon that verdict on July 31, 1895. On August 1st following the complainant tendered to James B. Vredenburg the amount of \$130,000, together with six days' interest upon that sum. Mr. Vredenburg refused to accept the amount tendered. On August 5th, on notice to Mr. Vredenburg, an order was made that the amount tendered should be taken by the clerk as paid into the circuit court. It is objected first that the tender to Mr. Vredenburg was not a legal tender to the defendants, and it is objected secondly that interest from the time of the verdict up to August 5th, the date of the payment into court, should have been paid into court with the principal sum. The general railroad act (Revision, p. 929, § 101) provides: "That in case the party or parties entitled to receive the amount * * * found by the jury, shall refuse upon tender thereof being

made, to receive the same, or shall be out of the state, or under any legal disability, then the payment of the amount found as aforesaid, into the circuit court of the county wherein the said land lies, shall be deemed a legal payment." In respect to the existence of this condition precedent to a legal payment into court, namely, a legal tender, or the existence of an excuse for such tender, I am of the opinion that the condemning company did all that they were called upon to perform. In reaching this conclusion, I do not deem it necessary to say that in all cases of condemnation a tender to the attorney who appears in the condemnation proceedings for the landowners is an efficient tender. But as the parties were conditioned in this case. If a tender was essential at all, the method adopted in making it in this instance seems the only one possible. The interest in the land condemned was a double interest. The interest of the United New Jersey Railroad & Canal Company, the lessors, however shadowy it may be, as well as that of the Pennsylvania Railroad Company, the lessee, is represented in the amount awarded by the jury. *Bright v. Platt*, 32 N. J. Eq. 362. The amount of the respective interests of the lessor and lessee in this single sum could not be measured by the connecting company. No tender of a less amount than the award could have been made to either company, nor could there have been made a tender to either of the entire amount, for they were not joint owners of the property condemned. Under these conditions, a tender made to that attorney who had represented the owners of all the interests condemned during the condemnation proceedings, and still represents them in all the litigations involved and springing out of those proceedings, was, in my judgment, a sufficient tender. It may be remarked, in addition, that the Pennsylvania Railroad Company is a foreign corporation, upon whom, by the statute, no tender need have been made, as a condition precedent to a payment into court.

Nor do I think that an insufficient sum was paid into the circuit court. If the tender was good, it, followed by payment into court, stopped the running of interest from the time of the tender. Now, it appears that interest was paid up to that date. Again, the legal evidence of the final conclusion in the appellate proceedings was the entry of judgment. This is an essential feature on every appeal. This was so held by the court of errors in *Ringle v. Board*, 56 N. J. Law, 661, 29 Atl. 483, in construing statutory language in respect to condemnation proceedings, which was linguistically similar to that of section 101 of the general railroad act. The verdict became a finality as a debt when the judgment was entered, and the amount of interest from that time to the date of the payment into court was included in the sum paid.

The defendants next insist that, even if a right to cross has been condemned, yet the manner of crossing proposed by the complainant is in excess of such right. The first proposition in support of this insistence is that the cutting of the three tracks as proposed is the exercise of an exclusive right pro tanto in the property of the defendants; that the petition and amended plan of the complainant does not seek to acquire exclusive possession of these tracks; and that all that the complainant can acquire is a use, common with the use of the defendants, of the place of intersection. The second proposition is that the cutting of these tracks would deprive the defendants of the right to fully, fairly, and freely exercise their franchises. The third proposition is that the permanent elevation of all of the defendants' tracks and the deprivation of the use of three of them during the process of constructing the proposed tunnel, if it can be justified at all, can only be vindicated upon the ground that such interference is absolutely necessary to effect a crossing.

In considering the first of these propositions it is essential that it should be clearly understood what is meant when it speaks of the condemnation of an exclusive right in defendants' property. The proposition that there is no power in any railroad to condemn an exclusive right in the property of another corporation, is too well settled for any present discussion. That the legislature could have conferred by express grant to this class of public corporations power to condemn such exclusive right is undoubted; that it has never done so is admitted; and it is entirely settled that from the general powers to condemn this right does not flow. A railroad company possesses the power under such a grant to condemn only a right to cross, the use at the point of crossing remaining common to both roads. Now, it is entirely clear that the proposition of defendants does not mean that the plan proposed results in the permanently exclusive use of any of the property of defendants. It can only import that there will be a temporary deprivation of the use of the three yard tracks during the period required for tunneling and arching the complainant's way; for it cannot be pretended that the slight permanent elevation of the yard tracks will, after the completion of the work, preclude the use of those tracks by the defendants substantially in the same manner as they are now used. So the question resolves itself into the query whether the method of crossing which temporarily puts into disuse 3 of the 21 tracks will so interfere with the operation of defendants' road as to be unwarranted by the circumstances under which the complainant is compelled to construct its crossing. This question will be further considered hereafter.

The remarks already made seem for the

present to dispose of the objection that the petition and amended plan do not seek the condemnation of an exclusive use of defendants' tracks, for it is not contended by the complainant that they are condemning any exclusive right to use the tracks of the defendants. What it claims is that in effecting the crossing, which, when completed, will leave the exclusive use of those tracks in the defendants, they have the right to temporarily interfere with those tracks, to the extent defined in the plan. Whether such an interference is justified will, as already observed, be again discussed. In respect to the second proposition, the remarks already made are in a degree pertinent. The point involved in this proposition is that, if this manner of crossing will prevent the defendants from fully, fairly, and freely exercising their franchises, it is an illegal method. This proposition is framed in conformity with the language of the chancellor in delivering the opinion of the court of errors in the case of *National Docks & N. J. J. C. Ry. v. United Companies*, 53 N. J. Law, 217, 21 Atl. 570. He there said that the manner of crossing, "is not to be destructive of the ability of the road crossed to fully, fairly, and freely exercise its franchises." In that case the question was whether the crossing company could adopt a plan of crossing which involved the permanent elevation of the main line of the defendants' road 3 feet and 10 inches, and the elevation of its yard above its then grade a height ranging from 3 feet 10 inches on the north to 8 feet on the south. It was in respect to the permanent result of this crossing upon the franchises of the crossed company that the opinion was dealing, and it laid down the rule that complainants, by their crossing, could not destroy the ability of the crossed company to exercise its functions as a public corporation. So the cases cited in support of this rule are in this respect of the same character. The principal one is *New Jersey Southern R. Co. v. Long Branch Com'rs*, 39 N. J. Law, 28. In this case the commissioners had laid out a street longitudinally over a strip of land belonging to the railroad company, upon which was placed a freight track in use. The existence of the street, inasmuch as both street and railroad could not exist in the same place, would have excluded permanently the railroad company from all use of this land. And the inability of the commissioners, under their general powers to condemn for streets, to take this property, was put upon the ground that it condemned a permanently exclusive right to the property of the railroad company. In the case of *New York & L. B. R. Co. v. Drummond*, 46 N. J. Law, 644, the question was whether a public road crossing a railroad track so as to make necessary the permanent removal of parts of certain platforms laid for the use of pas-

sengers and freight was the legal exertion of the power to condemn. The road would permanently displace the platform, and the court held that the parts of the platform were not so essential to the enjoyment of the franchises of the company that they could not, in subservience to the public necessity and convenience, be removed out of the way of a public road. In *National Ry. Co. v. Easton & A. R. Co.*, 36 N. J. Law, 181, the only pertinent ruling was that by the condemnation the defendant would acquire simply a right of way over the lands, and incidentally the power to cross the track of the elder company. In *Lehigh Val. R. Co. v. Dover & R. R. Co.*, 43 N. J. Law, 528, the point litigated was the right of the railroad company to cross the Morris Canal by a lift bridge resting upon stone abutments, and level with the lock walls. The court merely reannounced the doctrine that one corporation could not take the exclusive use of a corporate property necessary to the exercise of its authorized powers, as it resulted in the destruction or diminution of the franchises of the corporation; but held that the right to cross was acquired, and the manner of effecting it was not unnecessarily inconvenient to the canal company. In the case of *Pittsburgh Junction R. R. Co.'s Appeal*, 122 Pa. St. 511, 6 Atl. 564, cited in this argument, the crossing company attempted to run at grade through a coal yard, repair yard, and coal shed. The attempt was defeated, because, in the language of the court, "it was not an attempt to cross the yard and tracks with a common use, but absolutely to take a portion of the yard for the sole use of the new company, and that it could not be taken for its exclusive occupancy." It is perceived that the cases which preclude the crossing company from depriving the crossed company of its ability to fully, fairly, and freely exercise its franchises are referable to the completed work and its consequences upon the franchises of the elder corporation.

In respect to the power of interference with the property of the landowning company in effecting a crossing it seems entirely obvious that it cannot be deemed that the temporary deprivation of the ability of a crossed company to exercise its franchises may not in many instances be essential to the accomplishment of that purpose. The smallest grade crossing of a busy railroad, which crossing merely involves the placing of a frog, may for a time block its traffic, and so prevent the full and free exercise of its franchises. A much more conspicuous instance may be imagined, where the only possible method of crossing involves the interruption of traffic for much longer periods of time. Now, whether the right to cause such disturbance rests alone upon the existence of an absolute necessity, or it may be exercised when the condemning company

has reasonable need for it, in either view occasions must arise when such disturbances of the full and free exercise of a company's franchises must be permitted.

This conclusion leads to the next proposition of the defendants, which proposition involves the consideration of the conditions which must exist to legalize such disturbance. The proposition, as already stated, is that the condemning company cannot, in constructing its crossing, put in disuse a yard track of the elder company, unless such act is necessary in the execution of the work of constructing the new road. The word "necessary" is employed in its original, absolute sense; the insistence being that no considerations of expedition or amount of labor or skill or expense involved is to enter into the question at all. The point is that, if the condemning company can secure a way across the existing road, by the establishment of any possible grade for its road, or by the use of any possible method of construction so as to avoid disturbing the use of the elder company's tracks, then it is bound to do so, no matter how long a period it may require to construct the crossing, or how dangerous, how inferior, or how expensive may be the method it is compelled to employ. It is perceived that according to this theory nothing will justify even a temporary interference with the use of the tracks of the elder company but the existence of an inexorable necessity. In support of this theory, the cases of *Reg. v. Wycombe Ry. Co.*, L. R. 2 Q. B. 310; *Fenwick v. Railway Co.*, L. R. 20 Eq. 544; *Pugh v. Railway Co.*, 12 Ch. Div. 274, 15 Ch. Div. 330; and *Norton v. Railway Co.*, 9 Ch. Div. 633,—are cited. These cases were all constructions of the railway clauses act, which empowers railway companies to take and occupy land, so long as may be necessary for the construction of a railroad, for workshops, and to deposit work-up materials used for constructing the road on such lands, and to divert roads and streams of water, if such diversion is necessary for the construction of the railroad. The court held that parliament had expressly granted these extraordinary privileges to the railroad company to be exercised when necessary, and that the word "necessary" in such case meant more than merely convenient; that the diversion could not be made merely because it would diminish the expense of the construction of the railway; that private land could not be used for a mortar mill merely because it was less expensive and more convenient to manufacture the mortar at that point. In these cases the grant was to occupy private property, to divert streams to the injury of riparian owners, and to change the course of public highways. The grant was by the terms of the act limited to those instances where the necessities of the building of the road required this exertion of exceptional

power, and the grant of power was properly strictly construed against the grantee in favor of the public and in favor of the private owners, whose property was injuriously affected. In *Easton & A. R. Co. v. Inhabitants of Greenwich*, 25 N. J. Eq. 563-569, in construing a statute which provided that if a railroad company should find it necessary to change the location of any portion of any turnpike or any public road, they are thereby authorized and empowered to do so, the court of appeals, while holding that the existence of the necessity was a question for the court, employed this language: "Whether the necessity for a change of location of a public road must, as seems to be held by the chancellor, be an absolute necessity to make the change in order to construct the railroad, or need only be that reasonable necessity which arises when, without the proposed change, the company would be seriously inconvenienced, or put to great and unreasonable expense, is a question upon which no opinion need be intimated." And it may be remarked that in the case of *Transportation Co. v. Hancock*, 35 N. J. Law, 537-546, in interpreting the meaning of the word "necessary," as used in respect to property necessary to a railroad company for the accomplishment of the objects of their incorporation, and so exempt from taxation, the court of errors defined the word with more liberality. "Power necessary to a corporation," said the chief justice, "does not mean simply power which is indispensable. Such phraseology has never been interpreted in so narrow a sense. There are few powers which are in the strict sense absolutely necessary to these artificial persons, and to concede to them powers only of such a character, while it might not entirely paralyze, would very greatly embarrass their operations." And the definition of the word "necessary" as it was employed in the federal constitution, and defined in the case of *McCulloch v. Maryland*, 4 Wheat. 414, by Chief Justice Marshall, was invoked in support of the more liberal view. But, whatever view may be taken of the force which should be accorded to the word "necessary," it is not perceived how the cases cited are here pertinent. If the general railroad act had provided that the railroad company, in constructing a crossing over another road, should have the power to remove the tracks of the older company, if such removal became "necessary" in making the crossing, then these cases would be pertinent, although they might not be deemed controlling. But the general railroad act contains no such provision. The power to cross is contained in the exception to the proviso to section 36 of the general railroad act. It also springs out of the right to build a railroad between terminal points, which involves ex necessitate the right to cross whatever lies inter-terminal. The right to cross therefore may be said to rest upon neces-

sity. But neither by the terms of the statute nor by necessary implication is the adoption of any particular method of crossing dependent upon the existence of necessity. The manner of crossing, whether at grade, above or below grade, is left to the judgment of the crossing company, subject to judicial supervision. The supervisory power of the court is to be exercised to the extent that no more interference with the older company's road or disturbance of its business shall result than is necessary in executing the work of crossing in a reasonable manner. If the standard of absolute necessity be applied, then it is not perceptible how grade crossings, in most cases, could be constructed at all; for such crossings must, in nearly every instance, result in interference with the operation of the road of the older company; and scarcely any predicament can be imagined where the expenditure of money will not secure a crossing above or below grade. All that can be exacted of the crossing company is that the plan of crossing is a reasonable one, under the circumstances of the particular case, and when adopted is so executed as to interfere in the least degree with the business of the crossed company. This is obviously the view of Mr. Justice Knapp in delivering the opinion of the court of errors in *Lehigh Val. R. Co. v. Dover & R. R. Co.*, 43 N. J. Law, 528, where, after indicating the right of the Lehigh Valley Railroad Company to cross at all, used the following language: "The right to cross is clear, and the manner of effecting it is not unnecessarily or unreasonably inconvenient to the canal company." A method of crossing which would put into disuse all the tracks of an important trunk line for an indefinite period could hardly be justified by any conceivable difficulty in otherwise executing the work, and the proposed disuse might be so entire, and its period so prolonged, as to become practically the taking of an exclusive right, which power, as already observed, does not exist. On the other hand, a plan which involved but a slight interruption of traffic on the older road, might be justified, although such interruption could be avoided by the adoption of a more expensive or inconvenient method of crossing. In the language of the chancellor employed in delivering the opinion in *National Docks & N. J. J. C. Ry. v. United Companies*, 53 N. J. Law, 217-223, 21 Atl. 570, "the purpose of the law is to preserve, multiply, and maintain highways for the development of the country and the general public benefit." It is the policy of the law, therefore, to see that the ability of an existing corporation to serve the public shall not be unnecessarily impaired. It is equally the policy of the law that the service which the new corporation proposes to render shall not be lessened or impaired by unreasonable expense, or by unreasonably inferior methods of construction or operation. The de-

gree in which each company must yield its own convenience and private interests must be determined by what is the most reasonable course to be taken to preserve the continuity of the existing public service on the one hand, and securing the best and most efficient service from the new corporation on the other hand. Now, leaving the region of generalities, we confront the conditions which characterize the present crossing. The question is whether the present plan will entail such a degree of injury upon the defendants, and such disturbance of its traffic, as to make it reasonable that the complainant should adopt another plan of crossing. This involves, as a matter of course, not only a consideration of the effect of the plan upon the operation of defendants' road, but also a consideration of the ease or difficulty with which the complainant can employ a less or an entirely nontrack-disturbing plan. That the place selected for the crossing is the only practicable point is settled by the former decision of the court of errors.

The position taken by the defendants is that the cutting of their tracks successively, as the work of tunnel building progresses, will practically put in disuse all of the parts of these three tracks which lie east of the proposed tunnel; that the capacity of the yard is now no more than sufficient for its works; and that the defendants have no other available unused space to which this work can be transferred. It is insisted that, in consequence of such deprivation of the use of the eastern portion of the three tracks, it will become impossible for them to drill, clean, heat, and water their cars, break up arriving trains, and form and dispatch departing trains of the number and size and frequency that the public service requires, and in the manner in which they now operate their road. A number of witnesses in support of and in refutation of this view were sworn. Those of the defendants expressed generally their opinion that as the yard is now operated it is worked up to its full capacity. In enforcing this opinion the method in which the yard is used was developed. The trains arriving at the terminal station are drawn up on the southerly of the 4 tracks leading from the station to the yard, and are switched onto track 8 of the 21 yard tracks. Track No. 8 is the artery by which all trains are introduced into the yard. The different cars of a train are then taken separately, or sometimes by couples, and put upon separate tracks. This is accomplished by means of two ladders. Ladder No. 1 consists of two tracks, one leading off to the west from track No. 1, and the other leading from track No. 8. These tracks converge until they meet in a single track. Ladder No. 2 consists also of two tracks; one leading off from track No. 8, and the other from track No. 16. These tracks also converge and meet in a single track. Into ladder No. 1, by switches,

all tracks between 1 and 8 lead. Into ladder No. 2 all tracks from 8 to 16 lead. Tracks 17, 18, and 19 are connected with another track leading off westerly from track 16; tracks 20 and 21, with still another track, which is connected with the preceding track, and by switches with all the tracks, leading off westerly from the ladders. Generally speaking, the Pullman cars are placed on tracks 16 to 21. The trains are made up to be pushed down to the terminal station on tracks 9 to 16, and the cars are located temporarily, to be used when needed, on tracks 1 to 7. The point of all this is to show that all this work of drilling, shifting cars, and making up trains is done from the westerly end of the yard; that, if any of the three tracks are cut, it will be impossible to run any cars upon that portion of any of the three tracks east of the cut, by working from the west; that the only manner in which the easterly part of this yard can be used is by running the cars upon these tracks at the easterly end from one of the main tracks leading to the terminal station. Now, it is claimed that, save in exceptional instances, this cannot be done without an impracticable interference with the present use of tracks 1 and 2 on the main line; that the drilling at the east end, which this will necessarily require, will stop all trains running into the yard or track No. 1, and going out on track No. 2. It is claimed, therefore, that the trackage of the three tracks east of the cut, will be lost; that this space is equivalent to room for 30 cars; that, besides this loss of space, the shortening of the tracks will interfere with the making up of trains; and that the remaining trackage is insufficient to manipulate the cars and trains. In support of the view that the remaining space is insufficient for their work, tables of the number of trains received at and dispatched from the yard, the average number of cars to each train; the length of the cars, the extent of the available trackage, excluding clearance and working room, were exhibited. From these opinions and figures defendants claim that it is established that the loss of space which will follow the cutting of these tracks will prevent the handling of their business in their present yard, and they claim that they have no other available space which can be put to the same use. On the other hand, witnesses for the complainant, who examined the yard, expressed the opinion that the eastern portion can, after the cutting, be used for those cars the less frequently used; that a switch can be placed connecting track No. 8 with the east-bound engine track; that the movement of the drilling engines can be so accommodated to the movement of the trains moving in and out of the yard as not to seriously interfere with its operation; that thus the loss of trackage will be confined to nine cars, three upon each of the cut tracks. The opinion of some of complainant's witnesses is to the effect that, assuming the loss

of all the trackage to the east, yet there is room upon the remaining usable portions of the tracks for the practical operation of the yard. In support of this view, tables of measurements of the entire tracks of the yard, and the number of cars which it would accommodate, are exhibited. One witness for the complainant makes room for 313 cars of an average length of 60 feet, after leaving space on each track of a half car's length. He further testifies that he counted in the yard at one time, in July, 1893 (in the centennial year), 272 cars. He further testifies that, by actual count, made on six different days in December last, at different intervals of time during the day, he found the highest number of cars there at any one time to have been 210. From all this it is argued that the capacity of the yard to handle 272 cars is demonstrated by the fact that they were there, and that the December count shows that the present traffic is so far short of the traffic of 1893 that the loss of trackage caused by the cut will still leave space enough for operating purposes. The opinion of complainant's witnesses is further expressed that, even if defendants should be crippled in operating upon the remaining trackage, yet there are other places under the control of the defendants, now unutilized, which can be put into use for this purpose; that there is space between the ladders where tracks can be placed which would accommodate 42 cars, and space for two tracks in the space next north of the ladders which would accommodate 12 cars; that there is also a plot of land, belonging to the defendants, lying on each side of and under the county bridge, which could be used for tracks; and that there are also other facilities on the meadows for the storage of cars. Objections to each of these views are interposed by defendants' witnesses. The difficulty of coupling cars upon curved tracks; the interruption of signaling between brakemen and engineers; the requirement of straight tracks long enough to make up a complete train; the difficulty of running to and from the county bridge plot, without interfering with the traffic upon the two main lines; and the impossibility of introducing switches at the east end of the yard,—are, in the opinion of these witnesses, obstacles to the carrying into effect of any of these schemes. Without running the points of these counter positions into more minute details, I have reached the conclusion that the plan of the complainant will not result in the congestion of defendants' business to an extent which cannot be obviated by skill and diligence in adjusting their yard operations to the new, but temporary, conditions brought about by the cutting of the three tracks. It will result in inconvenience and expense. The plan of working in the yard, with which the agents of the defendants have grown familiar, will have to be reorganized. More switch tenders, more engines, may have to

be employed. New tracks, and perhaps new pipes, may have to be temporarily laid. But, while all this will be vexatious, it is, in my judgment, entirely practicable.

This conclusion, however, does not dispose of the question involved, for it remains to consider whether the degree of expense and inconvenience which this change will create could have been avoided by any other plan of crossing which the complainant could have reasonably adopted. The standard by which this question is to be determined I take to be this: Taking into account the efficiency of the new road when completed, and the time, safety, and expense of completing it, would the additional injury to the public service, as well as to the company, caused by any other plan of construction, be as great as that entailed upon the public service and upon the defendants by this plan. As already observed, the construction of the arch inclosing complainant's railroad involves the elevation of track No. 1 to the height of 16 inches above its present grade, and the remaining tracks a less height. Now, the defendants insist that this arch can be built without putting the overhead tracks into disuse at all. The theory is that, as the excavation of the tunnel proceeds, the tracks can be elevated into their new position, and supported upon stringers until the completion of the crown of the arch, upon which they are to finally rest. Most of the testimony of the engineers upon this point was spent in showing how stringers 55 feet long, the width of the cut, could be supported, while the excavation of the tunnel and the erection of the walls and the turning of the arch was in progress,—so supported as to permit the use of the tracks for the use of moving as well as standing cars. Several plans for accomplishing this result were developed on the trial. Some propose excavating for the wall first, and leaving a core of the tunnel, for a middle support of the stringer, until the core shall have been partly excavated for turning the arch. Other plans propose the excavation of the center part of the tunnel first. All, however, involve the support of the stringer by means of posts and braces, which depend, ultimately, for their support, upon the soil itself. This soil is largely composed of filling introduced in grading the yard. The arch is to be built around these supports, the supports being changed from place to place as the work progresses.

Now the testimony of the engineers, in respect to the possibility of working out these plans, was very interesting and ingenious; but my reading of the testimony has deepened the impression made upon me by its delivery. I think that it is possible to construct an archway and support the tracks by one or more of the plans mentioned. The instance mentioned of the springing of an arch under the statue of William IV., in constructing the London

underground railway, and other instances adduced by the witnesses, enforce the fact that there are few engineering difficulties which modern skill, when provoked by necessity and backed by money, cannot surmount. I think that, if it became indispensable that an arch should be built under the main track of a railroad so posited that its track could not be displaced, such a feat of engineering could be executed. But it is entirely clear that the execution of this work, by so supporting the tracks, would involve great delay, great expense, and probably inferior work. The removal of the materials excavated; the introduction of stringers, and the appliances to be employed in supporting them; the frequent shifting of the supports; the difficulty in securing a firm base for them in the soil; the slow and difficult operation of building and turning the arch close under the stringer, embarrassed as it would be by the existing supports, and the necessity of changing them as the work progressed,—would necessarily be slow, painful, and expensive. Besides, it must be kept in mind, that it is proposed, during all the period of its progress, to have cars standing upon or moving over these tracks. This presents an unusual condition of affairs, quite different from mountain tunneling, where the overarching earth, by its own cohesion, is in a degree self-supporting, and dissimilar from working under stringers whose quiescence remains undisturbed, and whose weight remains unchanged. It must be kept in mind that the supports for all these stringers have, as their base, this soil already mentioned; that the danger of their sinking is so great as to need constant vigilance. Mr. Brown, the chief engineer of defendants' road, was speaking within bounds when he said that the supporting posts would have to be watched and blocked up all the time, night and day. Now, to my mind, it is demonstrated that an attempt to support these tracks in use during the execution of this work would not only result in a degree of inconvenience, delay, and expense extremely great, but to a still greater degree in danger to all concerned, whether in operating trains above or in laboring below. Nor do I think that this inconvenience, expense, and danger would be greatly diminished if the complainant possessed the authority to use 75-foot, instead of 55-foot, stringers. A chasm of 54 feet would have to be spanned by these stringers, and, save at the ends, they would have to be supported in the same manner as the proposed 55-foot stringers. In my judgment, in either instance, the injury to the complainant, the danger to life threatened by an attempt to effect such support, would be much more than commensurate with the injury and inconvenience which would result to the defendants by the execution of the present plan.

But it is again suggested that it was within the power of the complainant to have so constructed its arch that it would not have caused any elevation of defendants' tracks. As I understand the testimony, the present height of the crown of the arch is essential to the passing of complainant's road at the grade adopted. The depression of the crown of the arch can only be accomplished by lowering the grade of the railroad. Complainant says that the present grade of its road is as low as it can be reasonably fixed. It appears that, at a distance of 201 feet from the portal of the tunnel, their road crosses Wayne street; that the authorities of Jersey City compel it to cross above grade, and that this crossing has been effected at the lowest grade possible. From Wayne street to the portal of the tunnel the grade is now 104 feet to the mile. It is in testimony that this is quite a heavy grade. The depression of the tracks at the tunnel a depth of 16 inches, so that the crown of the arch would avoid the present tracks, would require a grade of 2.66 feet per 100 feet. The testimony shows this to be a grade which, against the traffic, is very hurtful to the operation of a road, as it requires several trains to do the work of one, on account of the inability of one locomotive to haul heavy trains up such an ascent. That the adoption of such a grade would permanently affect the usefulness of the connecting road is manifest. A very strong reason therefore should exist before its adoption by the complainant should be made compulsory. Now, no perceptible reason exists. The only possible effect of the depression of the grade would be to save the permanent elevation of the yard tracks to the height of 16 inches and less, which elevation, it is not pretended, will cause any material difference in the operation of the yard. So far as respects the effect of this grade upon the cutting of the tracks, it would seem to have no influence whatever; for the tracks would still have to be supported, if their severance is to be prevented, the only difference being that in one case they would be supported 16 inches higher than now, and in the other instance in their present position. The difficulty and danger inherent in the work would seem to be exactly the same in kind and degree.

My conclusion, therefore, is that the plan adopted by the complainant, upon which damages were assessed, is, under the circumstances, a reasonable plan, and that they should be protected in its execution by the injunction powers of this court. And I further remark that, in arriving at this conclusion, I have ignored the printed case containing the trial of 1893, on appeal from the first award. I am of the opinion that the fact that witnesses for the defendants on that trial testified that the method then adopted would necessitate the cutting of two or three tracks at a time, and that this would compel the running of cars to the meadows, cannot be proved as an independent fact. The issue

on that trial was simply the amount of damages. The facts sworn to by the witnesses for the purpose of gauging or augmenting such damages was merely testimony; and, as such, it is inadmissible in another suit, except for the purpose of contradicting the testimony of any witness then sworn, and here resworn. For such purposes only, by consent, the printed testimony was used. In respect to the prayer for an injunction, contained in the cross bill, I am of opinion that the facts proved fail to show any intention to continuously trespass upon the property of the defendants, outside of the limits of the route condemned. As to the appointment of a manager, I do not see, at present, any need of such an officer. If the occasion for his appointment should arise, an application for such appointment can hereafter be made. I will, on application, settle the details of the decree.

ELLIS v. WALDRON et al.

(Supreme Court of Rhode Island. Feb. 14, 1896.)

NEGLIGENCE—PLEADING—RES IPSA LOQUITUR.

1. In an action by a servant of the lessee against the lessor for personal injuries caused by the defective condition of the elevator in the building of the lessor, which the lessee had the privilege of using, and received while the servant was using the elevator, by reason of its falling, the complaint need not set out in what way the elevator was defective.

2. A complaint alleging that plaintiff was lawfully upon the elevator for the purpose of raising and lowering goods of the lessee, and that "while engaged in his said employment in and upon said elevator" he received the injuries, sufficiently alleges the work plaintiff was engaged in at the time of receiving the injuries.

Action by Harry B. Ellis against Nathan B. Waldron and others. On demurrer to the declaration. Overruled.

Littlefield, Stiness & Stiness, for plaintiff. Hayes & Hayes, for defendants.

TILLINGHAST, J. The defendants have demurred to the plaintiff's declaration in this case on the grounds: (1) That it does not appear by said declaration in what way the elevator in question was defective, unsuitable, and unsafe, so that the defendants should be put upon their inquiry; (2) that it does not appear by said declaration what duty said defendants owned to the plaintiff; and (3) that the plaintiff does not set forth specifically what he was employed to do, nor the particular work he was engaged in at the time of receiving the injuries complained of, but merely an inference or conclusion of law, viz. that he was rightfully and lawfully upon said elevator for the purpose of raising and lowering goods of said Greene, Anthony & Co. from the third floor of said building.

The first contention of defendants' counsel in support of his demurrer is that, in order

to allege negligence, the plaintiff must set out specifically in his declaration what the defect was or in what way the elevator was unsuitable or unsafe. This contention is clearly in accordance with the general rule in cases of negligence. *Smith v. Tripp*, 13 R. I. 152; *Wilson v. Railroad Co.*, Index, NN, 106, 29 Atl. 258. But this rule is not without exceptions, and we think this case is embraced in that class of exceptions of which *Cox v. Gas Co.*, 17 R. I. 199, 21 Atl. 344, is an example. In that case it was substantially held that, where a servant is injured in the course of his employment, in consequence of some defect in a machine or instrument not under his control, which defect he is unable to discover, the rules of pleading do not require him to specify such defect. In other words, that the rules of pleading are not so rigid as to be unreasonable. See, also, *Parker v. Steamboat Co.*, 17 R. I. 376, 22 Atl. 284 and 23 Atl. 102. In the case at bar the declaration shows that the defendants had granted to their lessees, Greene, Anthony & Co., as a part of their leasehold interest in the premises where the accident happened, the use of the elevator in question for the purpose of raising and lowering goods and wares in the course of their business. This grant, however, did not have the effect to put the elevator under the control of the plaintiff, who was a servant and employé of said Greene, Anthony & Co., so far as the construction, condition, or state of repair of said elevator was concerned. In other words, it was only under his control in so far as the using of the same in connection with the discharge of his duties to his employers was concerned. It did not become his duty to examine or inspect the elevator in order to ascertain for himself whether it was suitable and safe for the uses assigned to it; but, in the absence of obvious defects, of which of course he was bound to take notice, he had the right to presume that it was safe and free from defects. He alleges that he was in the exercise of due care; that he had no knowledge of the defective and unsafe condition of the elevator, its attachments and apparatus, but that it was defective and unsafe, and that this fact was known to the defendants, or might have been known to them by the exercise of proper care and diligence. To require more than this, we think, would be unreasonable. The mere fact that the elevator fell, taken in connection with the attendant circumstances, may be sufficient to raise a presumption of negligence, and thereby cast upon the defendants the burden of establishing their freedom from fault. That is to say, when the machine or thing in question is shown to be under the control of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the control exercise proper care, it affords prima facie evidence that the ac-

cident happened from want of due care. *Mullen v. St. John*, 57 N. Y. 567; *Bridges v. Railroad Co.*, L. R. 6 Q. B. 377, 391; 1 *Shear. & R. Neg.* (4th Ed.) § 59, and cases cited. See, also, note on the maxim of "*Res ipsa loquitur*," 2 *Thomp. Neg.* pp. 1227-1235; 16 *Am. & Eng. Enc. Law*, pp. 449, 451. The rule that an accident may be of such a nature as to raise a presumption of negligence is fully sustained by the authorities collected in the opinion of the court in *Cummings v. Furnace Co.*, 60 Wis., on page 612, 18 N. W. 742, and 20 N. W. 665. See, also, *Goodsell v. Taylor*, 41 Minn. 207, 42 N. W. 873; *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266.

As to the second ground of demurrer, it is sufficient to say that we think the duty which the defendants owed to the plaintiff to keep and maintain the elevator in a safe and suitable condition for the use of the said lessees and their employes is sufficiently stated in the declaration. It sets out the facts upon which the supposed duty is founded, together with the duty to the plaintiff, with the breach of which the defendants are charged. *Smith v. Tripp*, supra.

As to the third and last ground of demurrer, we are of the opinion that the declaration is not defective in the particulars suggested. It alleges that at the time of the accident he was rightfully and lawfully upon the elevator for the purpose of raising and lowering goods of said lessees, and avers that while engaged in his said employment in and upon said elevator, and being in the exercise of due care, he received the injury complained of. We think the averment that he was rightfully on the elevator, and engaged in his employment under said lessees, is sufficiently specific without setting out particularly what he was employed to do, or the particular work he was engaged in,—that is, the particular goods he was actually raising or lowering,—at the time of the accident.

Demurrer overruled, and case remitted to the common pleas division for further proceedings.

PAQUIN v. STATE BOARD OF HEALTH. (Supreme Court of Rhode Island. Feb. 11, 1896.)

PHYSICIANS—QUALIFICATIONS.

That a person engaged in the shoe business in 1889 took up by himself the study of medicine, and later in the year began to practice; that from the latter part of 1889 he gave his attention exclusively to the practice of medicine, leaving his shoe business to the management of clerks,—does not show that he, prior to January 1, 1891, was reputably and honorably engaged in the practice of medicine, within the meaning of Pub. Laws, c. 1353, § 3 (May 16, 1895), so as to entitle him to a certificate authorizing him to practice medicine.

Application by Severe Paquin to the state board of health for a certificate to practice medicine. From a decision of the board de-

nying applicant a certificate, he appeals.* Affirmed.

Charles E. Gorman and Ambrose Choquet, for appellant. Edward C. Dubois, Atty. Gen., for appellee.

PER CURIAM. The appellant claims to be entitled to a certificate authorizing him to practice medicine, in accordance with Pub. Laws R. I. c. 1353, § 3, of May 16, 1895, on the ground that he was reputably and honorably engaged in the practice of medicine prior to January 1, 1892, in this state, within the meaning of the second clause of the section. We think that this clause was intended to apply to physicians who, not possessing a diploma from a reputable and legally chartered medical college, indorsed as such by the state board of health, as required by the first clause of the section, had been in practice a sufficient length of time prior to January 1, 1892, and with sufficient success, to have acquired an honorable reputation in the community as practitioners. The appellant has not presented satisfactory evidence that he possessed this qualification. The testimony is that for several years prior to 1889 he was engaged in the dry-goods and boot and shoe business in Warren; that in 1889 he took up by himself the study of medicine, and later in that year began to practice, chiefly, if not wholly, among the French residents of the town; that from the latter part of 1889 he gave his attention exclusively to the practice of medicine, leaving the dry-goods and boot and shoe business to be managed by clerks; and that he continued his practice up to January 1, 1892, some of his patients being satisfied with his services, and some not. There is no evidence that on January 1, 1892, he had come to be regarded by the community in which he practiced as a skillful and successful practitioner, and therefore had acquired the honorable reputation as a physician necessary to qualify him to practice contemplated by the statute. The decision of the state board of health denying a certificate to the appellant is confirmed.

In re STATEHOUSE BONDS.

(Supreme Court of Rhode Island. Jan. 21, 1896.)

STATE FUNDS—APPROPRIATION.

1. The people, by vote, authorized the legislature to provide for the issue of state bonds, in an amount not to exceed \$1,500,000, "so much of said money as may be necessary to be applied to the purchase of a site for and the erection of a new statehouse." *Held*, that neither the legislature nor any state officer was authorized to provide for the use of any of the proceeds of such bonds to pay the general expenses of the state, before the completion of the statehouse, though the amount so used was to be replaced from the general revenue of the state before it should be needed.

2. Where the legislature determines to issue bonds for the construction of a statehouse, it is not enough to provide, in the acts authorizing the submission of the proposition to the people, for the repayment into the general treasury of mon-

ys already expended for such object; but the proposition submitted to the people to authorize he loan should also contain authority for such repayment.

Communication by the governor to the supreme court in the matter of the statehouse bonds.

To His Excellency, Charles Warren Lippitt, Governor of the State of Rhode Island and Providence Plantations:

We have received from your excellency a communication requesting our opinion on the following questions:

First. Authority to issue statehouse bonds to the extent of \$1,500,000 was voted by the electors on November 8, 1892. By chapter 201 of the Public Laws, passed May 24, 1893, said bonds were finally authorized. The proceeds of said bonds have been deposited in bank by the general treasurer, and interest is being allowed upon the same. The statehouse commission will probably not use, for any purposes connected with the statehouse, during the first eight months of 1896, more than \$650,000. In such circumstances, can the general treasurer legally and properly use any portion of the proceeds of said statehouse bonds to pay the general expenses of the state during the first eight months of 1896, until the regular income of the state, to be received during said eight months, places the state in a position to return said money with interest to said statehouse fund?

Second. In case none of the general officers of the state have, at present, the necessary power, can the legislature, which meets January 21, 1896, authorize such temporary use of a portion of the proceeds of the said statehouse bonds to defray the general expenses of the state as stated above?

Third. In case the proper authorities should determine to issue bonds to provide funds to pay for the land required for, and the cost of erecting, the Rhode Island State Normal School and the proposed state armory in the city of Providence, can provision be made, in the acts authorizing said bonds, to repay into the general treasury of the state such sums of money as have already been appropriated by the legislature, and expended by the Rhode Island normal school commission and the commission to erect a state armory in the city of Providence, for the purposes contemplated in the acts creating such commissions?

Fourth. Has the legislature power to authorize said repayment from the proceeds of said normal school and said state armory bonds, or must the intention to make said repayment be specified in the act, creating said bonds, to be submitted to the electors?

The proposition submitted to the people, by which authority was given for the issue of the statehouse bonds, was as follows: "Shall the general assembly be authorized and directed to provide for the issue of state bonds in an amount not to exceed the sum of \$1,500,000, so much of said money as may be

necessary to be applied to the purchase of a site for, and the erection and completion of, a new statehouse?" Pub. Laws R. I. c. 1093; Act May 19, 1892. It thus appears that, by the vote of the people adopting that proposition, so much of the money received from the bonds as was necessary for the purpose of a site for a new statehouse, and its erection and completion, was to be devoted to that specific purpose. The surplus, only, which may remain after this purpose has been accomplished, can be devoted to other uses. It is impossible to determine in advance what, if any, portion of the moneys, the proceeds of these bonds, will not be needed for the purpose for which they were authorized. This being the case, and no authority having been conferred, by vote of the people, on the general treasurer or any general officer, or on the general assembly, to divert from its purpose so much of the fund as may be required for the specific use for which it was voted, and there being no inherent authority known to us in any general officer or the legislature to do so, we feel constrained to answer the first two questions propounded in the negative, notwithstanding the moral certainty, amounting almost to absolute certainty, that the money can be returned, with interest, to the statehouse fund, before it will be needed by the statehouse commissioners, from the regular income of the state, to come in during the next eight months. The fund is analogous to a trust fund, and cannot be legally applied to any other purpose than that for which it was created, except by the consent of the people by whom it was created.

We reply, to the third and fourth questions propounded, that, in case it is determined to issue bonds for the purpose mentioned in the third question, we are of the opinion that it will not be enough to provide, in the acts authorizing the submission of propositions to the people for the repayment into the general treasury of the moneys already appropriated by the legislature, and expended by the Rhode Island normal school commission and the commission to erect the state armory, but that the proposition submitted to the people to authorize the loans should also contain authority for such repayment; that, while it may not be necessary to specify particularly the repayment into the general treasury, the proposition should be so framed as to evince an intention that the loan authorized is to be used for the payment of moneys already expended, or, as in the case of the proposition for creating the statehouse loan, to leave an unexpended surplus in the general treasury, which, of course, would be subject to the action of the general assembly.

CHARLES MATTESON.

JOHN H. STINESS.

PARDON E. TILLINGHAST.

GEORGE A. WILBUR.

HORATIO ROGERS.

WILLIAM W. DOUGLAS.

ROBERTS' v. ROBERTS.

(Supreme Court of Rhode Island. Jan. 25, 1896.)

DIVORCE—PETITION FOR NEW TRIAL—SUFFICIENCY.

A new trial, in a suit for divorce, will not be granted upon petition by defendant, alleging that the petition for divorce and the evidence in support thereof were untrue, and that he did not contest the petition because of illness, where he failed to notify the court of the alleged falsity of the petition, or to employ counsel to appear for him, and, particularly, as it appeared that defendant's wife had died since the divorce, leaving property.

Petition for divorce by Jane Roberts against Edward Roberts. The petition was heard and granted; but, after the petitioner's death, defendant moved for a new trial. Denied.

Claude J. Farnsworth, for heirs of Jane Roberts. George J. West, for defendant.

MATTESON, C. J. On August 22, 1894, Jane Roberts filed in this court her petition for divorce against Edward Roberts. Citation on this petition, returnable at the October session, 1894, was duly issued, and served on the respondent September 7, 1894. No appearance was entered by the respondent or in his behalf, and on February 13, 1895, the petition was heard by the court and granted. The petitioner, Mrs. Roberts, died July 10, 1895, leaving personal estate to the amount of about \$7,000. On August 1, 1895, the respondent filed his petition in the cause to set aside the docket entry granting the divorce, and to reinstate the case on the docket. He rests his petition on the ground that the allegations of the petition for divorce, and the evidence in support thereof, were false, as the petitioner and her witnesses well knew, and seeks to excuse his failure to contest the petition because of his inability, by reason of confinement to the house by a serious illness, to wit, consumption. But, if the charges in the petition were false, he must have known of their falsity before the petition was heard, and could either have employed counsel to appear for him to suggest their falsity, or, at least, could have notified the court himself that they were false. The petition is, in effect, a petition for a new trial of the divorce petition, because of the falsity of the charges contained in it, and of the testimony in support of them, and because the petitioner knew of the falsity of the charges and of the testimony, and therefore practiced a fraud on the court such that the court ought to set aside its decree. We should have regarded the petition with more favor if the respondent's solicitude for the court and the interests of the public had prompted him to move in the matter before the death of Mrs. Roberts. We cannot resist the feeling that the respondent is more solicitous to obtain the \$7,000 left by the deceased than to protect the court from imposition and uphold the interests of justice. The language of the court in *Zoellner v. Zoellner*, 46 Mich. 511, 9 N. W. 831, in denying a

motion similar in its effect to the present petition, is so applicable that we quote it: "Waiving all objections based on the manner in which the relief sought is applied for, and viewing the case as it stands explained by the petitioner, the court is of the opinion that the decision of the court below should not be disturbed. Nothing is now involved except property. The sole motive of the petitioner, in assailing the judicial proceeding which purported to sever her connection with the deceased complainant, is to get, through a kind of post mortem adjudication, a share of the property he left. We think she was not disposed to attack the proceedings during his lifetime, and when, if successful, the result would have been a revival of the state of marriage; but that she designedly abstained from moving until, in consequence of his death, the property interest might be pursued without the risk of any restoration of the conjugal connection." But, even if the petition had been filed during the lifetime of Mrs. Roberts, no sufficient ground is stated for granting a new trial. In *Folsom v. Folsom*, 55 N. H. 78, it was held that a retrial of a libel for divorce would not be granted on the ground that the decree was obtained by fraud and perjury of the libellant and his witnesses; no fraud being shown except by implication from the charge of perjury. And in *Dexter v. Handy*, 13 R. I. 474, the defendant in an action of slander petitioned for a new trial on the ground that the plaintiff's witnesses, after the trial, admitted their testimony to have been untrue, and presented affidavits of persons claiming to have heard the admissions. No affidavits of the witnesses themselves, admitting their testimony to be untrue, were presented, and no steps had been taken by the petitioner to prosecute them for perjury. It was held, in this state of facts, that the petition should not be granted. And see *Brown v. Grove*, 116 Ind. 84, 87, 18 N. E. 387, to the effect that a new trial will not be granted to admit the introduction of impeaching evidence. Petition is denied, and dismissed.

CRONIN v. HOLLAND et al.

(Supreme Court of Rhode Island. Feb. 11, 1896.)

WILLS—LEGACIES PAYABLE OUT OF INCOME—ACTION BY LEGATEES TO ENFORCE COLLECTION OF LEGACIES.

Where a will directed the executor to take charge of the income of the estate until it was sufficient to pay debts and legacies, legatees cannot sue the executor to recover their legacies, in the absence of a showing that the income will not be sufficient within a reasonable time for the payment of such legacies; their only remedy being a bill for an account of the income.

Bill by Dennis Cronin against Elizabeth A. Holland and others for an injunction. Granted.

Dennis H. Sheahan, for complainant. Bal-lou & Tower and Warren R. Perce, for respondents.

MATTESON, C. J. The second clause of the will directs the complainant, as executor, to take the charge and possession of the income of the testator's property until such time as he can derive from it sufficient moneys to pay the testator's funeral expenses, just debts, and the legacies bequeathed in the will. The will thus, in effect, constitutes the executor a trustee, and provides for the payment of the legacies out of the income of the estate. We are of the opinion, therefore, that the legatees are not entitled to maintain suits for the collection of the legacies against the executor, or to enforce the charge by bill against the estate, which would be their remedy except for the provision directing the payment of legacies out of the income (*Mathewson v. Arnold*, 12 R. I. 145); or, at any rate, that they cannot maintain such a bill until it becomes apparent that the income of the property will not be sufficient in any reasonable time for the payment of the legacies. The only remedy to which they are entitled is a bill for an account, if the executor unreasonably refuses to render them an account of the income. An injunction restraining the prosecution of the suits at law against the executor in the district court of the Sixth judicial district is granted.

In re WATSON.

(Supreme Court of Rhode Island. Jan. 23, 1896.)⁹

BIGAMOUS COHABITATION—INDICTMENT—SUFFICIENCY.

An indictment under Pub. St. c. 244, § 1, providing that every person who shall be convicted of being married to another, or of cohabiting with another as husband and wife, having at the time a former husband or wife living, shall be imprisoned, etc., failing to allege the existence of a second marriage, is fatally defective.

Petition for habeas corpus by Francis C. Watson. Petitioner discharged.

James E. Denison, for petitioner. Edwin C. Dubois, Atty. Gen., and Henry J. Dubois, Asst. Atty. Gen., for the State.

TILLINGHAST, J. This is habeas corpus, and is brought to determine whether the petitioner is lawfully imprisoned by virtue of a conviction and sentence in the common pleas division. The indictment on which the petitioner was tried and convicted charges that Francis C. Watson, of Hopkinton, in the county of Washington, on the 9th day of October, 1870, at Sterling, in the state of Connecticut, was lawfully married to Melinda Buddington, and the said Melinda Buddington then and there had and took for his lawful wife, and that afterwards, and while he was so married to the said Melinda Buddington, then Melinda Watson, by the marriage aforesaid, and while the said Melinda Watson was his lawful wife, and living, on the 25th day of May, in the year of our Lord 1893, and

for a long space of time thereafter, to wit, for the space of 20 months, with force and arms, at Hopkinton aforesaid, in the county of Washington, feloniously and unlawfully did cohabit, and continue to cohabit, with one Mary A. Watson, alias Mary Watson, as husband and wife; and the said Melinda Watson not having continually remained without the limits of this state for the space of seven years together, without the said Francis C. Watson knowing the said Melinda Watson to be living within that time; and the said Francis C. Watson never having been legally divorced from the said Melinda Watson; and the said Francis C. Watson not having been less than 14 years of age, and the said Melinda Watson not having been less than 12 years of age, at the time of their said marriage,—against the form of the statute in such case made and provided, and against the peace and dignity of the state. Said indictment is based upon Pub. St. R. I. c. 244, § 1, which provides as follows: "Every person who shall be convicted of being married to another, or of cohabiting with another as husband and wife, having at the time a former husband or wife living, shall be imprisoned not exceeding five years nor less than one year or be fined not exceeding one thousand dollars: Provided, that this shall not extend to any person whose husband or wife shall be continuously remaining without the limits of this state for the space of seven years together, the party being married after the expiration of said seven years, not knowing the other to be living within that time, nor to any person who shall be divorced at the time of such second marriage, nor to any person by reason of any former or prior marriage, made when the man was less than fourteen and the woman less than twelve years of age."

The first ground upon which the petitioner relies is that the indictment fails to charge any offense under said statute, because it does not allege the existence of a second marriage. We think it is clear that the point is well taken. The statute above quoted provides for the punishment of bigamy proper and also for the punishment of the equally heinous offense of the bigamous cohabitation of persons not technically guilty of the crime of bigamy, because of the fact that the second marriage was contracted, either in some other county than that in which such bigamous cohabitation takes place and is sought to be punished, or in some other state. Pub. St. R. I. c. 248, § 7. But, in order to constitute either of the offenses named, it is clear that there must have been a second marriage, and hence it follows that such second marriage must be alleged in the indictment. The language of the statute is that "every person who shall be convicted of being married to another, or of cohabiting with another as husband and wife, having at the time a former husband or wife living," etc. It will be observed that the phrase, "having at the time a former husband or wife living," applies equal-

ly to both offenses. And it needs no argument to prove that there can be no such thing as a former husband or wife unless there is also a latter, or second, husband or wife. The proviso also applies equally to both offenses. The language is: "Provided, that this shall not extend to any person whose husband or wife shall be continually remaining without the limits of this state for the space of seven years together, the party being married after the expiration of said seven years, not knowing the other to be living within that time, nor to any person who shall be divorced at the time of such second marriage, nor to any person by reason of any former or prior marriage, made when the man was less than fourteen and the woman less than twelve years of age." It is clearly to be seen, therefore, from the proviso, that neither of the offenses aforesaid can be committed unless a second marriage has been contracted. The pleader himself, in framing the indictment before us, evidently recognized the fact that said proviso applies to the offense attempted to be charged, as he has negated the exceptions contained in said proviso, or rather attempted to do so, by incorporating a part of said proviso therein. But he has emasculated it by omitting all reference both to the "former" and "second" marriages, referred to therein. If it is necessary to negative the exceptions contained in the proviso, it is necessary to do so substantially in the language of the statute, which has not been done in said indictment. Cases are not rare where a person who is married contracts a second marriage, and then removes to a county or state other than that in which the second marriage was entered into, where the parties cohabit as husband and wife. Such cohabitation, however, does not constitute the crime of bigamy, as this crime can be committed only in the county and state where such second marriage is contracted. *State v. Palmer*, 18 Vt. 570; *State v. Cutshall*, 110 N. C. 538, 15 S. E. 261; *Walls v. State*, 32 Ark. 565; *Beggs v. State*, 55 Ala. 108; *State v. Sloan*, 55 Iowa, 217, 7 N. W. 516; 2 Bish. Cr. Proc. §§ 885, 886. But the parties, being illegally married, and subsequently living together in another county or state, are there, under statutes like ours, guilty of bigamous cohabitation, which is evidently looked upon by the lawmaking power as practically equivalent to bigamy proper. The Massachusetts statute, on this subject, provides that "whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife in this state, shall, except in the cases mentioned in the following section, be deemed guilty of polygamy," etc. The language there used in defining the offense is somewhat different from ours, and may be a little more explicit, but it comes to the same thing. Instead of saying, "having a former husband or wife living," it puts it the other way about, and says, "continues to cohabit with such second hus-

band or wife." But it is aimed at precisely the same offense as our statute aforesaid, and evidently means no more. See *Com. v. Putnam*, 1 Pick. 139, as to what the indictment should charge. In *Com. v. Bradley*, 2 Cush. 553, the defendant was convicted on an indictment, under the Massachusetts statute aforesaid, charging him with the offense of continuing to cohabit in that state with a second wife, having a former wife living. The indictment alleged that the defendant, on the 1st of July, 1836, was married, in New Hampshire, to Deborah Jane Evans; that on the 9th of January, 1846, that marriage still subsisting, he was married, in Connecticut, to Sarah Jane M. Smith, and that he afterwards did cohabit and continue to cohabit with said Sarah Jane at Lynn, in Massachusetts, for a long space of time, to wit, for the space of six months, his said former wife being then living. The court held the indictment good, and said that "the offense, as defined by statute, consists in continuing to cohabit with a second wife or husband in this state." See also, *Com. v. Godsoe*, 105 Mass. 464; *Com. v. Richardson*, 128 Mass. 34. *Com. v. Lucas*, 158 Mass. 81, 32 N. E. 1033, was a case where the defendant married a woman at Portland, in the state of Maine, having a former wife then living. The indictment charged him with cohabiting and continuing to cohabit with his second wife at Brockton, in Massachusetts, for a long space of time. Field, C. J., said: "This last allegation is material, because the second marriage is alleged to have taken place in the state of Maine, and there would be no offense against the laws of this commonwealth if the defendant had not cohabited with such 'second wife in this commonwealth.' To continue 'to cohabit with such second husband or wife,' as the words are used in Pub. St. c. 207, § 4, must mean to continue to live or dwell together as husband and wife ordinarily do; but, according to the weight of authority, the words do not necessarily imply actual sexual intercourse." In Tennessee, the statute on this subject provides that, "if any person being married shall marry another person, the former husband or wife then living, or continue to cohabit with such second husband or wife in this state, such person shall be imprisoned in the penitentiary not less than two, nor more than twenty-one years." In *Finney v. State*, 3 Head, 544, the court, in construing the statute, said: "We think it clear, that by this section, 'to continue to cohabit with such second husband or wife, in this state,' is a distinct and complete offense, and as much cognizable in the county where it occurs as the crime of bigamy is in the county where the second marriage took place. The offender could not be charged for the latter crime in any other county than that where it occurred; but, as to the former, it may be in a different county, and must be located by the facts, as well as the other. They are two distinct offenses. To make out the case for

unlawful cohabitation, the offense of bigamy must be proved by establishing both the marriages, and that at the time of the second the former had not been dissolved by divorce or death, either actual or presumed. This new offense was created to prevent the scandal and evil examples of permitting men and women to cohabit in any community of this state, upon an unlawful second marriage, when the first, as well as the last, or either, may have taken place in any other state or county." See, also, *Brewer v. State*, 59 Ala. 101. Statutes intended to define and punish the same offense have been enacted in many other of our sister states, and, while the language thereof is more or less variant, both the purport and purpose thereof are the same. See, for examples, 1 Starr & C. Ann. St. Ill. p. 762; 1 Gen. St. Kan. 1889, § 2364; Code W. Va. 1891 (3d Ed.) c. 149, §§ 1, 2; Rev. St. Fla. 1892, p. 820; How. Ann. St. Mich. 1882, c. 322, § 4; Gen. St. Conn. 1888, §§ 1523, 1524. Of course, we do not intend to be understood, by what we have herein said with reference to the offense of bigamy being limited to the county in which the second marriage takes place, that the guilty party cannot be indicted and punished in that county, although the bigamous cohabitation under such marriage takes place in another. For, under Pub. St. R. I. c. 248, § 9, the person against whom an indictment is found may be brought into the county where the offense was committed, for trial and punishment. But the only offense under said statute for which a person who contracts a bigamous marriage can be indicted and punished in any county other than that where such marriage occurs is that for bigamous cohabitation, as aforesaid,—so that, where the guilty party has escaped, or removed into another county than that in which the bigamous marriage took place, and there cohabits with another as husband and wife, the attorney general can elect whether to bring an indictment for bigamy in the former county, or an indictment for bigamous cohabitation in the latter. As the conclusion to which we have thus arrived disposes of the indictment, it is unnecessary to consider the other point taken by the petitioner, namely, that relating to the amendment made by the assistant attorney general. As the indictment against the petitioner charges him with no offense, therefore, it must be quashed, and the petitioner discharged from imprisonment thereunder.

INGRAHAM v. UNION R. CO.

(Supreme Court of Rhode Island. Jan. 30, 1896.)

WARRANTY — BREACH — SCIENTER — WHAT CONSTITUTES WARRANTY.

1. In an action for breach of warranty as to an article sold, a scienter need not be alleged or proven.

2. The vendor at a public auction sale of a

number of horses publicly stated "that all horses which would then and there be offered for sale had been driven single," and that all horses which were not safe to drive single would be specified when sold. *Held* that, where horses were afterwards sold without any statement as to whether they were safe to drive single, there was a warranty that they were safe.

Action by Ira Ingraham against the Union Railroad Company. On demurrer to the declaration. Overruled.

Littlefield, Stiness & Stiness, for plaintiff.
David S. Baker, for defendant.

TILLINGHAST, J. The only ground upon which the defendant's counsel bases his demurrer to the plaintiff's declaration in this case is that it does not allege that the defendant company, or its agents and servants, knew or ought to have known that the horse sold to the plaintiff by said defendant was vicious and unfit to drive in single harness. But this court has twice decided that in an action for false warranty of a horse, whether it be assumpsit or case for tort, a scienter need not be averred, and, if averred, need not be proved. *Place v. Merrill*, 14 R. I. 578; *Fogarty v. Barnes*, 16 R. I. 627, 18 Atl. 982. We see no reason to depart from the decisions rendered in those cases.

While we might properly stop here, yet, as the counsel for the defendant has taken the point in his brief that the representations and declarations alleged to have been made by the agent of the defendant at the time of the sale in question are not sufficient to constitute a warranty, which point has also been fully discussed in the brief of plaintiff's counsel, we deem it proper, in order to avoid the necessity of again hearing the case on an amended demurrer, to pass upon the question thus raised.

The declaration charges in substance, in the first count, that the defendant was the owner of a large number of horses, which it was desirous of selling, and did offer for sale by public auction; that at the time of said sale, before it began, in order to induce the plaintiff to purchase one of said horses, said defendant, by its agent, publicly stated and declared that all the horses which would then and there be offered for sale had been driven single, and that all the horses that were not kind and safe to drive single would be mentioned and specified at the time when they were sold; that, after the making of said statement, several horses were sold, one or more of which were stated to be unsafe to drive single, and then a black horse, numbered 54, was put up, and offered for sale by said defendant, and the plaintiff and others were requested to bid for said horse; that when said horse was offered for sale, and while the sale was being made, said company, by its agent, did not mention nor state that said horse was unsafe and dangerous to drive single, and the plaintiff, not knowing said horse to be

unsafe, and wholly relying on the representations aforesaid, and believing that said horse was safe to drive single, bid upon the same, and became the purchaser thereof. And the plaintiff says that he, confiding in the statement and representation aforesaid, and believing said horse to be safe to drive single, then and there led said horse away, put his own harness upon him, and attached him single to his own carriage, and set forward with said horse to go to his home. Yet the plaintiff says that said horse was not then and there safe to drive single, but was exceedingly unsafe and dangerous; and almost immediately, although the plaintiff is an experienced driver, and exercised the greatest care in driving said horse, and without any negligence on the part of the plaintiff, and without any cause save the vicious and ugly nature of said horse, he became uncontrollable and furious, and kicked and plunged about with terrible violence and force, whereby the plaintiff's carriage was demolished, his harness destroyed, and the plaintiff himself thrown out, and greatly injured. The second count, after setting out the defendant's representations made as aforesaid, alleges that it became and was the duty of the defendant then and there to state to the plaintiff that said horse was unsafe and dangerous to drive single; yet that said defendant negligently and carelessly omitted and failed to give the plaintiff notice of the dangerous nature of the horse, etc., as by its agent it had agreed and promised to do, whereby the plaintiff was injured as aforesaid.

Any positive affirmation or representation made by a vendor at the time of the sale with respect to the subject thereof, which operates as an inducement thereto, unless it be the expression of a mere matter of opinion or purely matter of description, constitutes a warranty. In other words, a warranty under a sale of personal property is a statement or representation of fact made by the vendor as to the character or quality of the article sold or of the title thereto, whereby the vendor promises that the thing is or shall be as represented. 28 Am. & Eng. Enc. Law, p. 738, and cases cited in note 1. In *Handy v. Waldron*, Index 00, 69, 29 Atl. 143, this court adopted the following brief definition: "A warranty is a statement of fact as to an article sold, coupled with an agreement to make the statement good." Such an agreement may be express or implied. Nor is any particular form of words necessary to create a warranty; any definite statement or affirmation as to the quality of the thing sold, made by the seller at the time, which it may reasonably be supposed was intended to induce the sale, and which is relied on by the purchaser, may be regarded as constituting a warranty; and if the vendor, at the time of the sale, affirms a fact as to the quality of the thing sold, in clear and intelligible language, and the purchaser buys on the

faith of such affirmation, there is an express warranty, and the vendor is liable in damages if the article sold is not what it is represented to be. Nor is it true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty; for if the representation as to the character or quality of the article sold be positive, and not mere matter of opinion, and the vendee understands it and relies upon it as a warranty, the vendor is bound thereby, no matter whether he intended it to be a warranty or not. As said by Earle, J., in *Hawkins v. Pemberton*, 51 N. Y. 202: "He is responsible for the language he uses, and cannot escape liability by claiming that he did not intend to convey the impression which his language was calculated to produce in the mind of the vendee." We think the language alleged to have been used by the defendant's agent in the case at bar, in the circumstances detailed in the declaration, was sufficient to constitute a warranty under the rule above stated, and that the plaintiff had the right to rely thereon. The statement alleged to have been relied on was "that all horses which would then and there be offered for sale had been driven single, and that all horses which were not kind and safe to drive single would be mentioned and specified at the time when they were sold." This was equivalent to an affirmation that all horses which would be then and there sold were kind and safe to drive singly, unless the contrary was stated. If, therefore, the plaintiff purchased the horse in question relying upon said affirmation, and it turned out that said horse was unsafe and dangerous to drive singly, and plaintiff has been damaged thereby, we think he is entitled to recover. Demurrer overruled, and case remitted to the common pleas division for further proceedings.

WARREN et al. v. PROVIDENCE TOOL CO. et al.

(Supreme Court of Rhode Island. Jan. 30, 1896.)

STOCKHOLDER'S LIABILITY—ACTION TO ENFORCE—LIMITATION—PLEADING—DEMURRER—LACHES—ARRAY.

1. In a suit to enforce the liability of stockholders on an unsatisfied judgment against the corporation, the bill showed that the judgment against such corporation had been entered after the expiration of the period of limitations, but also showed several undated payments on the claim which could have been made within six years prior to the commencement of the suit in which such judgment was rendered. *Held*, that a demurrer on the ground that the bill showed that the claims were barred by limitation at the time the action was brought against the corporation should be overruled.

2. Where the bill in a suit to enforce the liability of stockholders on an unsatisfied judgment against the corporation alleged a joint and several liability because of the neglect to file statements as required by manufacturing corporation act of

1847, a defense that, under the acts amending such statute, the liability of stockholders in manufacturing corporations was limited to the par value of paid-up shares, and an additional amount not exceeding such par value, could not be raised by demurrer.

3. Laches is not a ground for demurrer unless the facts constituting it appear on the face of the bill.

Suit by Charles H. Warren and others against the Providence Tool Company and others. Heard on demurrer to bill. Overruled.

James, Wm. R. & Theodore F. Tillinghast, for complainants, Van Slyck & Mumford, Bassett & Mitchell, Edwards & Angell, John D. Thurston, Thomas P. Barnefield, Joseph C. Ely, Herbert Almy, Thomas C. Greene, James M. Ripley, John Henshaw, and Cooke & Angell, for respondents.

MATTESON, C. J. This is a bill to enforce the liability of stockholders for a debt of a corporation. The case is before us on demurrers of a number of the respondents. The bill sets forth that on February 20, 1892, the complainants obtained a final judgment in the court of common pleas for Providence county, against the Providence Tool Company, a manufacturing corporation created by the general assembly, formerly doing business in Providence, for \$79,638.68 debt, and costs of suit, \$15.55; that execution issued on the judgment, on which the officer charged with its service made a return of nulla bona, and that the judgment remains in full force and wholly unsatisfied; that the Providence Tool Company was incorporated by an act of the general assembly at its June session, 1847; that it organized under the act; and that section 6 of the act is as follows: "Sec. 6. The liability of the members and officers of this corporation for the debts of the company shall be fixed and limited by, and the corporation, its members and officers, shall in all respects be subject to, the provisions of 'An act in relation to manufacturing corporations,' passed at the June session of the general assembly, A. D. 1847, in the same manner as if said company had been incorporated after said act had gone into effect." The bill further sets forth that neither the corporation, nor its officers, nor any of its members or stockholders, ever made and filed any statement that its capital stock had been paid in, in accordance with the provisions of sections 1 and 2 of the act in relation to manufacturing corporations, referred to in section 6 of the act of incorporation, or of the statutes in re-enactment of those provisions, nor has the corporation or its officers or any of its members or stockholders ever made any statement of the condition of the corporation, as required by section 9 of the act in relation to manufacturing corporations referred to, or by the statutes re-enacting the provisions of that section, and avers that all the members and stockholders of the corporation have thereby be-

come liable, and are jointly and severally liable, for the debts of the corporation due and owing to the complainants, including their judgment, and liable to pay the same accordingly. The bill sets forth a description of the several notes given to the complainants, the earliest bearing date March 31, 1879, and the latest bearing date March 11, 1882, and also a statement of a book account which became due and payable March 27, 1882, and avers that these, with the interest thereon, less payments made at sundry times on account thereof, were the basis of the judgment obtained by the complainant as stated.

Pub. St. R. I. c. 155, § 22, is as follows: "All proceedings to enforce the liability of a stockholder for the debts of a corporation shall be either by suit in equity, conducted according to the practice and course of equity, or by an action of debt upon the judgment obtained against such corporation, and in any such suit or action such stockholder may contest the validity of the claim upon which the judgment against such corporation was obtained, upon any ground upon which such corporation could have contested the same in the action in which such judgment was recovered."

The first ground of defense under the demurrers is that it appears by the bill that the complainants' right of action on their claims was barred by the statute of limitations at the time the action was brought against the corporation. It is, doubtless, true that the defense of the statute of limitations may be taken on demurrer, if it clearly appears on the face of the bill that the claim is barred. But we do not think that the rule is applicable to the case at bar, since it does not clearly appear that the claims were barred by the statute of limitations prior to the action at law in which the judgment was obtained; for, though the latest claim was a promissory note dated March 11, 1882, which matured four months later, and the judgment was not obtained until February 20, 1892, it appears by the bill that sundry payments had been made on the claims, and, for aught that appears, these may have been made within the six years prior to the bringing of the suit.

The second ground urged in support of the demurrers is that the bill avers a joint and several liability of the stockholders for the debts of the corporation under section 6 of the charter, because of the neglect to file the statements required by the provisions of the act in relation to manufacturing corporations, passed at the June session, 1847, of the general assembly, and the acts in re-enactment of its provisions, whereas it appears, by the statutes in amendment of the act referred to, that the liability of the stockholders in manufacturing corporations is limited to the shares of the stockholders paid up to the par value thereof, and an additional amount up to, but not exceeding, such par value. This is a defense which goes, not to the right of the com-

plainants to maintain their bill, but merely to the extent of the liability of the stockholders. We are of the opinion, therefore, that it is not a defense of which advantage can be taken on demurrer.

The respondents also set up the defense of laches in support of their demurrers. But the facts on which they claim that it would be inequitable to entertain the suit do not appear on the face of the bill, at least with sufficient certainty to warrant us in sustaining the demurrers and denying the relief sought. If the complainants have been guilty of laches such as to render the maintenance of the bill inequitable, the respondents can set that forth in their answers; and the court, with the proofs before it, will be in a better position to pass on the question than it is on these demurrers. Demurrers overruled.

EVANS v. STATE BOARD OF HEALTH.

(Supreme Court of Rhode Island. Feb. 11, 1896.)

PHYSICIAN—REGISTRATION—ITINERANT.

Under the provision of Pub. Laws, c. 1353, § 4, that "nothing in this chapter shall be so construed as to authorize any itinerant doctor to register or practice medicine in any part of this state," a physician whose residence and principal office are in another state, but who, in the practice of a specialty, visits cities in this state and in others at stated intervals, treating patients at his rooms in hotels, is not entitled to register or practice.

Appeal by David Evans from decision of state board of health. Affirmed.

Charles E. Gorman, for appellant. Edward C. Dubois, Atty. Gen., for appellee.

PER CURIAM. The appellant is a domiciled resident of Boston, Mass., and a practicing physician, making a specialty of the treatment of catarrh. His main or regular office is in Boston, and for 10 years past, except when absent from the country, or prevented by illness, he has visited Providence in the practice of his specialty on stated days each month. He has had no office in Providence except the rooms he has taken in the hotels at which he has stopped. He has notified his patients of his visits to Providence by advertisements in the Providence Journal, and has met them in his rooms at the hotels at the times mentioned in the advertisements. He has also during this 10 years, for greater or less periods, been in the habit of visiting, in the practice of his specialty, Worcester, Springfield, New Bedford, and Lowell, Mass., in the same manner as he has visited Providence. On these facts the state board of health decided that he was to be regarded as an itinerant doctor, within the meaning of Pub. Laws R. I. c. 1353, § 4, which provides that "nothing in this chapter shall be so construed as to authorize any itinerant doctor to register or to practice medicine in any part of this state." We think that this decision was correct, and affirm it accordingly.

BOUCHER v. STATE BOARD OF HEALTH.

(Supreme Court of Rhode Island. Feb. 11, 1896.)

PHYSICIAN—CERTIFICATE OF QUALIFICATION—POWERS OF STATE BOARD OF HEALTH.

Graduates from the medical department of Laval University, which is a legally chartered medical college of Canada, having been uniformly granted a certificate to practice by the state board of health when they also presented a license to practice in Canada from the College of Physicians and Surgeons, and it appearing that such license is granted as a matter of course, without examination, on the diploma of the applicant, and on payment of a fee therefor, the refusal of the board to grant a certificate for lack of such license is erroneous.

Appeal by Joseph G. Boucher from decision of state board of health. Reversed.

Charles E. Gorman and Ambrose Choquet, for appellant. Edward C. Dubois, Atty. Gen., for appellees.

PER CURIAM. The appellant is a graduate of the medical department of the Laval University, a legally chartered medical college in Montreal, Canada; but his application for a certificate to practice medicine was refused by the respondents, on the ground that Laval University had not been indorsed by them as a reputable and legally chartered medical college. It appears, however, that if he had presented with his diploma a license to practice medicine in Canada from the College of Physicians and Surgeons, a board similar to the respondents, they would have granted him a certificate to practice. The evidence shows that the license of the College of Physicians and Surgeons is granted as a matter of course to those holding diplomas from the Laval University, who, like the appellant, had been found by the governors of the College of Physicians and Surgeons qualified to pursue the study of medicine, and had been registered in the books of the college as having commenced the study, on the payment of the prescribed fee, and that it merely confers authority on the licensee to practice in Canada. We understand, also, from the testimony, that in several instances the respondents have granted certificates to practice to graduates of Laval University who, having practiced medicine in Canada prior to coming here, had the license of the College of Physicians and Surgeons. If this be so, we think that inasmuch as the license of the College of Physicians and Surgeons is granted to holders of diplomas of Laval University, of the class mentioned, without examination, merely on the payment of a prescribed fee, the granting of certificates by the respondents to other graduates of Laval University, qualified as above stated, was, in effect, an indorsement of that university by them as a legally chartered medical college, to the extent mentioned, and that they therefore erred in refusing a certificate to the ap-

pellant merely because, not wishing to practice in Canada, he did not pay the fee and obtain the license from the College of Physicians and Surgeons. Decision of the state board of health overruled.

CRUMLEY et al. v. LUTZ et al.

(Supreme Court of Pennsylvania. Jan. 10, 1896.)

Appeal from court of common pleas, Philadelphia county; Thayer, Judge.

Action by Henry Crumley and others against John Lutz and others. From a judgment for defendants, plaintiffs appeal. Appeal quashed.

John M. Arundel, for appellants. Frederick J. Knaus and Horace Haverstick, for appellees.

PER CURIAM. Appeal quashed.

POOL et al. v. WHITE.

(Supreme Court of Pennsylvania. Oct. 8, 1895.)

Appeal from court of common pleas, Westmoreland county.

Laird & Keenan, Morehead & Garther, and Robbins & Kunkle, for appellant. John F. Wentling, David A. Miller, Jas. S. Moorhead, and John B. Head, for appellees.

PER CURIAM. Writ quashed.

CAMPBELL v. CITY OF YORK.

(Supreme Court of Pennsylvania. Jan. 6, 1895.)

ACTION AGAINST CITY — DEFECTIVE SIDEWALK — EVIDENCE—PERSONAL INJURIES—MORTALITY TABLES.

In an action for injuries not resulting in death, mortality tables are admissible, provided they are accompanied by proper instructions in regard to their use.

Appeal from court of common pleas, York county; J. W. Latimer, Judge.

Action by John Campbell against the city of York. From a judgment for plaintiff, defendant appeals. Affirmed.

The court charged as follows as to the use of the Carlisle tables: "When you come to the question of determining the measure of damages, you will consider in that connection the Carlisle tables, showing the expectancy of life, which were also introduced. There is a case in Pennsylvania in which the supreme court have said that it seems that that probably is proper,—*Kraut v. Railway Co.*, 160 Pa. St. 327, 28 Atl. 783. But you must not misunderstand the testimony. The Carlisle tables are based upon the mortality experience of insurance companies. Of course, the insurance companies have gathered together a vast amount of statistics from which they are able to ascertain the average expectancy of life at any particular period; and of course those tables are based upon the selected lives,—for people are only insured by life insurance companies after having passed a medical examination insuring good health. At 47 the ex-

pectancy of life is 23 years. That does not mean to say that a man at 47 is going to live 23 years. He may die the next day; he may live to be 90. It simply means that of people aged 47 the average existence of their lives will be about that. If there is a class of 100,000 living at 47 years, the average life of those whole 100,000 will be 23 years. Of course, the duration of any particular life, such as this, cannot be predicted; and of course it depends largely upon the condition of health,—the physical condition of the man,—and depends largely upon the acts and conduct, and the liability to contract disease, and matters of that sort. I say this, because I do not want you to assume that, because the expectancy of life at 47 years is 23 years, that this man will live 23 years. He may live twice that; he may die to-morrow."

Stewart, Niles & Neff and Robert F. Gibson, for appellant. N. W. Wanner and Allen C. Wiest, for appellee.

McCOLLUM, J. The negligence of the city in the construction and maintenance of the sidewalk in question is obvious and undisputed, and it is established by the verdict of the jury that this negligence was the sole cause of the injury complained of. The city appears to have conceded its own negligence in the premises, and to have based its defense on the alleged contributory negligence of the plaintiff. The questions raised by this defense, and all the evidence relating to it, were carefully presented to the jury for their consideration, with the repeated instruction that, if there was negligence on the part of the plaintiff which contributed in the slightest degree to the accident, he could not maintain the suit. The city has no cause to complain of the instructions on this branch of the case, as it is clear that the court would not have been justified in ruling that there was contributory negligence which precluded a recovery. The evidence tending to show the plaintiff's knowledge of the condition of the sidewalk, his manner of passing over it on the night of the accident, and his acquaintance with other streets and sidewalks in the neighborhood of it, was for the jury. From this evidence they found that his case was clear of contributory negligence. It cannot be justly said of the evidence that the weight of it is against the verdict, or that it warrants a legal conclusion destructive of the plaintiff's claim. The sidewalk, from the time of its construction until and subsequent to the occurrence in question, was unsafe, and it exposed to casualties like the one under consideration all persons having occasion to pass over it at night. The municipal authorities were cognizant of its condition, and the risks involved in traveling upon it; but they declined, when requested, to incur the expenditure required to render it reasonably safe for public use. It is difficult to imagine a more flagrant disregard of official duty than was shown in this case by the representatives of the city, who

were charged with the supervision and care of its streets. There is some evidence which indicates that they supposed the sidewalk, at the east end of it, was in the township of Spring Garden; but as the evidence is clear and uncontradicted that it was constructed by, and within the limits of, the city, there was no warrant for their supposition. It being established by a verdict, supported by competent and sufficient testimony, that the sidewalk at the point where the accident occurred was defective and dangerous, that it was known to the municipal authorities to be so, and that their negligence in the construction and maintenance of it was the proximate cause of the plaintiff's injury, a particular specification of its defects seems to be unnecessary.

The city's contention based on the second specification of error is without merit, because it was not shown by either party that there was any change in the condition of the sidewalk from the time of its construction until some time after the accident, except such as was made by the board bridge at the east end of it, or was the natural sequence of the manner of constructing it. The testimony of the plaintiff explanatory of his fall is consistent with the testimony descriptive of the condition of the sidewalk anterior to it, and the question whether the city had notice of the latter before the occurrence of the former was for the jury, upon all the evidence in the case pertinent to it.

The city complains of the admission of the mortality tables, and of the instructions in regard to them. In admitting this evidence, the learned court below followed and was governed by the decisions of this court in *Steinbrunner v. Railway Co.*, 146 Pa. St. 504, 23 Atl. 239, *McCue v. Knoxville Borough*, 146 Pa. St. 580, 23 Atl. 439, and *Kraut v. Railway Co.*, 160 Pa. St. 329, 28 Atl. 783; and in commenting upon it fairly conformed to the suggestion made in the case first cited. This complaint, therefore, furnishes no ground for reversing the judgment. The contention based on the excerpts from the charge embraced in the third and fourth specifications of error has no substantial merit in it. These excerpts, considered in connection with the charge as a whole, and in the light of the testimony in the case, cannot be fairly characterized as misleading or prejudicial to the rights of the city. The specifications of error are overruled, and the judgment is affirmed.

RICH v. BLACK et al.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

AGENT TO SELL LAND—RIGHT TO PURCHASE.

Where one intrusted with the sale of real estate purchases it himself through other parties, the vendor may rescind the sale, though the price paid is all that was demanded by her.

Appeal from court of common pleas, Allegheny county; Thomas Ewing, Judge.

Bill by Martha K. Rich against Black & Baird, Daniel H. Barr, and others, to have said Barr declared trustee for plaintiff as to certain land, and to obtain an accounting by defendants. From a decree for plaintiff, defendants appeal. Affirmed.

J. S. & E. G. Ferguson, for appellants. M. A. Woodward, for appellee.

STERRETT, O. J. The rule of public policy which avoids, at the instance of the cestui que trust, purchases made by agents for sale, is practically absolute in its character. Courts of equity view such transactions with jealous eye; and it is only under special circumstances, amounting to a dissolution of the trust relation, when the parties have dealt at arm's length, that their validity is recognized. *Davoue v. Fanning*, 2 Johns. Ch. 254. And the reasons are obvious. On the one hand, the relation which such agents bear is confidential, and disarm the vigilance of their principals. It affords peculiar facilities for obtaining exclusive information in respect of the property intrusted to them for sale. Their employment implies that they have superior advantages for making sales, and that they will use every effort and means to obtain the highest price for the benefit of their principals. On the other hand, their individual interest is to purchase at the lowest price, and places them in a position which is inconsistent with the faithful and proper discharge of the duties of the trust. The opportunity will naturally lead to temptation, to abuse, and, as was aptly said by Mr. Chancellor Kent in *Davoue v. Fanning*, supra, be poisonous in its consequences. The cestui que trust is not bound to prove, nor is the court bound to judge, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power distinctly and clearly to show it. "There may be fraud," as Lord Hardwicke observed, "and the party not able to prove it." Thus an agent, by virtue of his trust relation, may discover valuable minerals in the land, and, locking the knowledge in his breast, take advantage of it in making a contract with his cestui que trust. If he deny it, how can the court find the fact? "The probability is that a trustee who has once conceived such a purpose will never disclose it, and the cestui que trust will be effectually defrauded." *Ex parte Lacey*, 6 Ves. 627. So he may take advantage of his superior knowledge of the market and skill in manipulation to obtain results beneficial to himself. "It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the cestui que trust to come, at his own option, and without showing actual injury, and insist upon having the experiment of another sale" (*Davoue v. Fanning*, supra); or, as was held in our own case of *Swissheim's Appeal*, 56 Pa. St. 475, treat the purchase as inoperative in respect of the land unsold by the trustee, and compel an ac-

ount of the proceeds of sale made by him to innocent purchasers for value. "This is a remedy that goes deep, and touches the very root of the matter." *Davoue v. Fanning*, supra; *Leisenring v. Black*, 5 Watts, 303; *Parhall's Appeal*, 65 Pa. St. 224; *Rice v. Davis*, 36 Pa. St. 439, 20 Atl. 513; *Murphy v. O'Shea*, 2 Jones & Le T. 422. The cestui que trust must, it is true, move within a reasonable time; but what shall amount to a reasonable time will depend on circumstances, and lies in the discretion of the court. In the absence of special circumstances which may lengthen or shorten the time, the analogy of the law is followed. *Marshall's Estate*, 138 Pa. St. 205, 22 Atl. 90. These appellants misapprehend the rationale of this rule. They insist that because, as they claim, the sale was satisfactory to Mrs. Rich, the rule has no application. Conceding that in the first instance it was satisfactory, that fact would not take away her option to rescind; for these appellants then and for a long time afterwards ostensibly maintained towards her the character of agents for sale, and willfully concealed the fact of their own interest. They maintain their characters of inconsistency even now by claiming not only title as purchasers, but commissions as agents for sale. Roll, whom they first reported as the purchaser, confessedly knew nothing of it. The alleged interest of Gillespie and Neeb is more than doubtful, and, if it ever existed, was soon parted with. To all practical intents and purposes, these agents were the real purchasers, without the knowledge of their cestui que trust. *Rosenberger's Appeal*, 26 Pa. St. 67. However Mrs. Rich may have felt in the first instance as to the sale, it is not likely that it would have been satisfactory had she been fully informed of the facts. When she gave her agents a minimum price, it was manifestly intended as a guide to them in negotiating the sale, and implied a just expectation on her part and an engagement on theirs that they would make an honest endeavor to obtain a higher price. If Roll, Gillespie, and Neeb were really intending purchasers, the obvious course was that these agents for sale should make competitive bids. They did not occupy the position of middlemen with equal duty to both. Their primary duty was to Mrs. Rich. But, so far as appears, no bona fide effort was made by them to perform this duty. Instead, Mrs. Rich was asked to take less, and when this was refused, they hastened to avail themselves of the minimum price in their own interest, and had already made large profits before Mrs. Rich's discovery of the facts. If they could realize profits for themselves, they could and should have done so for their cestui que trust. That was their employment, and that their undertaking; and equity will treat that as done which ought to have been done. To sustain the purchase made in these circumstances would work "actual injury" to Mrs. Rich, tend to encourage reaches of trust, and violate a wise rule of

public policy. Having taken action in time, the plaintiff was entitled to the relief which the decree of the court below is intended to secure. Decree affirmed, and appeal dismissed, with costs to be paid by appellants; and it is ordered that the record be remitted to the court below for further proceedings.

McCUTCHEON v. SMITH et al.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

FRAUD—CONFIDENTIAL RELATIONS—TENANTS IN COMMON.

The two members of a firm, after dissolution, in order to realize on a debt, purchased at judicial sale a farm which had been conveyed to the debtor's wife, each contributing one-half the price, and taking title to an undivided half interest. After holding the property together for 10 years, one of them made a contract for the sale of the farm for \$8,500, and immediately after doing so, without disclosing the sale to his partner, he purchased the latter's half interest for \$2,500. *Held*, that the relation between the parties was of a confidential nature, so as to incapacitate the one from thus making a profit at the expense of the other.

Appeal from court of common pleas, Allegheny county.

Bill by William McCutcheon against Mary Smith, executrix of George F. Smith, deceased, and others, for an accounting. From a decree for plaintiff, defendants appeal. Affirmed.

J. M. Shields, for appellants. A. Blakeley, for appellee.

STERRETT, C. J. In 1867, William McCutcheon, the plaintiff, and George F. Smith, the defendants' testator, formed an equal co-partnership in the name of George F. Smith & Co., which continued until April, 1876, when by mutual consent it was dissolved. One of the outstanding assets of the firm was an overdue account of about \$7,000 against Samuel Hare, which the latter was willing, but unable, to pay. Afterwards, with the view of realizing at least part of this, and other delinquent accounts, the late partners concluded to purchase the Hare farm, the deed for which had been made to the wife of their principal debtor. They accordingly bought the same at judicial sale, each contributing one-half of the purchase money, and taking title to an undivided half interest. As found by the learned master, "the purchase was made for the purpose of selling for the best price they could obtain, and out of the profits, if any, make up a portion or all of the loss they had jointly sustained while carrying on the business in the firm name of G. F. Smith & Co." He also found that, while each was authorized by the other to seek a purchaser for the farm, Smith, with the consent of McCutcheon, was the more active in managing the place and in endeavoring to effect a sale thereof; that in the purchase, ownership, and sale of the common property the parties were equally interested,

and occupied a confidential relation towards each other; that during the existence of that relation Smith entered into a contract with J. G. Rolshouse, whereby the latter agreed to pay \$8,500 for the farm. Immediately after doing so, he went to McCutcheon, and, without disclosing to him the fact that Rolshouse had agreed to give \$8,500 for the farm, succeeded in purchasing his undivided half, and obtaining a conveyance thereof to himself, for \$2,500. Smith received \$500 from Rolshouse on the execution of his contract, \$6,000 in about two weeks thereafter, and shortly after Smith's death the residue of the \$8,500, with interest, was paid to his personal representatives. The facts above outlined, and other material as well as strongly corroborated facts, found by the learned master on abundantly sufficient evidence, are clearly and concisely stated by him in his able and very satisfactory report, and need not be further referred to here.

In view of the facts thus conclusively established, the master was fully warranted in his conclusions that Smith's duty in the premises was to fully inform McCutcheon of the Rolshouse contract; that the relation of trust and confidence which had so long bound them together could not be severed by the one buying out the other's interest in the farm without first divulging to the fullest extent all the knowledge he possessed concerning their joint enterprise. Smith did not do this. On the contrary, at the very time he induced McCutcheon to sell and convey his half interest in the farm to himself for \$2,500, he had Rolshouse's agreement to pay \$8,500 for both interests, and adroitly concealed the fact until he accomplished his purpose. If authority for the legal conclusions of the master of which the decree is predicated be needed, it will be found in the cases cited by him, to which may be added *Swisshelm's Appeal*, 56 Pa. St. 475; *Rich v. Black* (not yet officially reported) 33 Atl. 880, and cases there cited.

We find nothing in the record that would warrant us in sustaining any of the assignments of error, nor do we think that either of them requires discussion. In the circumstances, the amendment of plaintiff's bill was rightly allowed, and the testimony received and considered by the master was neither irrelevant nor incompetent. There was no error in dismissing the exceptions to the master's report, nor in entering the decrees recited in the fourth and fifth specifications. Decree affirmed, and appeal dismissed, with costs to be paid by the defendants.

DAVIS v. YODER.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)
CONVEYANCE BY DEBTOR — LEGAL FRAUD — ADEQUACY OF CONSIDERATION.

1. The owner of most of the stock in a gas company, having become financially involved, in-

duced appellant, to whom he owed a large sum, and who was also liable as indorser on his notes, to take up all the gas stock by paying the debts for which the stock had been given as collateral, they having concluded that the only way to save the debtor's interest in the company was to keep the stock together. *Held*, that the fact that after appellant procured the stock from the pledgees he agreed with the debtor that the latter should receive a large commission if he could sell the stock for a certain sum did not show fraud as to other creditors.

2. Where a bona fide creditor, with large contingent liabilities on claims against his debtor, takes at a fair valuation property belonging to the debtor, the fact that thereafter, by putting in large additional capital, he makes the property extremely profitable, does not affect the validity of the transfer to him as against other creditors of the common debtor.

Appeal from court of common pleas, Allegheny county; J. F. Slagle, Judge.

Proceeding by Eliza G. Davis upon an execution attachment issued on a judgment rendered against E. M. Hukill, in which proceeding L. T. Yoder and the West Penn Gas Company were made garnishees. From a judgment against said Yoder he appeals. Reversed.

W. C. Moreland and Willis F. McCook, for appellant. D. F. Patterson, for appellee.

MITCHELL, J. It is conceded that no fraud in fact was intended by the appellant. The learned judge charged the jury on that basis, saying in his instructions on the measure of damages: "If it had been a case of actual fraud, there would have been no difficulty about it. He [Yoder] would have had to pay the full value of this stock, because he could have taken no benefit by it." The question is, therefore, was there evidence to support an inference of fraud in law? The circumstances, as shown by all the testimony, were these: The gas company had been prosperous, but had been got into difficulties by Hukill's operations with the water company. As he was the owner of all the shares in the water company, and all but four in the gas company, financial difficulty for him, either personally or as representing the water company, of course meant like difficulty for the gas company. In fact every share that he owned in the latter had been pledged for loans to carry the former; and in September, 1893, he had, in his own phrase, "come to the end of his string." The water company's paper was out, and could not be met. The creditors were threatening to sue. Hukill was indorser to the extent of \$20,000, and, as he says, the creditors seemed to think the gas company ought to father the debts of the water company, and made threats that they would pursue the gas company and his stock. As already said, every share he owned was pledged for loans, and he was of opinion that, if attached, and his equity in it sold, "the whole thing would become complicated, and waste would follow," but that if it could all be held together until he had an oppor-

unity to sell it as a whole, there would be enough realized to pay all the debts, both the company's and his own. In this situation Hukill called upon appellant, stated the foregoing facts, and "told him that something would have to be done." The significance of his last remark lies in the fact that appellant was a creditor of Hukill for \$5,000, apparently unsecured, and was contingently liable for \$10,000 more as indorser on the notes of Hukill, held by various banks. He had, therefore, a direct and considerable pecuniary interest in Hukill's ability to meet his obligations. The latter's view was, as already said, that if the stock could be held together until a sale of the whole plant could be made, enough money would be realized to pay all claims, and appellant first made an effort to induce the banks who held the stock as collateral to act in concert to carry out this plan. They, however, refused to come into it, and then appellant, with the assistance of Vandersaal, whom he induced to join him, paid the amounts due the banks, took assignments of the stock, and held it as owners, for repayment and possible profit. This is the substance of the appellant's action, which plaintiff complains of, and on which the jury found their verdict.

Two additional circumstances are relied upon to sustain the claim of legal fraud. Appellant, at the end of the transaction, was a creditor of Hukill for about \$36,000, made up of his original claim and the amount he had advanced to repay the banks. He then agreed with Hukill that in case the latter sold the gas company plant he might have half the excess over \$40,000, and it was urged that this was a fraudulent benefit to the debtor, which tainted the whole transaction. But the undisputed testimony is that his agreement was not made until after appellant had become the owner of the whole stock, and was looking around for means of realizing on it. Hukill says distinctly that nothing was said of any money to come to him until Yoder had got control of all the stock, and elected a new board of directors. Then it was agreed he should have a commission in case he succeeded in selling. Of course, it was previously understood that here was to be a sale. The whole plan hinged upon that, and the object of putting in more money to redeem the stock and hold it together was to get the benefit of a sale of the plant as a whole. This is the losing point in the case, and might justify an unfavorable view by the jury, if there were any doubt or conflict in the evidence as to the time this agreement was made; but there is not. Appellant had become the owner of the property, not with the idea of running the company, but to get out of his liabilities in regard to it without loss. To do this he must sell, and there was no legal objection, under the circumstances, to his employing the previous owner to make the sale, and paying him even a liberal commission.

The other circumstance urged as sustaining the idea of fraud is the excessive value of the stock, as compared with what appellant paid for it. A clear excess of value of property transferred over the debt, and a reasonable margin for delay and expense in converting the property into money, is evidence of fraudulent intent. But it is conceded here that there was no actual fraud intended, and the excess of value is too uncertain and contingent to be a safe basis for an inference of law. Hukill says, indeed, that the value of the stock was "assumed" to be \$20 a share, but this assumption was on the basis of a sale of the whole 5,100 shares for \$100,000 which the event proved could not be made. Before the difficulties of the gas company arose, or at least were known, the stock was pledged for loans running from \$2.75 to \$14 a share, and the banks refused to loan any further amounts on it. The small number of shares pledged at \$14, were sold by the holders, Spang, Chalfant & Co., and did not bring the amount of the loan for which they stood as collateral. And finally Vandersaal, who seems to have been the first to make a careful businesslike examination of the gas company's affairs, testifies that he "didn't think we could go out in the market and sell the plant for enough to pay its debts," and he was willing to go out for the amount he had put in, and lose the interest. This evidence of the value at the time is not overcome by the fact that the company subsequently became profitable under the new management of Vandersaal, with closer attention, more economical administration, and additional capital, for all of which the jury do not seem to have made any allowance at all.

In this review we have taken the evidence of Hukill and Yoder, on which the case must rest, with every unfavorable inference that it will fairly support, and are of opinion that it is not sufficient to sustain the conclusion of fraud in law any more than in fact. If appellant had been a volunteer, the result would have been different. But he was a bona fide creditor to a large amount, with still greater contingent liabilities in case Hukill failed to pay. He took a large property to secure himself, but to do so he was obliged to put in additional capital, to double the amount of his first risk, and to take a property of uncertain and shifting value, which might or might not reimburse him. The difference between the position of a volunteer who comes forward to assist a failing debtor to delay or hinder his creditors and that of a bona fide holder of an existing debt has been recently stated in *Werner v. Zierfuss*, 162 Pa. St. 360, 29 Atl. 737. Appellant stood in that position in regard to Hukill, and we see no sufficient evidence that in his action he exceeded his legal rights. The defendant's first point should have been affirmed, and a verdict directed in his favor. Judgment reversed.

In re PARK'S ESTATE.

Appeal of LEECH.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

LIFE TENANTS AND REMAINDER-MEN — RIGHT TO PROFITS.

Testator left his estate to his executors, in trust, to receive and collect the rents of the real estate, and the income and profits of the personal estate, and, after deducting taxes and certain annuities, to pay the residue of the net income to his daughter during her life, the corpus of the estate to go to her children after her death. The executors invested a part of the estate in mortgages, which were foreclosed, they buying in the property, in order to protect the estate, for the amounts of the mortgages. *Held*, that the testator's daughter was entitled to the profits arising from the subsequent sale of such property at an advance.

Appeal from orphans' court, Allegheny county; Over, Judge.

Proceedings to settle the accounts of Andrew D. Smith, surviving trustee under the will of David E. Park, deceased. From a decree confirming the trustee's account, Margaretta P. Leech appeals. Reversed.

The dissenting opinion of Hawkins, P. J., referred to in the opinion, was as follows:

"I dissent from the view which the auditing judge has taken in respect of what shall constitute 'income and profits,' and what 'principal.' If the gift had been of specific property for life, with remainder over, it may be conceded that Mrs. Leech would have had no right to share in the proceeds of its sale; for such proceeds when realized would simply have been the measure of value of the specific property which, by the terms of the will, those in remainder would otherwise have had a right to demand at her death. The gift, however, being general, gave those in remainder no title to any specific property, but implied conversion into cash, which referred the value of the corpus to the date of the testator's death. Had the gift to Mrs. Leech been legal as well as equitable, that value would have been the measure of her liability to those in remainder, and the source of the income and profits beneficially intended for her. Investment and reinvestment would have been in her control, and for her sole benefit. Those in remainder would have had no interest further than the safety of this corpus, and its payment at her death. This being conceded, why should the mere separation of legal and equitable estates imply any change in her beneficial estate? The obvious purpose of separation was to vest in the trustee the duty of administration of the trust estate. The gift of the beneficial interest was as absolute as though coupled with a legal estate. It was no greater or less because of the separation. In either event the trust estate would consist, at the beginning, of cash, and Mrs. Leech, by the terms of the will, be entitled to whatever 'income and profits' it might earn during her life. The direction given

by the testator to invest and reinvest necessarily had reference to cash as its subject, for the will spoke as of his death. Had bond been required of the trustee, that must have been the basis upon which its amount would have been fixed, and the measure of liability to those in remainder. If the testator had manifested an intent that the fund should be invested in the purchase of lands, and thereby work a conversion, any increase in value of the lands must, it is conceded, have inured to the benefit of the remainder. In re Gerry, 103 N. Y. 445, 9 N. E. 235. But there is no such intent apparent upon the face of the will. On the contrary, the direction to invest and reinvest evinces a temporary holding, and negatives any change in the nature of the fund. But, however this may be, the investment made here was, in fact, of part of the corpus in a mere temporary security; and it is too plain for argument that the purchase of the mortgaged land under foreclosure proceedings was not a reinvestment. The trust estate was creditor to the extent of the mortgage debt, and the trustee must have accepted tender of the amount at any time before delivery of the deed. The proceeding was simply a process for collection, and part of the necessary duty of the administration of the trust estate. *Oeslager v. Fisher*, 2 Pa. St. 467. The purchase did not work conversion into realty. The investment retained its character of personality, and the trustee had the same power over the land as he had over the mortgage. When the amount of the investment had been restored, what more could be claimed on behalf of those in remainder? Speaking from the death of testator, that was the amount which the will gave them. If Mrs. Leech would have been entitled to 10, 20, or any larger percentage, reserved in the mortgage, as must be conceded, as income and profit, why not earnings resulting from process of collection by foreclosure? If she is entitled to 6 per cent. out of those earnings, why not to all? It is impossible to understand why the earnings retained by the trustee are not as much 'income and profits' as that paid to Mrs. Leech. If it was right to pay her 6 per cent. out of these earnings, the whole earnings logically belonged to her; for they are equally income and profits which sprang from the mortgage investment. It is obviously immaterial how the earnings arise. It is enough that they were the income of the fund invested to give Mrs. Leech the right to them. It is said that, 'because a loss would have fallen on both the remainder-men and life tenant, it is but equitable they should both participate if there be a profit, in the same proportion as they would bear the loss.' This rule, logically carried out, would enable a trustee to create a contingent fund of any profits, whether interest, dividends, or such as the present, and thus defeat the expressed in-

ent of the testator. But, suppose no loss should ever occur; to whom should these admitted profits belong? If profits, the remainder-men could make no claim; and Mrs. Leech would be beyond the need of them. The true test of the equities of the parties must be found in the will; and that gave Mrs. Leech 'all the income and profits' during life, and the principal to her children at her death. Loss of part of the corpus, when it happens, is a question of administration, which the trustee must answer. If result from his negligence, he must make it good; if not, he is entitled to credit on the principal. But, in any event, neither he or the remainder-men can make her income security for hypothetical losses. In *re Gerry*, supra. The testator, having specified the deductions which he intended should be made, thereby excluded all others, and made the net 'income and profits' the absolute property of Mrs. Leech. It may well be that if, as has been suggested, a loss had happened in one of these investments, it could have been made up out of gain in the other; for the amounts invested were but parts of a simple estate, and the purpose and result of its administration must have been the same, whether the investments had been in several or one sum; the estate and its administration should be treated as entireties. But there was in fact no impairment of principal, and therefore no such question can arise here.

"No Pennsylvania cases precisely similar to the facts have been found, but analogous cases show (1) a favorable construction given bequests of income, and (2) life donees entitled as well to extra as ordinary profits earned pending their estates. That class of cases in which the earnings for coal and royalties in oil have been treated as income, although they consume the principal, are striking illustrations of the first proposition (*Appeal of Eley*, 103 Pa. St. 300; *In re Woodburn's Estate*, 138 Pa. St. 606, 21 Atl. 16), while scrip dividends (*Appeal of Philadelphia Trust, etc., Co.* [Pa. Sup.] 16 Atl. 734) and the proceeds of sales made by bond companies (*In re Oliver's Estate*, 136 Pa. St. 43, 20 Atl. 521; *In re Thomson's Estate*, 53 Pa. St. 332, 26 Atl. 652, 653) sufficiently illustrate the second. In *Appeal of Earp*, 28 Pa. St. 368, which is the leading case, it was held that the surplus profits earned prior to testator's death on stocks were essentially part of the stock itself and principal, while those earned after, whether declared in the form of cash, scrip, or stock, belonged to the life donee. 'In the case before us,' said the chief justice, 'the testator has not made a bequest of the stock itself to appellant. On the contrary, he has given them only the income for life. Their interest commences after the death of testator. They have no right whatever to claim the income which had accumulated before his death. * * * It is equally

clear that the profits arising since the death of the testator are income within the meaning of the will, and should be distributed among the appellants.' This principle was said by Mr. Justice Clark, in *Re Smith's Estate*, 140 Pa. St. 344, 21 Atl. 438, to have ruled all the cases involving the relative rights of donees for life and in remainder down to *In re Oliver's Estate*, supra, which was the then last, without modification or change. In *re Oliver's Estate*, and the subsequent case of *In re Thomson's Estate*, supra, perhaps, come nearest the present. There, as here, extraordinary profits were made during the life estate out of temporary investments in real estate; and, as the life donees were there entitled, the necessary inference is they are entitled here. The increase in profits belonged to the donees for life, and those in remainder were only interested to the extent of the investment actually made.

"The authorities cited in the support of the theory of capitalization of profits are not, in my opinion, entitled to the weight which has been given them. The rule as quoted from *Hill, Trustees*, to the effect that 'any extraordinary' profits realized from 'stocks or other property' belong to the corpus, was no doubt the result of the English cases which had been decided when the text was written; but later cases have greatly modified, if not reversed, it, while it has been distinctly repudiated in Pennsylvania. *Appeal of Earp*, supra. The case of *Van Vleck v. Lounsbery*, 34 Hun, 569, decided by a subordinate court of New York, may be classified with the Massachusetts and Georgia cases, which were said, in *Re Smith's Estate*, supra, to be exceptions to the American, which is the Pennsylvania, rule. The question involved here does not appear to have been decided by the court of last resort in New York. In *re Gerry*, 103 N. Y. 445, 9 N. E. 235, cited for the trustee, was made to turn upon a question of construction. 'The theory of the will,' said that court, 'did not contemplate any traffic in securities by the trustee, but a permanent investment in interest bearing obligations, subject to be sold or exchanged only when the exigencies of the trust required it to be done. It is quite clear that the life tenant could not have compelled the trustee to sell or convert securities lawfully purchased or held, upon the ground that their market value had appreciated in their hands, any more than they could have compelled her to make good any depreciation in the value of such securities. Their acquisition and retention was one of the objects contemplated by the will of the testator, and was essential to execute his design; and a proceeding to compel their sale would plainly have been contrary to his intent in creating the trust.' The court expressly distinguished this from that class of cases in which investments in stocks or trade have been authorized. It

was admitted that *In re Ware's Estate*, 12 Wkly. Notes Cas. 571, also cited for the trustee, has been reversed. Appeal of Middleton, 103 Pa. St. 92. And *In re Hubley's Estate*, 18 Phila. 327, like *In re Gerry*, supra, appears to have involved a question of distribution of the proceeds of sale of property specially given, wherein the natural increase was held to belong to the remainder.

"These suggestions sufficiently indicate the trend of decision, and the principle which should settle the question raised here. The gift being, not of specific property, but general and residuary in its character, the measure of the remainder is its value at the date of testator's death, and that of the life estate the increase thereafter. It follows that the amounts invested in mortgage, which were admittedly parts of the estate at testator's death, should be treated as the corpus, and the residue in the hands of the trustees, arising from foreclosure, as belonging to Mrs. Leech, as 'income and profit,' within the 'purpose and intent' of Mr. Park's will."

George W. Guthrie, for appellant. John E. Kuhn, for appellee.

STERRETT, C. J. This case was before the orphans' court in bank on exceptions to the decree of the learned auditing judge, in which he held "that the net profits realized from the sales of the Adams and McKelvy properties belong to the corpus of the trust estate," and thereupon dismissed appellant's exceptions to the surviving trustee's account, and confirmed the same absolutely. The court being equally divided in opinion as to the controlling question before it, neither of the exceptions was sustained, and hence the decree of the auditing judge stood as the final decree of the court below. From that decree this appeal was taken, and the main question here, as in the court below, is what, under the facts of the case, properly constitutes "income and profits," and what "principal." That question has been so thoroughly considered and so satisfactorily solved by the learned president of the orphans' court in his dissenting opinion that, for reasons therein given, we are all satisfied the court erred in holding as it did. The decree is therefore reversed, with costs to be paid by appellant, and it is ordered that the record be remitted, with instructions to correct the surviving trustee's account in accordance with said dissenting opinion.

MOORE et al. v. TAYLOR et al.
(Court of Appeals of Maryland. Dec. 13, 1895.)

APPEALS—REARGUMENT—DEATH OF PARTY.
Code, art. 5, § 75 (which is a codification of Act 1806, c. 90, § 11), provides that, when a

case is under rule argument in the court of appeals, and a party having an attorney in court shall die, judgment shall be given to the same effect as if such party were alive. Under the present constitution, all causes stand for argument at the first term after transmission of the record, and there is no necessity for rule argument; and such rules are, in fact, never laid. *Held*, that the death of a party, after argument has been had and the cause submitted, is no ground for a reargument.

Appeal from circuit court, Baltimore county, in equity.

This was a bill by Eleanor Taylor and others against Charles J. Moore and others, for partition. A decree was entered below for complainants, and defendants appealed. The cause having been argued and submitted (see 32 Atl. 320), a motion was made for a reargument on the ground of the death of one of the appellees since the hearing in this court. Motion overruled.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, BRISCOE, PAGE, ROBERTS, and BOYD, JJ.

George G. Hooper, for appellants. D. G. McIntosh, for appellees.

BRYAN, J. A motion for a reargument has been filed on the ground that one of the appellees has died since the hearing, and before the decision. The question is settled by article 5, § 75, of the Code. It is there enacted: "When a case is under rule argument in the court of appeals, and a party shall die having an attorney in court, the court of appeals shall give judgment to have the same effect as if the party were alive," etc. The section is a codification of Act 1806, c. 90, § 11. Under the present constitution all causes stand for argument at the first term after the transmission of the record, and therefore the necessity for a rule argument no longer exists. In point of fact, such rules are never laid. In the present case the death occurred not only after it stood for argument, but after the argument had been heard and the cause submitted to the court for decision. The motion must be overruled. Motion overruled.

MIDDLE STATES LOAN, BLDG. & CONST. CO. OF HAGERSTOWN v. HAGERSTOWN MATTRESS & UPHOLSTERY CO. OF WASHINGTON COUNTY.

(Court of Appeals of Maryland. Feb. 14, 1896.)
TENDER—RUNNING OF INTEREST—EQUITY—BUILDING AND LOAN ASSOCIATION.

1. Where money is borrowed from a bank for the purpose of making a tender, and, on its refusal, is again returned to the bank, this is insufficient to stop the running of interest. To have that effect, the money must be kept continually ready, so that no profit is made upon it. *Building Ass'n v. Crump*, 42 Md. 194, followed.
2. A borrower and stockholder in a building and loan association filed a bill praying leave to repay the borrowed money and redeem his mortgage. The bill further showed that it was the desire of the mortgagor to entirely terminate its relations with the association. *Held*, that a court

of equity would not, after finding in favor of the right to redeem, limit its decree to an ascertainment of the amount due on the mortgage, but would afford full relief, by ascertaining what was due the mortgagor upon his stock, so as to determine the entire controversy.

3. By the charter and by-laws of a building and loan association, money was loaned to its stockholders on mortgage, according to the amount of their stock. They were bound to pay interest on the mortgage monthly at the rate of 6 per cent. per annum, and also to pay monthly dues of 60 cents per share on their stock, 50 cents of which went into the loan fund, and the remaining 10 cents to defray expenses. These payments were to continue until the shares were worth the amount of the loan, when the shares might be surrendered to the association, and the debt be thereby canceled. Dividends were not payable on stock held by members to whom loans were made. The mortgagor had an option to repay the loan at any time, on giving 30 days' notice. *Held*, that when a borrower exercised this option the amount to be paid by him must be ascertained by charging him with the amount of the loan and interest, and crediting him with his payments into the loan fund, with interest on each payment from the time it was made, but that he was not entitled to any dividends on his stock.

Appeal from circuit court, Washington county.

This was a bill by the Hagerstown Mattress & Upholstery Company of Washington County, against the Middle States Loan, Building & Construction Company of Hagerstown, praying leave to repay borrowed money, and redeem the mortgage given as security. The court below rendered a decree in favor of complainant, and the defendant appealed. Reversed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, and BRISCOE, JJ.

Hy. Kyd Douglas, for appellant. F. F. McComas and A. C. Strite, for appellee.

BRYAN, J. The Hagerstown Mattress & Upholstery Company of Washington County borrowed \$5,000 from the Middle States Loan, Building & Construction Company of Hagerstown, and executed a mortgage to secure the payment of the loan. It filed a bill in equity praying leave to repay the money and redeem the mortgage. It was not questioned that it had the right of redemption, but the controversy was upon the amount to be paid for the purpose. The court below filed an opinion in which it stated the terms on which the redemption might be made, and referred the case to an auditor to state an account in accordance with its opinion. Upon the coming in of the auditor's report the account was ratified and confirmed. The Middle States Company has appealed.

The following recital in the mortgage shows the nature of the transaction between the parties: "Now, whereas the said Hagerstown Mattress and Upholstery Company has become a member of the said Middle States Loan, Building and Construction Company, of Hagerstown, Maryland, and has subscribed for 100 shares of the stock of said company, and has a loan of five thousand

dollars thereon, for which he has executed his bond or obligation of even date herewith, payable to said company, with interest from date, payable monthly, with the following conditions: If the said Hagerstown Mattress and Upholstery Company shall pay the interest monthly on said sum of five thousand dollars received by them as aforesaid, and shall make the monthly payments monthly on 100 shares of stock of said company, and shall pay any and all fines assessed against them on said shares of stock, and shall likewise pay, when due, the taxes assessed against the property mortgaged to secure the repayment of said loan of five thousand dollars and the premiums necessary to keep the buildings on said mortgaged property insured from loss by fire, in such sum as the said company may require (not exceeding \$5,000.00), until the said stock subscribed for by them as aforesaid becomes fully paid in, and of the value of \$100.00 per share, then it is understood that, upon the surrender of said stock to said company, this obligation shall be deemed fully paid and canceled. But, if they fail to pay, when due and payable, the said taxes and insurance premiums, or make default in the payment of said monthly interest, fines, and monthly payments on said stock, for a period of six months after the same are, or any installment thereof is, due, then, at the option of said company, the whole indebtedness evidenced by this obligation, including any taxes and insurance premiums due or paid by said company, shall at once become and be due and collectible, and a foreclosure of said mortgage in the manner therein provided may be had."

The mortgage has some of the features of an ordinary building association mortgage, but it also has some others, appropriate to ordinary loans of money. Building associations are authorized to transact their business by Code, art. 23, §§ 95-99. They advance to any member, for such premium as may be agreed upon, the sum which he would be entitled to receive on the dissolution of the corporation, for any number of shares which he may pledge, or they purchase from him certain shares of his stock. And the member is bound to pay the dues on the shares of stock as provided by the articles of association, and to pay interest at the rate of 6 per cent. per annum on the sum so paid or advanced to him. He is to pay the dues and the interest at such times as are prescribed by the articles or by-laws, and also fines and penalties for default in the prompt payment of interest and dues, as may be in like manner prescribed. These payments are to continue until the shares are worth the sum of money advanced or paid to him. And it is usually provided that when the association is to be dissolved the member so receiving the advance or payment of money executes a mortgage to the association to secure the payment of the interest

and his dues, and the fines and penalties which he may incur; but he never agrees to pay back the money advanced to him, or contracts any responsibility for it. It is anticipated that, from the prosecution of the business of the association, the shares will, in the course of time, be worth the amount advanced, and that the association will be paid by its ownership of them. On the other hand, the borrowing member participates in the prosperity of the business, by being enabled, through the enhanced value of the stock, to discharge the loan in consequence of the surrender of his shares to the association. In the present case the shares, at their par value, are worth double the amount borrowed, and the dues are to be paid upon them until they reach par, when they are to be surrendered to the association. The mortgage secures the payment of the interest and of the dues and fines, and also the repayment of the sum borrowed. On default in any of the conditions of the mortgage, the sum borrowed becomes, at the option of the mortgagee, a debt to be paid by the mortgagor. By section 5 of article 6 of the by-laws of the building company, the mortgagor has a right to repay the loan at any time, on giving 30 days' notice. The notice having been duly given, a controversy has arisen in regard to the amount necessary for the repayment of the loan. A borrower can never, in this state, be required to pay, in satisfaction of an ordinary loan, more than the principal and 6 per cent. interest per annum thereon. Therefore, if this amount should be paid by the mortgagor in this case, the debt would be discharged. But the mortgagor is not only a debtor, but is also a stockholder in the building company; and, after the payment of the debt, it would still be a stockholder, and would still have all the rights, and be liable to all the obligations, attached to the ownership of stock. By the by-laws it would have the right of withdrawing its stock, according to certain terms, which will hereafter be explained. Although not stated in so many words, it is evident that it is the purpose of the mortgagor to settle and conclude all of its business with the mortgagee, and to dissolve all connection between them. It is proper to settle in this suit all the questions between the parties growing out of their dealing with each other on the subject of this loan. We must therefore determine what amount the mortgagor is bound to pay to the mortgagee, and what amount it is entitled to receive, on the withdrawal of its shares.

It is alleged in the bill of complaint that on the 5th day of February, 1894, the mortgagor tendered to the mortgagee \$3,126.60, in full satisfaction, and that the mortgagee refused to accept it, but demanded a larger sum as due, to wit, \$3,735.98. And in the thirteenth paragraph of the bill it is further alleged that the mortgagor, ever since the day of said tender, has been, and at the time

of the filing of the bill was, able and ready to pay the amount of principal and interest due on said mortgage, and it was maintained that interest on the principal should not run after the day of the tender. The mortgagee (the defendant below) denied the thirteenth paragraph. It was shown in evidence by the treasurer of the mortgagor that he borrowed the money from the bank of Eavey, Lane & Co., and tendered it to the mortgagee, and on its refusal to accept it he returned it to the bank. Such a tender is far short of what is necessary to stop the running of the interest. In *Building Ass'n v. Crump*, 42 Md. 194, it was decided that in order to stop the interest the mortgagor must not only make the mortgagee a tender, but "must keep the money continually ready, and make no profit of it." Section 13 of article 2 of the by-laws, already mentioned, states the terms on which stock may be withdrawn. It is in these words: "Shares may be withdrawn at any time after three months, and before maturity, and the holder thereof will be entitled to receive the amount paid into the loan fund, in monthly payments on such shares, together with six per cent. annual interest, less any losses to which the stock withdrawn may be subject. The membership fee of one dollar per share cannot be withdrawn." By section 5 of the same article the monthly payment on each share is fixed at 60 cents. Of this sum, 50 cents a month must be paid into the loan fund, and 10 cents a month must be applied to defray the operating expenses. By the charter of the building company, dividends are not to be paid to members who receive advances or loans on their shares. If the mortgagor is ready to pay the amount due on the mortgage, its rights will not be affected by the twelfth section of article 2 of the by-laws, which declares that "shares on which loans have been made may be withdrawn if the loan is paid, but not otherwise." It would flagrantly and unreasonably increase expense and litigation if we should merely determine the amount due on the mortgage, and remit the parties to another suit to determine the amount to be paid to the mortgagor on the withdrawal of his shares. In such case the mortgagor would be required to pay to the mortgagee a sum of money, with the necessity of ascertaining by future litigation what portion of this money should be returned to him. No court of equity could tolerate such a proceeding. Justice requires that we should ascertain what the mortgagor would be entitled to receive when his shares are withdrawn, making the hypothesis that the mortgage debt has been paid, and then we must deduct this amount from the sum due on the mortgage. There is no possibility that we can in this way injuriously affect the rights of the mortgagee, because, until the whole indebtedness shall be paid, the mortgage must remain in force and effect.

In our opinion, the mortgagor must be charged with the loan of \$5,000, with interest thereon down to the filing of the bill of complaint; and it is to be credited with its payments into the loan fund, to wit, 50 cents a month on each of its shares, with interest on each payment from the time it was made down to the institution of this suit. For the amount thus ascertained to be due, the mortgagee is entitled to a decree, with interest thereon until paid. The learned judge who heard this cause in the court below decided that the mortgagor was entitled to the dividends on its shares of stock. He also decided that the tender of \$3,126.60 by the mortgagor was good, and effectual to stop the running of interest from the time it was made. The ground of his opinion was that the amount tendered was more than was due. If the dividend on the stock be not allowed to the mortgagor, the amount was less than was due. And according to the case in 42 Md., above cited, the tender would not, under the circumstances accompanying it, be sufficient to stop the accrual of interest. We will reverse the order of the court below, and remand the cause for further proceedings in accordance with this opinion. Reversed, with costs in both courts, and remanded.

This opinion was filed after Judge ROBINSON'S death, but he concurred in it in his lifetime.

BOYCE et al. v. WORLEY.

(Court of Appeals of Maryland. March 27, 1895.)

APPEAL—EXCEPTIONS TO AUDITOR'S REPORT—EVIDENCE.

On a claim for compensation for services rendered as clerk to the executors of an estate, two of the executors gave testimony from which it might be fairly inferred that there was an agreement, express or implied, for a salary of \$100 a year. The clerk himself denied such contract, and the other executor testified that he himself told the clerk that he would be paid what his services were fairly and reasonably worth. The auditor found that the latter was the real agreement, and allowed compensation accordingly, and exceptions to his report were overruled by the court. *Held*, that this order should not be disturbed on appeal.

Appeal from circuit court of Baltimore city.

This was an appeal by William W. Boyce and others, executors of the estate of James Boyce, deceased, from an order overruling exceptions to the auditor's account, whereby an allowance of \$40 per month was made to William M. Worley for services rendered as clerk to the executors. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, and ROBERTS, JJ.

Vernon Cook (Gaus & Haman, on the brief), for appellants. Wm. S. Bryan, Jr. (E. N. Rich, on the brief), for appellee.

ROBINSON, C. J. This is an appeal from an order of the court below overruling exceptions to the auditor's account in the estate of James Boyce, deceased, allowing the appellee \$40 a month for services rendered by him as clerk to the executors. The question turns upon whether these services were rendered under an agreement with the executors by which the appellee was to be paid \$100 a year, or under an agreement by which he was to be paid a fair and reasonable compensation for such services. If the case rested upon the testimony of John A. Boyce and W. W. Boyce, two of the executors, it might be fairly inferred that the services were rendered by the appellee under an agreement, express or implied, by which he was to be paid \$100 a year. The appellee, however, denies that there was any such agreement or understanding, and Judge Fisher, the other executor, testifies that, when the appellee inquired of him as to what he was to be paid for his services, he (the witness) told the appellee to go on with the work, and he should be paid what his services were fairly and reasonably worth. The proof shows that the services rendered by the appellee were fairly and reasonably worth \$40 per month; and, in view of this conflict in the testimony, it can hardly be said that the exceptants have satisfactorily established an agreement between them and the appellee, by which the latter was to be paid \$100 a year. We agree, therefore, with the court below, that the appellee is entitled to a fair and reasonable compensation for his services. Order affirmed.

DU PUY et al. v. TRANSPORTATION & TERMINAL CO. OF BALTIMORE CITY.

(Court of Appeals of Maryland. Jan. 9, 1896.)

CORPORATIONS—APPOINTMENT OF RECEIVER—FRAUD OF OFFICERS.

Plaintiffs were induced to buy stock in a corporation by representations in a prospectus which were utterly false, and in the belief that the stock belonged to the corporation. The proceeds were appropriated by the chief promoter, M., who had subscribed for practically all the stock. Six months later, the officers decided to wind up the company, and their first step was to cancel a subscription contract made by M., by which he had agreed to place in the company a large and valuable interest in another concern. The corporation then made a deed of all its property to a trustee, who immediately agreed with M. to relieve him from other contracts of subscription made by him. The trustee then made fictitious sales of other corporate property, by which it ultimately passed to parties who, under antecedent contracts, were to acquire it. *Held*, that there were such illegal conduct, fraud, and ultra vires proceedings that a court of equity would, on plaintiffs' application, appoint a receiver to unmask such transactions, and to recover the property of the corporation.

Appeal from circuit court of Baltimore city.

Bill by Amy H. Du Puy, by her husband and next friend, Herbert Du Puy, and Herbert Du Puy, against the Transportation &

Terminal Company of Baltimore City. From a decree for defendant, complainants appeal reversed.

Argued before ROBINSON, C. J., and BRISCOE, BRYAN, PAGE, BOYD, FOWLER, and McSHERRY, JJ.

Charles Marshall, E. H. Gans, and B. H. Hanan, for appellants. Bernard Carter, John K. Cowen, E. J. D. Cross, W. A. Fisher, W. J. Taylor, and Hugh L. Bond, for appellee.

McSHERRY, J. The record in this case is quite voluminous, the transactions which it unfolds are numerous, and the fraud which it exposes is both bold and unblushing. The bill which opened the pending controversy was filed by stockholders of the Transportation & Terminal Company of Baltimore City, in behalf of themselves and of others who might join them, against that company and other corporations and individuals, who were made codefendants; and its object is to secure the appointment of a receiver who shall be clothed with authority to institute appropriate proceedings to rip up the unlawful and fraudulent acts complained of, and to recover back the property which the officers of the transportation and terminal company disposed of without warrant or color of law.

With respect to the legal principles applicable to such a case there can be no dispute. A stockholder, though owning but a single share, may invoke and set in motion the plenary and far-reaching powers of a court of equity to investigate, strike down, and strip of its covering any act of the corporation to which he belongs when that act is tainted with fraud or is *ultra vires* or illegal. This jurisdiction is one of the most salutary and conservative possessed by a court of equity, and neither adroitness of the imputed fraud nor the skill that seeks to hide the illegality of the impeached transaction will thwart the exercise of the court's coercive and remedial authority. Mere internal dissensions among stockholders, or mere differences or disputes as to corporate management, so long as the officers or stockholders do no act that is fraudulent, illegal, or *ultra vires*, will not warrant the intervention of a court of chancery, because, in the absence of fraud, illegality, or conduct that is *ultra vires*, the will of the majority is entitled to control the policy and the business of the body corporate. *Shaw v. Davis*, 78 Md. 308, 28 Atl. 619; *Gamble v. Water Co.*, 123 N. Y. 91, 25 N. E. 201.

The Transportation & Terminal Company of Baltimore City was incorporated under the general laws on December 13, 1888. Its authorized capital stock was \$15,000,000. On the very day certificate of incorporation was signed, the five incorporators named in the certificate met, and each subscribed for one share of the capital stock, and thereupon

proceeded to effect an organization. The corporation was designed to be a pooling company, gathering together the stock and property of several other corporations, both existing and projected, and conducting and operating their distinct enterprises under one central management. The chief promoter of the scheme was one John Henry Miller, and, on the very day the company was chartered and formally organized, this same Mr. Miller submitted in writing a proposal to subscribe for 15,000 shares of preferred stock to be paid for in the following named property, viz.: 2,100 shares of the capital stock of the Maryland Central Railway Company, 4,200 shares of the York & Peach Bottom Railway Company, and 4,000 shares of the Deer Creek & Susquehanna Railroad Company. On the same day, Miller subscribed for 80,000 shares of the common stock, to be paid for in certain property situated on North avenue and Oak street, in Baltimore city; and on August the 1st, 1889, he again subscribed for 69,000 shares more of the common stock, to be paid for with other lots or parcels of land situated in Baltimore, and by a transfer of 22,500 shares of the capital stock of the Maryland Central Railway Company and 19,950 shares of the capital stock of the Penn Anthracite Coal Company. These two subscription agreements entitled Miller to the whole issue of the preferred stock, and to 149,000 out of the total of 150,000 shares of the common stock of the transportation and terminal company. Twelve thousand eight hundred shares of the common stock were delivered to him or to his order. Without pausing at this point to refer to other details and transactions, we come to the period when Miller, aided by the president of the company, began operations to induce the plaintiffs to subscribe for the preferred and the common stock of the concern. A prospectus was prepared, and a copy of it was forwarded by Miller on January 31, 1890, to Gustav Lindenthal, who had been connected with the enterprise as civil engineer, and who had had frequent interviews with both Miller and Gilmore, the president, respecting the disposition of the company's stock. This prospectus was sent by Miller in a letter wherein he says: "I also inclose a statement of the affairs of the Transportation and Terminal Company of Baltimore City. * * * I need not repeat to you how desirable, for the purposes mentioned in our late conversation, it is to secure from fifty thousand to one hundred thousand dollars, and your kind offices in this direction will be very highly appreciated by several of our best friends." The statement or prospectus thus inclosed was intended to be shown to Mr. Du Puy, a friend of Lindenthal's, and a person who had been solicited to purchase from the company some of its preferred stock. This prospectus set forth—First. The names of the directors of the transportation and terminal

company, as follows: "John Gill, president Mercantile Trust and Deposit Company, Baltimore, Md.; James Sloan, Jr., president Farmers' and Merchants' National Bank, Baltimore, Md.; George S. Brown, of Alexander Brown & Sons, Baltimore; J. Swan Frick, attorney at law, Baltimore, Md.; William Gilmore, president Maryland Central Railway Company, Baltimore, Md.; Samuel Rea, vice president Maryland Central Railway Company, Baltimore, Md.; George M. Jewett, president Deer Creek and Susquehanna Railroad Company, Glenville, Md.; T. M. Logan, New York City; Samuel Thomas, New York City." The officers were: William Gilmore, president; John H. Bryant, vice president; J. G. Case, secretary. Secondly. A statement that "the company was chartered under the laws of Maryland in December, 1888, and owns the following property: 27,000 shares, \$100 par value, Maryland Central Railway Company, the authorized capital of which is 30,000 shares; 4,000 shares, \$50 par value, Deer Creek and Susquehanna Railroad Company, being two-thirds of the stock issued; 19,500 shares, \$100 par value, of the stock of the Penn Anthracite Coal Company; 1,500 shares, \$100 par value, of the Maryland Construction Company of Baltimore City; extensive railroad terminal properties and stock of the Penn Anthracite Coal Company; 1,500 shares, \$100 par value, of the Maryland Construction Company of Baltimore City; extensive railroad terminal properties and buildings at North avenue, Baltimore." It then gave a statement of the company's annual income, which it represented to be \$1,290,000. This was followed by representations which we transcribe in full, as follows: "The Penn Anthracite Coal Company owns 2,700 acres of the best character of anthracite coals, situated in a body at Mt. Carmel, in Northumberland and Columbia counties, Pennsylvania. The contracts between this company and a mining company guaranty the payments of royalties which will annually net a minimum of \$150,000, and may be double that amount. The contracts between the mining company and the terminal company for the marketing of coal guaranty, also, a minimum profit of \$250,000. Through the operations of the Baltimore Belt Railroad Company, the terminal company's properties at North avenue will produce a minimum rental of \$100,000, from their use by the Baltimore and Ohio, the Maryland Central, and other railroad companies using the Belt Railroad. Through the operations of the Maryland Construction Company, 60% of the stock of which is owned by the terminal company, \$1,500,000 of the first preferred stock of the Baltimore Belt Railroad Company becomes the property of the terminal company. This stock is a 6% dividend payer, the income to provide which is guarantied by the contracts between the Baltimore Belt Railroad Company, the Baltimore and Ohio Railroad Company,

and the Maryland Central Railway Company. The Belt Railroad Company's preferred stock alone provides for the 6% 'guarantied' dividend on the preferred stock issue of the terminal company, which issue, limited to 15,000 shares (\$100 par), with its 6% perpetual, accumulative, annual dividends, is secured under the Maryland laws as a first mortgage lien on all the company's assets now and hereafter acquired, thereby making this stock an investment security. The Maryland Construction Company, being the contractor for the building and completion of the Belt Railroad, expects a cash profit therefrom, sixty per centum of which the terminal company receives, this being estimated as sufficient to pay dividends on the first preferred stock during construction of the Belt Line; but the royalties from the mining of the coal on the Penn Anthracite Coal Company's property commence immediately, these alone being sufficient to provide for the first preferred stock interest."

On February 6, 1890, William Gilmore wrote, in his official capacity as president of the transportation and terminal company, to Lindenthal, a letter, from which the following extracts are taken: "Dear Mr. Lindenthal: In the present additional allotment of our syndicate affairs, your proportion would be one thousand (1,000) shares of preferred stock, \$100,000 par value, and one thousand (1,000) shares of common stock, on the same terms to the promoters as before; \$75,000 for the block as above, with the privilege, at the expiration of one year from date, to return the preferred stock, and receive therefor the \$75,000, with interest; the 1,000 shares of common stock remaining in your hands as the profit on your share in the syndicate, the par value whereof is \$100,000." "If you are, perhaps, not able now to take the entire block, you are at liberty to have some friend, acceptable to us, join you. Kindly advise me as to your decision at the earliest date." "As our Belt Line contracts with the B. & O. have been approved, and the passage of the city ordinance is assured, we must proceed promptly to complete the purchase of the right of way and station properties." "You are aware the Belt bonds have been placed with the 'Brown.' Thus, we are in good shape now for future operations, and should lose no time in carrying forward our part of the project."

Relying with implicit confidence on the truth of the representations made in the prospectus, and trusting to the assurances given by Gilmore in the above letter of February 6th, Mr. Du Puy agreed to purchase from the transportation and terminal company 800 shares of preferred stock and 800 shares of common stock, for which he delivered to Lindenthal two checks, each for \$30,000, and each bearing date February 20th. Seven days later, two receipts, each one acknowledging the receipt of \$30,000 in payment for 400 shares of preferred stock and 400 shares

of common stock, were signed by Gilmore, as president, and in each receipt it was stipulated that "the holder of said stock shall have the privilege to return after one year from date the said 400 shares of said first preferred stock, and to receive therefor from the said company thirty-thousand (30,000) dollars and six per cent. interest, after deducting the amount of dividends paid by the company on said shares, and to retain the 400 shares of common stock of said company." Not one cent of this \$60,000 was paid to the transportation and terminal company, or ever went into its treasury. One check passed into the possession of Gilmore, and was deposited to his individual credit. After he had deducted \$10,000, to pay himself a debt due to him by Miller, he gave his own checks to Miller for the residue. The other \$30,000 check was turned over by Miller to Samuel Rea, who, after paying himself \$4,000 for four months' salary as vice president of the Maryland Central Railway Company, and after paying something over \$10,000 to a contractor for work on the Maryland Central Railway, turned the balance over to Miller. This disposition of the money was unknown to Du Puy. It is simply impossible to read these letters and receipts to which we have referred without giving credence to that part of the testimony of Lindenthal and Du Puy wherein they both unequivocally assert that they never imagined the stock purchased with the proceeds of the two \$30,000 checks was the property of Miller. They both unquestionably believed the representations made to Lindenthal that the stock belonged to the transportation and terminal company, and was being sold for its uses and benefit, and especially for the purchase of terminal facilities in Baltimore. The pretext that Mr. Gilmore signed by inadvertence the receipts in his official capacity, instead of individually, finds no support outside of his own declaration, and that declaration is neutralized by his letter of February 6th, wherein he made, in almost the identical language used in the receipts, the statement with respect to the repurchase by the company of the preferred stock at the end of one year. Besides, it is not perceived what Gilmore could possibly have had to do with signing any receipts for this \$60,000 if the parties to the transaction understood that Du Puy was purchasing stock that actually belonged to Miller; and, to clinch the matter, Miller himself, as late as August 28, 1890, wrote to Lindenthal that he (Miller) would take and pay for the preferred stock referred to in the letter of William Gilmore, president, dated February 6th, "if the transportation and terminal company shall refuse or neglect to comply with their engagements in the premises."

That a deliberate scheme to deceive and to entrap the credulous and unsuspecting had been devised by Miller, upon a large and imposing scale, and had, either actively or

through culpable inattention or inexcusable indifference to consequences, been furthered or aided by Gilmore, in his official capacity as president of the transportation and terminal company, is too obvious to admit of discussion. The prospectus prepared by Miller, the active and reckless promoter and founder of the enterprise, was false in almost every particular. Of the five prominent and widely known business men named as directors of the transportation and terminal company, not one occupied that position; and, out of the whole list of seven, none but Gilmore and Rea were in fact connected with the undertaking. The transportation and terminal company did not own 27,000 shares of the Maryland Central Railway Company's stock, nor 1,500 shares of the Maryland Construction Company's stock, nor an interest in the Belt Railroad Company, though the prospectus flatly alleged that the transportation and terminal company "owns" those shares; and the statement that \$1,500,000 of the first preferred stock of the Baltimore Belt Railroad Company became the property of the terminal company, and that the Belt Railroad Company's preferred stock alone provides for the 6 per cent. "guaranteed" dividend on the preferred stock issue of the terminal company, was without the semblance or shadow of truth. The "six per cent. perpetual, accumulative, annual dividend, * * * secured under the Maryland laws as a first mortgage lien on all the company's assets now and hereafter acquired," was a pure fabrication, devoid of the faintest prospect or the remotest possibility of a realization. The stock ledger of the terminal company shows that 7,500 shares of preferred stock were disposed of to sundry individuals, but the record does not disclose the amount received therefor. If the sales were made at the same figures charged Du Puy, nearly half a million of dollars were realized, and, if realized, doubtless went into the pockets of the enterprising and speculative promoters. Having secured all the money that was obtainable, Miller and the terminal company's officers turned their attention to the project of dismantling the company of whatever assets it had, and of then winding it up. This feature of the case is most astounding. In the vigorous language of one of the distinguished counsel for the appellants, "it dignifies these transactions to call them frauds."

One of the avowed objects of the pooling company was, by acquiring the majority of the stock of the Penn Anthracite Coal Company, to control the latter's shipments and business. The construction of the Deer Creek & Susquehanna Railroad, to the coal fields of Pennsylvania, was a part of the general plan, and the evidence indicates that those coal fields gave promise of being the most valuable assets of the concern. Now, Miller, by his subscription contract of August 1, 1889, had agreed to place in the terminal company a controlling interest in the stock of this coal

company, and to that extent to give a tangible value to the shares of preferred stock; but, when the scheme of dismantling began, the very first step taken by the directors of the terminal company, at the instance of Gilmore, and upon the request of Miller, was to cancel this subscription on August 16, 1890, just six months after Du Puy had paid his \$60,000 of actual cash. Miller was thus relieved from his obligation to assign the Penn Anthracite Coal Company's stock to the terminal company, and the only consideration for this action was Miller's forbearing to take 66,500 shares of the common stock, which he had previously agreed to take. As, by this arrangement, one of the chief sources from which there was ever any prospect of value accruing to the pool company's stock was deliberately cut off, the objects of the company became, as was claimed, materially changed. Accordingly, on November 8, 1890, the president, William Gilmore, made to the board of directors the following statement: "I have had considerable talk with the parties interested in the affairs of this company, and it seems desirable, as the purposes for which the company was originally formed have been in some respects materially changed, that we had better take some action, and appoint a committee to discuss with stockholders and parties interested some plan of winding up the affairs of the company." A committee of three, including the president, was thereupon appointed, "to confer with parties in interest and counsel as to the advisability of adjusting, settling, and winding up the affairs of this company." On the 4th of December the committee reported that, "in order to settle and adjust the indebtedness of this company, as well as to properly relieve it from its obligations, we deem it advisable for this company to make, execute, and deliver a deed of trust to some suitable trustee." It was then resolved "that the affairs of the Transportation and Terminal Company of Baltimore City be wound up, and the assets and property of said corporation be sold and disposed of, and the proceeds distributed according to law to those entitled thereto, and a deed executed for these purposes, with the necessary legal formalities, unto Winfield J. Taylor, as trustee." On the same day, December 4th, the terminal company executed a formal deed of trust. On the very next day, Taylor (who, in a report filed in circuit court No. 2, on December 5th, stated under oath that he had been appointed "to wind up the affairs of this corporation") entered into an agreement in writing with Miller wherein it was stipulated, subject to ratification by the court, that Taylor, as trustee of the terminal company, would deliver and quitclaim to Miller the 2,100 shares of the Maryland Central Railway Company's stock and the 4,000 shares of the Deer Creek & Susquehanna Railroad Company's shares, and release him from any and all further payments of money, stocks, bonds, securities, or property whatsoever on account of his (Mil-

ler's) subscription to the terminal company's stock, provided Miller would, in consideration of such delivery, quitclaim and release, assign to Taylor, the trustee, 11,000 shares of the preferred stock of the terminal, and would relinquish his claim to any further shares of common stock beyond the 20,000 shares theretofore agreed to be issued to him. In his report to the court, on the 6th of December, the trustee stated that this arrangement had the approval of a majority in value of the creditors of the terminal company and a majority of its stockholders. In a moment we shall see who the creditors were. The stockholders, other than the preferred one, were Miller and the directors, the latter holding but a few shares. Upon the representations made in this ex parte report, circuit court No. 2 ratified the agreement between Miller and Taylor, and, as a consequence, Miller was released from his obligation to deliver to the terminal company the shares of stock of the Maryland Central Railway and of the Deer Creek & Susquehanna Railroad, which he had bound himself to deliver, and the transportation company got in exchange nothing but its own preferred stock, which had been diminished in value to the precise extent that the surrendered shares in these other companies had any appreciable worth. This was a step in the declared scheme to wind up the affairs of the company in the interest of the parties who had selected the trustee; but it was not a step that would ever have been taken had the design of the directors and their trustee been to realize whatever the assets would fairly bring, and then in good faith distribute them to the creditors, if any there were. This proceeding was unlawful, but, indefensible as it is, it is by no means as reprehensible as the acts to which we are now about to allude.

While it is perfectly well settled that a corporation in failing circumstances may make an assignment for the benefit of its creditors (*State v. President, etc., of Bank of Maryland*, 6 Gill & J. 205; *Merrick v. Trustees*, 8 Gill. 59), yet this is quite different from an attempt to wind up and dissolve a corporation, and to destroy its existence under the pretext of merely paying its creditors. It is the object of an act that determines its character. If, then, the object of the directors of the terminal company was, as stated by them in the resolution which they passed on December 4th, to wind up the affairs of the company, their proceeding was illegal, because the mode pointed out by the statutes to effect that end was not pursued, and no other one could be substituted. Code, art. 23, § 264 et seq., prescribes in detail the method to be followed in the formal winding up of a corporation. It is only necessary to say that in this instance the method therein provided was not observed, either in form or substance. If, then, the design was, in fact, to wind up the concern, the attempt was abortive and illegal. If, on the other hand, the design was, under the cloak of a deed of trust, to accomplish the

same end, then, also, was the proceeding illegal, because, no matter what the form of the proceeding, if the ultimate and ulterior purpose were forbidden to be accomplished in that particular way, the means employed to bring about the unlawful result would, in consequence of the unlawfulness of the result, themselves be unlawful. But if, passing by the declared intent of the deed, as evidenced by the resolution we have quoted, we concede that the deed was in fact, and was designed to be, a deed of trust such as a corporation in failing circumstances may lawfully make, its validity, like the validity of every other deed of the same character, must depend on the good faith of both the grantor and the trustee. If the deed does not in terms hinder or delay creditors, then it is valid, whatever may have been the intent of the grantor, unless the trustee becomes implicated in the fraud. It is only where the trustee does become implicated in the grantor's fraud that a deed regular on its face can be made to hinder and delay creditors; and in such a case the deed is void. *Ferrall v. Farnen*, 67 Md. 76, 8 Atl. 819.

We come, then, to inquire whether the trustee was involved in and connected with the fraud which incontestably influenced, under the dominion of Miller, the officers of the terminal company in making the deed of trust. Such an inquiry is, to some extent, of a metaphysical character, because it involves an investigation into an undisclosed and deliberately concealed mental design. A fraudulent intent unexecuted is a mere mental concept. It is intangible. When executed, it is generally not susceptible of proof otherwise than as extrinsic, visible acts, which owe their origin to it, indicate its antecedent or coincident existence. You cannot look into and see the hidden processes of the intellect; but, as no rational creature does a deliberate act without some motive or design, you may, through the act when done, and through all its attendant surroundings, deduce or discover the intent with which it was performed. In no other way can the motives of human conduct be fathomed or exposed, unless, at the moment an act is done, its purpose is truthfully declared by the actor himself. No power can act without an object as to the terms of its action, and as a cause that must specify that action; for all acts are specified, determined by their object. Even the will cannot elicit an act of free choice which concerns no object at all. Hence the act of an intelligent agent that concerns no formal object at all is inconceivable; it is nothing. Necessarily, then, an act which has been done by an intelligent agent had an object when it was done, and that object must be traced back, to be discovered, through the act itself, and through the surroundings which co-ordinate with it. Now, we have seen, from their own recorded declarations, what the design of the officers and directors of the terminal company was. Did Taylor participate therein? He

was conferred with about the execution of the deed of trust, and was evidently familiar with the condition of the company's affairs. On the very day that the resolution was passed authorizing the winding up of the company, the deed of trust to Taylor was executed. It was filed for record the following morning, and thereupon the petition heretofore alluded to, praying for permission to return to Miller the stock already described, was filed by Taylor, and was acted on at his instance by the court. This haste showed considerable familiarity on the part of Taylor with the subject, and indicates a preconceived arrangement between him and Miller, who obviously controlled the directors, to strip the company of much of its apparent assets. After the completion of this transaction, no steps appear to have been taken by the trustee until the 7th day of February, 1891. On that day Taylor filed a report of sales, wherein he reported that he had sold at private sale the lots of ground conveyed by Miller to the terminal company in payment for stock, as stated in a former part of this opinion; and that Thomas H. Blick was the purchaser, for the total sum of \$121,012.33. The report declared that the purchaser, Blick, will pay, "in money, the sum of thirty-five thousand twelve dollars and thirty-three cents, in three payments. * * * He will assume from date and pay the liens now existing upon the property." And the liens are then set forth and described. Now, the truth is that Blick, who was only a clerk in the office of William Gilmore, president of the Baltimore & Lehigh Railroad Company, though he signed the report of sales, never did purchase the property, and never was financially able to do so. He testified that Taylor and Gilmore called on him, and that Gilmore stated that "they desired me to take charge of some property which they wished to deed to me, and desired me to hold it until such time as they should ask for a retransfer, and I think Winfield Taylor remarked to me that it was a large purchase. I at once said to him, 'I am not purchasing property.' He said, 'All right, Blick; the purchase money will be provided, and you can just take the deed of this property, which will not involve you in any way, and it will be an accommodation to the company. They will make all the payments. As an employee, of course, I felt disposed to accommodate them, and I remarked to them at the time, 'Gentlemen, this property is an elephant, and I do not buy any elephants.' They said that all was right, and took the property with the understanding that I was to deed it to them whenever they wished. I told them the only trouble was that, in the event of my death, they might get tied up in some way." Further on, he was asked, "Was it ever intended between you and Houseman and Taylor and Gilmore that you should pay the amount of money which you undertook to pay by this contract?" And he answered, "On the contrary, they assured me

that I should not pay it, and should not be required to pay it." On the 9th day of April, 1891, Taylor conveyed this property to Blick, and in the deed stated that "Blick hath fully paid the purchase money agreed by him to be paid." This statement was absolutely without foundation. It was never intended that Blick should pay, and in point of fact he never did pay, a single cent of purchase money. On April 25th, Blick, at the request of the real purchasers, conveyed a portion of the property pretended to have been sold to him to Moses H. Houseman, the general solicitor of the terminal company, for the expressed consideration of five dollars and other good and valuable considerations; and on the 7th of September, following, Blick conveyed to the same grantee others of said lots, for a like expressed consideration; and on the same date he conveyed to the Baltimore & Lehigh Railroad Company, of which Gilmore was president, the residue of the property so purporting to have been bought from Taylor. The consideration mentioned in the deed to the Lehigh Railroad Company was \$13,723. Not one cent of this sum ever went into the hands of Blick. On the 6th of April, the trustee procured an auditor's report to be ratified. In that report he was charged with the whole pretended purchase money, viz. \$121,012.33. when in fact he had received none of it. He was allowed \$9,680.98 commissions, as though he had collected the entire proceeds of sale; and the net balance was distributed in partial payment of the claims filed by Moses H. Houseman, the Maryland Central Railroad Company (the predecessor of the Baltimore & Lehigh), and Winfield J. Taylor. These three were all the creditors of the terminal company. These claims are said to constitute the considerations for the subsequent conveyances made by Blick; and this audit is said to demonstrate that the terminal company was insolvent. Without making particular allusion to the conveyances which followed, it is sufficient to say that this property, which is called in the prospectus the "terminal property," got into the hands of the very parties who, under antecedent contracts, were designed ultimately to acquire it. The trustee, while having full commissions allowed to himself, so as to indicate an apparent insolvency of the terminal company, did not claim and was not paid his commissions and his audited fee, but only about \$1,000, or less than one-tenth of the whole. Upon the basis that he received only about \$1,000, the terminal company could have paid in full the three claims filed against it, and would not have shown an apparent insolvency. Thus, by the acts of the trustee, the assets of the company were gotten rid of; its property was sold under a purely fictitious sale, and eventually got into the hands of parties who were designed to have it; and the trustee deliberately relinquished his commissions, because, as he says, he thought the parties interested would make this up to him

in some other way. It is simply impossible, on looking dispassionately into these occurrences, and tracing them back to their origin, to avoid the conclusion that the results reached were the identical results intended to be reached when the resolution to appoint a trustee was adopted; and it is equally impossible to hold that these results could have been brought about as originally designed to be accomplished, without the active and willing co-operation and assent of the trustee. Circuit court No. 2 was misled into ratifying a sale, which, instead of being a sale, in fact was a mere sham; and this the trustee knew, and was instrumental in having done. If he imposed upon the court, he could not have been acting innocently; and as the ultimate outcome of all that he did was to bring to pass, under the outward forms and semblance of law, precisely the things which the directors, by their prior determination, intended should be done, and done through the instrumentality of a trustee, his intent—the color and character of his intent—in doing what he did cannot be mistaken. He was obviously a perfectly willing instrument to put into the shape and appearance intended the plan or scheme agreed upon. On no other possible hypothesis can his actions throughout be explained. On that hypothesis his conduct is consistent.

We have, then, illegal conduct, fraudulent acts, and ultra vires proceedings; and a court of equity is asked by the persons who have been victimized to appoint a receiver, who may rip open all these actions. Can it refuse to grant relief? If it is powerless to do so, not only would the law be open to grave reproach for inefficiency, but serious wrongs would go unredressed, and fraud of a stupendous character would escape and go unrebuked. It is not for us to say what particular assets or property a receiver can, when appointed, recover. It is enough for the purposes of this case for us to be able to see from the record that wrong and fraud have been perpetrated, and that this is an eminently fit case for the appointment of a receiver, to unmask and rip open whatever is not beyond the reach of successful assault. We shall therefore reverse the decree below which dismissed the bill, and remand the cause for further proceedings. Decree reversed, with costs, and cause remanded for further proceedings.

BANK OF AMERICA v. FOULTNEY
SLATE WORKS' ASSIGNEE.
(Supreme Court of Vermont. Rutland. Dec. 5,
1895.)

CORPORATIONS—CONTRACTS—EVIDENCE.

In an action by a bank to recover the amount of notes which it had discounted, it appeared that the P. Slate Works, a partnership, was indebted to J. & Co., such debt representing the cost of the plant; that on defendant's incorporation the entire plant was conveyed to it in

payment of capital stock, defendant assuming payment of the debt to J. & Co.; that H., who was defendant's treasurer, and the main partner in J. & Co. (which fact was known to plaintiff), caused certain notes payable to defendant to be discounted from time to time by plaintiff, giving defendant credit for such amounts on the books of J. & Co., which firm likewise received credit therefor on its bank account with plaintiff; that these transactions were approved by all of defendant's stockholders; that H. subsequently drew from plaintiff the amounts credited to J. & Co.; and that the notes were never paid. There was no evidence of any meeting of defendant's stockholders or directors. *Held*, that plaintiff was entitled to recover from the corporation the amount of the notes discounted.

Exceptions from Rutland county court; Tyler, Judge.

Action by the Bank of America against the assignee of the Poultney Slate Works to recover the amount of certain notes discounted by plaintiff. From a judgment for plaintiff, entered on the report of a referee, defendant brings exceptions. *Affirmed*.

Roberts & Roberts, for plaintiff. Geo. E. Lawrence and F. S. Platt, for defendant.

TYLER, J. It is found that the debt of \$64,000, due J. De Rivera & Co. from the partnership called the Poultney Slate Works, was valid, and represented the entire cost of the plant, and that when the corporation was formed it assumed the payment of the debt. H. C. De Rivera caused the 18 notes to be discounted from time to time by the plaintiff, and gave the corporation credit for the several amounts, though they were insufficient to pay the entire debt by about \$10,000, and the plaintiff gave De Rivera & Co. credit for the amounts on its bank account. These transactions were known and approved by all the stockholders of the corporation. The plaintiff discounted the notes in good faith, and in the regular course of business, and H. C. De Rivera subsequently drew from the plaintiff for his firm all the money so credited to it. The firm failed in July, 1886, and the corporation was adjudged insolvent the following month. All the notes were duly protested. The same facts are found in respect to the other three notes, excepting that the plaintiff held them as collateral security for a loan made by the plaintiff to J. De Rivera & Co. for a much larger sum than the amount of the notes. The debt was never paid, and the three notes were protested for nonpayment. Neither the referee's report nor the defendant's brief discloses a defense to the suit. The plant, property, and business of the partnership, Poultney Slate Works, were conveyed to the corporation to pay for the capital stock that was issued, and were the consideration for the corporation assuming the debt of the partnership to J. De Rivera & Co. The fact that the plaintiff knew that H. C. De Rivera was treasurer of the corporation, and the main partner and financial manager of the affairs of the New York firm, did not affect the validity of the notes; nor is it a defense

for the corporation or its assignee in insolvency that no meeting of the stockholders of directors is shown to have been held. Judgment affirmed.

THORP v. ROBBINS.

(Supreme Court of Vermont. Chittenden. Dec. 24, 1895.)

CONVERSION—WHAT CONSTITUTES.

That an officer forecloses a chattel mortgage, invalid as against an attaching creditor of the mortgagor, for failure to record the same, the possession of the property being in no way interfered with by the officer or purchaser at the foreclosure sale, does not constitute a conversion, as against the attaching creditor.

Exceptions from Chittenden county court; Ross, Chief Judge.

Trover by Ira W. Thorp against A. D. Robbins. There was a judgment for plaintiff on the facts found by the court, and defendant excepts. *Reversed*.

The plaintiff sued for certain shafting and machinery. It appeared that in March, 1893, one Smith had bought this property of one Terrill, and attached the same, in the usual manner, to his (Smith's) sawmill. In August, 1893, Smith gave a chattel mortgage of this property to one Hunt, which was good in other respects, but never recorded. January 3, 1894, Hunt placed this mortgage in the hands of the defendant, an officer, with instructions to foreclose it, and the defendant proceeded to post and sell the property. Hunt bid the same off at the sale, but did not move or in any way interfere with the possession of it. December 27, 1893, Terrill brought suit for the purchase price of this property, and attached it, by copy in the town clerk's office. The plaintiff was the officer making the attachment. Terrill obtained judgment, February 3, 1894, and an execution was placed in the hands of the plaintiff for collection, who demanded the property of Smith. No demand was made on the defendant.

J. J. Monahan, for plaintiff. B. A. Hunt, for defendant.

START, J. Upon the findings of fact, the court below should have rendered judgment for the defendant. No demand was made. In fact, a demand would have been of no avail, as the defendant never had actual or constructive possession of the property, nor did the purchaser have such possession. It remained in the same condition it was in at the time of the attachment. So far as appeared, it was then set up in a sawmill, on land leased by the mortgagor, and so remained until the trial in the court below. It does not appear that the defendant delivered the property to the purchaser, or that he ever exercised any acts of ownership or control over it, except to stake it off to the mortgagee at the auction sale; nor does it appear that the purchaser ever took possession of the property. It does not appear that the plaintiff

ad been deprived of any right that he acquired by the attachment as against the mortgagee, nor does it appear that he has been disturbed in his possession. The defendant has done nothing to hinder or prevent the plaintiff from preserving his attachment lien, and satisfying the execution by a sale. If the mortgage was invalid as against the attaching creditor, the sale did not make it valid; and the mortgagee acquired no title, as against the plaintiff or the attaching creditor, by having the property sold, and becoming the purchaser. So far as appears, the plaintiff has had the exclusive and uninterrupted possession of the property since the attachment. It has been neither moved nor changed. The attachment was made by lodging a copy of the writ in the town clerk's office. This was effectual to preserve the attachment lien, against subsequent purchasers, as a removal and actual taking of possession of the same by the plaintiff. Acts 1884, No. 99. If the plaintiff has kept alive his attachment lien, such possession has continued; and he had the same possession at the time the suit was brought that he had when he made the attachment. How can it be said that the defendant has converted the property, when the plaintiff has had the exclusive and uninterrupted possession, as against the defendant and the purchaser, and the defendant and purchaser have exercised no acts of ownership or control over it? The case is not like cases cited and relied upon by the plaintiff, where it has been held that a sale is a conversion. In those cases, the contract of sale was consummated by a delivery of the property. A conversion, in the sense of the law of trover, is an unauthorized dealing with the goods of another by one in possession, where the nature or quality of the goods is essentially altered, or by which one having the right of possession is deprived of all substantial use of the goods, permanently or temporarily. 15 Am. Law Rev. 363. Conversion is any unauthorized act which deprives another of his property, either permanently or for an indefinite time. *Hort v. Bott*, L. R. 9 Ch. 86. Conversion is the turning or applying the property of another to one's own use. *Bouv. Law Dict.* In the sense of the law of trover, a conversion consists either in the appropriation of the property to the person's own use, benefit, and enjoyment, or in its destruction, or in exercising dominion over it, exclusion or defiance of the plaintiff's right, or in withholding the possession from the plaintiff under a claim of title. *Kellogg, J., Tinker v. Morrill*, 39 Vt. 480. The mere assertion of ownership of property, without any way interfering with it or the owner's right to control it, is no evidence of a conversion. *Irish v. Cloyes*, 8 Vt. 30. In *Clark v. Smith*, 52 Vt. 529, the property was attached by a copy lodged in the town clerk's office, and sold on execution to the defendant; and remained undisturbed on the premises where it was attached and sold for some

months, when the defendant took and sold it. The court held that while the property remained undisturbed after the attachment and sale on the execution there was no occasion for the owner to move in the matter, but that when the defendant took the property and sold it he converted it, and the cause of action then accrued. As between the parties, the mortgage was valid, and at the time of the sale the mortgagor had an interest in the property. He had a right to redeem it from the attachment and mortgage liens. The mortgagee could foreclose the equity of redemption of the mortgagor by a sale, provided he could do so without interfering with the plaintiff's attachment lien or his possession of the property. The findings do not show any interference with the property by the defendant or the purchaser that in any way affected the rights of the plaintiff; therefore, no conversion is shown, and the action of trover cannot be maintained. Judgment reversed, and judgment for the defendant, to recover his costs.

BARNEY v. CUNYES.

(Supreme Court of Vermont. Caledonia. Dec. 5, 1895.)

JURISDICTION TO ANNUL MARRIAGE.

R. L. § 2346, provides that marriages prohibited by law on account of either of the parties having a former wife or husband living shall, "if solemnized within the state," be void without a decree. Section 2347 provides that, when a marriage is supposed to be void for the causes mentioned in the preceding section, the marriage, on libel filed by either party, shall be decreed void. *Held*, that the court had jurisdiction to decree as void a marriage solemnized in another state which was void by reason of one of the parties having a former husband or wife living.

Exceptions from Caledonia county court; Start, Judge.

Petition by Alonzo Barney against Sarah Anna Cunes. From a judgment dismissing the petition, petitioner excepts. Reversed.

The trial court found as matter of fact that, at the time the marriage was celebrated in Massachusetts, the laws of that state prohibited marriages between parties either of whom had a husband or wife then living.

W. P. Safford, for petitioner.

TYLER, J. The petition alleges that the parties were married in due form of law, at Northampton, in the state of Massachusetts, on April 6, 1893; that the petitioner was then single, and competent to enter into the marriage contract; that he entered into the contract upon the petitionee's assurance and his belief based upon that assurance that she was also single and competent; that the parties lived together as husband and wife in this state from the time of the marriage until the next November, when the petitioner discovered that the petitionee was, on April 6th, the lawful wife of another man, who was still living; that, upon this discovery, the pe-

petitioner ceased to treat the petitionee as his wife, but separated from her; that no child was born of the marriage; that the petitioner had been a resident of this state for 22 years. It is further alleged that the petitionee intentionally deceived the petitioner as to the fact of her former marriage. The truth of these allegations was established to the satisfaction of the court below, which held that the case fell within the provisions of R. L. § 2346, which is: "Marriages prohibited by law on account of consanguinity or affinity between the parties, or on account of either of them having a former wife or husband living, shall, if solemnized within the state, be void without a decree of divorce or other legal process."

The only question is whether this court has jurisdiction, the marriage having been solemnized in another state. We think the words "if solemnized within the state" are employed to prescribe the conditions upon which marriages may be treated as void without a decree. Certain marriages are declared void without the decree of a court. Section 2347 provides that when a marriage is supposed to be void, or its validity is doubted, for the causes mentioned in the preceding section,—that is, on account of consanguinity or affinity between the parties, or on account of either of them having a former wife or husband living,—either party may file a libel, and the marriage shall, upon proof, be declared void by a decree or sentence of nullity. The words "if solemnized within the state" do not relate to the causes, but they fix the condition, upon which the marriage may be treated as void. Without words clearly indicating that the intention of the legislature was to the contrary, it cannot be assumed that it intended to restrict its jurisdiction to marriages that were solemnized in this state. "A suit to declare a marriage void from the beginning concerns the marriage status precisely like one to break the marriage bond for a post nuptial delictum. Therefore, it may and should be carried on in the courts of the domicile." Bish. Mar., Div. & Sep. § 73. Judgment reversed, and the marriage declared null and void.

BARRE WATER CO. v. CARNES et al.
(Supreme Court of Vermont. Washington.
Dec. 5, 1895.)

INJUNCTION BOND—DAMAGES.

Where one sues to enjoin the withdrawal of water from a natural stream, claiming that he is entitled to the entire flow, and, without hearing, a pro forma decree is entered, on bill and answer, dismissing the bill, and continuing the temporary injunction, as modified by agreement of the parties, till final disposition of the cause, and the supreme court, on a trial on the merits, affirms the decree, attorney's fees incurred by defendant in the supreme court cannot be included in assessing damages on the bond.

Appeal in chancery, Washington county; Start, Chancellor.

Action by the Barre Water Company against William M. Carnes and others for an injunction. On proceedings for assessment of damages on the injunction bond on dissolution of the injunction. From a decree for defendants all parties appeal. Affirmed.

The defendants claimed to recover in respect to nine items. No question was made in supreme court as to the disposition of the first eight. The ninth was for counsel fees, and as to it the master reported as follows: "The orator claimed, in regard to this item, that the counsel fees and expenses charged under this head were not proper damages arising under the injunction bond, excepting such part of them as were incurred in procuring the dissolution of the injunction. On the other hand, the defendants claimed that, inasmuch as the only relief asked for in the orator's bill was an injunction, they were entitled to all such fees and expenses charged. I find, in regard to this item, that all of the services and expenses charged were rendered and expended in the defense of this bill, and that the prices charged are reasonable, and that they have been paid and discharged by the defendants. I also find that the only relief sought by the orator in its bill was an injunction restraining the defendants from interfering with this water in any manner, and that, the supreme court having held that the injunction order was improperly granted, and that the orator was not entitled to the same, the defendant is entitled to recover the whole of this item, as the entire cost and expense of the preparation of this case for trial was necessary to get rid of the injunction. I therefore find, subject to the opinion of the court upon the facts found and reported, for the defendants to recover the sum of \$187.50 under this item; but if, in the opinion of the court, the defendants are only entitled to recover such counsel fees and expenses as were incurred by the defendants in procuring the dissolution of the injunction in the court of chancery, and not those incurred in the supreme court, then I find that those counsel fees and expenses amount to \$73." The chancellor, in his decree, disallowed the counsel fees incurred in supreme court.

E. W. Bisbee and Geo. W. Wing, for orator.
R. A. Hoar and S. C. Shurtleff, for defendants.

ROWELL, J. The court below allowed to the defendants, as injunction damages, a sum paid to counsel for services on a motion to dissolve a temporary injunction granted in the case. The injunction was not dissolved, but was modified by agreement of the parties. The orator claimed a right to have all the water of a certain brook flow into a certain other brook, and thence into its aqueduct, and sought to have its claim established, and the defendants perpetually enjoined from taking water from the first-mentioned

brook for the purposes proposed by them, namely, for supplying the village of East Barre with water for domestic, sanitary, and fire purposes. The case stood on bill and answer, and in the court below the bill was dismissed pro forma, and without hearing, and the injunction, as modified, was continued until the final disposition of the case. The injunction bond is conditioned for the payment of such damages as the defendants might sustain by reason of the injunction, if the court should eventually decide that the orator was not equitably entitled thereto. The orator does not now object to the allowance made, but does object to an allowance for counsel fees in the supreme court, where the decree was affirmed. 27 Atl. 609. The defendants concede that only such damages as are the direct result of the injunction can be recovered, and that these do not include counsel fees incurred for a trial on the merits, which, they say, is a trial to ascertain and settle the facts upon which the right of recovery depends, whereas, this case was tried on bill and answer; and they insist that it differs from the ordinary case in which a temporary injunction is granted as ancillary to the main remedy sought, in which only counsel fees incident to getting the injunction removed are recoverable when the suit fails, because here the injunction was the main remedy sought, and, it having been continued till final decree, and the orator having appealed, they were obliged to come to this court and have a hearing on the main case in order to get rid of the injunction.

This is a strong position in some of its features, and addresses itself to us with much force; but it can hardly be said that the injunction was the main remedy sought, as it belongs to the class of injunctions frequently described as for the protection of legal rights and interests. The main object of the bill was to establish the right claimed by it, and the injunction was asked for to protect that right, and to secure the orator in the enjoyment of it. In this respect the case is like *Lillie v. Lillie*, 55 Vt. 470, in which remainder-men sought to restrain the life tenant from cutting wood and timber, and committing any waste and spoil, and counsel fees, as injunction damages, were refused, because incurred in defending the suit on its merits, and not regardable in any sense as damages occasioned by the injunction. A permanent injunction was, manifestly, the peculiar remedy to protect the right; but it was held, in effect, to be secondary, and not the primary remedy sought. In *Andrews v. Wool Co.*, 50 N. Y. 282, in which a permanent injunction was sought, a motion to be dissolved was denied, because it involved an inquiry into the merits of the case, which the court thought more proper to be made at the hearing. The defendant was thereupon compelled to go to trial to obtain a decision that the injunction was improperly

granted, in order to recover the damages he had sustained in endeavoring to procure a dissolution; and it was held that a counsel fee for the trial of the suit was allowable. But that case differs from this. Here was a pro forma decree, made without hearing, which precludes the idea of judicial action based on a consideration of the case, and does not even disqualify from sitting in banc. It is not to be supposed that either party asked for a hearing and was denied, as it was the duty of the court to hear if asked; but it is rather to be inferred that the parties consented to, and were satisfied with, that disposition of the case. If the court had dismissed the bill on hearing, as it should have done, in view of the final result, it does not follow that it would have continued the injunction as it did; and, if the parties had not agreed to a modification of the injunction, but had left the motion to dissolve to stand for the consideration of the chancellor, he might have sustained it. Hence it cannot be said that the injunction was kept on foot in spite of the defendants, as it was in the New York case; but the inference is that they were content with it as modified, as they made no further effort to get rid of it, except incidentally, by defeating the case on the merits. It is therefore manifest that the expense in the supreme court was not incurred solely nor principally by reason of the injunction, but would have been incurred just the same had there been no injunction. The statement of the master that, the supreme court having held that the injunction was improperly granted, the defendants are entitled to this expense, "as the entire cost and expense of the preparation of the case for trial were necessary to get rid of the injunction," is not controlling; for, if regarded as a finding of the fact, it is but an inference from other facts found, and not warranted thereby. But we think it intended more as an opinion than a finding of fact. Let there be no costs in this court, as both parties appealed, and neither has prevailed. Affirmed and remanded.

HULL et al. v. SANCTUARY.

(Supreme Court of Vermont. Chittenden. Dec 5, 1895.)

TRESPASS—WHEN LIES BY TENANT AGAINST LANDLORD.

A lease of the "basement of the old grist-mill" required the lessor to supply sufficient water power for the lessees, and provided that, if the power failed at any time, the lessees were to furnish steam power at their own expense, and, while furnishing it, pay no rent, and also gave the lessees the "use and full control of the above-named property." The mill was operated by water conducted to the mill wheel through a flume, and the power thus afforded, if properly applied, was more than was needed to conduct the lessees' business. Held, that the lessor was not liable in trespass *quære clausum* to the lessees for opening the dam half a mile away, and diverting the water from the flume.

Exceptions from Chittenden county court; Ross, Chief Judge.

Action of trespass quare clausum by H. M. Hull and others against Useb Sanctuary. From a judgment for defendant, plaintiffs bring exceptions. Affirmed.

E. R. Hard, for plaintiffs. R. E. Brown, for defendant.

ROWELL, J. The defendant leased to the plaintiffs "the basement of the old gristmill * * * for creamery purposes," and agreed to furnish good, satisfactory water power for running the business, and to have it ready by such a time; and in case that power failed at any time to be sufficient and satisfactory, the plaintiffs were to furnish steam power and to pay no rent while they furnished it. The "use and full control of the above-named property" were given to the plaintiff during the term. There was a dam somewhat over half a mile above the gristmill, from which water there was, and for 30 or 40 years had been, taken through an artificial ditch, and a flume, directly to the wheel of the mill for the purpose of operating the mill. The water power thus afforded, if properly applied, was more than enough to operate the creamery which, as contemplated by the lease, the plaintiffs established and carried on. Soon after they took possession, and before the commission of the alleged trespass, the plaintiffs had furnished and were using steam power to operate their creamery because of the unsatisfactory application of the water power, due to the neglect of the defendant; and at the time in question and from about the time they took possession the plaintiffs were using water brought through said ditch and flume to supply their steam engine and for washing purposes, but not directly as a power, and were claiming to occupy rent free, under the stipulations in the lease concerning the cessation of rent. The act complained of as a trespass consisted in opening the dam, so that the water was diverted from the artificial channel, and flowed in its natural course; the plaintiffs then being in possession of the property and rights covered by the lease, subject to which the defendant had title to the mill and the power. It is quite obvious that the lease did not convey to the plaintiffs such an interest in the locus in quo as to enable them to maintain trespass quare clausum for the act complained of. The lease does not purport to convey any interest therein, but only to obligate the defendant to furnish a good, satisfactory water power. The power supplied by the dam, when properly applied, was more than sufficient to operate the creamery; and, clearly, the defendant had the right to use the excess to operate what remained to him of the mill, or for any other purpose, and this right and his obligation to the plaintiffs rendered it necessary that he should have the exclusive control of the dam, that he might enjoy the one and fulfill the

other. This view is favored, also, by the stipulation that the plaintiffs were to occupy rent free while they had to use steam power. We therefore construe this to be, not a demise of the locus, but an agreement to furnish water power, for the breach of which this action is not maintainable. Judgment affirmed.

PEABODY, Probate Judge, v. MATTOCKS et al.

(Supreme Judicial Court of Maine. June 19, 1895.)

EXECUTORS AND ADMINISTRATORS—SETTLEMENT OF ACCOUNTS—COSTS AND ATTORNEY'S FEES—EFFECT OF APPEAL.

1. After a final decree of this court affirming a decree of the probate court as to the settlement of an account of a testamentary trustee, a judge of probate has no power, in the settlement of a subsequent account, to allow costs incurred and counsel fees for services rendered in the settlement of the prior account, and in the prosecution of an appeal from the decree of the probate court in relation thereto.

2. The whole subject of costs and the allowance of counsel fees in all contested cases in the original or appellate court of probate rests in the discretion of the court, but that discretion must be exercised in the proceedings in which the costs were incurred and the services of counsel rendered.

3. The question of the allowance of costs in the settlement of an account in the probate court, and in an appeal from the decree of the probate court, being necessarily involved in that proceeding, the final decree, whether it allows costs and counsel fees to either party, or is silent upon the subject, is conclusive upon the whole question.

See *Mattocks v. Moulton*, 24 Atl. 1004, 84 Me. 545.

(Official.)

Exceptions from supreme judicial court. Cumberland county.

Action by Henry C. Peabody, judge of probate, against Charles P. Mattocks and others, on a bond as trustees. Judgment for plaintiff, to the amount of which he excepts. Exceptions sustained.

Augustus F. Moulton, for plaintiff. Charles P. Mattocks and L. Barton, for defendants.

WISWELL, J. The defendant, a testamentary trustee, filed his account in the probate court for Cumberland county, therein crediting himself with various investments of the trust estate.

The judge of probate allowed certain of these investments, and disallowed others, aggregating \$3,039.82. From the decree of the judge of probate disallowing these items, the defendant appealed to the supreme court of probate. The appeal was carried to the law court (*Mattocks v. Moulton*, 84 Me. 545, 24 Atl. 1004), and an entry ordered of "decree of probate court affirmed, with costs." At the April term, 1892, of this court, for Cumberland county, the presiding justice made a decree in accordance with the opinion and mandate of the court.

By the decree of the judge of probate, af-

firmed by the supreme court of probate, the defendant was charged with a balance of \$5,853.39, which sum included the above amount of disallowed investments. Of this balance, all but the amount of the items disallowed has been turned over by the defendant to the person entitled thereto.

This action is upon the defendant's bond as trustee. Judgment was entered in the suit for the penal amount of the bond, and a hearing had before the justice presiding at nisi prius, to determine the amount for which execution should issue, in accordance with the following stipulation of the parties: "This case is submitted to the presiding judge, who, in determining the amount for which execution shall issue upon the bond in suit, is authorized to make any further allowances and charges which the judge of probate might make if the account was in settlement before him; it being the desire of the parties that the rights of Mattocks, as trustee, and the cestui que trust in the trust estate, should be finally settled and adjudged in the cause, according to law and equity applicable thereto."

At this hearing, the defendant claimed that he should be allowed the sum of \$555.39 for costs and counsel fees incurred in the settlement of the prior account and in the appeal, including the sum of \$175, charged by him for legal services, he being a counselor at law, and including, also, the costs allowed against him by the final decree in the appeal proceedings. This sum was allowed to the defendant by the judge at nisi prius, to the allowance of which the plaintiff duly and seasonably excepted.

The question presented by these exceptions is whether after a final decree by this court affirming the decree of the probate court, with costs, as to the settlement of an account, a judge of probate has the power, in the settlement of a subsequent account, to allow costs incurred and counsel fees for services rendered in the settlement of the prior account, and in the appeal from the decree of the probate court, and the costs allowed against him in that proceeding.

It is the opinion of the court that a judge of probate has no such power, and that, consequently, the ruling of the presiding justice in allowing these items was erroneous. The question of the allowance of costs incurred in the appeal was necessarily involved in that proceeding. By Rev. St. c. 63, § 30, "In all contested cases in the original or appellate court of probate, costs may be allowed to either party, to be paid by the other, or to either or both parties, to be paid out of the estate in controversy, as justice requires." The whole subject of costs in matters of this kind rests in the discretion of the court. That discretion must be exercised in the proceedings of which the costs were incurred; and, even if a final decree is silent as to costs, it must be conclusively presumed that the question of the allowance of costs to either or

both of the parties to the controversy was considered and passed upon. The decree of this court, made at the April term, 1892, in Cumberland county, was final as to all matters involved. We have seen that the question of the allowance of costs was necessarily involved. The question is therefore *res adjudicata*. The decree referred to was not silent as to costs, but allowed them against the defendant.

This rule would not deprive a judge of the power to open a prior account so far as might be necessary to correct errors,—a power expressly given by statute in Massachusetts. It simply prevents a matter being reopened which has once been adjudicated.

In *Alvord v. Stone*, 78 Me. 296, 4 Atl. 697, it is said: "In such case [an appeal from a probate court] a final decree, silent as to costs, is as conclusive a bar to a recovery of them as if it affirmatively disallowed them. This court no longer has any jurisdiction over the subject."

In *Lucas v. Morse*, 139 Mass. 59, 29 N. E. 223, which decides that the probate court has no power to allow costs after a final decree has been entered in the controversy in which the costs accrued, it is said: "Costs are awarded as a part of the judgment or decree of the cause in which they arise; and no case is cited which decides that a court, either at law or in equity, can award in one case costs which have accrued in another, unless they are included in the judgment."

The power of the court in the allowance of costs in probate appeals is precisely the same as in equity. *Alvord v. Stone*, *supra*. The rights of the parties in equity are determined by the final decree. "There must not only be a decree in favor of a party, but there must also be an express order or decree for his costs, or they are lost." *Stone v. Locke*, 48 Me. 425.

But it is urged that, even if the foregoing rule is correct as to the allowance of costs, it does not follow that it is applicable to expenses properly and necessarily incurred in procuring the assistance of counsel.

We think the principle is precisely the same. The sums which were allowed in this case were for the services of counsel, and the charges of the defendant for legal services, in the identical proceeding in which a final decree was made. If expenses such as these are to be allowed at all, it must be done in the judgment or decree in the proceeding in which they were incurred.

We do not question that costs and counsel fees properly incurred by a trustee in protecting the estate confided to his care, and paid by him, should be reimbursed to him out of the estate; nor that trustees who are obliged to employ counsel in the settlement of their accounts should be allowed to charge to the estate the reasonable expenses therefor, as held by many cases cited in the defendant's brief. But these rules do not apply to the question here at issue.

In Clement's Appeal, 49 Conn. 519, an executor, in the settlement of his final account, charged the estate for his services and expenses in defending against an appeal from the allowance by a probate court of his prior account. It was held that he was entitled to an allowance out of the estate of a portion of the expenses incurred in the previous proceeding; but the question here discussed was not raised nor considered in that case.

The entry must therefore be, exceptions sustained.

WARD v. METROPOLITAN LIFE INS. CO.
(Supreme Court of Errors of Connecticut. May 28, 1895.)

INSURANCE — FALSE STATEMENTS IN APPLICATION — KNOWLEDGE OF AGENT — WAIVER.

1. Where a policy provided that no statements made or given to its agents or any other person should affect its rights unless incorporated in the application, parol evidence of statements made to the agents of defendant is admissible to show a waiver of the breach of warranty of such statements, where it was proposed to follow it up by showing that the information given to the agents had been communicated to the company.

2. Where a policy provided that statements of or to an agent should be insufficient to modify the terms of the contract, a charge that, where there was evidence of statements by and to the agent, it would be presumed that, in accordance with his duty, he notified the company thereof, was erroneous.

3. Where a policy provides that no agent can stipulate for a modification of its provisions not brought to the knowledge of his principal officers, knowledge of the general superintendent that material statements in the application were false is not knowledge on the part of the company.

4. Where a plain breach of warranty in an application for life insurance had been proved, and no waiver thereof by the insurer was shown, it was proper to direct a verdict for defendant.

Appeal from superior court, New Haven county; Ralph Wheeler, Judge.

Action by Patrick J. Ward to recover against the Metropolitan Life Insurance Company on a policy of insurance on the life of John Ward. Judgment for plaintiff. Motion for new trial overruled, and defendant appeals. Reversed.

The following were among the provisions of the policy:

"This policy is issued in consideration of and relying upon the truth of each of the statements, declarations, and warranties contained in the application for this insurance, and the answers, statements, and declarations contained in or indorsed upon the application are, and each of them is, warranted to be true; and it is expressly agreed upon between the company and the insured that if they or any of them are untrue, or if this policy has been obtained by fraud, misstatement, or concealment, then this policy shall be absolutely null and void, and all premiums paid thereon be forfeited. Inasmuch as only the officers at the home office of the company in the city of New York have authority to determine whether or not a policy

shall issue on any application, and as they act on the written statements and representations made in the application for this policy, it is expressly understood and agreed that no information, statements, or representations made or given by or to the person soliciting or taking the application for this policy, or by or to any other person, shall be binding on the company, or in any manner affect its rights, unless such information, statements, or representations have been reduced to writing, and presented to the officers of the company at the home office, in the application referred to. * * * No agent has the power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, to issue a permit for residence, travel, or occupation, or to bind the company by making any promise or receiving any representation or information. This power can be exercised only by the president or secretary of the company, and will not be delegated."

A copy of the application was attached. Among its contents were the following:

"Give full particulars of any illness you may have had since childhood. Thirteen years ago had rheumatism in the left leg from working in water. It lasted in slight degree for two months. Has not had it since. When were you last confined to the house by illness? Had typhoid fever 24 years ago; was sick a month; perfectly recovered. (5) Have you ever met with any accidental or personal injury? No. (6) Have you ever been seriously ill? If so, when, with what, and who was the medical attendant? (State his name and residence.) Only when ill with typhoid fever, 24 years ago. Dr. Barry, of New Haven, attended him. * * * (8a) Name and residence of your usual medical attendant? A. I haven't any. (b) When and for what has his services been required? 24 years ago, for typhoid fever. (9) Have you consulted any other medical man? If so, when and for what? No.

"It is hereby declared, agreed, and warranted by the undersigned: (1) That the answers and statements contained in the foregoing application, and those made to the medical examiner as recorded in parts A and B of this sheet, together with this declaration, shall be the basis and become part of the contract of insurance with the Metropolitan Life Insurance Company; that they are true, and are correctly recorded, and that no information or statement not contained in this application received or acquired at any time by any person shall be binding upon the company, or shall modify or alter the declarations and warranties made in this application; that any false, incorrect, or untrue answer, any suppression or concealment of facts in any of the answers to the foregoing questions, any violation of the covenants, conditions, or restrictions of the pol-

icy, any neglect to pay the premium on or before the date it becomes due, shall render the policy null and void, and forfeit all payments made and all dividends which may have accrued therefrom. (2) That no person other than the president or secretary shall have power to waive any contract or condition on behalf of the company, which alteration or waiver to take effect must be in writing."

The answer alleged that the insured was suffering at the date of the application from the results of a serious accident, from which he never recovered. The reply alleged: "(2) At the time of the making of said application, and prior thereto and after the same was made, the said John Ward and the plaintiff fully stated to and informed the defendant and the agents who took said application of all the facts set up in all said special defenses; and at the time the defendant issued said policy, and from that time down to the date of the death of said John Ward, the defendant and its officers and agents knew of said facts set up in all said special defenses. (3) The defendant, its officers and agents, knowing all of said facts set up in all said special defenses, as set forth in paragraph 2 of this reply, collected premiums on said policy till the date of the death of said John Ward, and thereby waived all claim and right to insist on a forfeiture of said policy in suit, and thereby ratified and confirmed said policy, notwithstanding any of the matters set up in said special defenses; and the defendant is estopped from claiming any of the matters set up in any of said special defenses as a reason why the plaintiff should not recover." There was evidence that the insured had suffered from the injuries as alleged; that these facts were communicated to the general agent of the defendant at the time the application was made out, and also to the local agent; that they both knew of the statements in the application, and accepted the premiums from the insured; and that they had both informed the assured that this would make no difference in the validity of the policy.

The court charged as follows: "There is a presumption that an agent of the principal, acting in his duty as agent, and receiving information which it is his duty to communicate to his principal, will so communicate it. If it be proved, however, in any case, that an agent, even a general agent, acted in collusion with a third person fraudulently towards his principal for the benefit of that third person, and not of his principal, there is no longer any presumption that he communicated any knowledge to his principal; and so, in such a case, an insurance company would not be chargeable with any knowledge of the untruth of statements in the application which were made by the applicant fraudulently, and at the fraudulent suggestion of agents, who simply desire, for their own purpose, to procure applicants

for insurance. Of course, fraud, in any case, is not to be presumed; it must be proved as a fact; but it may be proved by circumstantial evidence, if the circumstances are such as to remove the presumption of honest conduct, which always exists, and also to outweigh the testimony tending to disprove the fraud. If the jury find from the evidence upon this question that there was fraudulent collusion between Lefebure and Morrissey and Ward, that neither the president, secretary, nor managers were actually informed of the real facts in regard to the application, then the plaintiff cannot recover, and your verdict should be for the defendant. * * * If you find from the evidence that the president and secretary of the company, or its managers in New York, learned in fact from Lefebure or from Morrissey or any one else that the statements in the application were not correct, and were informed of all the facts in connection with the issue of the policy, and that the company still continued to receive the premiums, such knowledge and the receiving of the premiums would be a waiver of any right to contest the policy on those grounds. If you find from the evidence that Lefebure was a superintendent of the company within a certain district, including the city of New Haven, and in such agency it was within the scope of his duties to see that all the agents and the assistant superintendents engaged in soliciting policies and collecting premiums or filling out applications in the district performed their duties, that such superintendent received the applications so obtained and the premiums collected, and forwarded them to the home office, and received and delivered the policies or caused them to be delivered, and that it was a part of his duty to see each risk, and to recommend risks to his company; and if you also find that he had in any way knowledge of all the real facts in regard to the application, and that he knew the statements were not correct or true, but that in good faith to his company, and not fraudulently or collusively with the insured, John Ward, he not only recommended the risk, but thereafter, having full knowledge of the facts, continued to collect the premiums and pay them over to the company,—then I instruct you that the knowledge of Superintendent Lefebure was also the knowledge of the company, and that the company is chargeable with such knowledge, and that, if thereafter it continued to receive such premiums, it is estopped from defending this suit on the grounds set up in the special defenses."

Henry Stoddard and Samuel A. York, Jr., for appellant. Charles S. Hamilton, for appellee.

BALDWIN, J. There clearly was evidence upon which the verdict can be supported, under the charge of the court. The act of 1893 (chapter 51, p. 228) was designed to afford a remedy only when none could

be had by appeal. *Johnson v. Norton*, 64 Conn. 134, 29 Atl. 242; *Bissell v. Dickerson*, 64 Conn. 61, 71, 29 Atl. 228. The court feels bound to express its strong disapproval of a resort to motions of this character, involving large expense to the state from the cost of printing the entire evidence, when the real grievance arises from the instructions which the jury received from the court. No verdict can be treated, under this statute, as against the evidence in the cause, which was warranted, on the evidence, by the terms of the charge, however erroneous such charge may have been.

Of the errors assigned upon the appeal, it is necessary to notice but three.

1. The policy in suit provides that inasmuch as only the officers of the defendant at the home office have authority to determine whether a policy shall issue in any case, and as they act on the written statements made in the application, it is expressly agreed that no information, statements, or representations made or given by or to its soliciting agents, or any other persons, shall in any manner affect its rights, unless put in writing and incorporated in the application, and also that no agent has power to modify the contract, waive any forfeiture, or bind the company by receiving any representation or information, but that such power can be exercised only by the president or secretary of the company, and will not be delegated. It is further stated that each of the statements in the application on which the policy was issued is warranted to be true, and that, if any of them are untrue, the policy shall be absolutely null and void. It was not disputed (except in the pleadings) that certain statements in this application, of a material character, were untrue; but the plaintiff was allowed to introduce parol evidence of statements and representations made to and by the general and local agents of the defendant, for the purpose of showing that this breach of warranty had been waived, or that the company was estopped from setting it up as a defense. The objection to the reception of this evidence was properly overruled. It tended, so far as it went, to support the reply, which the defendant had traversed. The court could not know that it might not be followed up by further evidence that the information received by the agents had been communicated to the company, and was known to the president or secretary at the home office, when the policy was issued, in which case the plaintiff would clearly have shown himself entitled to a verdict. No direct evidence of this nature was afterwards produced, but the jury were instructed, in substance, that its place might be supplied by a presumption that an agent receiving, as such, information which it is his duty to communicate to his principal, will so communicate it; that a presumption of honest conduct always exists where no fraud or collusion is shown;

and that fraud in any case is not to be presumed. The term "presumption" is used to signify that which may be assumed without proof, or taken for granted. *Morford v. Peck*, 46 Conn. 380, 385. It is asserted as a self-evident result of human reason and experience. In its origin, every presumption is one of fact, and not of law. It may, in course of time, become a presumption of law, and even an indisputable one. Its truth may be so universally accepted as to elevate it to the position of a maxim of jurisprudence. Its convenience, as a rule of decision, may be so generally recognized as to place it in the rank of legal fictions. But, so long as it retains its original character as a presumption of fact, it has simply the force of an argument. 1 Greenl. Ev. § 44; Steph. Dig. Ev. 246. The presumption that public officers, in the discharge of their duties, have observed all proper formalities, may be now considered as one of law. *Booth v. Booth*, 7 Conn. 350, 367; *Coggill v. Botsford*, 29 Conn. 439, 447. But this cannot be said of the presumption that the duties of a private agency have been faithfully performed. The superior court properly admitted evidence of the knowledge of the defendant's agents at New Haven of the breach of warranty, but it erred in instructing the jury that, in determining its effect upon the question of estoppel, they might proceed, in the absence of countervailing proof, on the presumption that it was duly communicated to the home office. The plaintiff relies upon *McGurk v. Insurance Co.*, 56 Conn. 528, 538, 16 Atl. 263; but the objection there overruled was taken to the admission of the evidence, not to the charge to the jury. Under the instructions given in the case at bar, the jury were not told simply that they would be warranted in taking into consideration the presumption in question, but it was stated to them as an authoritative and binding rule, the only exceptions to which arose from fraud or collusion. It is true that their attention was also directed to the testimony of the defendant's officers that they were in fact never informed of the statements made to its agents; but this still left the burden of proof, as to the point of notice, on the wrong party. The difference between a presumption of fact and one of law, as these terms are commonly used, is that the former may be, the latter must be, regarded by the trier. The charge in the present case was calculated to make the jury suppose that they were bound in law to give some weight to each of the presumptions to which reference was made. It also built a presumption of waiver upon a presumption of notice. This put it on too insecure a foundation. The defendant could not be estopped from setting up a breach of warranty, unless it had waived its right to take advantage of it. *Insurance Co. v. Wolff*, 95 U. S. 324, 233. "A waiver is an intentional relinquish-

nt of a known right." A presumption of
relinquishment of a known right cannot
rested on a presumption that such right
s known. First. Nat. Bank v. Hartford
& Annuity Ins. Co., 45 Conn. 25, 44;
S. v. Ross, 92 U. S. 281, 283; Manning
Insurance Co., 100 U. S. 693, 699.

The superior court also erred in instruct-
the jury that if the district superintend-
of the company at New Haven forwarded
application in question to the home of-
in good faith, with a recommendation of
risk, when he knew that material state-
nts in the application were false, and, af-
the policy was issued, continued to collect
accrued premiums upon it, and remit them
the defendant, then his knowledge was its
nowledge, and its receipt and retention of
premiums estopped it from setting up the
ach of warranty. There are expressions
the case of McGurk v. Insurance Co., 56
n. 528, 539, 16 Atl. 263, which lend some
tenance to the plaintiff's claims in this
pect, but they were used with reference to
otally different question,—that of the ad-
ssibility of evidence of the knowledge of
agent; nor did the policy there in suit
tain any provisions similar to those in that
the plaintiff, as to oral statements which
re not incorporated in the application. The
e that the knowledge of an agent is the
nowledge of the principal, if the agent ac-
red it while acting for the principal, in the
rse of the transaction which is in question,
ts on the ground that the agent stands,
that transaction, in the place of the prin-
al, and in effect is the principal, so far as
cerns the rights of the other party. Bank
Payne, 25 Conn. 444, 449, 450. It is unim-
tant whether he in fact communicated his
nowledge to the principal, because, even if
did not, it would be unfair to allow such a
ach of duty on the agent's part to put the
er party in a worse position. Smith v.
nmissioners, 38 Conn. 208, 218. There is
reason why a corporation which necessari-
contracts through agents, but may have
nts of superior and agents of inferior au-
rity, should not stipulate in any contracts
euted in its behalf that their provisions
be varied by no notice or representations
brought to the actual knowledge of one of
principal officers, nor by any waiver not
horized by them. Ryan v. Insurance Co.,
Conn. 168, 175; Insurance Co. v. Wolff,
U. S. 326, 332. Provisions of that charac-
were inserted in the policy in suit, and
the application upon which it was based.
ey were designed to exclude the operation of
rule that notice to the agent who negoti-
s a contract is notice to the principal; and
b was their necessary effect.

The superior court was asked to direct
jury to return a verdict for the defendant.
plain breach of warranty had been proved.
e plaintiff introduced evidence that it was
own to and waived by the local agent and
strict superintendent of the company, but

none that it was ever known at its home of-
fice. The local agent and the person who
was president of the company at the date of
the application were dead, but the defendant
produced the district superintendent, the vice
president, the secretary, and the general man-
ager of the company, each of whom testified
that he never knew that any of the statements
in the application were untrue until after the
death of John Ward. Under these circum-
stances, no verdict for the plaintiff could be
supported, and there was nothing left to sub-
mit to the consideration of the jury upon
which their opinion could be of any impor-
tance in the determination of the cause. It
might, as it has done, defer, but it could not
avoid, the inevitable result. It therefore be-
came the duty of the court, to the end that
right and justice might be administered with-
out denial or delay (Const. art. 1, § 12), to
comply with the defendant's request, and di-
rect a verdict in its favor. People's Sav.
Bank v. Borough of Norwalk, 56 Conn. 547,
558, 16 Atl. 237; Talcott v. Meigs, 64 Conn.
55, 58, 29 Atl. 131.

The motion for a new trial is denied; but
upon the appeal there is error, and a new
trial is ordered. The other judges concurred.

TOWN OF ANSONIA v. COOPER et al.
(Supreme Court of Errors of Connecticut. May
28, 1895.)

ESTOPPEL—CONVEYANCE OF FEE BY LIFE TENANT
—RATIFICATION—DEPOSITIONS—RIGHT OF
ADVERSE PARTY TO READ.

1. A widow, who was owner of a life estate
in certain real estate,—the remainder being in her
sons,—sold and conveyed the property by war-
ranty deed, and received payment therefor, the
understanding being that she conveyed the full
title. After her death her sons divided the mon-
ey left by her—which consisted mostly, if not en-
tirely, of the proceeds of this property—between
them. Held, that one of the sons, who did not
know of the conveyance when made, but who, af-
ter learning all the facts, retained the money re-
ceived from his mother's estate, and allowed her
grantee to remain in possession of the premises for
a number of years, thereby ratified her sale, and
was estopped to claim an interest in the property.

2. Either party may read in evidence any
part desired of a deposition regularly taken in
the action, and filed with the clerk.

Appeal from superior court, New Haven
county. George W. Wheeler, Judge.

Action in the nature of a bill of interplead-
er between Henry G. Alling and Elizabeth
Downs. Judgment in favor of Alling, and
Downs appeals. Affirmed.

George P. Carroll, for appellant. V. Mun-
ger, for appellee.

TORRANCE, J. This is a proceeding in
the nature of a bill of interpleader between
Henry G. Alling and Elizabeth Downs, to
determine which of them is entitled to a fund
paid into court by the town of Ansonia, as
the appraised value of land taken by said
town for a schoolhouse site. The land was
formerly owned by Charles Cooper, who died

in 1876, leaving a will which gave the use of the land to his widow for life, and the remainder in fee equally to his four sons, Charles, Alfred, William, and Henry. In July, 1880, the widow sold the land for \$2,500, and gave a warranty deed of it. In the usual form, which purported, and was intended, to convey the fee. The widow died in March, 1884. In 1886 the land came, through mesne conveyances, by warranty deed, to Henry G. Alling, one of the claimants of the fund, who then paid to his grantor \$3,500 for it. Alfred Cooper has never conveyed his interest in the land, and the fund in question is the appraised value of that interest. The town began proceedings to take the land in September, 1891, and in November, 1891, Alfred Cooper assigned all his right, title, and interest in and to the fund in question to Elizabeth Downs, of which assignment the town had due notice. In one phase of it, this case has already been before this court. *Town of Ansonia v. Cooper*, 64 Conn. 536, 30 Atl. 760. In that case Alling set up certain facts showing, as he claimed, that Alfred Cooper had ratified the sale and conveyance made by his mother. Elizabeth Downs demurred to the facts so set up. The superior court sustained the demurrer. This court, on appeal, reversed that judgment, and the case stood again for trial in the superior court. Thereupon Elizabeth Downs denied the facts upon which the claim of ratification was founded. The superior court found that Alfred Cooper had ratified said sale, and that Alling was entitled to the fund, and from that judgment Elizabeth Downs brings the present appeal. The errors assigned are 30 in number, but it will be unnecessary to consider all of them separately and in detail. The court below has found that Alfred Cooper ratified the sale. If that conclusion is warranted by the facts found, and no harmful error intervened in the process of reaching it, then the judgment appealed from must stand. Upon the argument before this court, Alling claimed that the conclusion reached upon the question of ratification was one of fact, which could not be reviewed upon appeal; but, whatever doubts upon this question may be suggested by the record, we will, for the purposes of the case, consider that conclusion as one which can be reviewed on this appeal.

We will first consider whether the facts found warrant the conclusion that Alfred Cooper ratified the sale. These facts are set out in detail upon the record, and the following appear to be, in substance, the controlling ones: The sale and conveyance was made with the approval and by the advice of her son Henry, but without the knowledge of the other three sons. The purchase price then paid was \$2,500. The court finds that the land was then worth \$3,500, but it does not appear that the parties at that time considered it worth any more than the price

paid. The conveyance was made freely, and without the use of any undue influence. Her grantee took immediate possession under the deed, and in 1881 sold and conveyed the land, by warranty deed, to Charles D. Alling. He, in 1886, sold it to Henry G. Alling for \$3,500, and conveyed it by warranty deed. These deeds were duly recorded, and the grantees named therein took and held the possession of said land under said deeds in good faith, as owners, from 1880 down to the time the land was taken by the town. All the four sons knew of this conveyance by the widow before her death. At her death she left in cash about \$2,200, "the same being, in whole or greater part, from the proceeds of said sale." Shortly after her death three of the sons (Charles, William and Henry), with full knowledge of all the facts, agreed to divide the balance of their mother's estate, after paying her debts and funeral expenses, and appointed Henry to carry the agreement into effect. He paid the debts and funeral expenses, and divided the remainder among the four sons. Alfred's share was \$394, and it was paid over to him in 1884. He knew when he received it that it was from moneys in the hands of his mother at her decease. About a year after his mother's death, Alfred was fully informed by Charles and William of all the facts in the case, and of the agreement aforesaid of the three brothers, and of the share of each son, and of the fact that the share paid over to him came in whole or in part from the proceeds of the sale made by his mother. He then objected to the smallness of the balance divided among the sons, and thought the land ought to have brought more, and said, if it had sold for \$1,000 more, he would have been satisfied. He also then said that the land ought not to have been sold without the consent of the sons, that the purchaser had a shaky title, and that they could make him trouble if they wanted to. But he neither at this nor at any subsequent time made any complaint "in regard to the agreement aforesaid of the three brothers, or to the manner in which it had been carried out." Neither he nor his brothers ever demanded possession of said land, nor did he or they ever repudiate the sale made by their mother, or make any demand upon Henry G. Alling or his predecessors in title, except that in 1891, when Alfred Cooper was requested to quitclaim his interest in said land, "he did not repudiate said sale, but subsequently demanded of the purchaser, and desired, only such sum as represented his share of the difference between the purchase price and the real value as claimed by him at the time of the sale." Had Alfred received from Henry G. Alling \$250, he intended to give him a quitclaim deed as requested.

It clearly appears from the record that probably in the fall of 1884, and certainly in 1885, Alfred Cooper had full knowledge of all the material facts pertaining to the sale of his

d, and the disposition of the proceeds of the sale, and the settlement of his mother's estate. He then knew that she had sold the land for \$2,500, and had received the money; that she and her grantees in good faith supported the deed conveyed the fee, and had thereafter dealt with the land on that position; that substantially the whole of the purchase money had remained at his mother's decease; that his three brothers had agreed to divide that money among her creditors and her four sons, and settle her estate of court. And he also knew that this had not been done, and that he had received his share of this purchase money. With this full knowledge of all the material facts, and of his rights with respect to the land sold by his mother, he does substantially what his three brothers had done. He assents to what they did in the settlement of his mother's estate, and the division of the purchase money; he retains, and proposes to retain, his share of that money. It is true, his assent to it had been done in a grumbling one, accompanied with expressions of dissatisfaction her outcome and result; but his dissatisfaction is not really because his mother had not received the fee, but rather because she did not do enough for it, and because the amount wrongly divided between the sons was so small. He did not then and never has repudiated the

He has never made demand for the money, and he has never offered to give up the money he received from his mother's estate. Upon the facts found, Alfred Cooper had no right, when he became fully informed of all the material facts, either to repudiate this sale of his land, or to adopt it and take the benefit of it; and, when so informed, he was bound to do one or the other, and could not do both. In 1884 or in 1885, he had full knowledge of all the facts. He knew that his mother had sold his land and received the money for it. He knew that, under the agreement made by his brothers, his share of that money had been paid to him; and, with full knowledge of all the facts, he decided to keep the money. We think there can be but one conclusion drawn from his conduct, and that is that he elected to take the benefit of the sale and intended to ratify it. Suppose she had told him in 1883 what she had done, and that his three brothers had approved of her sale and taken their share of the purchase money, and suppose he had told her that she ought not to have sold the land for the price received, or without his consent, but had nevertheless taken his share of the purchase money, and retained and proposed to retain it. Would he afterwards, under such circumstances, successfully assert his title to the land in a court of equity? We think not. But the material case does not materially differ from the supposed, so far as this question of ratification is concerned. The essential thing in the case consists in taking and retaining, with full knowledge, the benefit of his mother's sale. "Ratification" means the adoption by a

person, as binding upon himself, of an act done in such relations that he may claim it as done for his benefit, although done under such circumstances as would not bind him, except for his subsequent assent. * * * The acceptance of the results of an act with an intent to ratify, and with full knowledge of all the material circumstances, is a ratification." *Town of Ansonia v. Cooper*, 64 Conn. 536, 30 Atl. 760. Indeed, the case last cited is decisive upon the point in question. So far as they bear on this matter of ratification, the facts admitted in that case do not essentially differ from the facts found in this. In both the essential fact is that Alfred Cooper, with full knowledge of his rights and of all the material facts, takes, and decides to keep, his share of the purchase money. If the facts admitted in the former case amounted, as was held, to a ratification, the facts here found must equally be so considered. We think the facts found warrant the conclusion that Alfred Cooper ratified the sale.

This disposes of the principal question in the case, and we will now consider the more important of the other errors assigned, which relate, in a general way, to the overruling of certain claims made by the appellant, and to rulings upon questions of evidence. Most of the claims which it is alleged the court overruled were simply propositions of law, more or less correctly stated, setting forth the legal elements of a valid ratification. It does not appear that the court expressly overruled any of these claims, and, as to very many of them, we cannot see that it did so by implication. We shall therefore only consider briefly one or two of them, which, it may be fairly claimed, the court, in finding as it did, must have overruled.

The first is this: That there was a material variance between Alling's allegations and proof, and therefore he could not recover. The claimed variance between allegation and evidence is not pointed out, nor indicated in any manner upon the record; and we have no means of determining whether such variance exists, or whether it is a material one. In addition to this, it is impossible to see, from the record, how the overruling of this claim can have harmed the appellant in any manner.

The next claim is that the record, as a whole, shows that the purchase money received by the widow had been so dealt with by her as to have lost its identity long before she died, and that, therefore, no part of the purchase money, as such, remained in her hands at her decease. We are not sure that we fully understand this claim. Apparently, it is that the entire record shows, contrary to the express finding, that the \$2,200 left by the widow was no part of the purchase money, as such. We do not so read the record. The finding is that the money left by the widow came, "in whole or in greater part, from the proceeds of said sale;" and this is a finding of fact, which, for aught we can

see to the contrary, is warranted by the record, and is conclusive upon this matter. The finding thus takes away the very foundation of the appellant's claim upon this point, and the court did not err in overruling it.

These are all of the assigned errors relating to the overruling of the claims made by the appellant which it seems necessary to consider. We come now to the rulings upon questions of evidence, the more important of which relate to the depositions used in the case.

It appears that the appellant had taken, in due form, the depositions of Alfred Cooper, and of his wife and daughter. Counsel for both parties had stipulated that the depositions should be filed with the clerk, and might be opened and taken away by counsel for Downs to be typewritten and copied for the convenience of court and counsel, and that one typewritten copy should be considered as the original. The original and typewritten copy were both lying upon the table before the court, and apparently in the physical possession of counsel for appellant. Alling offered to read from these depositions, and to lay in evidence the portion so read. Thereupon the appellant objected, chiefly on the ground that she herself had not offered them in evidence. The court, against the objection of the appellant, ruled that, under these circumstances, Alling might use them. Upon a careful examination of the record, it is difficult to see how this ruling, even if erroneous, can have harmed the appellant. The depositions were those of her own witnesses, whose testimony, from the nature of the case, would presumably be favorable to her. A good deal of that testimony, so far as it appears on the record, relates to matters not seriously disputed; and, as a whole, it appears to be favorable to her, or, at least, it does her no harm. The fact that the ruling did not harm the appellant would justify us in passing this matter without further consideration; but as the question involved is one which, so far as we are aware, has not been decided by this court, and is one of some importance in practice, it seems advisable to express our views upon it. In most cases, depositions are taken for the purpose of being used by the party taking them. The cases where they are not so used are comparatively few in number; but in such cases, if the right to use the depositions be denied to the adverse party, it may work a great hardship and injustice. It will seldom be known in advance of the actual trial whether the party taking the depositions does or does not intend to use them, and, when it is known that he will not use them, it will usually be too late for the adverse party to avail himself of the testimony of the deponents in any way, although he may have relied on that testimony in support of his case. If this right be denied to the adverse party, it will in very many cases necessitate the taking of two sets of depositions of the same wit-

nesses, involving a useless expenditure of time and money. We see no good reason why this should be done; at least, not in cases like the present, where the depositions were filed with the clerk, in whose custody they must, by statute, remain, unless suppressed by the court, until final judgment in the cause. On the whole, we see no good reason on principle for denying this right to the adverse party; and such appears to be the prevailing opinion as expressed in statutes, or rules of practice, or by the decisions of courts. See the authorities cited in 5 Am. & Eng. Enc. Law, p. 607. It is true, as claimed by the appellant, that some of the authorities there cited in support of this right are not in point, as, for instance, the case of *Henshaw v. Clark*, 2 Root, 103; but, after all, we think it does appear that the weight of authority is in favor of this right. We think the court did not err in ruling as it did on this point.

The appellant also complains because the court, against her objection, permitted Alling to read and put in evidence such parts of the depositions as he chose. But in making that ruling the court informed the appellant that she might read and offer in evidence, as part of Alling's case, and not of her own, such parts of the depositions as she deemed relevant and material, and which were omitted by Alling; and after this all of the deposition of Alfred Cooper was read, and most of the depositions of the wife and daughter, "and all portions were read which counsel for Downs desired to read." This ruling clearly did the appellant no harm.

She also complains of the ruling of the court in admitting testimony concerning what the three brothers said and did in the absence of Alfred, after the mother's death. That evidence was objected to because Alfred was not present at that meeting, and so could not be bound by what they said or did. It was offered with the promise "to connect it with Alfred Cooper, and to show his subsequent knowledge and acquiescence in the same," and this connecting evidence was subsequently offered. This ruling was clearly not erroneous.

The claimed errors already considered and disposed of seem to be the principal errors assigned. There are other errors assigned, relating to rulings upon evidence; but we deem it unnecessary to consider them separately, as none of them furnish any ground for a new trial. There is no error. The other judges concurred.

PERKINS v. BRAZOS.

(Supreme Court of Errors of Connecticut. May 28, 1895.)

RES JUDICATA—EXTRINSIC EVIDENCE AS TO ISSUES DETERMINED.

1. Where defendant pleads a prior judgment in bar, the deposition of the judge who tried the former action as to the issues therein tried is

admissible, where the facts do not appear by the unaided record.

2. The maker of a note sought to enjoin its transfer on the ground that it was given for the purchase of certain buildings; that the payee had agreed to transfer to the maker the insurance thereon; that the buildings were destroyed by fire; and that, by failure to transfer, the maker suffered loss, and the consideration of the note failed. The relief prayed for was denied. *Held* that, in an action on the note, such judgment was *res judicata*, where the evidence pleaded in the note was failure to transfer the policies, whereby defendant lost the consideration of the note.

Appeal from superior court, Fairfield county; Prentice, Judge.

Action by Jane A. Perkins against Antoine Brazos. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles H. Fowler, for appellant. Stiles Judson, Jr., for appellee.

HALL, J. This is an action upon a note of \$1,000 given by defendant to plaintiff. The defendant's answer and counterclaim allege that this note, with others, was given as a part consideration for the plaintiff's agreement to transfer to the defendant certain policies of insurance, to the amount of \$3,000, upon property purchased by defendant of the plaintiff; that said property was destroyed by fire; and that, by reason of the failure of the plaintiff to keep her agreement, and transfer said policies, the defendant lost the consideration of said notes, and suffered damage to the amount of \$3,000. To this answer and counterclaim the plaintiff replied that the matters therein set forth had been fully adjudicated in favor of the present plaintiff, in a certain action in the superior court between the same parties, which action and judgment was described in the reply, and a copy of the record of the proceedings in said prior suit was made a part of the reply as Exhibit B. To this reply the defendant made the following rejoinder: "So far as it is claimed that any judgment has been had, or now exists, which is a bar to the claims made in the defendant's answer and counterclaim, the allegations of the plaintiff's reply are denied." This was the only issue raised by the pleadings.

By this form of pleading the question of the sufficiency of the reply—that is, whether the facts alleged constitute a bar to the claims of the answer and counterclaim—is not raised. *Powers v. Mulvey*, 51 Conn. 433. The rejoinder is but a denial of the facts alleged in the reply. It raises only the questions of the existence of the alleged prior judgment and proceedings, and of the identity of the issues or questions raised and decided in that case and those presented by the answer and counterclaim in this action. In finding the issue in favor of the plaintiff, the court has decided these questions of fact, and its judgment is final, unless there was error in some ruling of evidence, or in reaching these conclusions of fact from the facts found. Upon the trial, for the purpose of

proving the facts alleged in the reply, the plaintiff offered in evidence a copy of the same record of judgment and proceedings which is made a part of the reply. The defendant made no objection to the admission of this record, either as evidence of the alleged judgment and proceedings, or as evidence that, by those proceedings, the same question had been litigated and decided which is sought to be raised by the defendant's answer in this suit. The plaintiff thereupon offered in evidence the deposition of the judge who had tried the former action, for the purpose, as stated in the finding, "of proving that, of the several issues raised by the pleadings in said former action, the particular issues raised by the defendant's answer and counterclaim in the present action relative to the note in controversy were in fact heard in said former action, and determined by the court in said action in favor of this plaintiff and against this defendant." To the admission of this deposition the defendant objected, upon the ground that the facts found and the issues decided by the court in the former action, could only be proved by the record, and could not be varied or supplemented by extrinsic evidence. The court overruled the objection and admitted the evidence.

By this ruling is presented the only question of law which the record discloses to have been raised by the defendant upon the trial in the superior court, and the only one which can properly be considered upon this appeal. General Rules of Practice 17, § 1 (26 Atl. xv.). Whether this deposition contained any statement prejudicial to the defendant, or contained any evidence which was inadmissible, we are unable to determine, as the record furnishes us no information regarding the contents of the deposition. So far as the record discloses, no further evidence was offered by the plaintiff, and no evidence was offered by the defendant to prove, and no claim made, that the note sued upon in the present suit was not one of the notes described in the former action. That extrinsic evidence, consistent with the record, may be received to prove that a matter within the issue raised in a prior action, between the same parties, was contested and decided in such action, when the fact does not appear by the unaided record, is well settled in this state. *Supples v. Cannon*, 44 Conn. 424; *Mosman v. Sanford*, 52 Conn. 24; *Huntley v. Holt*, 59 Conn. 102, 22 Atl. 34. The fact that the prior suit was of an equitable nature does not alter the effect of the proof that in that action the subject-matter in controversy in the present action was involved and determined. *Munson v. Munson*, 30 Conn. 425. Nor is it rendered inadmissible, as defendant's counsel seems to claim, by reason of section 1111 of the General Statutes, which requires all courts to cause the facts upon which their final judgments are founded to appear on the record. A finding

specially setting forth such facts is only required to be made by the court when requested by any party to the action. The general rules of practice expressly provide that the requirements of this section are complied with, by a finding of the issues in favor of the plaintiff or defendant. Rule 17, § 5 (26 Atl. xv.).

But a sufficient reason why extrinsic evidence might have been excluded in the present case, is found in the fact that Exhibit B furnishes, in itself, sufficient proof of the allegations of the reply. The substance of the allegations of the complaint in the former action is that, as a part consideration for the purchase of certain land and buildings, the plaintiff in that action gave to the defendant four notes (one of which the court finds was the note in suit); that the defendant had caused said buildings to be insured in the sum of \$3,000, and, as a part consideration for said notes, had agreed to cause said policies to be transferred to the plaintiff; that the premises were destroyed by fire; that by reason of defendant's failure to transfer said policies as agreed, the plaintiff lost the value of said buildings, alleged to be \$4,000; that the defendant was without property; that there was danger that she would transfer said notes before due; and that plaintiff was without remedy at law. The relief asked for was an injunction restraining the negotiation of the notes, and that they be delivered up for cancellation. The answer contained only admissions and denials. By reason of the express admission in the answer of certain paragraphs of the complaint, and because, under section 4 of Rule 4, rules under the practice act (26 Atl. vii.), other paragraphs not denied are deemed to have been admitted, it appears that the issue tried and decided at the former trial was upon the question whether the defendant had agreed to cause the policies in question to be transferred to the plaintiff, and that the granting of the relief asked for in the former action was opposed solely upon the ground that the defendant had not made the alleged agreement. We are of opinion that it appears, from the record of the prior suit, that the particular question which is decisive of the present action, and which constitutes the substance of the defendant's answer and counterclaim, was necessarily tried and determined by the court in the former action. If it can be said that there was more than one issue of fact raised by the pleadings in the former suit, and that, by the form of the judgment file, which reads that "the issue" is found for the defendant, there is a question as to what issue was decided, we think that, as the court rendered final judgment in the case, and as the judgment file is signed by the clerk, which can only be done when all the issues are found in favor of the prevailing party (General Rules of Practice 18, § 4 [26 Atl. xvi.]), that the word "issue" in the judgment file may properly

be read "issues." In cases where, by the pleadings, more than one material allegation of fact is denied, and all the issues are found in favor of the prevailing party, the proper form of the judgment file is that the issues, not the issue, are found in favor of such party. There is no error apparent upon the record. The other judges concurred.

CULLEN v. NEW YORK, N. H. & H. R. CO.
et al.

TALLMADGE et ux. v. SAME.
(Supreme Court of Errors of Connecticut. May 28, 1895.)

HIGHWAYS — CLOSING OF STREET OVER RAILWAY CROSSING — STATUTE — DAMAGES TO ADJUTING LOT OWNER.

1. Within the limits of Gen. St. §§ 3489-3491, providing that, on petition of any railroad company and notice to the "owners of land adjoining such crossing," the railroad commissioners may make alterations in the location of a highway or a railroad at a crossing of the two, to render the crossing less dangerous to the public, the powers of the commissioners over streets or highways in cities are paramount to those of the municipal authorities, and they may alter or discontinue a street, not only within the boundaries of the railway location, but also so much of it on either side as would otherwise be left in a condition of danger or be no longer of public necessity or convenience, and may determine at whose expense the alteration shall be made.

2. All owners of land or lots abutting on the portion of a street or highway closed by such an order of the railroad commissioners are "owners of land adjoining such crossing," within the meaning of the statute, and are entitled to have the damages for such discontinuance assessed, under its provisions for appraisal and payment of damages arising for the land "or other property" taken, the use of the street constituting a part of the value of their land; and, where no steps are taken for such appraisal, they may sue the parties made liable by the order of the commissioners therefor.

Appeal from superior court, New Haven county; George W. Wheeler, Judge.

Actions by Jeremiah Cullen and Oscar Tallmadge and wife against the New York, New Haven & Hartford Railroad Company and the city of New Haven to recover damages to house lots owned by them, respectively, by reason of the closing of a portion of Ferry Path, a street or highway in New Haven, on which such lots abutted. Ferry Path intersected two other streets, which crossed each other at right angles, diagonally, forming with them a triangle. That portion of it lying between such intersections, and on which the property of the plaintiffs abutted, was vacated or closed by order of the railroad commissioners, on petition of the defendant railroad company, to obviate a grade crossing of the railroad track. The commissioners' order required the expense of the change in the street to be paid jointly by defendants herein, the railroad company and the city. There was judgment in each case for the plaintiff, and defendants appeal. Affirmed.

George D. Watrous, Edward G. Buckland, and William H. Ely, for appellants. Henry

G. Newton, Philip P. Wells, and James P. Bree, for appellee.

BALDWIN, J. Two claims are made in support of these appeals: First, that, under the order of the railroad commissioners, only so much of Ferry Path was or could be closed as is included in the location of the railroad at the point of crossing; and, second, that, however this may be, the order was made in the exercise of the police power of the state, to remove a source of public danger, and therefore any resulting damage to private individuals is *damnum absque injuria*.

The application to the commissioners was founded on chapter 36 of the Public Acts of 1876, as amended by chapter 8 of the Public Acts of 1877 (Gen. St. §§ 3480-3491). These statutes provided that the directors of any railroad company whose road crosses or is crossed by a highway might bring a petition to the railroad commissioners, "therein alleging that public safety requires an alteration in such crossing, its approaches, the method of crossing, the location of the highway or railroad, or the removal of obstructions to the sight at such crossing, and praying that the same be ordered." Notice was then to be given to the owners of the land adjoining such crossing, and, after due hearing, the commissioners were to "determine what alterations or removals shall be made, by whom done, and at whose expense." In case the company could not "agree with the owner of the land or other property to be removed or taken under the said decision of the railroad commissioners, the damages" were to be "assessed in the same manner as is provided in case of land taken by railroad companies; the expense of such assessment to be paid in the same manner as the expense of the alterations." An appeal to the superior court, to be taken within 20 days, was given to any person aggrieved by the decision. The charter of the city of New Haven, which was enacted in 1881, provides (section 31) that the court of common council "shall have sole and exclusive authority and control over all streets and highways, and over all parts of streets and highways now or hereafter existing within the limits of said city, and shall have sole and exclusive power to lay out, make, or order new highways and streets within the limits of said city, and to alter, repair, and discontinue all highways and streets now or hereafter existing within the limits of said city." This section must be read in connection with the statutes existing at the date of its enactment which relate to the location of railroads and the powers of the railroad commissioners. It has always been the policy of the state to allow railroad companies, with the approval of the railroad commissioners, to lay out and construct their roads in the best possible line, and, if necessary for this purpose, to change the course of existing highways. Gen. St. §§ 3476, 3480, 3488, 3461. Such a change may result in the discontinu-

ance of a part of a highway, and the substitution of a new section of road, or the diversion of travel upon another existing highway. *Waterbury v. Railroad Co.*, 27 Conn. 146, 156; *Suffield v. New Haven & N. Co.*, 53 Conn. 368, 5 Atl. 366.

These provisions in the general laws control, so far as they apply, the effect of section 31 of the city charter. *State v. Railroad Com'rs*, 56 Conn. 308, 15 Atl. 756. The same reasons which induced the legislature to put in the hands of railroad companies the power, with the approval of the railroad commissioners, to alter or discontinue highways, in order to secure the best location for a railroad, apply also and with equal force to the case of an alteration or discontinuance of a highway, in order to promote the safe operation of a railroad. The act of 1876 appears to us to have been framed with this view. A steam railroad is a road in the safe maintenance and operation of which the whole state is directly interested. It is therefore put under the supervision of a board of state officers, with extensive powers. Their authority sometimes trenches upon what would otherwise be within the exclusive jurisdiction of some particular municipality; and, wherever it does, the latter must give way, for so only could any general policy of administration be carried out. The proper regulation of railroads, in their course through different towns, is a matter which is necessarily of more than local concern. As highways must give place to railroads where both cannot occupy the same ground, so municipal control and management of highways must yield, at times, to state control and management, when safety of railway operation is in question. It would deprive the statute for the removal of grade crossings, which is under consideration, of much of its efficiency were it to be construed as authorizing the discontinuance, under an order of the railroad commissioners, of only so much of a highway as lies within the limits of the railroad location. To accomplish the best results, it is plainly necessary that they should have power to discontinue also so much of the highway approaching the crossing on each side as otherwise would be left still in a condition of danger, or become no longer of public necessity and convenience.

That portion of Ferry Path between Alton and Main streets is about 540 feet in length. The railroad crossing was about 150 feet from Main street, and 40 feet wide. The discontinuance of the street at the point of crossing, only, would have left a short cul de sac on each side, diagonally bounding house lots, most of which ran through to other streets which were thoroughfares. We are of opinion that the discontinuance of these approaches, as ordered by the commissioners, was a matter properly within their jurisdiction, and fully justified under the terms of the application.

The statute provided that the commissioners should determine what "alterations or re-

movements" should be made, and "at whose expense." If the party by whom the changes were to be made could not agree with the owners "of the land or other property to be removed or taken," the damages were to be "assessed in the same manner as is provided in case of land taken by railroad companies"; the expense of such assessment to be paid in the same manner as the expense of the alterations. The general law as to taking land by railroad companies (Gen. St. § 3464) provides that, if they cannot agree with the parties interested, they may apply to any judge of the superior court for the appointment of appraisers, whose duty it shall be "to estimate all damages that may arise to any person from the taking and occupation of such real estate for railroad purposes." The reference in the statute to removals of property is obviously confined to removals of obstructions to the sight, which make the use of the crossing dangerous to those using the highway or the railroad. But the provision for the payment of the "expense of the alterations," and the assessment of damages in favor of the owners of land or other property taken, appear to be adequate to support the plaintiffs' actions.

The result of the order was to leave the house lot of the plaintiff Cullen, which adjoined the crossing, without any mode of ingress or egress, except by the permission of his neighbors, or by trespassing on the railroad location. His property was thereby "taken" in the strictest sense, and the railroad company, although five years elapsed before the institution of the action, took no proceedings for his relief under Gen. St. § 3462. The house lot of the plaintiff Tallmadge was more than 100 feet from the crossing, and was bounded by Monroe street in the rear. It was improved by a house fronting on and near to Ferry Path, the rear of which was more than 100 feet from the other street. He was one of those named in the original application of the railroad company, with reference to this crossing, as parties to be notified, and we think he may properly be regarded as one of "the owners of the land adjoining such crossing," within the spirit and intent of the statute, which obviously requires notice to all parties adversely interested. *Town of Westbrook's Appeal*, 57 Conn. 95, 102, 17 Atl. 368. All owners of land abutting on that part of the street discontinued, and so, presumptively, owners of the fee in half of it, came within that description, since the use and enjoyment of their property was necessarily and directly affected by the change. As the word "bridge" may include not only the principal structure, but the highway approaches on each side, so the words "land adjoining the crossing," as used in the act of 1876, in order to do justice to all concerned, must be taken to cover land adjoining the approaches to the crossing, which are or may be altered by the order of the

railroad commissioners. *Burritt v. New Haven*, 42 Conn. 200; *New Haven and Fairfield Counties v. Town of Milford*, 64 Conn. 568, 30 Atl. 768. The damages done to the owner of any such land, if his "land or other property" is taken, unless agreed upon with him, are to be assessed by appraisers, who are to include in their estimate (Gen. St. § 3464) all damages that may arise to him from its taking or occupation. In *Bradley v. Railroad Co.*, 21 Conn. 294, 300, it was held that to raise the highway approaches to a railroad bridge in such a manner as to obstruct the access to a store and lot abutting on the street was not a taking of the land, within the meaning of the constitution of this state, but was an act for which the railroad company was liable, under a provision in its charter, requiring it to pay all damages that might arise to any persons by its taking or injuring their real estate.

In the case at bar, the statute provides for all damages arising from the taking of the land "or other property" of the plaintiff. The owner of land abutting on a highway has an interest in the highway of a special and peculiar nature, which may well be considered as a part of his property. *Hubbard v. Deming*, 21 Conn. 356, 360; *Wheeler v. Bedford*, 54 Conn. 244, 7 Atl. 22; *Prink v. Lawrence*, 20 Conn. 117. If it is his only means of communication with the rest of the world, its maintenance is essential to the enjoyment of his land. If it is simply one of several means of communication, its discontinuance, while it would not destroy, must, of necessity, depreciate, his estate. To take away the street on which a man's house fronts is to take away a considerable part of its value. For such an injury to his property, we think, the statutes under consideration afford a remedy, even without the aid of the charter of the Shore Line Railroad Company, which makes it liable to pay all damages that may arise to any person from its entry upon or use of any franchises, lands, or real estate in the course of the construction or operation of its road. 4 Priv. Laws, 469. The resulting damage constitutes a legitimate part of the "expense" of the improvement, as to which provision is made in Gen. St. § 3489. Had that part of Ferry Path which was discontinued by the order of the railroad commissioners been discontinued by the city of New Haven, the plaintiffs would have been entitled to payment of just damages, to be assessed by the board of compensation, under section 47 of the city charter. The city was a party to the proceedings before the commissioners, and, in their apportionment of the expense that would be occasioned by their order, was subjected to the payment of half. This was a matter within their jurisdiction, and, as no appeal was taken by the city, their decision was final. *Town of Fairfield's Appeal*, 57 Conn. 167, 17 Atl. 764. Neither the railroad company nor the city having taken any

steps to procure an assessment of the plaintiffs' damages, they had a right to sue for them at law. *Holley v. Torrington*, 63 Conn. 426, 28 Atl. 613. They were also entitled to rely on the order of the railroad commissioners as establishing the liability of both defendants, and the obligation of each to pay half of the damages which might be assessed. No exception has been taken by either defendant to the rendition of a joint judgment.

The demurrer of the railroad company was properly overruled. So far as the city is concerned, as it raised no points of law in the court below, it can raise none here, which are not necessarily presented on the face of the judgment. But one such is suggested,—that the award of damages is excessive, because based upon a legal closing of Ferry Path for the entire distance between Main and Alton streets. That this was its basis is true; but, as we are of opinion that all that part of Ferry Path was legally closed, it constitutes no ground of appeal for either defendant. There is no error in the judgment of the superior court. The other judges concurred.

STATE v. FALK.

(Supreme Court of Errors of Connecticut. May 28, 1895.)

GAMING—INDICTMENT—EVIDENCE.

1. In a prosecution for violation of Pub. Acts 1893, c. 68, an indictment charging defendant with keeping a place with apparatus for registering wagers, and also for the purpose of buying and selling pools, as the keeping of a place for either of these purposes is forbidden by the statute, does not charge two offenses.

2. An indictment under Act 1893, c. 68, for being engaged in the business of transmitting money out of the state to be bet on horse races is insufficient, unless it charges that defendant had knowledge of the unlawful purpose for which the money was transmitted out of the state.

3. Under an indictment for keeping a place for transmitting money to be bet on races out of the state, it is no defense that defendant was concerned in it as a corporator or agent of a corporation authorized to do such business in another state.

Appeal from court of common pleas, Fairfield county; Walsh, Judge.

Albert Falk was convicted of violation of the act of 1893, to prevent pool selling, and appeals. Affirmed.

J. C. Chamberlain and Stiles Judson, Jr., for appellants. William B. Glover, for the State.

ANDREWS, C. J. The defendant was prosecuted for violating the provisions of chapter 68 of the Public Acts of 1893. The information contained three counts. He was found guilty on the first and third, and not guilty on the second. There was a motion in arrest of judgment which was overruled. One fine only was imposed. The defendant appealed to this court, and has assigned nu-

merous reasons for his appeal. If either the first or third count is a good one, then the complaint is sufficient to sustain the verdict and the judgment.

We think the first count is good. It does not charge two offenses. It charges the keeping of only one place. True, it charges that the place was kept with apparatus, etc., for the purpose of recording and registering bets and wagers, and for the purpose of buying and selling pools. But as the keeping of a place for either of these purposes is forbidden by the statute, and as these purposes may both exist at the same time, with reference to the same room or place, and so become each a part in one continuous act, charging them both in connection with the keeping of the place is not duplicity. It does not charge two offenses. It points out two purposes of the keeping of one place, and proof of either purpose, or of both of them, shows that one crime has been committed. *State v. Bosworth*, 54 Conn. 1, 4 Atl. 248; *State v. Burns*, 44 Conn. 149; *Barnes v. State*, 20 Conn. 232; *Francisco v. State*, 24 N. J. Law, 30; 1 Bish. Cr. Proc. § 348.

The third count charges that the defendant "was concerned in the business of transmitting money out of this state, by telegraph or other means, * * * there to be bet and placed on certain horses and horse races, * * * against the peace, and contrary to the form of the statute in such case provided." This language follows quite closely the words of the part of the statute on which the prosecution is based. This part of the statute seems to contemplate a person who is concerned in the business of transmitting the money of other persons than himself, out of this state, there to be bet. And the element in the business which makes it criminal by the statute is that the money transmitted out of the state "is there to be bet or placed on a horse race or other game." The business of transmitting money out of this state is not itself unlawful, and that is not forbidden, except when the transmitting is attended with the specified purpose. The third count undertakes to charge the defendant with being concerned with this business, and it is obviously defective unless it charges him with that ingredient of the business which alone makes it unlawful. In other words, the count is defective unless it charges that the defendant had knowledge of, or participated in, the unlawful purpose for which the money was transmitted out of the state. It seems to us that this count does not contain any such charge, and is therefore not a good count. Bearing in mind that it is the money of some other persons which the defendant is in the business of transmitting out of the state, there is nothing in the count to show that he had any knowledge of, or that he took any part in, the unlawful purpose for which the money was so transmitted. In ordinary cases it is sufficient to use the words of the statute in informations charging a statutory offense.

But there are instances to the contrary. The language of a statute creating an offense may be so general that an information upon it which used no greater particularity than the words in the statute would not charge any offense at all, or would not charge one with such sufficient certainty as the law requires. *State v. Costello*, 62 Conn. 128, 25 Atl. 477; 1 Bish. Cr. Proc. § 612.

During the trial of the cause, upon the cross-examination of a witness called by the state, certain questions were asked, which, on objection by the state, were excluded by the court. As to some of these questions the court finds distinctly that the witness had not, in chief, testified to anything which made them proper cross-examining questions. As there is no finding of the testimony given in chief by the witness, we cannot say that the ruling as to any of these questions was not correct. If we were at liberty to assume that the witness of whom these questions were asked was the witness who testified to the arrangement of the room or office kept by the defendant, the furniture and the apparatus there, and to the method in which the business there was carried on, we should be of the opinion that the questions were properly excluded. They were not properly cross-examining questions, but an attempt to have the witness put a construction upon the facts to which he had testified. It seems to have been conceded that the defendant kept the room. The state claimed that from the arrangement of the room,—the partitions partly of wood and partly of glass, with apertures having designations over them,—the furniture, the apparatus, and the method in which the business was there carried on, all of which had been fully detailed to the jury, it was kept for the purpose named in the first count of the information, and asked the jury so to decide. Whether or not these facts in evidence proved the ultimate fact which the state claimed, was for the jury to say. The objection to these questions was that they asked the witness to do what it was for the jury to do.

The defendant offered in evidence the charter of the Electric News & Money Transfer Company, a corporation organized under the laws of New Jersey, and made several claims therefrom. On objection this was ruled out. We are unable to see how the defendant was prejudiced by this ruling. The purpose for which the admission was claimed was irrelevant. If the business in which the defendant was concerned at the room kept by him at Bridgeport was in fact a business which is forbidden by the statute of this state, it would not be made lawful because it was a business authorized to be done in New Jersey by a charter of that state. And, if the business was unlawful, it would not benefit the defendant to show that he was concerned in it as a corporator or an agent of a foreign cor-

poration. The jury was to determine, on the business in which the defendant was concerned at the office kept by him in Bridgeport, whether it was lawful or not by the statute of this state, and to determine that question upon the evidence of what was actually done there, and not on the provision of any charter. Even if this were otherwise, the defendant has suffered nothing. Before the charter was offered in evidence, he had testified to all the material things which he claimed would be proved by the charter, and the state offered no witnesses to contradict him. Indeed, counsel, in their requests, and the court, in its instruction to the jury, assume the facts in this behalf to be as claimed by the defendant.

As to several of the assignments of error, there is nothing in the finding to show that the questions were made on the trial. Most of the others have become immaterial by reason of the conclusion reached upon the third count of the complaint. Those remaining we have considered, and we find no error. The other judges concurred.

HORTON et ux. v. NORWALK TRAMWAY CO.

(Supreme Court of Errors of Connecticut. June 7, 1895.)

SUNDAY TRAVEL—INJURY TO PASSENGER—LIABILITY OF CARRIER.

Gen. St. § 1569, providing that every person who shall do any secular business, or engage in any sport or recreation, on Sunday, shall be fined, when construed with Pub. Acts 1882, p. 12, and Pub. Acts 1883, p. 258, repealing the sections of former statutes prohibiting travel and the letting of vehicles for hire on Sunday, does not prohibit riding for pleasure, on a street car on Sunday, so as to exempt the carrier from liability for injury to the passenger.

Appeal from superior court, Fairfield county; Shumway, Judge.

Action by Gilbert Horton and Martha Horton against the Norwalk Tramway Company to recover damages for personal injuries to plaintiff Martha Horton. The injuries to plaintiff occurred while she was riding for pleasure on a Sunday afternoon, before sunset, in one of defendant's cars, which collided with another; and defendant contended that, as plaintiffs' cause of action arose out of an illegal contract for transportation on Sunday, plaintiffs are not entitled to recover more than nominal damages. From a judgment for plaintiffs, defendant appeals. Affirmed.

Robert E. De Forest, for appellant. Joseph A. Gray, for appellees.

BALDWIN, J. The defendant claims that the plaintiffs' cause of action is founded on a contract which was entered into in violation of Gen. St. § 1569. That section provides that "every person who shall do any

secular business or labor, except works of necessity or mercy, or keep open any shop, warehouse, or manufacturing or mechanical establishment, or expose any property for sale, or engage in any sport or recreation, on Sunday, between sunrise and sunset, shall be fined not more than four dollars, nor less than one dollar." To determine the meaning of these provisions, it is necessary to examine their history. Our statutes, so late as the beginning of this century, required every one to attend public worship on Sunday, unless necessarily prevented, and forbade, not only the transaction upon that day of any manner of secular business, upon land or water, but also all recreation, all traveling, except from necessity or charity, and even leaving the house, "unless to attend upon the public worship of God, or some work of necessity or mercy." St. 1808, tit. 140, p. 577. Of these provisions the following only remained in force in 1875 (Revision of 1875, tit. 20, c. 9, pp. 521, 522):

"Sec. 57. Every person, who shall travel, do any secular business, or labor, except works of necessity or mercy, or keep open any shop, warehouse, or manufacturing or mechanical establishment, or expose any property for sale, or engage in any sport or recreation on Sunday, between sunrise and sunset, shall be fined not more than four dollars, nor less than one dollar; but haywards may perform all their official duties on said day.

"Sec. 58. Every person, who shall be present at any concert of music, dancing, or other public diversion on Sunday, or on the evening thereof, shall be fined four dollars."

"Sec. 62. Every proprietor or driver of any vehicle, not employed in carrying the United States mail, who shall allow any person to travel therein, on Sunday between sunrise and sunset, except from necessity or mercy, shall be fined twenty dollars, to be paid to the town in which the offense is committed." In 1882 section 57 was amended by striking out the words "travel or," and in the following year section 62 was repealed. Pub. Acts 1882, p. 124; Pub. Acts 1883, p. 253. In 1887 (Gen. St. § 3523) it was provided that no railroad company shall run any train on any road operated by it within this state, between sunrise and sunset on Sunday, except from necessity or mercy, or for the carriage of mails or preservation of freight. The terms of this statute, the manner in which it was incorporated in the Revision of 1888, and the provisions of the act of 1893,

160, p. 307, "concerning street railways," are such as to make it clear that the legislation of 1887 was not intended to affect railroads of the latter description. In 1889 it was enacted that "no person who receives a valuable consideration for a contract, express or implied, made on Sunday, shall demand any action upon such contract on the ground that it was so made, until he restores such consideration." Pub. Acts 1889, c. 130,

p. 72. In view of this course of legislation during the last twenty years on the subject of the observance of Sunday, it is plain that the prohibitions of secular business and engaging in recreation contained in Gen. St. § 1569, must be read with reference to the environment in which they appeared in the Revision of 1875. The act of 1882 was obviously intended to make traveling on Sunday no longer punishable as an offense against the law, and that of 1883 was passed to relieve from any penalty the owner or driver of the vehicles used for such travel. The defendant has the general powers, and is subject to the general restrictions, appertaining to street-railway companies. 10 Priv. Laws, p. 1068; Sp. Acts 1893, p. 975, § 8. Nothing in its charter, or in the public statutes of the state, makes any special provision as to the operation of its road on Sunday. To continue its operation upon that day was therefore not prohibited. *Carroll v. Railroad Co.*, 58 N. Y. 126, 132. The use of vehicles, in which to ride to church or go to the performance of any work of necessity or mercy, on Sunday, has always been permissible. The letting of vehicles for Sunday travel on the highway, whatever its purpose might be, has not been forbidden since 1883. The greater includes the less, and, when the statute which might have made it illegal to let an entire street car for Sunday use was repealed, it ceased to be illegal to admit a single passenger to a seat in one upon that day, or to take the usual fare from him for such a ride. It is true that engaging in any recreation on Sunday is still prohibited by Gen. St. § 1569, and that the term "recreation" may be used in a sense which would include taking a ride for pleasure in a street car. That it is not so used, however, in the statute in question, is fairly to be implied from the action of the legislature in 1882.

The contract between the company and Mrs. Horton being a valid one, it is unnecessary to inquire whether the plaintiffs' complaint is so drawn as to make it the basis of their action. There is no error in the judgment appealed from. The other judges concurred.

WHITE et al. v. HOWD.

(Supreme Court of Errors of Connecticut. May 28, 1895.)

APPEAL—REVIEW—PRACTICE.

1. On review, under Act 1893, by motion for new trial, on the ground that the verdict is against the evidence, error in admission or exclusion of evidence cannot be considered.

2. On review by "appeal," under Act 1882, for revision of questions of law arising on the admission or exclusion of evidence, a finding by the trial court is essential.

Appeal from court of common pleas, Litchfield county; Warner, Judge.

Action by James T. White and others against Salmon G. Howd. There was a verdict and judgment for defendant, and

plaintiffs appeal, and also file a motion for a new trial. New trial denied, and appeal dismissed.

Charles D. Burrill and John T. Hubbard, for appellants. Samuel A. Herman, for appellee.

HAMERSLEY, J. Action on contract of sale to recover \$20 damages. The case was tried to a jury, and the issue found for the defendant. The plaintiffs filed a written motion for a new trial on the ground of a verdict against evidence; and, under the provisions of chapter 51 of the Public Acts of 1893, the trial court has reported the evidence to this court for its action on the motion. This report contains certain "rulings" of the trial court on the admission and rejection of evidence. Such rulings do not belong to the record. The statute authorizes only a report of the evidence submitted to the jury, and the only question before this court is whether "the verdict was against such evidence." Errors in the rulings of the court, whether in the admission and rejection of evidence, or in the charge to the jury, may be reviewed on appeal, but cannot be considered in passing upon this motion. It is clear that the evidence reported was sufficient to sustain the verdict.

The record before us also contains what purports to be an appeal, assigning, as reasons of appeal, specified errors of the court in the admission and rejection of evidence. There is no valid appeal. A finding by the court is necessary to the proper presentation of the questions of law arising on the admission and rejection of evidence; and the statute requires such finding to be made by the court, upon the request of the party intending to appeal, before an appeal for the revision of such questions of law is taken. The rules of court require such request to be in writing, and to contain a draft of the proposed finding and a statement of the questions of law, arising thereon, which it is desired to have reviewed. This request must be filed with the clerk in duplicate, one copy for the judge, and one copy for the counsel on the opposite side, who are entitled to file a counter finding. Neither the statute nor the rules have been complied with. No finding was made by the trial judge; and, from the statements made in the briefs on both sides, it appears that no request for a finding was made by the plaintiffs' counsel. If the appeal under such circumstances could be operative for any purpose, it would be only to review questions of law arising upon the pleadings; but the plaintiffs claim no error as to any such question, either in their briefs or reasons of appeal. Aside from these defects, however, the appeal is void, because it appears that the court below has rendered no judgment. It is plain, on reading the record, that there is a serious question as to the admissibility of some of the evidence

admitted by the court. The plaintiffs have been deprived of their right to an appeal on this question by the failure of their counsel and of the trial judge to understand or to obey the provisions of the law. Such failure to observe the rules necessary for bringing a case before this court, and which in a less degree has characterized some other cases, seems to call for a statement which, except for such instances, would be deemed wholly unnecessary.

Besides the writ of error, the mode by which relief can be sought in this court includes the appeal, the reservation, and the motion for new trial for verdict against evidence. Each of these proceedings constitutes a distinct process for bringing before this court the questions to be adjudicated. "Appeal" is the name given a proceeding for the revision of questions of law arising in a trial, which, prior to 1882, were brought here by motion in error or motion for new trial. The name in no way alters the nature of the proceeding. The act of 1882 substituted such appeal in place of the former methods, authorizing the combining of both in one process. The appeal simply performs the office of the old motion for new trial and motion in error. It is entirely different from the process, called "appeal," which transfers a case tried in one court to another court for retrial. *Morse v. Rankin*, 51 Conn. 326; *Schlesinger v. Chapman*, 52 Conn. 271; *Styles v. Tyler*, 64 Conn. 457, 30 Atl. 165. The process of writ of error has remained unchanged. If the questions to be revised on appeal are such as were formerly revised on motion in error, no finding by the court is ordinarily necessary; but the questions of law sought to be revised must clearly appear from the record, and be specifically stated in the reasons of appeal. If the questions to be revised are such as were formerly revised on motion for new trial, a finding by the court is essential. In order to properly perfect an appeal, the provisions of the General Statutes (section 1129 et seq.) and of the general rules of practice (article 17 [26 Atl. xv.]) must be strictly complied with. The reservation is a process by which any question of law may, at any time before judgment, and with the consent of all parties to the record, be reserved by the trial court for the advice of this court. In such case, the judgment of this court is in the form of advice, to which the trial court is bound to conform its action. The motion for new trial for verdict against evidence is a peculiar process authorized by chapter 51 of the Public Acts of 1893, by which the single question of the sufficiency of the evidence to support the finding of the jury on the issues joined is brought to this court for decision. The process may consist of a copy of the pleadings, showing the issues joined, the verdict and judgment, the motion for a new trial on the ground that the verdict is against the evidence, and the report of the

evidence to this court by the trial judge. This process is authorized at the will of the defeated party, and the whole expense of preparing and printing the record for this court is thrown upon the state. The cases are frequent where the defeated party is dissatisfied with the verdict, but are rare when the court can say, as a question of law, that the verdict is against the evidence. Since this statute was passed, motions under it have been brought here possessing no merit, and which no attorney would advise his client to bring if the costs of preparing the record were taxable against the unsuccessful party. In such case, the motion should never be filed. This process is distinct from the appeal. And while, in a proper case, both the appeal and the motion may be allowable, and, for convenience, be printed in one record, and argued together, yet they should be printed separately, and the record must show, as to each, the steps necessary to perfect the process; but matter printed in full under one process may be referred to in the other without repetition.

The motion for new trial is denied. The appeal is dismissed. The other judges concurred.

STATE v. HOJA.

(Supreme Court of Errors of Connecticut. May 28, 1895.)

INTOXICATING LIQUORS—ILLEGAL SALES.

Gen. St. 1888, §§ 3078, 3087, authorize any licensed dealer in spirituous liquors to solicit and procure orders for his goods in any licensed town in the state. Act 1889, p. 112, provides that "no person shall act as agent to procure and deliver spirituous and intoxicating liquors to any person or firm not legally authorized to sell the same, without a written order," etc. *Held*, that the latter act refers only to persons acting as the agents of the buyer, and not to one acting as agent of the seller.

Appeal from court of common pleas, Fairfield county; Carroll, Judge.

Harry Hoja was convicted, on appeal from a justice court to the court of common pleas of Fairfield county, of a violation of the liquor laws, and appeals. Reversed.

J. C. Chamberlain and Nathaniel W. Bishop, for appellant. William B. Glover, Pros. Atty., for the State.

HAMERSLEY, J. In 1882 an act was passed revising the law regulating the sale of spirituous and intoxicating liquors, and repealing all statutes on that subject then in force. Section 1, pt. 6, of this act imposed a penalty on "any person who without a license therefor shall, by sample, by soliciting or procuring orders, or otherwise, sell or exchange, * * * or shall own or keep with intent to sell or exchange, any spirituous and intoxicating liquors." Section 11, pt. 4, of the same act provided, "Nothing in this act contained shall prohibit any dealer in spirituous and intoxicating liquors duly licensed

under the provisions of this act from soliciting and procuring orders in any town in this state in which such liquors may legally be sold." These provisions were incorporated into sections 3087 and 3078 of the General Statutes of 1888. Under this law, any dealer licensed to sell in his own town can sell his goods in any other license town, "by soliciting and procuring orders"; and it is immaterial whether such sale is made by himself personally, or through his duly-authorized agent. In 1889 the following act was passed: "No person shall act as agent to procure and deliver spirituous and intoxicating liquors to any person or firm not legally authorized to sell the same, without a written order from such person or firm; which order shall in each case specify the kinds and quantity of each kind of liquor ordered, and the name of the person or firm to whom it is to be delivered. Such agent shall cause the person from whom such liquors are procured to indorse on each order the date when such liquors are procured, and the kinds and quantities furnished. Such agent shall keep said orders on file, and when called upon to do so by any prosecuting agent of the county, or by any grand juror of the town in which said liquors are delivered, shall produce any order or orders which may be called for by such officer; and any person who shall procure and deliver spirituous and intoxicating liquors to any person, not legally authorized to sell the same, without an order made and endorsed as above provided shall be deemed to have sold said liquors to the person to whom and in the town in which it is delivered; and on due proof thereof shall be subject to the penalty provided in section 3087 of the General Statutes." Laws 1889, p. 112.

This is a penal statute, defining a crime, and its language cannot be stretched to include any crime not clearly defined. The act contains no repealing clause, and cannot repeal existing legislation on the same subject, unless, by a reasonable construction, it is inconsistent with that legislation. The act says "any person" who shall procure and deliver liquors under the circumstances described shall be deemed to have sold the liquor to the person to whom, and in the town in which, it is delivered, and shall be punished as for a sale without license. It would hardly be claimed that this language makes it a crime in every licensed dealer to so procure and deliver to his customers, at his own place of business, the liquors he is licensed to sell. The act says that no person shall "act as agent to procure and deliver" liquors to any person under the circumstances described. This language cannot be held to repeal the existing law authorizing any licensed dealer to sell through his agent, by "soliciting and procuring orders," unless it reasonably expresses such intention. If the agent to procure and deliver liquors, mentioned in the act of 1889, is the agent of the person for whom and to whom the liquors

are procured and delivered, the act is not inconsistent with the act authorizing a licensed dealer to sell by soliciting and procuring orders; and we think this construction is not only a reasonable one, but the only reasonable construction. The language of the act plainly indicates an agent of the person for whom and to whom the goods are to be procured and delivered. When we speak of one acting as agent to procure and deliver goods under an order for that purpose given by the person for whom the goods are to be procured, the natural inference is that he is acting as agent for the person who gives the order. It is not a natural inference that in procuring the goods he is acting as agent of the person from whom he procures them. The object of this act evidently is to provide for evidence that may be useful in detecting and prosecuting any person who, whether in a license town or not, owns and keeps liquors with intent to sell, without having a license therefor. The object is evidently not to limit the existing right of a licensed dealer to sell his goods in a license town. If such were its object the act would go further, and say that no licensed person shall procure an order unless the same is written, etc. That it clearly does not do, and it would require precise and unmistakable language to express an intention to make a servant a criminal for an act of his master, done through the servant, which is lawful when the master does the act by himself instead of by another. In pursuance of the evident object of the act, limitations are put on the power of all unlicensed persons to purchase liquor surreptitiously for illegal use; and every person who acts as their agent in procuring liquor is required to obtain and keep written evidence of the amount and kinds so procured, as well as of the time when, and of the persons from whom, he procures it, and is punished if he acts as such agent without obtaining such evidence. The language of the act may be sufficiently clear to authorize the punishment of any person who acts as the agent of any unlicensed person, whether in a license town or not, in procuring for and delivering to such unlicensed person spirituous liquors without an order made and indorsed as provided in the act, but it certainly is not sufficiently clear to authorize the punishment of the agent of a licensed dealer simply for soliciting or procuring orders for such dealer in a license town.

In this case the defendant was complained against for selling liquors without a license, and on that complaint was tried by jury, and convicted. There was no serious conflict in the evidence, and it appeared that the defendant was the servant of one John Sullivan, a liquor dealer duly licensed in the town of Bridgeport, and drove his delivery wagon and delivered his orders; that, while driving the wagon in the town of Westport (assumed by the case to be a license town), he was told orally by one McGovern, who

was in the habit of ordering beer of the defendant, to bring him a case of lager the next time he came through; that the next morning, before starting from Bridgeport, he put into the wagon a particular case of beer for McGovern; that whenever he got an order he put it on his order book, and was in the habit each morning of loading on his wagon as many cases as he had orders for, and always had as many cases as he had orders; that he delivered this case of beer to McGovern, at his residence, in Westport, and McGovern then paid him one dollar for the beer. The state claimed this transaction was a sale of liquor by the defendant without having a license therefor, in violation of section 3087. The defendant claimed it was a sale by Sullivan through his agent, the defendant, and authorized by his license, under the provisions of section 3078. The reasons of appeal assigned claim that the court below erred in refusing to comply with the defendant's request to charge, and in the charge as given. It is unnecessary to consider the requests or charge in detail, as the view taken of one passage in the charge, to which the defendant excepted, is decisive of the case. The court, after having stated the law to be that "it is illegal for any person to act as agent to procure and deliver spirituous and intoxicating liquors to any person or firm not legally authorized to sell the same, without a written order for the same," charged the jury as follows: "If you are satisfied beyond a reasonable doubt that he [the defendant] was acting as agent for Mr. Sullivan, he is equally guilty as if he was acting as agent for Mr. McGovern." For the reasons above given this instruction is clearly erroneous. There is error in the judgment of the criminal court of common pleas. The other judges concurred.

SHEA v. NEW YORK, N. H. & H. R. CO.
(Supreme Court of Errors of Connecticut. June 7, 1895.)

DISTRICT COURT OF WATERBURY—TIME TO APPEAL
—CONSTRUCTION OF STATUTES.

1. Gen. St. § 715, provides that, from all final judgments or decrees of the district court of Waterbury, either party aggrieved may appeal to the next term of the superior court to be held at Waterbury, provided that said "next term" shall be construed to mean the next return day to said court. *Held*, that the "next return day to said court" means the next return day after the day upon which the judgment appealed from was rendered, and that a party had no right of appeal, and the court no power to allow an appeal, to any other day.

2. Gen. St. § 715 (Sp. Acts 1879, p. 155), provides that appeals from the district court of Waterbury to the superior court shall be made returnable to the next return day of the superior court. Gen. St. § 794 (originally passed as a general act in 1886), provides that process in civil actions brought to the superior court, which shall include all appeals, shall be made returnable upon the first Tuesday of any month, and all process shall be made returnable to the next return day, or the next but one, to which it can be made so

returnable. *Held*, that the passage of said section 794 did not affect section 715, but that the latter section, applicable to appeals from the district court of Waterbury, is an exception to the former.

Appeal from superior court, New Haven county; George W. Wheeler, Judge.

Action by Michael Shea, administrator, against the New York, New Haven & Hartford Railroad Company for damages for causing the death of plaintiff's intestate. From a judgment in his favor for nominal damages, plaintiff appealed to the superior court in New Haven county, where defendant pleaded in abatement that the appeal was taken too late. A demurrer to the plea was overruled, and plaintiff appeals. Affirmed.

John O'Neill, for appellant. John P. Kellogg, for appellee.

HALL, J. From a judgment of the district court of Waterbury rendered on the 24th of April, 1894, the plaintiff, on the 3d of the following May, appealed to the superior court next to be holden at Waterbury. In the superior court the defendant pleaded in abatement of the appeal, upon the ground that it was taken to the first Tuesday of June, when it should have been taken to the first Tuesday of May. From the judgment of the superior court sustaining the plea in abatement, the plaintiff appeals to this court.

The plaintiff's contention that his appeal from the district to the superior court was properly taken to the first Tuesday of June is based upon two grounds: First, that the words "next return day," in section 715 of the General Statutes, mean the next return day after the allowance of an appeal, which, it is claimed, may be allowed by the court at any time during the term in which the judgment is rendered; second, that by section 794 of the General Statutes an appeal may be taken from the district court of Waterbury to either the next, or the next return day but one, of the superior court at Waterbury, after the judgment. The defendant claims that section 794 does not apply to appeals from the district court of Waterbury, and that the only right of appeal from that court to the superior court is granted by section 715, and is limited to a right to appeal to the next return day of the superior court after the judgment from which the appeal was taken, which in the present case was May 1st. By section 715 it is provided that, from all final judgments or decrees of the district court of Waterbury, either party aggrieved may appeal "to the next term of the superior court to be held at Waterbury." At the close of the section is the following provision: "And provided also, that the next term of the superior court to be held at Waterbury, within and for the county of New Haven, shall be construed to mean the next return day to said court." We think it clear that by "the next return day to said court" was meant the next return day to the su-

perior court at Waterbury after the day upon which the judgment appealed from was rendered, and that by the provisions of this section the plaintiff had no right of appeal, and the court no power to allow an appeal, to any other day. Under section 715 the right to appeal existed immediately upon the rendering of the final judgment. This section provides but one day to which an appeal may be taken. That day is the next return day after the right to appeal exists. The next return day to which the plaintiff could have appealed, in this case, was the first Tuesday of May, which was May 1st. To sustain the plaintiff's claim that the court may allow an appeal at any time during the term in which the judgment is rendered would be, under the present arrangement of the terms of the district court, to permit an appeal to be taken to the superior court after the expiration of nearly six months from the date of the final judgment. The power of the district court to allow an appeal is defined by the law which gives to parties the right of appeal. It does not result from the control which the court may have over its judgments during the term in which they are rendered.

Was the plaintiff entitled to appeal to the first Tuesday of June, under the provisions of section 794? The language of that section is as follows: "Process in civil actions, brought to the superior court, which shall include all appeals, transfers, applications for relief and removals, shall not be made returnable to any term or session of said court, but shall be made returnable upon the first Tuesday of any month, except July and August; provided that service be completed at least twelve days inclusive before such return day; and all process shall be made returnable to the next return day, or the next but one, to which it can be made so returnable." It is further provided that this section shall not affect the time for taking appeals from probate, or from the doings of commissioners. By an act passed in 1876 (Pub. Acts 1876, p. 100), amended in 1877 (Pub. Acts 1877, p. 202), all civil process returnable to the superior court in Hartford, New Haven, and Fairfield counties was made returnable, in addition to the first days of the respective terms, to the first Tuesday of any month except July and August, with a proviso that the return day should not be more than 15 weeks from the date of the process, and that service be completed at least 12 days before the return day. A special act passed in 1879 (Sp. Acts 1879, p. 155), which granted the right of appeal to the next term of the superior court held at Waterbury, from the city court of Waterbury (which in 1881 became the district court of Waterbury, with the same jurisdiction and right of appeal,—Pub. Acts 1881, p. 68), contained this provision: "And the next term, as mentioned in this act, shall be construed to mean the

next return day to said superior court." In 1886 an act was passed making civil process, including all appeals, returnable on the first Tuesday of any month, except July and August, and all process returnable to the next return day, or the next but one, to which it could be so made returnable. Pub. Acts 1886, p. 629. This act contained substantially the same provisions as section 794 of the General Statutes, together with a clause repealing all acts or parts of acts inconsistent therewith. We do not think that the provision of the act of 1879 limiting the right of appeal from the district court of Waterbury to the next return day of the superior court was repealed or affected by this act of 1886. While there was a reason for extending the time for the return of process, in some civil actions, beyond the first return day, and especially of those which were required to be served at least 12 days before the return day, there was no reason why appeals like that under consideration, and which require only the furnishing of a bond for their completion, should not be made returnable upon the next return day after the judgment. Again, the act of 1879 was a special act,—a part of the city charter,—which would not be repealed by a general act, unless the language of the latter made it clear that such was the intention of the legislature. *Coe v. Meriden*, 45 Conn. 156; *New York, N. H. & H. R. Co. v. Bridgeport Traction Co.*, 65 Conn. 410, 32 Atl. 953. That it was not the intention of the legislature of 1887—which, in adopting the Revision of 1888, enacted section 794—to extend the time for taking appeals from the district court of Waterbury to the superior court is clearly shown by the fact that the same legislature, in section 715, re-enacted the law of 1879 concerning the return day of appeals from the district court of Waterbury, and included it among the general laws of the state. Unless it was intended that the two sections should stand together,—section 715 forming an exception to section 794, as to the return day of appeals,—there is no apparent reason why the same legislature should have enacted both sections. A similar exception to the operation of section 794 is found in section 683, making appeals to the superior court from justice courts, in certain counties, returnable to the first Tuesday of the month next succeeding the allowance of the appeal. There is no error in the judgment appealed from. The other judges concurred.

DENNEHY v. O'CONNELL.

ROCHE v. SAME.

(Supreme Court of Errors of Connecticut. May 28, 1895.)

LIBEL—PRIVILEGED COMMUNICATION—MALICE—EVIDENCE—PLEADING.

1. To prefer written charges against a policeman before the board of police commissioners, to

the effect that he had committed perjury, falsely and with the deliberate purpose of injuring said policeman and causing his dismissal from the police department, is actionable.

2. Where, in an action for libel, plaintiff was asked on cross-examination whether he had a dispute with defendant about a certain bill, it was within the discretion of the court to permit plaintiff to explain what the claim was.

3. On a trial for illegally selling liquor, two policemen testified that they found a pipe with a faucet in a certain bedroom on defendant's premises, and that beer was drawn therefrom. Afterwards defendant preferred charges against said policemen, before the board of police commissioners, for perjury in so testifying. *Held*, in an action for libel by said policemen for maliciously preferring said charges, in which action said policemen affirmed the truth of their testimony as to said pipe, that it was not error to refuse to permit defendant to testify that on the trial for illegally selling said liquors, which took place nine days after defendant's arrest, defendant asked the judge to inspect his premises.

4. In said action for libel, one M. testified that he put in said pipe on defendant's premises. At the hearing before the police commissioners, a witness testified that M. had told him (the witness), that he (M.) had put in said pipe. M. thereafter, at said hearing, admitted that the pipe was put in by him. *Held*, in the action for libel that it was not error to refuse to permit defendant to show the order in which the witnesses were called at said hearing, though defendant asserted that the testimony of said M. was thereby influenced, it not appearing that defendant expected to prove that the testimony so given was false.

5. It was not error to refuse to permit defendant to show that other testimony given against him by plaintiffs on the trial for illegally selling liquors, and specified in the charges preferred against plaintiffs, was false, and that the allegation in the charges relevant thereto was true, where plaintiff's complaint was based only on the falsity of the charges as to plaintiff's testimony relative to said pipe.

Appeal from superior court, New Haven county; George W. Wheeler, Judge.

Actions by Jeremiah Dennehy and John Roche against Michael O'Connell for libel. There were findings and judgments for the plaintiffs for \$800 and \$700, respectively, and defendant appeals. *Affirmed*.

Defendant, Michael O'Connell, was prosecuted and convicted in the city court for illegally selling liquors. On appeal to the court of common pleas, the jury disagreed on a trial held on November 6 and 7, 1889, and the case was dismissed. Afterwards said Michael O'Connell preferred charges against Jeremiah Dennehy and John Roche, who were members of the police department of the city of New Haven, before the board of police commissioners, charging them with perjury in the prosecution against him in a court of common pleas. The plaintiffs were summoned before said board, and tried upon said charges. The trial continued through several sessions of said board held in February and March, 1890. The defendant appeared, and testified, and then claimed that plaintiffs had on the trial of said court of common pleas committed perjury. The plaintiffs were discharged by said board, and afterwards brought this action for libel.

The complaint in the first case is as follows: "(1) The plaintiff is, and for more than three years last past has been, a policeman under

the police department of the city of New Haven. (2) On February 8, 1890, the defendant published in certain charges preferred by him against the plaintiff before the board of police commissioners of the city of New Haven, in a certain written document purporting to be charges against the plaintiff, and addressed and delivered to the board of police commissioners of the city of New Haven, the following words concerning the plaintiff: 'One Jeremiah Dennehy and one John Roche, then and now policemen of said city, testified at said trial [meaning a certain trial had in the court of common pleas, criminal side, held at New Haven, on November 8, 1889, wherein the defendant was charged with unlawfully selling liquors at No. 227 Chapel street, in said city of New Haven, on Sunday, the 20th day of October, 1889] that they entered said premises on Sunday, about four o'clock in the afternoon, and found a pipe with faucet connected therewith in a certain bedroom, and said Dennehy testified that he drew beer from said faucet. All of said testimony was false, and known by both said policemen to be untrue,'—a copy of said written document containing said publication being the Exhibit A now on file in this cause. (3) The defendant meant thereby that the plaintiff had willfully and deliberately committed perjury in so testifying in said court of common pleas. (4) Said publication was false and malicious, and was known by the defendant to be untrue, and was published by the defendant with the deliberate purpose and intention of injuring the plaintiff, and causing his dismissal from said police department. The plaintiff claims damages," etc. Defendant interposed a demurrer to the complaint, on the ground that the writing declared upon was a privileged communication. The demurrer was overruled, and defendant answered, alleging that the allegations relating to the plaintiffs, appearing in said Exhibit A, annexed to said complaint, were true.

The court found, inter alia, as follows: "(14) I find that the defendant knew the plaintiff testified in said court of common pleas to the truth, and that the charges which the defendant published to the board of police commissioners, as set forth in Exhibit A, and which are alleged in these complaints, were false. (15) On October 28, 1889, the defendant began a suit against Dennehy, upon a groundless cause of action, for the sum of \$506.15, for the purpose of showing in the trial in the court of common pleas that prior to October 20, 1889, Dennehy had had a dispute with the defendant regarding the subject-matter of this suit of October 28th; and, upon the trial herein, the defendant offered, in substantiation of his bill of particulars in said suit of October 28th, false and fraudulent entries upon his journals and ledgers of transactions which never took place, and testified to dealings with Dennehy none of which ever took place. * * * (19) I find that said charges of perjury as published by the de-

fendant in Exhibit A were false, and then known to the defendant to be false, and that in publishing said charges the defendant acted with wanton and corrupt malice and deliberation, and published the same for the purpose of disgracing the plaintiffs, and securing their dismissal from the police force. (20) Upon the cross-examination of the plaintiff Dennehy he was inquired of as follows: 'Q. Didn't you and he have some dispute about a liquor bill that he claimed that you had run up over there in Blatchley avenue at that time? A. When? Q. Why, in 1889. * * * A. Oh, there was a bogus suit brought against me at that time by Michael O'Connell for \$506.15, or something of that kind, but I never had a dispute, and never had a conversation with him, nor I never owed him any bill. I never had any dealings with him. * * * Mr. Stoddard: The records will show it, won't they? Mr. Webb: Well, we will lay in the file in the suit of O'Connell against Dennehy.' * * * (21) The plaintiffs offered in evidence the testimony of Charles F. Bollmann. * * * Upon cross-examination of the witness, he was asked if he was the plaintiff in the case of Bollman v. Loomis, reported in the 41st volume of Conn. Reports. The plaintiffs objected. The defendant's attorney claimed it, and stated that, if the witness answered in the affirmative, he should offer such case in evidence to affect the credibility of the witness. The court excluded the question, and the defendant duly excepted. (22) Upon the trial the defendant took the stand, and was inquired of as follows: 'Q. I will ask you now when was the first time that you ever heard that there was a claim made that there was a pipe came up through that room? A. That very day in the city court. In the police court. Q. Now, I will ask you if at your request your counsel asked the judge to go down there and look at the premises that day? (Objected to by plaintiff. Claimed to show that the instant the claim was made, and before opportunity for change, the defendant requested the judge trying the cause to go and look at the premises, to determine from inspection whether there was any pipe there, or evidence of any. The court excluded the question, and the defendant duly excepted.)' (23) The plaintiff offered the testimony of one McDonald that he had placed a pipe in said room by cutting out a piece of said floor. Upon the cross-examination, he said that said Roche came to him in the winter of 1890, pending said charges, and requested him to tell what he knew of the matter to the police commissioners; that he did not agree to do this; that after this, of his own motion, he went to said Catherine O'Connell, and told her she knew he had put said pipe in said room, and requested her to let this matter drop; failing in this, he went to one of the police commissioners, and told him in confidence, for his own use and that of the other members of the board, that he put said pipe in the room; that he was subsequently

called before said board on a summons. The defendant offered to prove by the stenographer's notes of the testimony taken at the hearing before the board of police commissioners, upon the charges contained in Exhibit A, that, before McDonald testified on the hearing on said charges, Dennehy called one Patrick McGovern, a policeman, who testified, in the presence of McDonald, that McDonald told him that he put the pipe in said room, and subsequently McDonald was placed on the stand, and testified that he did put said pipe in. The defendant claimed this evidence to show the manner and circumstances under which McDonald testified before said board, and the compulsion resorted to, to compel McDonald to so testify, but did not offer to contradict anything testified to by said McDonald in this case, by the testimony of said McGovern. Upon objection, the court excluded the evidence, and the defendant duly excepted. (24) The defendant at the trial offered to prove that the plaintiff Dennehy had testified falsely upon the defendant's trial in the court of common pleas, regarding the color of the paint in the room in question, to show that that allegation in Exhibit A was true, but did not claim to offer this evidence for the purpose of contradicting anything Dennehy had testified to in this trial. The plaintiff objected, upon the ground that that issue was not raised upon the pleadings. The court excluded the evidence offered, and the defendant duly excepted."

Charles S. Hamilton and William B. Stoddard, for appellant. John W. Alling and James H. Webb, for appellees.

ANDREWS, C. J. The demurrer to the complaint was properly overruled. The article published by the defendant might have been privileged if made without malice. As it is charged to have been made with malice, and "with the deliberate purpose and intention of injuring the plaintiff, and causing his dismissal from the police department," it is clearly actionable. A publication which would be privileged if made without malice may become libelous if maliciously made. The general rule in respect to privileged communications is that the plaintiff is required to bring home to the defendant the existence of malice as the true ground of his conduct. Malice may be alleged and proved to have existed in proceedings before such tribunal as is referred to in the complaint, although such tribunal may have been the appropriate authority for redressing the grievance represented to it; and proof of express malice in any written publication, petition, or proceeding addressed to such tribunal will make the publication, petition, or proceeding actionable. *Folk. Starkie, Sland. 506, 507; Blakeslee v. Carroll, 64 Conn. 235, 29 Atl. 473.*

Upon the cross-examination of the plaintiff, the defendant's counsel asked him if the defendant and himself had not had a dispute

about a liquor bill. This question was asked for the purpose of discrediting the plaintiff, and to show that he was interested. The plaintiff had the clear right to explain that claim, and to show just what it was. Every witness, whether on his examination in chief or on his cross-examination, has a natural right to explain and make clear the evidence he has given. *Swift, Ev. 111.* The whole matter was within the discretion of the judge, and is not the subject of error.

The question asked of the witness Bollmann was properly ruled out. It is difficult to perceive why it was asked.

The defendant offered to show that, at the time he was on trial in the police court on the charge of violating the liquor law, he asked the judge of that court to go and view the premises where it was claimed the pipe had been seen. This offer was ruled out. As the trial in the police court was nine days after the time when the witness claimed to have seen the pipe in the bedroom, the willingness of the defendant to have the room examined on that day might have suggested to the police court that the room was not on that day in the same condition it was on the day the witness claimed to have seen it. The offer amounted to no more than a declaration by the defendant that he was innocent. There was no error in the ruling.

The witness McDonald testified that he put the pipe in the bedroom, in the place where the plaintiff stated that he had seen it. McDonald had testified to the same thing on the hearing before the police commissioners. At the present trial the defendant claimed to show that, at the said hearing before the police commissioners, one McGovern was called as a witness, and testified that McDonald had told him (McGovern) that he (McDonald) had put the pipe into the bedroom. It is not claimed that either McGovern or McDonald testified falsely. It is claimed now that the order in which these witnesses were called at the police hearing had some sort of an influence on McDonald unfavorable to the defendant. It does not appear very clearly how. The argument in this court seems to be that, unless McGovern had been called and had testified as he did before McDonald was called, he (McDonald) would have denied that he put the pipe in the bedroom, and would have said that he put it in the barroom; in other words, that McDonald might have denied a fact which he knew to be true. As so presented, the claim of the defendant is that he was injured, because he was not allowed to show that, at the police hearing, the plaintiff took such a course in putting in his evidence that he prevented the witness McDonald from being drawn into a prevarication. It does not appear to this court that the defendant has any just ground for complaint.

The publication referred to as Exhibit A contained various statements other than the one that is recited in the complaint, one of

which is to the effect that, at the said trial before the court of common pleas, the plaintiff testified that the said bedroom was painted white, when in fact it was painted a dark color. Upon the trial of the present cause, the defendant offered to prove that said testimony was false, and to show that that allegation in the said Exhibit A was true. This evidence was not offered to contradict anything the plaintiff had said on the present trial. To this evidence the plaintiff objected, on the ground that the truth or falsity of that allegation in Exhibit A was not raised by the pleadings. The court sustained the objection. We are of opinion that this ruling was correct. The plaintiff excluded from his complaint all the parts of Exhibit A except the portion which he recited, and did this designedly. He says, "A copy of said written document containing said publication being the Exhibit A now on file in this cause." We have underscored some of the words in order to bring out the meaning which, it seems to us, the plaintiff intended to convey. The clear reference to its part of Exhibit A would show that the other parts were intended to be excluded. To be sure, the second defense says that all the statements and allegations relating to the plaintiff appearing in Exhibit A are true. It is a general rule that all pleadings should be such as to fairly apprise the opposite party of the facts intended to be controverted. By his second defense, the defendant intended to put this allegation of Exhibit A to the case, he should have done so in some distinct manner, as by a recital or by express reference. Not having done anything of that kind, the plaintiff had the right to assume that he referred to Exhibit A in the same sense that the complaint had referred to it, and that the defense intended to aver no more than that the portion of Exhibit A set out in the complaint was true. The court apparently took this view of the answer, and we think was amply justified in so doing.

The case presented by the finding is a peculiarly aggravated one, where a malicious and willfully false charge against the plaintiffs has been supported by repeated and industrious perjuries. The damages are not excessive. There is no error. The other judges concurred.

STATE (APPLEGATE et al., Prosecutors) v. BOARD OF EDUCATION OF CRANBURY TP., IN MIDDLESEX COUNTY.

Court of Errors and Appeals of New Jersey.
March 3, 1896.)

SCHOOL DISTRICTS—ISSUE OF BONDS—PROCEDURE.

It is necessary that it shall clearly and unequivocally appear upon the face of proceedings for the issue of bonds of a school district under the nineteenth section of the amendment to the act to establish a system of public instruc-

tion, which was approved May 25, 1894 (P. L. 506), that the bonds are to be issued only for purposes which the statute authorizes them to be issued for.

(Syllabus by the Court.)

Error to supreme court.

Certiorari by the state, on the prosecution of Abijah Applegate and others, against the board of education of the township of Cranbury, in the county of Middlesex. On a finding for the defendant (31 Atl. 1033), plaintiffs bring error. Reversed.

Upon certiorari, proceedings contemplating the raising of moneys by special tax upon taxable property in the township of Cranbury, for school purposes, and the issuance of bonds by the board of education of that township, were reviewed by the supreme court, and sustained as legal. In virtue of the direction of the board of education of the township named, this notice was duly published as the statute (P. L. 1894, p. 511, § 11) requires: "Notice of a Special School Meeting. Notice is hereby given to the legal voters of the school district of Cranbury township, in the county of Middlesex and state of New Jersey, that a special school meeting will be held at Odd Fellows Hall, in the village of Cranbury, in said school district, on Saturday, the 15th day of September, at the hour of 3 o'clock in the afternoon of said day, at which meeting will be submitted to the legal voters the following propositions, to wit: (1) To vote and appropriate the sum of \$1,600 to purchase a certain lot of land in the village of Cranbury, Middlesex county, New Jersey, known as the 'Duncan Lot' described as follows, to wit: [Here follows description.] (2) To vote and appropriate the sum of \$400 for the purpose of grading and fencing said lot, and furnishing a proper drinking-water supply. (3) To vote and appropriate the sum of \$4,000 for the purposes of erecting and constructing a suitable schoolhouse on said described lot. (4) To vote and appropriate the sum of \$500 for the purpose of purchasing suitable furniture for said school building. (5) To authorize the board of education, in order that immediate funds may be procured for the purposes above mentioned, to issue school bonds in the corporate name of the board of education of the township of Cranbury, in the county of Middlesex, to the amount of \$6,500, payable at such time and in such amounts as the legal voters at said special meeting may direct, with interest at a rate not to exceed six per centum per annum, payable semiannually. (6) To vote and appropriate for the purpose of purchasing free school text-books the sum of (\$300) three hundred dollars. (7) To vote and appropriate for the purpose of paying for the services rendered to the board by the district clerk at the monthly ratio of (\$100) one hundred dollars per year. (8) To vote and appropriate for the purchasing of crayon, brooms, pails, and other necessary school

supplies, and meeting the expenses of cleaning and caring for the school rooms, the sum of (\$100) one hundred dollars. The amount thought to be necessary for above purposes is the sum of (\$7,000) seven thousand dollars. D. C. Lewis, President. C. F. Garrison, Secretary. Dated Cranbury, N. J., this 29th day of August, A. D. 1894."

It appears by what purports to be the certificate of the proceedings at the meeting held in pursuance of the notice that a series of resolutions were offered, in the following order and language: "Resolved, that we order to be raised by special assessment on the inhabitants of Cranbury Township school district, and their estates, and the taxable property therein, the sum of (\$300) three hundred dollars, which we hereby appropriate for the purpose of purchasing text-books required in addition to those at present in use in the hands of the pupils, or owned by said school district. Resolved, that we order to be raised by special assessment on the inhabitants of Cranbury Township school district, and their estates, and the taxable property therein, the sum of (\$100) one hundred dollars, which we hereby appropriate for the purpose of paying for services rendered by the district clerk, or to be rendered during the year, to said board of education. Resolved, that we order to be raised by special assessment on the inhabitants of Cranbury Township school district, and their estates, and the taxable property therein, the sum of (\$100) one hundred dollars, which we hereby appropriate for the purposes of purchasing crayon, brooms, pails, and other necessary school supplies, and meeting the expenses of cleaning, and of keeping clean, the school rooms of said school district. Resolved, that said board of education be hereby authorized and empowered to do whatever is necessary for the benefit and advantage of said school district in carrying out the true meaning, intent, and purpose of the above resolutions. Resolved, that we order to be raised by special assessment on the inhabitants of Cranbury Township school district, and their estates, and the taxable property therein, the sum of (\$1,600) sixteen hundred dollars, which amount we hereby appropriate for the purpose of purchasing the Duncan lot, in the village of Cranbury and school district aforesaid, which said lot is described as follows: [Here follows description.] Resolved, that we order to be raised by special assessment on the inhabitants of Cranbury Township school district, and their estates, and the taxable property therein, the sum of (\$400) four hundred dollars, which amount we hereby appropriate for the purposes of grading and fencing said lot, and furnishing a proper drinking-water supply. Resolved, that we order to be raised by special assessment on the inhabitants of Cranbury Township school district, and their estates, and the taxable property therein, the sum of (\$4,000) four thousand dollars, which amount we hereby appropriate

for the purpose of erecting and constructing a suitable schoolhouse, with the necessary out-houses, on said described lot. Resolved, that we order to be raised by special assessment on the inhabitants of Cranbury Township school district, and their estates, and the taxable property therein, the sum of (\$500) five hundred dollars, which amount we hereby appropriate for the purpose of purchasing suitable school furniture for said school building. Resolved, that the board of education of the township of Cranbury, in order to raise immediate funds for the purposes above mentioned, be authorized, and we do hereby authorize said board, to issue school bonds in the corporate name of 'The Board of Education of the Township of Cranbury, in the County of Middlesex,' to the amount of (\$3,500) six thousand and five hundred dollars, in order to raise said needed amount immediately, in the denomination of (\$200) two hundred dollars each, at a rate of interest not to exceed six per cent. per annum, payable semiannually at the National Bank of Cranbury. The bonds hereby authorized to be issued are to fall due and paid, two each year during the first ten years, and three thereafter until all are paid, and the necessary amount raised at the annual meeting of each year, until all the outstanding bonds, and the accrued interest thereon, shall have been paid."

It is agreed by stipulation in the case that the resolutions were consented to by a majority of those present at the meeting, by ballots, each of which was as follows: "Cranbury Township School District Ticket. September 15th, 1894. For raising special tax for the following purposes: Resolved, that we order to be raised by special assessment: (1) The sum of \$300 for text-books. (2) The sum of \$100 for services of clerk. (3) The sum of \$100 for supplies, janitor, cleaning, etc. (4) That said school board be authorized and empowered to do for the advantage and benefit of school district in carrying out the true meaning of above resolution. That we order to be raised by special assessment: (1) The sum of \$1,600 for purchase of Duncan lot for school purposes. (2) The sum of \$400 for fence, grading, and water. (3) The sum of \$4,000 for school building. (4) The sum of \$500 for furniture. (5) That the board of education be authorized, in the corporate name of 'The Board of Education of Cranbury Township,' to issue school bonds to the amount of \$6,500, in denominations of \$200, to fall due and be paid, with interest, two each year during the first ten years, and three each year thereafter, until all are paid."

Alan H. Strong, for plaintiffs in error. H. Brewster Willis, for defendant in error.

McGILL, Ch. (after stating the facts). The nineteenth section of the amendment to the "Act to establish a system of public instruction" (Revision), approved March 27, 1874,

which was approved May 25, 1894 (P. L. 506), provides that the legal voters of a school district, either at an annual meeting, or at a special meeting called for that purpose, may, by the consent of a majority of those present, authorize the board of education of the district to issue bonds for these purposes: (a) The purchase of land for school purposes; (b) the building of a schoolhouse or schoolhouses; (c) making additions, alterations, repairs, or improvements in or upon schoolhouses already erected, and the lands upon which they are located. It is deemed that this specification of the purposes for which bonds may be issued limits the authority to issue bonds to those purposes. That which the board of education of the township of Cranbury proposed to submit to the legal voters at the special meeting called for September 15th was stated in the notice of that meeting; but that which was actually submitted and assented to is not found in that notice, but appears by the resolutions adopted, and the ballots through which those resolutions were assented to. The consent appears to have been that \$300 for text-books; \$100 for services of clerk; \$100 for supplies, janitor, cleaning, etc.; \$1,600 for purchase of Duncan lot; \$400 for fence, grading, and water; \$4,000 for school building; and \$500 for furniture,—be raised by special assessment, and then that, "in order to raise immediate funds for the purposes above mentioned," the board of education should be authorized to issue bonds to the amount of \$6,500. All purposes for raising money, as appears by the order in which the resolutions are put in the certificate of the proceedings to the meeting, and by the order in which they are arranged upon the ballot, were expressed prior to the resolution which authorizes the issue of bonds; but as the total of their amounts exceeds the sum (\$6,500) authorized to be raised by the bonds, and it appears that after the resolution authorizing the raising of the third item, to wit, \$100 for supplies, etc., there intervened a resolution empowering the board of education to do whatever was necessary to carry out the intent of the "above resolutions," and the elimination of the first three items will leave just \$6,500 in the four remaining items, it is insisted that it is a fair inference that the language, "purposes above mentioned," in the resolution for the bonds, was intended to have reference only to the last four items. It may be that this inference is correct. It is aided to some extent by the numbering of the items upon the ballot in two series, yet it is a mere inference. It lacks positiveness and certainty, and for that reason we deem it to be insufficient upon the question whether the bonds were confined to the purposes authorized by the statute. We think the purposes for which the bonds were to be issued should clearly and unequivocally have appeared upon the face of the proceedings, so as to indubitably show that their

issuance will be wholly within the power conferred by the statute. But, if it be conceded that it is sufficiently plain that the intention was that the bonds were to issue for the purpose of meeting the last four items of the appropriation, we are confronted with the question whether two of those items—\$400 for fence, grading, and water, and \$500 for furniture—were within the authority of the statute. The supreme court deemed them to be parcel of the construction of a well-appointed schoolhouse. We are inclined to so regard the fencing, grading, and water, and so, also, to consider any furniture which may be constructed with, and permanently affixed to, the building, such as slates and blackboards built in the walls; but we cannot so regard the ordinary movable furniture of a school, which is not fixed to the building. If, by the \$500 item, such fixed furniture had been intended, appropriation for building a schoolhouse, without further specification, would suffice to cover it; but here there is not only an appropriation for the school building, but also an appropriation for furniture, as though they were separate things. The inference would appear to be that furniture which is not part of the building was intended. Bonds cannot be issued to pay for such furniture. But, whatever may be the inference, it at least is not clear, as it should be, that the furniture intended is to be part of the building. Our conclusion upon the points stated leads to a reversal of the judgment before us, and hence we do not deem it necessary to review the remaining questions passed upon by the supreme court, or suggested by counsel.

INHABITANTS OF TOWNSHIP OF BLOOMFIELD v. MAYOR, ETC., OF BOROUGH OF GLEN RIDGE et al.

(Court of Chancery of New Jersey. Feb. 24, 1896.)

MUNICIPAL CORPORATIONS—ADDITIONAL TERRITORY—CONTROL OF SEWERS.

1. Where a portion of the territory of a municipal corporation is thrown into a new municipality, the right to use, and to regulate the use of, sewers and hydrants within such territory passes to the new government.

2. Boroughs, created from townships under the act of 1878, are distinct from the townships in respect to their control over sewers and hydrants.

(Syllabus by the Court.)

Bill by the inhabitants of the township of Bloomfield against the mayor and common council of the borough of Glen Ridge and others. Demurrer to bill sustained.

The bill states that the complainant is a township, authorized to construct sewers, and to contract with other municipalities for the right to connect its sewers with theirs; that it made a contract with the city of Orange for the building of a main outlet sewer, through which, by said contract, it

is entitled to discharge sewage, and to prohibit any other municipality, except the city of Orange and the township of Montclair, from doing so; that complainant paid \$55,034 for its share of the expense, and issued bonds for the same, which are still outstanding; that the complainant constructed lateral sewers through its streets, and paid for the same \$30,863.97; that, after the construction of these sewers, the borough of Glen Ridge was organized, including within its limits a number of streets through which such lateral sewers were constructed; that all the sewers in the borough of Glen Ridge discharged through lateral sewers of the complainant into the main outlet sewer; that all the sewers were constructed as part of an entire system, and required to be under one management; that the township of Bloomfield adopted an ordinance for the management of its entire system; that, since the formation of the borough of Glen Ridge, it has adopted an ordinance for the control of said sewers within its border, inconsistent with complainant's ordinance; that, before the formation of the borough of Glen Ridge, the complainant had made a contract with the township of Montclair, giving Montclair leave to construct a sewer through Bloomfield to connect with the main outlet sewer; that part of the Montclair sewer ran through the district now within the borough of Glen Ridge; that, by the contract with Montclair, complainant acquired the right to use the sewer jointly with Montclair, for the consideration of the sum of \$4,000, and the payment of its proportionate share of the cost of maintenance, operating, and repair. The bill charges that, in one instance, the borough prevented a plumber from making a connection under a permit issued by the township of Bloomfield; that, on the other hand, the borough has itself issued a number of permits, and has made a number of connections with the sewers within its limits. The prayer is for an injunction restraining the defendants from interfering with the complainant's sewer within the limits of the borough, and from exercising any management over such sewers, or authorizing any connection with said sewers, or authorizing any discharge in or through said sewers; also, for an injunction restraining the defendants from interfering with the complainant or its agents in making connections with the sewers within the limits of the borough of Glen Ridge.

George S. Hilton, for complainants. Joseph G. Gallagher and Joseph Coult, for defendant.

REED, V. C. (after stating the facts). It appears that the township of Bloomfield, together with the city of Orange and the township of Montclair, built an outlet sewer, each to pay its proportion of the expenses; that Bloomfield has raised its proportion by issuing bonds, which are still outstanding. It appears that the township of Bloomfield also constructed lateral sewers through its streets,

and paid for them \$30,863.97. It appears that, since the construction of these sewers, a new borough has been organized, called the "Borough of Glen Ridge." It also appears that a portion of the territory of the township of Bloomfield has been included within the limits of the new borough, and that a number of streets in which these lateral sewers were placed are now within the territorial limits of the borough. The question which the bill attempts to raise is whether the right to control the use of such sewers as now lie within the borough has passed to the borough government, or whether it still resides in the township authority. The contention on the part of the township is that it paid for these laterals, and is liable to pay for its part of the cost of the main sewer, by means of which the laterals became usable; that the title in the laterals still resides in it; and that it has the right to control and use its own property. It is stated in the bill, for the purpose of adding to the force of this contention, that these sewers were built to be operated as a single system, and that it has, under a contract with the township of Montclair, become liable to pay a proportionate share of the expense of building and maintaining the sewer through the territory of Glen Ridge.

I do not perceive that these facts can influence the decision of the question in hand. The sewers must be regarded as any other corporate property for which the municipality has paid, or for which it is liable to pay, either by reason of its outstanding bonds, or by the terms of a contract still outstanding. It is corporate property, and the query is, to whom does the right to use and control it belong after it is thrown into the new municipality? Many of the questions which spring out of the divisions of the territory of a municipality in respect to the property of the old municipality are entirely settled. For instance, it is settled that the legislature, by virtue of its control over municipal corporations, has the ability to fix the rights of the new and the old corporations in the property, and to adjust the burden of the corporate debts. Dill. Mun. Corp. § 127. It is also settled that, where no legislative adjustment is provided for, then the old corporation remains liable for all the debts. Id. § 128. It is also settled that all transitory property, such as bonds, money in sinking funds, and property of that class, and all real estate that lies within the limits of the old corporation, remains the property of the old municipality. But in respect to property used for public purposes, such as engine houses, school houses, public markets, which are located upon lands which fall within the limits of the new corporation, there exists some contrariety of judicial sentiment. There are cases which hold that the old corporation is not stripped of its title to such property. In *Whittier v. Sanborn*, 38 Me. 32, it was held that the alterations of the lines of the

school district, whereby a schoolhouse was left in another district, would not change the right of property therein. It was also said, *obiter*, in *School Dist. v. Richardson*, 23 Pick. 62, that the alteration of the lines of a school district would not change the property rights of the old district in a schoolhouse thrown outside of its limits. In *Board of Health v. City of East Saginaw*, 45 Mich. 257, 7 N. W. 808, land had been conveyed to the board of health in trust for cemetery purposes for the township of Buena Vista. Afterwards the city of East Saginaw was incorporated, including the cemetery. The court held that there was no common-law rule by which property can be transferred from one corporation to another without a grant, and, as there was no statute, the property was unaffected by the change of corporate lines. In *City of Winona v. School Dist. No. 82*, 40 Minn. 13, 41 N. W. 539, a schoolhouse, by the alteration of the city lines, had been thrown within the city limits. It was held that the old district still retained title to the schoolhouse. The opinion of this case reviews, exhaustively, the cases which have dealt with the subject. These cases, as is perceived, involve the question of title to schoolhouses, cemeteries, and ministers' houses, which, by reason of the manner in which and the purpose for which they are usable, may possibly be distinguishable from other kinds of municipal property lying within the new territory. But the reasoning upon which some of the cases go, *viz.* that there is no other way by which the old corporation can be deprived of its title, except through its own grant, or by express legislation, seems to include within the rule announced property of all kinds.

Opposed to the theory of these cases, there are dicta of great weight in favor of an opposite rule as the better one, *viz.* that property fixed to the land within the new corporation becomes the property of that municipality. The cases in which this doctrine has been asserted or approved are the following: *Hartford Bridge Co. v. East Hartford*, 16 Conn. 171; *School Dist. v. Tapley*, 1 Allen, 49; *Laramie Co. v. Albany Co.*, 92 U. S. 315; *Mt. Pleasant v. Beckwith*, 100 U. S. 525; *Board of Education v. Board of Education*, 30 W. Va. 424, 4 S. E. 640; *North Hempstead v. Hempstead*, 2 Wend. 109. In my judgment, the cases which hold that the right to control this kind of property remains still in the old corporation press unduly the notion that there must be an express grant or express legislation to pass control over such property to the new municipality. The title held by a municipality is of a peculiar kind. It is held by the corporation as a trustee for the public. Municipal corporations are organized for the purpose of creating agencies for the purchase, construction, and operation of such appliances as are essential to the health, safety, and convenience of the people and

their property. The appliance so created, whether engine house, market house, school house, lamps, water pipes, hydrants, or sewers, are so distributed as to be of the most efficient service to the public. They are brought into existence to be so used. Now, when the territorial limits of a corporation are diminished by the excision of a part of its territory, the power of control of the public agent over these appliances is restricted to the newly-defined limits of the corporation. This is admittedly so, unless the legislature does what is unusual,—confers a power upon its agents to act extraterritorially. It is entirely settled that the powers of city officers are extended or restricted in conformity with the change of the boundaries of a municipality. *Ehrgott v. Mayor, etc.*, of New York, 96 N. Y. 264; *St. Louis Gas Light Co. v. St. Louis*, 46 Mo. 121; *Town of Toledo v. Edens*, 59 Iowa, 352, 13 N. W. 313; *City of Coldwater v. Tucker*, 36 Mich. 471; *Strauss v. Town of Pontiac*, 40 Ill. 301. It follows, therefore, that the power to use the property lying outside of the boundaries of the old corporation for municipal purposes is extinct. It is admitted in the case of *Winona v. School Dist. No. 82*, *supra*, that the old corporation held only the bare title to the schoolhouse, which, by change of line, was thrown into the city. The old corporation could only sell it as it stood. It could not use it for the purpose to which it had been built and devoted. Now, as a matter of public policy, it is important that this kind of property shall be continuously employed in subserving the public purpose for which it was created. The only agency existing which can so use it is that which has sprung into existence by the organization or creation of the new corporation. Now, it seems to me quite as reasonable to say that the legislature, by conferring the power to create the new corporation, implicitly conferred a power to employ all public property found within its limits, as it is to say that it meant that this property should lie idle. And if it be said that the new corporation may purchase it, it is answered, "Who is to fix the price, and, while negotiations are pending, who is to control and use this public property?" Now, the legislature, undoubtedly, if its attention was called to this matter, would fix upon some method, judicial or otherwise, by which the distribution of municipal property and municipal debts could be adjusted in all instances like the one under consideration. But, in the absence of such legislation, I think that the doctrine which I have announced is the most conducive to the public interest; nor is it, as a rule, more inequitable than the other. When the property which falls within the new corporation is still to be paid for, it is, of course, inequitable that the whole burden of payment should fall upon the old corporation. But it is quite likely that such property, as I understand is the case in respect

to the lateral sewers, has been already paid for. In such case, the people in the new government have paid their proportion of the expenses, and where the property is of a kind to be distributed through the territorial limits of the old corporation, like lamp posts, hydrants, water pipes, and sewers, it is quite probable that the new corporation gets no more, by the alteration of municipal lines, than its inhabitants have paid for.

Upon the assumption, therefore, that the borough and the township are distinct corporations, I am of the opinion that the complainants have exhibited no ground for the relief they claim. The complainants, however, insist that the parties to this suit do not stand on the footing of distinct municipalities. The contention is that the borough, organized within the township limits, does not exclude the control of the township over all the objects of local government; that, like the city of Plainfield and the village of Flemington and certain commissions, only a portion of the local government is confided to it, while the residue remains in the larger municipality. Now, it is undoubtedly true that the boroughs, as originally formed, under the act of 1878, did not possess local powers coextensive with those of townships. Many of the objects of local government still remained in the township; but as, by supplements to the act of 1878, the powers of the borough government were enlarged from time to time, so, *pari passu*, that of the townships were diminished, and the township governments were necessarily excluded from any control over the subjects which were thus confided to the borough government. This consequence necessarily results from the well-settled doctrine that there cannot be two municipal corporations for the same purposes, with coextensive powers of government, at the same time, over the same territory. Grant, Corp. 18; Dill. Mun. Corp. (3d Ed.) § 184; President, etc., of City of Paterson v. Society for Establishing Useful Manufactures, 24 N. J. Law, 385; Rex v. Pasmore, 3 Term R. 199. Now, among the subjects which have been confided to the borough government, under supplements to the general act, is that of control over sewers. P. L. 1893, p. 460; Id. p. 271; P. L. 1892, pp. 196, 397. The effect of investing boroughs with this control is to exclude the control of any other municipal corporation within the limits of the borough. It is therefore apparent that the discussion with respect to the constitutionality of the act of 1895, which act purported to sever the territory of the boroughs organized under the act of 1878 from the territory of the township, is unimportant; for, unless all the supplements which have conferred powers upon the boroughs are unconstitutional, the act conferring control over sewers must be regarded as valid, and it, without further legislation, excludes the township from exercising any control, in respect to this

branch of municipal government, within the limits of the borough. I therefore regard the two municipalities, in respect to the matter now under consideration, as entirely distinct. This view strips the complainants, as already remarked, of their right to relief under this bill.

But there is another view, not discussed on the argument, which seems to me to defeat the complainants' present suit. The borough of Glen Ridge has indicated its right to control and regulate these sewers by an ordinance passed by its council. It has further indicated it by permits granted by the appropriate officer to its citizens to connect with the sewers. This appears in the bill. The legality of these ordinances and these permits are reviewable in a court of law by the writ of certiorari; and, so far as appears in this case, such remedy is entirely adequate. No case of irreparable injury to property is presented, nor is there presented a case where a municipal corporation is illegally attempting to exercise its corporate power to strip a citizen of his property. In the absence of either of these features, even conceding the right of the township to regulate it, there is no such interference with its property as cannot be adequately remedied by a resort to a writ of certiorari. For this reason, also, I think the demurrer is properly interposed.

INHABITANTS OF TOWNSHIP OF BLOOMFIELD v. MAYOR, ETC., OF BOROUGH OF GLEN RIDGE et al.

(Court of Chancery of New Jersey. Feb. 24, 1896.)

Bill by the inhabitants of the township of Bloomfield against the mayor and council of the borough of Glen Ridge and others. Heard on demurrer to bill. Demurrer sustained.

The bill in this case sets out that the township of Bloomfield entered into a contract with the Orange Water Company to buy water for city purposes, to be taken from the mains and hydrants of said company, already located in the streets of said township; that the township was to pay \$30 per annum for each hydrant, for the term of 8 years and 6 months; that the borough of Glen Ridge was formed; that, in the territory included within Glen Ridge, 48 of the hydrants were set; and that, after the organization of the borough of Glen Ridge, it passed an ordinance regulating the use of these hydrants, which ordinance deprives the township of Bloomfield, not only of the exclusive use of these hydrants, but of any use of them. The prayers are that the defendants may be enjoined from controlling or regulating these hydrants, or from interfering with the complainant in its use of said hydrants.

George S. Hilton, for complainant. Joseph G. Gallagher and Joseph Coult, for defendants.

REED, V. C. (after stating the facts). The same principles are involved in this case as in the preceding case, 33 Atl. 925. For the reasons there given, I conclude that the control over the hydrants, which, by the alteration of the township lines, are thrown into the borough limits, passed to the borough government. The borough

as the right to control hydrants. P. L. 1878, 407, § 12, subsec. 2, subd. 5; P. L. 1883, p. 6. The township being stripped of its right to control them, it has no footing to ask this court to enjoin the defendants from doing so, or from interfering with the complainant in doing so. Decree will be advised for the demurrants.

SKILLMAN v. WIEGAND.

(Court of Chancery of New Jersey. Feb. 17, 1896.)

GIFT—EVIDENCE—DEPOSIT IN SAVINGS BANK.

1. Where an account is opened and money deposited by a father in the joint names of himself and his child in a savings bank whose by-laws provide for the issuing of a pass book to each depositor, and require its production when money is drawn, the question whether the intention of the parent is to create a joint estate, the absolute right of survivorship, or merely to make the child his agent for convenience in drawing the money, is to be determined by the circumstances of the case and the conduct and declarations of the parent.

2. Where it clearly appears that such deposit is made merely for the convenience of the parent in drawing money, and not with the intention to make a gift to the child in case of its surviving the parent, a subsequent change of intention and determination to make a gift to the child must be proven by clear and satisfactory evidence. The mere permitting the account to remain in joint names, and loose declarations indicating a gift, are not sufficient. (Syllabus by the Court.)

Bill by Frederick V. D. Skillman, executor, against Lizzie A. Wiegand, to declare as to whether a gift was created or not. Decree for complainant.

Mr. Manning, for complainant. Mr. Puster, for defendant.

PITNEY, V. C. The contest in this cause over the sum of \$2,776.99, drawn by the defendant, Mrs. Wiegand, out of the Provident Institution for Savings, known as the "Bee Hive Bank," in Jersey City, the day before the death of the complainant's testator, benazer King. The money at the time stood on the books of the bank, as shown by the pass book, in the joint names of the testator and the defendant, by her maiden name Lizzie A. King. She was the testator's daughter. He died on the 29th of September, 91, at her house, in Jersey City, in his eighty-second year. The by-laws of the bank provide that the pass book held by the depositor must be produced when money is drawn. The bill alleges that the bank account was opened by the testator in 1875, and that all the moneys deposited therein were his own moneys, and not those of the defendant; that the testator, for convenience to himself, so that moneys could be drawn therefrom without his personal presence at the bank, caused the name of his daughter to be joined with his own in the pass book. The answer admits that the account was opened in the joint

names, so that drafts could be obtained without testator's personal attendance at the bank, but denies that this was done for the sole convenience of testator. The answer does not deny the express charge in the bill that the moneys deposited to the joint account were at the time of such deposit the moneys of the testator. The answer further states that the defendant drew the amount in question from the bank by both the implied and expressed consent and knowledge of the testator. It further states that the account was kept in the joint names of the defendant and her father, so that, in case of the death of either of the said parties, the survivor could draw the amount due thereon, and close the same, without the expense of administration or other legal steps. It further charges and insists that the said deposits were made for the sole benefit of the defendant, and that she drew the amount by her father's special instance and request, made to her personally on the day that she drew the same.

The following facts appeared: For many years prior to the 1st of January, 1891, the testator had been employed at Jersey City at a salary. His bank account commenced on the 2d of December, 1875, with a deposit of \$100, and increased by subsequent deposits, mainly in small sums, and additions of interest, from month to month, and year to year, until it amounted, on the 28th of September, 1891, to \$2,776.99. He appears to have been a widower for many years, and to have kept house, one or more of his daughters acting as housekeeper, up to the 1st of May, 1891, when he broke up housekeeping, and went to live with his daughter Mrs. Wiegand. His family consisted at first of four daughters and two sons, but the sons dying, and, as I infer, without issue, there remained the four daughters, viz. Mrs. Sarah Skillman (the wife of complainant), Mrs. Minnie Lemont, Mrs. Lizzie Wiegand, and Matilda King, a helpless cripple and invalid, who always lived with her father. Mrs. Lemont was twice married; became a widow in 1884, when she came home and lived with her father. Shortly after that, Mrs. Wiegand married, and went to Philadelphia, and lived there until May, 1891. In March, 1891, Mrs. Lemont married a second time, and later went to live with her present husband, leaving her father without any housekeeper except Matilda, who was unable to perform the duties thereof. Shortly after Mrs. Lemont's marriage, Mrs. Wiegand bought a house in Jersey City, and took her father and Matilda to live with her. The proofs show that the bank account was originally opened in the name of the testator alone, and that several years afterwards he caused his daughter Lizzie A. King's name to be inserted in the original book. His object and purpose in making this change were not shown by direct evidence, but the circumstances show that it was done, not for the purpose of

making a gift to Miss King or creating a joint estate with the right of survivorship, but merely for convenience for drawing money. In point of fact, he retained possession of the book, and treated the money on deposit as his individual exclusive property, up to at least a very short time before he died. His declarations and conduct all point in that direction, and they are competent for that purpose, as the authorities all agree, especially as evidence was given by the defense of the same character. Be that as it may, no objection was made to their introduction. The deposit in bank constituted his whole property, with the exception of a small house and lot, which rented for \$18 a month, subject to a tax of \$55, equal to \$4.50 a month, and subject to repairs and insurance, which would reduce its net rent to not more than \$12 a month. On the 13th of January, 1891, while still living in his own house with his daughters Mrs. Lemont and Matilda, he made his will, giving everything that he had, both real and personal, to his daughter Matilda, her heirs and assigns, forever, and then appointed the complainant, his son-in-law, his executor, adding these words: "And I direct his attention to the fact of there being money to my credit in the Provident Institution for Savings, in Jersey City." Before and after the time of making this will, he declared that his intention was that his whole estate, including the money in bank, should go to his daughter Matilda, giving as a reason that she was helpless, and that his other children were provided for; and such intention and desire were a matter of general talk and understanding among all the children, and, I am satisfied, were known by the defendant, Mrs. Wiegand. At the execution of the will, testator was advised by the counsel who drew and witnessed it that it would be prudent for him to have the bank deposit put in his individual name, and afterwards, in the month of March, he took the pass book to the bank for that purpose; but, upon being informed by the officers that such change would involve a loss of interest (the regular dividend days being the 1st of January and the 1st of July), he refrained, and left it standing in the joint names of himself and daughter. About the 1st of April, 1891, after the marriage of Mrs. Lemont, Mrs. Wiegand determined to purchase a house in Jersey City, and move there, and to that end wrote her sister Mrs. Skillman to make a contract to purchase a certain house, and to procure from her father the down money necessary for that purpose; and, at Mrs. Skillman's request, testator went to the bank on the 8th of April, and drew \$150, and handed \$100 of it to Mrs. Skillman, for the purpose of securing the contract for the house, but upon the express condition that it was to be repaid to him, and it was repaid to him by Mrs. Skillman, who procured it from the defendant. This was the last money drawn

from the account until September 28, 1891. The semiannual dividend of interest was credited as of the 1st of July, and by the draft on September 28, 1891, interest from July 1st was lost. The testator was, apparently, taken sick, and obliged to take to his bed, only a few days before he died. One of the complainant's witnesses saw him the day before he died, and found him hardly able to speak. Beyond that evidence none is given as to his physical and mental condition during the last few days of his life, nor as to how the pass book came into the possession and under the immediate control of the defendant, nor what induced her to go to the bank and draw the money at the time she did. No evidence was given in support of the allegation of the answer that defendant drew the money by the request of her father. The executor, after the funeral, ascertained that the money had been drawn the day before the testator's death, and then, with a witness, called on Mrs. Wiegand, and demanded the money. She declined to give it. He then spoke of the bill for the burial lot and the funeral expenses which he had paid, and she intimated that they would be paid, but declined to give him the money. Neither in that conversation nor in any other did she at any time state on what ground her claim to keep the money rested, but stated as a reason why she would not give it up that she was unwilling it should go into the hands of the complainant and his wife. Matilda King left Mrs. Wiegand voluntarily shortly after her father's death, and went to the Skillmans to live. Evidence was given of declarations by the testator made a few weeks before he died that "they" had compelled him to make a will, but that Lizzie "would down them all." The evidence fails to indicate that the least pressure was brought to bear upon the testator to make the will. On the contrary, it seems to have been strictly in accordance with both his wishes and duty.

The question in this class of cases is whether it was the intention of the creator of the joint estate to give to his joint tenant the right of survivorship, or whether the title was so vested in him in trust for the creator. Where the creator stands in the relation of parent towards the joint tenant, the usual presumption is that the arrangement and intention were that the parent was to have the sole use for his life, with right of survivorship, and the child was to have the right of survivorship. Such arrangements have been quite common in England in dealing with stocks of various kinds, where they have been used to evade legacy duty and probate fees; but, in the absence of the parental relation, the presumption is that the donee of the joint tenancy holds as trustee for the creator. In all cases, however, of personality, the courts look at the circumstances and declarations of the creator of the joint estate, made both before and after its creation, in or-

der to determine whether it was made in trust for the creator or as a gift with right of survivorship.

The authorities show that the courts are less disposed to infer a gift from the deposit of money in the joint names of the owner and another than in the case of vesting stocks in such joint names. The reason of this is obvious. Stock of any kind is an investment, and the certificate is not the evidence of a debt, but of an interest in some business enterprise, and there is little or no room for the motive of convenience. On the other hand, and especially in view of the well-known practice of savings banks to pay money only upon the presentation by the depositor in person of his or her pass book, the motive of convenience in drawing money without personal attendance becomes at once prominent and a not uncommon purpose in the placing of moneys in bank to joint account. The effect of the creation of such joint account is, in such cases, simply to make the one party the agent of the other to draw the money; and, in case of a savings bank, the proprietor of the fund, by retaining the pass book in his possession, retains complete control of it.

The competency of the declarations of the creator of the joint estate, made both before and after its creation, to show his or her intention, is sustained by the following authorities: *George v. Howard*, 7 Price, 646; *Rider v. Kidder*, 10 Ves. 360; *Kilpin v. Lamb*, 1 Mylne & K. 520; *Garrick v. Taylor*, 29 Beav. 79, 7 Jur. (N. S.) 116, and 30 Law J. Ch. 211, and, on appeal, 4 De Gex, F. & J. 159, 7 Jur. (N. S.) 1174, and 31 Law J. Ch. 68; *Whitney v. Wheeler*, 116 Mass. 490. In *Kilpin v. Lamb* (1833) 1 Mylne & K. 520, a wealthy gentleman, named Widmore, had an illegitimate, but acknowledged, daughter, who had married a Mr. Kilpin, and had four children, who were the acknowledged grandchildren of Mr. Widmore. On August 25, 1820, he transferred £900 per annum, long annuities, into the joint names of himself, Mr. and Mrs. Kilpin, and their son James (W.) Kilpin. At the same time he made the following entries in his memorandum book or journal (page 525): "Transfer of £900 per annum, long annuity, by Messrs. Ladbroke & Co., from my name to myself, Mr. Kilpin, Mrs. Kilpin, and James Kilpin, made August 25th, for my use during my life, then to Mr. Kilpin and Mrs. Kilpin, for the benefit of their children equally at the age of twenty-one." "L. A. £900 per annum. I think James should now relinquish, and give up all interest in the above, January 18th, 1821." "James is amply provided for under my will. He will not have occasion beyond that. January 21." "Equitable division of £900 per annum, long annuity; one-third for life to Mr. and Mrs. Kilpin or the survivor; then to become the property of W. H. Kilpin and C. J. Kilpin, it being allowed to James Widmore Kilpin to take £1,000 out and out. January 12th, 1822."

In addition to these written declarations, divers verbal declarations made by Widmore after the creation of the joint estate as to those long annuities, and also as to other stocks involved in the suit of *Kilpin v. Kilpin*, 1 Mylne & K. 520, heard at the same time, were proven and read in evidence. Between this last date and July 26, 1825, Mr. Kilpin, the husband, and James W. Kilpin, died, leaving James Widmore, the donor, and Mrs. Kilpin surviving. On that date, July 26, 1825, Widmore made a codicil to his will, by which he bequeathed the long annuities to his executors in trust for his two grandchildren William and James Kilpin, the complainants, declaring that he had placed the stock in the joint names of himself and Mr. and Mrs. Kilpin and James W. Kilpin in trust, and directed his executors to obtain possession of the stock. The daughter survived her father, and claimed the stock as survivor. She died pending suit, and her executor, Lamb, was made defendant in her stead. The decree was in favor of the children, the complainants, first, by Sir John Leach, M. R., and afterwards by Lord Brougham on appeal; and the declarations of the testator, both oral and written, were relied on by complainants. The case, in its material aspects, is much like that under consideration. In *Garrick v. Taylor*, *supra*, the question was as to the right of survivorship to 40 shares of bank stock which had been transferred by a Mrs. Grazebrook into the joint names of herself and a Miss Leigh. Evidence was admitted of the declarations of Mrs. Grazebrook as to her object in so transferring the shares, and it was held, first by the master of the rolls, and afterwards, on appeal, by the lord justices (Knight Bruce dissenting), that the survivor was entitled. The decision was based upon the effect of the parol declarations of Mrs. Grazebrook. Miss Leigh had lived many years with, and been supported by, Mrs. Grazebrook, and called her "aunt." In the more recent case of *Fowkes v. Pascoe* (1875) 10 Ch. App. 343, a rich lady, who had large sums of stock standing in her name, and who had no children or descendants, and centered her affection upon the children of her deceased son's widow by a second marriage, purchased from time to time small amounts of stock, and had it transferred to the joint names of herself and a son of her daughter-in-law, who had lived with her and was supported by her. Sir George Jessel, as master of the rolls, held him as a trustee for her executors, but the lord justices gave him the stock upon inferences drawn from the circumstances of the case. In *Marshall v. Crutwell* (1875) L. R. 20 Eq. 328, there was a bank account opened by a husband in the joint names of himself and wife, and so kept by successive deposits and drafts. The balance due upon it at his death she claimed as his survivor. Sir George Jessel, as master of the rolls, gave it to the husband's estate, upon the inference from the evidence that it

was kept in their joint names for convenience in drawing money. He states the law thus: "The mere circumstance that the name of a child or a wife is inserted on the occasion of a purchase of stock is not sufficient to rebut a resulting trust in favor of the purchaser if the surrounding circumstances lead to the conclusion that a trust was intended. Although a purchase in the name of a wife or a child, if altogether unexplained, will be deemed a gift, yet you may take surrounding circumstances into consideration, so as to say that it is a trust, not a gift. So, in the case of a stranger, you may take surrounding circumstances into consideration, so as to say that a purchase in his name is a gift, not a trust." In *Re Gadbury* (1863) 32 Law J. Ch. 780, government stocks were purchased with the money of a husband in the joint names of the husband and wife. Before his death, a portion of it was sold out by the joint act of the husband and wife, and the money taken by the wife, and in her possession in the house at the time of his death. It was held that the money so drawn belonged to the husband's estate, but that the stock remaining belonged to her by survivorship.

In our own state we have the case of *Schlick v. Grote*, 42 N. J. Eq. 352, 7 Atl. 852, decided by Chancellor Runyon in the prerogative court. There a husband deposited moneys in a savings bank to the credit of himself and wife, who survived him, and took out letters of administration on his estate. The question was whether she should be charged, as administratrix, with the money standing at his death to their joint account. The learned chancellor, affirming the orphans' court, held that she must be so charged, basing his judgment on the ground that the circumstances showed that the case in its inception was one of trust for himself, and not of gift to his wife. He further found that the evidence failed to show with sufficient clearness that there was any subsequent change of the equitable title by a gift from the husband to the wife. There were in that case, as here, declarations by the husband, sworn to by a witness, which tended to show a subsequent gift. The learned chancellor cites *Brown v. Brown*, 23 Barb. 565, and *Marshall v. Crutwell*, supra, and both are strongly in point. In the former the court found that it was probably the desire of the husband that his wife should have the fund as his survivor, but that he had not taken the proper means to perfect the gift. To the same effect are *Taylor v. Henry*, 48 Md. 550, and *In re Bolln*, 136 N. Y. 177, 32 N. E. 626; and see *Thornt. Gifts*, § 335. Other authorities are cited in 21 Am. & Eng. Enc. Law, p. 730.

The evidence in this case shows clearly that the joint account was opened and maintained by the testator solely for convenience, and that it was not at any time prior to May 1, 1891, the intention of the testator to make a gift of the fund to the defendant.

The testator lived with defendant from May to the date of his death, and upon his death-bed was under her complete control; so that she had ample opportunity to obtain possession of the pass book without his consent. By her answer, she fixed the date of the actual tradition by her father to her of the pass book, and direction to draw and keep the fund, on the day before his death. No proof was offered of such tradition or direction to draw the money, though her husband was living with her, and was an available witness. Moreover, when called upon for the money by the complainant, she did not put herself on the ground of a recent gift of the money.

Rellance is placed, for proof of the intention to give, upon certain declarations made by testator a few weeks before his death. Applying to these declarations the rules adopted in the cases last above cited, and by the court of errors and appeals in *Smith v. Burnet*, 35 N. J. Eq. 314, at page 323, I come to the conclusion that they are insufficient to prove a gift. They were proven by the husband of the defendant and a nephew of the testator, John King, and his housekeeper, Miss Closs. They amount to no more than this: that the house devised was enough to support Matilda, and also that the defendant would "down them all," or "beat them all." There is no proof of any declaration of gift to the defendant or in her presence, nor of any delivery of the pass book, which, as we have seen, was in his hands up to the date of the withdrawal of the money.

No question was raised as to the jurisdiction of this court. Counsel, no doubt, relied upon the fact that a trust and accounting were involved.

I will advise a decree that the defendant pay to the complainant the sum of \$2,776.99, with interest from the 28th of September, 1891. Complainant is entitled to costs.

LEWIS v. PENNSYLVANIA R. CO.

(Court of Chancery of New Jersey. Feb. 18, 1896.)

ABUTTING OWNERS—RIGHTS IN STREET—PRELIMINARY INJUNCTION.

1. It is sufficient, in a bill for an injunction to restrain a steam-railroad company from laying its tracks on the land of the complainant, to allege that the complainant is the owner and occupant of the premises, giving the boundaries thereof, without introducing the chain of title under which he holds.

2. Since the courts of law have decided that a conveyance of lands adjacent to the public street by courses and distances which begin in and run along the side of such street only are presumed to carry the title to the center of such street, unless the contrary appears by express statement or necessary implication, a court of equity is justified in awarding a preliminary injunction, restraining a steam-railroad company from laying its tracks in said street between said adjacent lots and the center line of the street, until it shall have made compensation to such owner for his damages.

(Syllabus by the Court.)

Bill by Griffith Lewis against the Pennsylvania Railroad Company, wherein an order issued to show cause why a preliminary injunction should not be granted. Order made absolute.

J. J. Crandall, for complainant. J. H. Baskill, for defendant.

BIRD, V. C. The bill in this case states that the complainant, Lewis, is the owner of a lot of land in the city of Burlington facing upon Broad street; that he is in the possession of his said lot by his tenant; that the defendant has for many years had the possession of the center of said Broad street by its tracks, upon which it has run its engines and cars; that said company has commenced to lay a second track upon said Broad street, along its present track, and on the side thereof next to the lot and dwelling house of Lewis; and threatens, without leave of Lewis, and without condemnation of the rights and interests of Lewis, to proceed and make excavations and lay its said second track upon his land in front of and opposite his said dwelling. To prevent this invasion of what he claims to be his rights he asks an injunction restraining the defendant from proceeding with the construction of such second track.

By way of defense, among other things, it is insisted that the bill is radically defective, in that it does not show any ownership or title to the premises in question in Lewis. The language of the bill is that he "is the owner and occupier by his tenant of all that certain lot of land, with dwelling house situate thereon, being in the said city of Burlington," following with the description by courses and distances. This makes it necessary to decide whether or not good pleading in a court of equity requires the complainant who seeks to establish his rights against a supposed trespasser or intruder to set forth in his bill the instruments of conveyance, under and by virtue of which he possessed of the title. Unless more certainty in this regard be required than in actions of ejectment, the bill of complaint in this respect is sufficient. In actions of ejectment only such certainty is required as will "apprise the defendant of their description and situation, so that from such description possession thereof may be delivered." See Revision, p. 326, § 5; Id., p. 27, § 10. Reason would seem to dictate that, if nothing more be required when the absolute possession of land is claimed by a plaintiff, the like description would suffice when the person in possession seeks protection against a trespasser. The general doctrine is that certainty to a common intent is sufficient, and that averments in a bill of complaint need not be more precise than declarations in actions at law. *Paterson & R. R. Co. v. Mayo*, etc., of Jersey City. 9 N. Eq. 434, 437. Indeed, the rules of plead-

ing in a court of equity, it has been said, are not so technical and precise as in courts of law. *Marsells v. Canal & Banking Co.*, 1 N. J. Eq. 31; *Cornelius v. Halsey*, 11 N. J. Eq. 28. In *Johnson v. Vall*, 14 N. J. Eq. 423, it was held: "But when the bill contains an express averment that the title to the real estate now occupied by the complainant is in her, and that the purchase money was paid out of her separate estate, the bill is not wanting in equity merely because it does not show with legal precision how the land originally became her separate estate." It would seem, therefore, that the claim of the complainant is set forth with sufficient certainty in the respect indicated.

But another objection was raised to the allegations in the bill of a like nature. The threatened invasion is in the public highway, over land to which the complainant claims title. The insistence is that there is a lack of certainty or comprehensiveness in the allegations of the bill in this particular, since the metes and bounds given do not include that portion of the territory which is included in the public street. The object of the bill and the nature of the controversy being so palpable, if the expressions used do not comprehend the entire tract, there is no reason why there should not be an amendment, which will remove all appearance of doubt. An amendment equally broad was adopted at the instance of this defendant in the case of *Pennsylvania R. Co. v. United States Pipe-Line Co.* (during the present term) 33 Atl. 809. Taking the allegations of the bill, sustained as they are by proof, as true, will any rights of the complainant be invaded in case the threatened action of the defendant should be carried out? This depends upon the extent of his title. The claim is that his title extends to the middle of the street. If this be so, it is practically admitted that the construction of the additional track will cover a portion of the land so claimed. In the case of *Higbee v. Transportation Co.*, 20 N. J. Eq. 435, 437, it appears that Chancellor Zabriske had a similar question before him for consideration, in which it was objected that the title to Broad street was in the municipal authorities or in the public at large, and that consequently the owners of adjacent properties could not possibly take title to any portion of the street. This view of the case was considered by the chancellor, and rejected by him for reasons which are presented in his opinion. From a consideration of the case referred to and all the other authorities upon the subject in this state, I conclude that whenever land is dedicated to the public use for a street or highway, whether by public authorities or by an individual, and the lands adjacent thereto are owned and retained by the public or by such individual, and afterwards conveyed, such conveyance includes and carries with it the title to the middle of the street, unless excluded by express words or necessary implication. The expressions of the courts in the

case of *Salter v. Jonas*, 39 N. J. Law, 469, and in *Ayres v. Railroad Co.*, 48 N. J. Law, 44, 46, 48, 3 Atl. 885; *Id.*, in the court of errors and appeals, 50 N. J. Law, 663, 14 Atl. 901; *Id.*, 52 N. J. Law, 405, 411, 20 Atl. 54,—prevent all further agitation of this question. In the latter case there was an expressed or unequivocal dedication of the lands to the public for street or highway purposes, the grantor owning and retaining the adjacent lands afterwards conveyed. The complainant had taken title from the same grantor to a lot adjoining such street. The conveyance described it as bounded on such street, but contained no expressions excluding the title to the fee of the street. The rule established in these cases has been relied upon and approved in many others. *Freeman v. Sayre*, 48 N. J. Law, 39, 46, 2 Atl. 650; *Weller v. McCormick*, 52 N. J. Law 470, 473, 19 Atl. 1101; *Perkins v. Turnpike Co.*, 48 N. J. Eq. 499, 501, 22 Atl. 180; *National Docks, etc., Ry. Co. v. United New Jersey Railroad & Canal Co.*, 52 N. J. Eq. 377, 28 Atl. 673; *National Docks, etc., Ry. Co. v. Pennsylvania R. Co.*, 52 N. J. Eq. 552, 30 Atl. 581; *Board of Selectmen of Jersey City v. Dummer*, 20 N. J. Law, 86; *Board of Com'rs v. Johnson*, 36 N. J. Eq. 211, 214; *Dodge v. Railroad Co.*, 43 N. J. Eq. 351, 357, 11 Atl. 751.

The views expressed by the chancellor in the case of *Higbee v. Transportation Co.*, supra, as to the devolution of the title to the lands of Broad street and the lands adjacent thereto are fully sustained or corroborated by the explicit declarations of the defendant in its answer in this case. The answer shows that the entire body of land, including the street and adjacent properties, was owned by the lords proprietors, or that they had authority, or assumed to have, to make disposition of the same. (It states that the said proprietors first dedicated or devoted certain portions of the said lands to the authorities of Burlington for the use of streets and highways, and that afterwards they conveyed the title to the premises, a part of which is now owned by Lewis, to one Biddle.) The theory of the answer and the result arrived at thereby will sufficiently appear from the following abbreviation thereof and quotation therefrom: It is said that the site of the city of Burlington is that of the first town located in West Jersey. On the 2d day of March, 1676, the proprietors granted to four persons authority "to select and lay out a town, and they selected Burlington." Then caused a map of said town to be made, "designating the streets thereon, including what is now Broad street." That on the 3d of March, 1676, said proprietors granted "convenient portions of land for highways and streets not under 100 feet in breadth, in cities, towns, and villages," and declared that they should be exempt from all charges whatever. In May, 1682, the assembly, with the approbation of the governor, declared that Burlington should be the chief town in the province. That in March, 1683,

it was enacted that said town, as laid out by one Emley, "should stand and remain for the use of the freeholders and inhabitants of said town." In October, 1693, it was enacted that, in order to prevent vexatious disputes respecting the land and soil of said town, a survey should be made, in which it was declared that the streets of said town "should be laid out as formerly, and no other, to the end that the quantity of the whole, and the quantity of the public streets deducted out of the whole, being known and ascertained, every proprietor and person interested in proprietries might know the exact proportion and quantity which they respectively should enjoy out of the remainder." And that a survey and map was made of the city in 1696, in which Broad street appears as it now exists; and that hence the soil of the streets of the city are in the municipal corporation. I can discover nothing in all this which conveys, or by any implication whatsoever may be supposed to have been intended to convey, any title whatsoever to the municipal authorities of Burlington in the fee of the said highways. It only secured to the public the use of the streets and highways, and defines their location. It is true, the answer states: "To the end that the quantity of the whole, and the quantity of the public streets deducted out of the whole, being known and ascertained, every proprietor and person interested in proprietries might know the exact proportion and quantity which they respectively should enjoy out of the remainder." It will be seen by what appears hereafter that this was 20 years after the town had first been laid out and the streets designated by the said commissioners, and also several years after the conveyance of the lands adjoining Broad street, as it then existed, to one Biddle. The object of the authorities in 1696 was to fix with certainty the bounds of the streets or highways already laid out, and to limit the extent of the use thereof, and that that was all which was in fact accomplished. The fee of the soil, if it had not already been conveyed to adjoining proprietors or others interested, remained in the proprietors. Concluding, as I must, from the facts as stated in the answer, in case the adjacent property had not been conveyed before 1696, carrying the fee to the center of the street, as it undoubtedly would according to the case of *Salter v. Jonas*, supra, when such adjacent property should afterwards be conveyed by a description similar to the one now under consideration it seems to me that the legal title to the fee to the center of the adjacent street would have most clearly passed. But the answer proceeds as follows: "That the lands described in said bill of complaint as the property of the said complainant are a portion of the lands originally granted by the lords proprietors to one William Biddle in the year 1676, after the grant of the soil of Broad street to the inhabitants of the town of Burlington as a public highway; and that, at the time of said

grant, this defendant avers that the title to the soil of said Broad street has been, as a result of the said several proceedings hereinabove stated, and was in the inhabitants of the town of Burlington, where it has ever since been; and that no grant or conveyance of the lands abutting upon said Broad street, and described in said complainant's bill of complaint, since the year 1696, aforesaid, has passed any title beyond the abutting line into said Broad street, or the center thereof;" and then avers that the fee of the soil of said street is in the inhabitants of the city of Burlington.

I do not think the facts thus pleaded by the defendant in any just sense warrant the conclusion by it arrived at. The first and principal fact is totally disregarded. The defendant proceeds upon the notion that the first steps taken towards locating the town and designating its streets were taken in 1696, whereas in truth they were actually taken in 1676. By a review of the above it will appear that the commissioners who were appointed on the 2d day of March, 1676, to select and lay out a town, selected the present location of Burlington, and caused a map of said town to be made, designating the streets thereon, including what is now Broad street, the very street upon the north side of which is located the complainant's premises; and that on the 3d day of March, 1676, said proprietors granted convenient portions of land for highways and streets, not under 100 feet in breadth in cities, towns, and villages; and that in October, 1693, it was enacted that a survey of the soil of said town should be made, in which it was declared that the streets of said town should be laid out as formerly, and no other. It thus indubitably appears that the said commissioners laid out the town, making a map thereof, and designating the streets. It also appears that the proprietors made a general grant of streets, roads, and highways, and that afterwards the assembly, in its proceedings respecting said town, referred to said streets and highways "as laid out as formerly, and no other." Therefore it seems to me to be placed beyond the possibility of contention that the action of the commissioners and of the proprietors was nothing more nor less than the delineation and establishment of streets and highways in the ordinary acceptance of the terms. There is nothing whatever to lead to the conclusion that there was anything more than a simple dedication or devotion of the lands included in such streets and highways to public use. This view is fully supported by the observations of Chancellor Zabriskie in the Higbee Case, 20 N. J. Eq. 436.

This being so, the next inquiry is, when was title to the adjacent land, a part of which is the premises of the complainant, first conveyed by the proprietors? The foregoing statements from the answer place that beyond controversy. It was after the year

1676 and before the year 1696. It was after the map of the town and the location of the street in question, and before the time when it is insisted that the lords proprietors, by a simple declaration, passed the fee of the soil to the authorities of Burlington. It was after Broad street had an actual existence as a street or highway, both in fact and in law, and, as already intimated, before the lords proprietors undertook the action which it is claimed passed the fee of the soil in the streets to the authorities of Burlington. This being so, the supposed action of the proprietors, whatever they attempted in the way of conveying title to the fee, was a nullity, because they undertook to convey that which in legal contemplation had passed beyond their reach; the fee of the soil of the street having previously passed to said Biddle by virtue of the conveyance to him, as is stated in the answer, after the delineation of such street, and before the attempted conveyance of such fee to the town authorities. Neither can I discover anything upon the record which exhibits anything more upon the part of the lords proprietors or the assembly than a distinct recognition of the streets as they existed at the time of the action taken by one or the other, and a more perfect or complete devotion or dedication of such streets to the public use. The sole object of every act was to define or limit the extent of such dedication and of such use. I conclude, therefore, that no act of the said commissioners, nor of the lords proprietors, nor of the assembly, was intended to accomplish anything more than an absolute devotion or dedication of a definite portion of lands to public use, and that the fee thereof remained in the lords proprietors until the conveyance to said Biddle; and that by such conveyance the title to said fee, to the middle of the street, passed to said Biddle. The authorities very plainly sustain this view. As already suggested, Chancellor Zabriskie was of this opinion. In Higbee v. Transportation Co., supra, he had many, if not all, of these very questions under consideration. As I understand his opinion, having granted a preliminary injunction, on final hearing he did not make it perpetual, because in the meantime the case of Railroad Co. v. Prudden, 20 N. J. Eq. 530, had been decided in the court of errors and appeals, which resulted in a reversal of the opinion of the chancellor, because a legal question was involved which had not yet been determined in this state by the courts of law. At the time of the deliverance in the Higbee Case it had not been definitely settled that a conveyance of lands adjacent to a public street or highway, the grantor's title extending to the center of said street, would carry the title of the grantee to the center of said street or highway when the description given in the conveyance extended only to and along the side of such street. It had, however, been decided that in case the owner

of land dedicated any portion of it to public use, as for streets or parks, the fee remained in the owner. Board of Selectmen of Jersey City v. Dummer, 20 N. J. Law, 86; Mayor, etc., of Jersey City v. Morris Canal & Banking Co., 12 N. J. Eq. 562; Trustees of M. E. Church v. City of Hoboken, 33 N. J. Law, 13; Halsey v. Railway Co., 47 N. J. Eq. 380, 20 Atl. 859; Ayres v. Railroad Co., 48 N. J. Law, 44, 3 Atl. 885; Id., 50 N. J. Law, 660, 14 Atl. 901; City and County of San Francisco v. Calderwood, 31 Cal. 585; Schurmeier v. Railroad Co., 10 Minn. 82 (Gil. 59); Wilder v. De Cou, 26 Minn. 16, 1 N. W. 48. But, as the case of Board of Selectmen of Jersey City v. Dummer, supra, was decided at the February term, 1843, holding that the fee in such case remained in the owner, Railroad Co. v. Prudden, supra, holding that rights of adjacent owners and alleged trespassers in such cases must first be settled at law before courts of equity can interfere was decided in March term, 1869; and the Case of Higbee, by the chancellor, in which he was governed by the doctrine laid down in Railroad Co. v. Prudden, refused a permanent injunction,—the legal question not having been disposed of,—after which, and in the June term, 1877, the court of errors and appeals decided the case of Salter v. Jonas, supra, which finally disposed of the legal principle involved in the case by holding that the owner of lands adjacent to a public street, owns the street to the middle thereof, and that his conveyance of such adjacent land will pass the title to the middle of such street, although the adjacent land is only described by courses and distances, which begin and end in the side of the street, and run along the line thereof, without including any portion of the street within the bounds of such courses and distances. The courts of law having been thus sustained by the court of errors and appeals in their declaration of the legal rights of the parties in similar cases, the court of chancery has thus been given a standard for its guidance which has ever since directed its course, and which for me to disregard understandingly would be the veriest presumption. Vice Chancellor Van Fleet in Board of Com'rs v. Johnson, supra, and in National Docks, etc., Ry. Co. v. United New Jersey Railroad & Canal Co., supra, recognized the propriety of proceeding in courts of equity in such cases, as did also Vice Chancellor Green in the case of Perkins v. Turnpike Co., supra. Nor can I find any room to doubt but that Chancellor Zabriskie would have decreed a perpetual injunction in the Higbee Case had it come on for final adjudication after the case of Salter v. Jonas, supra.

The facts and circumstances presented and brought under discussion in this case, relating as they do to the very first transactions of those who claimed and exercised the right to deal with the lands and titles thereto in question, justify me in saying that the prin-

ciple laid down in Salter v. Jonas, supra, and the other cases cited, prevails where the state or sovereign, or those representing either, make conveyances of lands bordering on highways or nonnavigable streams, and in many cases even where such streams are navigable above tide water, the public only having the use of the waters of the stream for navigation. Arnold v. Mundy, 6 N. J. Law, 1; Cold Spring Iron Works v. Inhabitants of Tolland, 9 Cush. 492, 495; Luce v. Carley, 24 Wend. 451; Canal Com'rs v. People, 5 Wend. 444; Lunt v. Holland, 14 Mass. 149; 3 Kent, Comm. marg. pp. 432, 434. The views of Chancellor Kent are cited with approbation in the cases of Railroad Co. v. Schurmeier, 7 Wall. 272, at page 287; Ice Co. v. Shortall, 101 Ill. 46; Schurmeier v. Railroad Co., 10 Minn. 82 (Gil. 59); Jones v. Soulard, 24 How. 41. In the Higbee Case, 20 N. J. Eq. 438, Chancellor Zabriskie said: "The preliminary injunction in this case was granted on the assumption that, if the legal right of the complainant seemed clear to the chancellor, it was his duty to protect it." In Weller v. McCormick, 52 N. J. Law, 473, 19 Atl. 1101, the supreme court in speaking of the liabilities of a defendant for injuries resulting from a limb falling from a tree which stood within the street limits, said: "It appeared, however, that he was in actual occupation as owner of the premises abutting upon the street where the tree stood, and his title and possession presumably extended to the middle of the street, subject only to the public rights;" citing Salter v. Jonas, supra.

According to the authorities thus referred to, in such case as is before me for consideration the legal presumption is that the conveyance carries the title to the middle of the street. That presumption has not been shaken by any allegation of facts in the answer, but, on the contrary, supported by the facts therein stated. The right insisted upon by the defendant under an agreement with the authorities of the city of Burlington cannot prevail against the complainant in this case if his title extends to the middle of the street, as I think it does. If the complainant is the owner of the fee to the center of the street, as has been claimed, it is not denied but that he is entitled to compensation. I will advise that the order to show cause be made absolute. Let the costs abide the final result.

NATIONAL DOCKS & N. J. J. C. RY. CO. v. PENNSYLVANIA R. CO. et al.

(Court of Chancery of New Jersey. Feb. 20, 1896.)

APPEAL—EFFECT—INJUNCTION—CONTEMPT—PUNISHMENT—SEQUESTRATION.

1. An appeal from the court of chancery is without effect upon the subsequent proceedings in a cause there pending, while it remains undetermined, except it be taken from a final decree, within 10 days after the decree is signed, in

which case it stays process in execution of the decree unless order be made to the contrary. If other relief against a final decree, while the appeal is undetermined, be necessary or proper, it must be had by order of this or of the appellate court.

2. The mere existence of an appeal from a final decree does not affect the inherent validity and force of that decree. If the decree is itself an injunction, that injunction remains in force after the appeal, and must be obeyed, unless this or the appellate court shall order a suspension of its effect.

3. In enforcing obedience to an injunction from a corporation, sequestration may be resorted to.

(Syllabus by the Court.)

Petition by the National Docks & New Jersey Junction Connecting Railway and others against the Pennsylvania Railroad Company and others for an order to show cause why defendants should not be adjudged in contempt. Order issued, and defendants adjudged in contempt.

The complainant, by condemnation, has acquired the right to cross a car yard of the defendants, nearly at right angles to 21 railroad tracks laid therein, by means of an arched masonry passageway beneath the surface of the yard. The parties having failed to agree as to the manner in which the work of constructing that arched passageway shall be executed, the aid of this court was invoked to regulate the enjoyment of their respective rights in that respect. The suit has been prosecuted to final decree, signed on the 28th of January, 1896, by which, among other things, it was ordered "that the defendants be, and they hereby are, enjoined and restrained from obstructing the complainant in the construction of its railroad and arch upon the route of complainant, according to the plan and in the manner set forth in the order of amendment of the Hudson circuit court, dated September 30, 1893, and in the statement filed July 11, 1895, in the office of the clerk of said court, copies of which are annexed to the bill, marked Exhibits 'B' and 'L,' respectively, and from placing or maintaining any cars within the route of complainant upon defendants' yard tracks 1, 2, and 3, being the most southerly of the yard tracks in the car yard of defendants covered by complainant's route, until the complainant shall have completed its arch across said tracks," etc. From this decree the defendants duly appealed, within 10 days from its date. On the 29th of January, the defendants, having first given notice of their appeal from the decree, through their superintendent, Edward F. Brooks, removed some baggage cars which for some time theretofore had been standing upon their yard track No. 1, over the route of the complainant's crossing, and deliberately moved five flat cars, loaded with heavy pieces of rock, to the place thus vacated, and maintained them there, having in readiness implements to enable the employees of the defendant companies to throw the rocks into any excavation the complainant might make, and thus obstruct the erection of the complain-

ant's tunnel. The flat cars were thus maintained until the complainant's workmen undermined the tracks upon which they were placed, and some of them fell into the excavation; but the defendants did not throw the rocks from them. The defendants have also, since the making of the decree, maintained passenger cars on their tracks 2 and 3, at the place of the complainant's crossing. Because of this conduct, the complainant seeks to have the defendants adjudged to be in contempt for violation of the injunctive provisions of the decree, and punished.

Charles D. Thompson and Charles L. Corbin, for petitioner. James B. Vredenburg, R. V. Lindabury, and Frank Bergen, for defendants.

MCGILL, Ch. (after stating the facts). The decree prescribes the manner in which the construction of the arched tunnel crossing of the defendants' yard is to be executed, restrains the defendants generally from obstructing such execution, and enjoins them particularly from placing or maintaining cars on their tracks at points in the route of crossing at which the complainant may, under the plan of construction, from time to time be proceeding with its work. The design of such injunction is to give the complainant possession of the route of crossing for the purpose of constructing its tunnel in the manner sanctioned by the decree. It is restrictive, in that it forbids interference, and it is mandatory, in effect, in its requirement that maintenance of existing obstructions, in the shape of cars upon the tracks to be crossed, shall cease. The defendants have disputed, and, in their appeal, propose yet to dispute, the lawfulness of the method of constructing the tunnel which the decree prescribes. Their argument is that such method permits the severance of several of the car tracks in the yard at a time, during the progress of the work, and thus sanctions the temporary putting of a portion of the yard into disuse, when, in fact, it is possible for the complainant, at additional expense, to accomplish the construction without severing any of the tracks. Therefore, such severance, and the consequent deprivation of the use of part of the yard is unnecessary, and, hence, an unlawful interference with them in the exercise of their franchises. In answer to this application they insist that the appeal operates as a supersedeas of the injunctive provisions of the decree, so that, pending the determination of the appeal, no movement may be made by the complainant under the protection of the decree, and they are not restrained from resisting any attempt upon the complainant's part to prosecute the construction.

In absence of any statutory regulation or established practice or court rule of our own, the English practice has always prevailed in this court. *West v. Paige*, 9 N. J.

Eq. 203; *Schenck v. Conover*, 13 N. J. Eq. 33; *Ratzer v. Ratzer*, 29 N. J. Eq. 162; *Hitchcock v. Rhodes*, 42 N. J. Eq. 495, 8 Atl. 317. In *Hovey v. McDonald*, 109 U. S. 150, 3 Sup. Ct. 136, Mr. Justice Bradley, who, it is remembered, at one time was an eminent practitioner in this court, said: "In England, until the year 1772, an appeal from a decree or order in chancery suspended all proceedings; but since that time a contrary rule has prevailed there. The subject was reviewed by the house of lords in 1807 (15 Ves. 184), and an order was made establishing the right of the chancellor to determine whether and how far an appeal should be suspensive of proceedings, subject to the order of the house on the same subject." Our cases recognize the later English rule, modified somewhat by court rule, as prevailing in this court. "By the practice of the English court of equity," said Chancellor Green, in *Schenck v. Conover*, *supra*, "as well as by the practice of this court, so far as regulated by statute, an appeal from a decree in equity, either interlocutory or final, does not stay proceedings in the case below, or prevent the issuing of process without a special order for that purpose." In the earlier case of *Doughty v. Railroad Co.*, 7 N. J. Eq. 629, the same distinguished judge, then chief justice, sitting in the court of errors and appeals, said: "By the ancient practice it was held that an appeal from a court of equity stayed all further proceedings in the court below. But by the modern English practice, the appeal does not stay proceedings, but an order for that purpose must be obtained in the court of chancery or in the house of lords. * * * By our practice, an appeal from an interlocutory decree does not stay proceedings, except by an order of this court or the court of chancery for that purpose. If an appeal from a final decree be filed in 10 days, it prevents issuing process on the decree. Court of Chancery Rule 20." The rules of the court of chancery, in force when Chief Justice Green thus wrote, are to be found in Potts' *Chancery Precedents*, published in 1841. They are as follows: "(20) Of Appeals. First. In case of an appeal from an order or interlocutory decree, the appeal shall not stay proceedings thereon without an order of this court or of the court of appeals, for that purpose first had, and upon complying with such terms as the court making the order to stay proceedings may impose. Second. In case of an appeal from any final sentence or decree, if the party appealing shall, within 10 days after such final sentence or decree, file his appeal with the clerk of this court, it shall prevent issuing process on the said decree, without the order of this court or of the court of appeals first had and obtained for that purpose." The rules to-day are in substance the same. They are: "(149) An appeal from an interlocutory decree or order shall not stay

proceedings in the cause without an order of this court or of the court of appeals, for that purpose first had, which order shall be granted upon such terms as the court making it may impose. (150) If the party appealing from a final decree shall, within 10 days after the filing of such final decree, file his appeal with the clerk of this court, process shall not issue on said decree without the order of this court or of the court of appeals."

It appears, then, to be clear that the mere taking of an appeal from this court is without effect upon subsequent proceedings in the cause, except it be taken from a final decree, within 10 days after the decree is made, and then it stays process in execution of the decree, unless order be made to the contrary. If other relief against the decree, pending the determination of the appeal, be necessary or proper, it must be had by order of this court or of the appellate tribunal. Moreover, I find no warrant for the insistence that the mere existence of an appeal suspends or in any manner affects the present inherent validity and force of the decree appealed from. The person in whose favor it is rendered is denied process to enforce it, and that is all. Consequently, where the decree is itself an injunction, that injunction is in force, and must be obeyed, unless, to continue the status quo of the parties, pending the determination of the appeal, this court or the court of errors and appeals shall order a suspension of its effect. And it is not necessary to issue a writ to bind the parties to the suit to obedience to such a decree. Being before the court, they are bound, at their peril, to take notice of the provisions of any decree rendered in due course, upon the issues tendered. *Hawkins v. State*, 126 Ind. 296, 28 N. E. 43. I find that the great weight of authority throughout the country, where statutes similar, in effect, to our rules prevail, accords with this view. In the case of *Hovey v. McDonald*, already cited, the decree directed a receiver to deliver certain funds to the defendants. After appeal had been duly taken, the receiver obeyed the decree, and question arose in the United States supreme court whether the appeal had operated as a supersedeas, so that the decree should not have been obeyed, and the court held that it had not. Mr. Justice Bradley, in the opinion of the court, said: "But the decree itself, without further proceedings, may have an intrinsic effect, which can only be suspended by an affirmative order, either of the court which makes the decree or of the appellate tribunal." He instances the decision of the United States supreme court in the *Slaughter-House Cases*, 10 Wall. 273, where it was held that a decree granting, refusing, or dissolving an injunction does not disturb its operative effect, and in which Mr. Justice Clifford said: "It is quite certain that neither an injunction, nor a decree

dissolving an injunction, passed in a circuit court, is reversed or nullified by an appeal or writ of error, before the cause is heard in this court." In the New York court of appeals, in the case of Sixth Ave. R. Co. v. Gilbert El. R. Co., 71 N. Y. 430, a judgment forbade the appellant proceeding with the construction of its railroad. An appeal was perfected, and an order was obtained, staying execution upon the judgment, and then the appellant, notwithstanding the restraint of the judgment, having tied up its affirmative enforcement, proceeded with the erection of its road, the thing forbidden by the judgment. A judge, at chambers, thereupon ordered the appellant to show cause why it should not be held to be in contempt. The general term of the supreme court vacated the order, and its action was carried to the court of appeals, where the appeal was dismissed, because the action of the general term appeared to have been put upon the ground of exercise of judicial discretion, and not upon the ground of want of power, and therefore was not appealable. But, in the court's opinion, Judge Allen discussed the subject we consider, taking views which have commanded general approval throughout the country. He said: "By the appeal, with a stay of proceedings on the part of the plaintiff in execution of the judgment, the judgment was not annulled, or its obligations upon the defendant impaired, but its 'execution' was stayed; that is, the plaintiff was prohibited from issuing process in execution of it. * * * The order of the judge was in substantial compliance with the statute, and stayed all proceedings, on the part of the plaintiff, in execution of the judgment. But this did not affect the validity or effect of the judgment, pending the appeal, so far as it bore upon and restrained the action of the defendant, its servants, or agents. It did not absolve them from the duty of obedience, and permit them to do that which the judgment absolutely prohibited, and the doing of which would cause irreparable mischief to the plaintiff, or an injury which could not certainly be compensated in damages." To the same effect are the cases of *Gardner v. Gardner*, 87 N. Y. 18, and *Genet v. Canal Co.*, 113 N. Y. 475, 21 N. E. 390. In the latter of these cases *Andrews, J.*, said: "The judgment in this case prohibits the defendant from using its structures on the plaintiff's lands in the way in which it had been accustomed to use them for several years, and from depositing culm on the surface. It adjudges the right as claimed by the plaintiff, and denies the adverse claim of the defendant. The judgment operates, of its own force, and without further process, as a prohibition against doing the act enjoined. The appeal does not, of itself, relieve the defendant from the duty to obey the judgment." In *Indiana* the same doctrine is maintained in well considered deliverances. *Central*

Union Tel. Co. v. State, 110 Ind. 203, 10 N. E. 922, and 12 N. E. 136; *Hawkins v. State*, 126 Ind. 296, 26 N. E. 43. And in *State v. Dillon*, 96 Mo. 56, 8 S. W. 781, where the effect of the statutory provision is that a perfected appeal should stay execution, and all further proceedings upon the judgment appealed from, *Brace, J.*, said: "Our law regulating practice in injunction and appeals is essentially the same as that prevailing in the federal courts and those of other states, and the overwhelming weight of authority is that injunctions ordered on final hearing on the merits are not vacated by an appeal from that decree. A stay of proceedings, from its nature, operates only on orders and judgments commanding some act to be done, and does not reach injunctions."

The wisdom of this limitation upon the effect of an appeal, and requirement of a special order to suspend the injunctive force of a decree, is conspicuous, when we regard the infinite variety of situations which command the exercise of the injunction power in the administration of justice, and consider that it is impossible to formulate any uniform scheme of suspension by the appeal alone, which may not be used as an instrument of grievous injustice. Each case must be submitted to judicial discretion. There is no doubt as to the power of the courts, original and appellate, to ascertain, and by order in furtherance of justice, to preserve, the status quo, pending appeal. In *Hovey v. McDonald*, Mr. Justice Bradley said, upon this subject: "This power undoubtedly exists, and should always be exercised when any irremediable injury may result from the effect of the decree as rendered." So, also, it is affirmed in *Genet v. Canal Co.*, 113 N. Y. 475, 21 N. E. 390, and *New Brighton, etc., R. Co. v. Pittsburgh, etc., R. Co.*, 105 Pa. St. 13, 23. Upon the facts presented by the complainant's petition, in the present matter, there is no question as to the defendants' disobedience of the injunctive provisions of the decree. Not only have they failed to desist from maintaining cars upon the tracks specified in the decree, but they have affirmatively substituted, for cars which were upon one of the tracks when the decree was made, others more obstructive of the work which the decree permits. Their disobedience has consisted of not only negative omission, but also of active commission. The facts charged are not denied. Refuge is taken in the advice of counsel, which was in accordance with the insistence here, that the appeal suspended the force and effect of the decree, and a disavowal upon the part of Mr. Brooks of any intent to condemn or defy the authority of the court. The defense is available, as tending to eliminate the criminal features of the contempt, and to mitigate punishment; but it does not change the fact of disobedience, and existence of at least constructive contempt.

Consideration of the action to be taken by the court remains. Should it inflict punishment, and proceed, as the complainant asks, by sequestration or otherwise, to enforce obedience to its decree? It is argued that, in the present situation of affairs, such action would be equivalent to an order that process shall issue to enforce the decree. It is true, resort to sequestration, which appears to be a proper method of securing obedience in case of corporate disobedience (*U. S. v. Memphis, etc., R. Co.*, 6 Fed. 237, 239; *Thompson v. Railroad Co.*, 48 N. J. Eq. 105, 110, 21 Atl. 182; *Spokes v. Board*, L. R. 1 Eq. 42; *Attorney General v. Great Northern R. Co.*, 15 Jur. 387; *Attorney General v. Birmingham, etc., Drainage Board*, -17 Ch. Div. 685, 693), would lead to the enforcement of the decree, and, also, that punishment, by fine or otherwise, leaving the decree in force, would be a step in the same direction; but, when the court's decree is disregarded, or deliberately defied, is the punishment of the contemner to be withheld because it may operate to deprive him of an advantage which the court's rules of procedure give him? The contrary has been held, even where the issuance of process in enforcement of a decree is forbidden by statute (*Sixth Ave. R. Co. v. Gilbert El. R. Co.*; and *State v. Dillon*, above cited); the proceedings in attachment being regarded as independent and quasi criminal. And this is the true rule. Otherwise, the decree of the court would practically be a nullity, from the time the appeal is taken until it shall be determined. In the argument of this matter the defendants' counsel distinctly declared that they did not ask for the suspension of the injunctive force of the decree,—that they denied the operative force of the decree, and rested upon that position alone. In this attitude of affairs, I deem it to be my duty, in meting out punishment, not only to so act as to rebuke the at least constructive indignity to the court, but also to do that which will insure obedience to the decree in respect to the complainant's right under it. 2 Bish. Cr. Law, § 269. The injunctive force of the decree remaining in force, such action is necessary to its adequate protection, and must be taken, notwithstanding its effect may be the enforcement or partial enforcement of the decree. Doubting the efficacy of a mere fine to accomplish more than punishment for the offense against the court itself, because of the defendants' preparation and manifest disposition to resist the complainant's progress by force, I feel constrained to resort to sequestration. I therefore will fine each of the defendants \$10. to be paid to the clerk for the use of the state, in accordance with the requirements of the statute (Revision p. 123, § 103), and I will direct the issuance of a commission of sequestration, limited to the car yard in question, and the goods and chattels of the defendant com-

panies while therein, to the end that they may be so controlled that future interference with the prosecution of the work permitted by the decree shall be prevented, which commission shall continue in force until the crossing shall be built, unless otherwise directed by order of the court. But, as I am reluctant to believe that the defendants will not immediately give satisfactory assurance of obedience to the decree which may induce me to revoke the direction for sequestration, the issuance of the commission will be withheld for 30 days.

EDGEWORTH v. WOOD.

(Supreme Cour. of New Jersey. Feb. 20, 1896.)

CORPORATIONS—HOW SUED—EVIDENCE OF OWNERSHIP AND POSSESSION.

1. The United States Express Company is a joint-stock company or association, formed under the laws of the state of New York, which expressly authorize any such company or association to sue and be sued in the name of its president or of its treasurer. *Held*, that the company possesses such corporate existence and powers that it does not fall within the provisions of the supplement to the practice act of May 23, 1890 (Laws 1890, p. 353); and an action may be maintained against it in this state in the manner prescribed by the laws of New York, viz. in the name of its treasurer.

2. Whether an aggregation of individuals formed by law in an artificial body is a corporation or not, is to be determined rather by the faculties and powers conferred upon the body than by the name or description given to it.

3. Plaintiff was injured by being run over in a public street by a wagon drawn by two horses. The evidence showed that the United States Express Company had a stable in the vicinity, in which were stabled the horses which drew over 100 wagons employed in the business of the company, which wagons were painted in a peculiar manner, and marked with the name of the company and a particular device used by it. *Held*, that evidence that the wagon which ran over plaintiff was so painted and marked was sufficient to justify the inference that the company was its owner, and, upon such inference, established *prima facie* that the company was in possession and control of the wagon by the driver as its servant.

(Syllabus by the Court.)

Action by Robert Edgeworth against Theodore F. Wood, treasurer of the United States Express Company. There was a verdict for plaintiff, and defendant sued out a rule to show cause why the same should not be set aside. Rule discharged.

Argued November term, 1895, before the CHIEF JUSTICE and LUDLOW and MAGIE, JJ.

Gilbert Collins, for the rule. Flavel McGee, opposed.

MAGIE, J. This is an action in tort, in which plaintiff seeks to recover damages for injuries suffered by him by reason of his being run over, in a public street in Jersey City, by a wagon of the United States Express Company, negligently driven by a driver in the employ of that company. The jury

having rendered a verdict for plaintiff, this rule to show cause why the verdict should not be set aside was allowed. Several reasons were filed in support of the rule, but only three have been urged in the argument. These only will be considered.

It is first contended that neither plaintiff's declaration nor the evidence produced by him discloses any liability on the part of Theodore F. Wood, treasurer of the United States Express Company, to answer for plaintiff's injuries, if inflicted as he claimed. Plaintiff claims to have made out his case in this respect, in the following manner: He produced proof that the United States Express Company was an association organized April 22, 1854, under the laws of New York, and having a principal place of business in the city of New York, and that Thomas C. Platt was its president, and Theodore F. Wood was its treasurer. He put in evidence chapter 258 of the Laws of New York for the year 1849, and sections 1919-1924 of the New York Code of Civil Procedure, whereby it appeared that any association thus organized was expressly authorized to sue and to be sued in the name either of its president or its treasurer for the time being. Upon this he contends that he is entitled to an action against Wood as treasurer, and as Wood is a resident of New Jersey, and was served with process here, that our courts, by comity, will recognize the liability to suit imposed by the laws of New York. In opposition to this, it is contended on the part of defendant that if it be conceded that our courts will, by comity, adopt and enforce remedies against such associations in the mode prescribed by the law of the state under which they came into existence, yet, if the law of this state has furnished a mode of procedure by which remedies against such associations may be enforced, the rule of comity ceases, and the mode of procedure provided by our laws must be pursued. The supplement to the practice act, approved May 23, 1890 (Laws 1890, p. 353), is conceived by counsel to have furnished a mode of procedure under which this action could have been maintained against the United States Express Company. By that act it is enacted that any "unincorporated company, stock company or association" consisting of two or more persons united for business purposes, and having a recognized name, may be sued by that name in any action affecting the common property or the joint rights and liabilities of such company or association. Provision is made for the service of process and for the issue of an execution upon judgment in the same manner as upon judgments against corporations. If the United States Express Company is an unincorporated association, within the meaning of the act, it would seem that plaintiff could have brought his action under that act.

Questions concerning the nature of associations formed under the laws of New York, such as the United States Express Com-

pany, have been frequently considered in the courts of that state. The act of 1849 speaks of them as joint-stock companies or associations. By its certificate this company calls itself a joint-stock company. In the earliest case to which my attention has been directed, the question requiring solution was as to the relation between a shareholder and such a company. After an exhaustive review of the New York statutes on the subject, Judge Barnard declared that such companies had all the qualities of corporations, except that of having a common seal. His conclusion was that, in a controversy between a shareholder and the company, he was not to be considered as a partner in a partnership, but the courts must deal with his relation following the analogy of the law of corporations. *Waterbury v. Express Co.*, 50 Barb. 157. In a later case, an action was brought by a shareholder in the same company against Fargo, its president, to recover for the loss of articles intrusted to it for transportation. The defense was that the owner of an interest in the company could not maintain such an action against it, which it was claimed was like an action by a partner against the partnership. The action was sustained by the court below. *Westcott v. Fargo*, 6 Lans. 319. Upon appeal the opinion was delivered by Dwight, one of the commissioners of appeal. Upon a review of the statutes, he declared that the president or treasurer of one of these joint-stock companies or associations was to be regarded, for the purposes of an action against the company, substantially as a corporation sole; that such companies possessed some powers and privileges of corporations not possessed by individuals or partnerships; and that an action upon a liability of the company might be maintained by one of its members. *Westcott v. Fargo*, 61 N. Y. 542. Later, the United States Express Company, the very company whose officer is here sued, objected to the imposition of a tax upon its corporate franchises and business computable upon its capital stock, under an act taxing corporations, joint-stock companies, and associations incorporated or organized under any law of the state. Its contention was that it was neither so incorporated nor organized. The right to impose the tax was sustained, T. Danforth saying: "The agreement which brought many persons into one artificial body was so framed as to accomplish that end, and, in proposing to conduct its affairs by the power given to it in the mode prescribed by the legislature, they must be deemed, for the purposes of the act in question, to be incorporated,—that is, formed or united under the law of the state,—whether the artificial body be termed a corporation, a joint-stock company or association." *People v. Wemple*, 117 N. Y. 136, 22 N. E. 1046.

Questions have also arisen respecting the

right to remove to the federal courts actions between the president or treasurer of such companies and other persons. In *New York* it was held, in a suit by *Fargo*, as president of such a company, organized in New York, that the company was to be considered, like a corporation, a citizen of New York, and the action was removable to the United States court if the other party was a citizen of another state. *Fargo v. McVicker*, 55 Barb. 437. In the United States circuit court for the district of Michigan, Judge Brown (now justice of the supreme court) held that such a company formed in New York was to be deemed a citizen of New York without regard to the citizenship of its members. *Maltz v. Express Co.*, 1 F. Supp. 611, Fed. Cas. No. 9,002. In another case in the federal courts, the action was brought by *Fargo*, as president of such a company, against a citizen of a Western state, and Judge Gresham held that such a company was a citizen of New York, and could maintain an action in those courts, notwithstanding the fact that some of its shareholders were residents of the state in which the defendant resided. *Fargo v. Railway Co.*, 6 Fed. 787. In the case last cited and in some of the other cases, the conclusion reached has not been deemed invalidated by the fact that some of the New York statutes speak of such companies and associations as unincorporated. In *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, the supreme court of the United States held that an English joint-stock association, which was endowed with certain corporate powers, must be considered by our courts to be a corporation, notwithstanding the acts of parliament declared that such associations should not be held to be corporations. Whether an aggregation of individuals united in an artificial body is a corporation or not is to be determined rather by the faculties and powers conferred upon the body than by the name or description given to it.

Upon this review, I have reached the conclusion that the United States Express Company is a corporate entity, empowered to sue and be sued, not, as is usual, in a corporate name, but in the name of designated officers. To such a corporation the act of 1890 does not apply, and this action was therefore properly brought against Wood, as treasurer, whose status in the suit is not that of an individual, but of a representative of the company. This reason cannot therefore prevail.

It is next contended that there was no sufficient evidence that the driver of the horses which collided with plaintiff was the servant or agent of the express company, for whose negligence the company would be liable. Upon this subject the evidence showed that the United States Express Company was engaged in the business of transporting express matter over railroads running out of Hoboken, and also over rail-

roads running out of Communipaw. It maintained a stable situated in the vicinity of the place at which plaintiff was injured, in which were stabled the horses which drew over 100 wagons belonging to the company. These wagons were painted in peculiar colors, and had upon their sides the name of the company and a device, which one of the witnesses calls its "trade-mark." All the witnesses who saw the accident and noticed the wagon which ran over plaintiff unite in declaring that it was painted as were the wagons of the company, and that it was marked with the company's name and device. Considering the great improbability that any other owner of a wagon would thus paint and mark it, a plain inference could be drawn from the evidence that the wagon in question was in the ownership of the company. If that inference be drawn, it is sufficient to establish *prima facie* that the wagon, being owned by the company, was in its possession, and that whoever was driving it was doing so for the company. In an action for an injury to a boat of plaintiff by a collision with a barge, there was evidence that the barge was marked by the defendant's name and number, and it was contended that this was not sufficient to show that it was navigated by defendant's servant, as it might have been taken by some one else or have been on hire. But Lord Denman, at nisi prius, held that the fact that the barge was owned by defendant was *prima facie* evidence that the bargeman was his servant, and cast on defendant the burden of proving it was otherwise controlled. *Joyce v. Capel*, 8 Car. & P. 370. Proof of the ownership of a pair of runaway horses in defendant was held in New York to be sufficient to justify a jury in finding the persons who were in charge of the horses when negligently permitted to escape were defendant's servants. *Norris v. Kohler*, 41 N. Y. 42. A like view was taken in *Svenson v. Steamship Co.*, 57 N. Y. 108. Evidence less forcible than that before us has been held to be *prima facie* sufficient to charge a master. *Railway Co. v. Callaghan* (Ill.) 41 N. E. 909; *Schulte v. Holliday* (Mich.) 19 N. W. 752. The verdict should not be disturbed for this reason.

It is lastly contended that the verdict is against the weight of evidence. This contention is put on this ground: The wagon which ran over plaintiff was drawn by two horses. The company used only two such wagons in the transaction of what was called "Jersey City business"; that is, in delivering express matter from Hoboken and Communipaw in that city, or carrying such matter from that city to those points. The drivers of those wagons testified that plaintiff was not injured by their wagons. But this contention overlooks the fact that the company employed many other wagons drawn by two horses, and that there was evidence from which the jury might find

that such other wagons were sometimes used by the company in carrying express matter about or through Jersey City.

The rule to show cause should be discharged.

STATE (COHEN, Prosecutor) v. WATSON,
Overseer of the Poor.

(Supreme Court of New Jersey. Feb. 20,
1896.)

FAILURE TO SUPPORT CHILD—FINDINGS.

In a proceeding under the fifth section of the act concerning disorderly persons, it must be alleged and found that the family may become chargeable to the township or city, and also that the father or husband willfully refuses or neglects to provide for and maintain his family.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Jake Cohen, against J. D. Watson, overseer of the poor, to review an order requiring him to support his infant child. Reversed.

Argued November term, 1895, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

S. C. Woodhull, for prosecutor. S. M. Robins, for defendant.

VAN SYCKEL, J. This certiorari is prosecuted to review an order made by the recorder of Camden, under section 5 of the "disorderly act" (Revision, p. 305), as amended in Supp. Revision, p. 219, requiring the prosecutor to support the infant child of Jennie Cohen. The fifth section, as amended, provides "that any husband or father who deserts or wilfully refuses or neglects to provide for and maintain his wife or other family shall be deemed and adjudged a disorderly person, and whenever any overseer of the poor of the township or city within which any husband or father resides or the overseer of the poor of the place of legal settlement of such husband or father believes that such person does desert or wilfully refuse or neglect to provide for and maintain his said family, and that by reason thereof such family was become chargeable to such township or city, it shall be his duty to make complaint thereof under oath before some justice of the peace in either the township or city where the said disorderly person resides or the place of his legal settlement." Section 14 of the act (Revision, p. 306) provides that, if the justice decides the person charged to be guilty, he shall adjudge him to be a disorderly person, and may make an order requiring him to pay a weekly sum for the support of his family. The return to the writ in this case shows that the recorder found that Jake Cohen was guilty of being a disorderly person, and thereupon ordered him to pay to the overseer of the poor of the city of Camden four dollars per week for the support of said child for one year. These proceedings must be set aside for two reasons: (1) The recorder did not find or decide that Cohen was

guilty of the charge made in the complaint against him; that is, that he neglected and willfully refused to maintain his wife or family. He only adjudged that Cohen was a disorderly person. That did not authorize him to make the order for support. He might have been a disorderly person, and yet have supported his family well. (2) The recorder did not find that the family of Cohen might become chargeable to the city of Camden, and, as far as appears, there was no evidence to support such a finding. This was a fatal omission, under the case of *Gedney v. Dey*, 44 N. J. Law, 576.

STATE (CAVANAGH, Prosecutor) v. BOARD
OF CHOSEN FREEHOLDERS OF
ESSEX COUNTY.

(Supreme Court of New Jersey. Feb. 20,
1896.)

REMOVAL OF VETERAN SOLDIER—NECESSITY OF
HEARING.

An honorably discharged Union soldier, who is employed as a guard or keeper in a county jail, such employment being for no specific time, is entitled to the protection of the act of March 14, 1895 (P. L. 1895, p. 317), which forbids the removal of such soldier from any position or office, under the government of any county of this state, the term of which is not fixed by law, except after hearing, and upon good cause shown.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Francis J. Cavanagh, against the board of chosen freeholders of the county of Essex, to review their action dismissing prosecutor. Dismissal set aside.

Argued November term, 1895, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Joseph A. Beecher, for prosecutor. Joseph L. Munn, for defendant.

GUMMERE, J. The writ of certiorari brings into this court, for review, the action of the jail inspection committee of the board of chosen freeholders of Essex county, removing the prosecutor from his position as keeper or guard in the Essex county jail. He was appointed to this position on March 4, 1890, for an indefinite period, and was removed on June 8, 1895, without a hearing, and without any charges having first been preferred against him. The prosecutor is an honorably discharged Union soldier, and claims that his removal is in violation of the provisions of an act, entitled "An act regarding honorably discharged Union soldiers, sailors, and marines," approved March 14, 1895 (P. L. 1895, p. 317). That act declares that no person now holding, or who may hereafter hold, a position or office under the government of this state, or the government of any city or county of this state, whose term of office is not fixed by law, who is an honorably discharged Union soldier, sailor, or marine, shall be removed from such position or of-

fice, except for good cause shown, and that, before any such soldier, etc., shall be dismissed from any such position or office, charges shall be preferred against him, a copy of which must be served upon him, and a time set for the hearing of the same, at which time the soldier, etc., so accused shall have the right to be represented by counsel, and to procure witnesses and testimony in his own behalf. This act was in force at the time of the prosecutor's removal, and he was entitled to its protection, provided he held a position or office under the county government, within the meaning of the act. The distinction between those positions which are entitled to the protection of what are commonly known as the "Veteran Acts," and mere employments under the state, city, or county, is pointed out in the case of *Lewis v. Jersey City*, 51 N. J. Law, 240, 17 Atl. 112; and it is there stated that those acts do not apply to employments which are occasional or temporary, or where the services to be performed are of a general character, and such as may be from time to time directed by a superior, without being in any manner indicated by the special nature of the employment, but that those employments, the duties of which are continuous and permanent, and specially pertaining to the position assumed, are within their protection. Applying this test, it seems to me that the prosecutor in this case was "a person holding a position," within the meaning of the act of 1895. He was appointed keeper or guard in 1890, and remained in that position, continuously, for a period of more than five years. His duty, which was to assist in guarding the jail, and in keeping watch over the prisoners, was permanent in character, not occasional or temporary, and it pertained to the position which he occupied. Being a person holding a position under the government of Essex county, who is an honorably discharged Union soldier, his removal without a hearing, and without any charges having been first preferred against him, was in violation of the act of 1895; and the resolution of dismissal should be set aside, with costs.

STATE (HORAN, Prosecutor) v. BOARD OF
EDUCATION OF CITY OF ORANGE.

(Supreme Court of New Jersey. Feb. 20,
1896.)

UNION VETERAN—DISCHARGE FROM OFFICE.

H., an honorably discharged Union soldier, was appointed by the board of education of Orange janitor of one of the schools of that city for a year. At the expiration of the year, the board appointed Y. to the position. *Held*, that such action of the board was not a violation of the act of March 14, 1895, which forbids the removal of an honorably discharged Union soldier, who holds a position under a city government of this state, except for cause and after hearing.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of Michael Horan, against the board of education of the city of Orange, to review the appointment of prosecutor as janitor of school No. 1, Orange, N. J. Writ dismissed.

Argued November term, 1895, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Joseph A. Beecher, for prosecutor. Colie & Swayze, for defendant.

GUMMERE, J. On the 22d of June, 1892, Horan, the prosecutor, was appointed by the board of education of Orange janitor of school No. 1 for the school year next ensuing. On the 23d day of June, 1893, he was again appointed by said board janitor of said school for the period of one year from the 1st day of July then next. On the 26th day of June, 1894, he was reappointed by said board janitor of said school for the year ending July 1, 1895, and was notified thereof by the secretary of the board. This reappointment he accepted in a written communication to the secretary, which reads as follows: "Please report to the board my acceptance of the appointment, pursuant to your notification." On May 22, 1895, the board passed a resolution appointing one James A. Young janitor of school No. 1 for a period of one year from the 1st day of July then next, and it is this resolution which the prosecutor seeks to have set aside by the proceedings in this case. He is an honorably discharged Union soldier, who served in the war of the Rebellion, and he attacks the validity of this resolution because its effect was, as he claims, to remove him from his position of janitor of school No. 1 without cause, and without a hearing, in violation of the provisions of "An act regarding honorably discharged Union soldiers, sailors and marines," approved March 14, 1895 (P. L. 1895, p. 317). That act declares that no person now holding or who may hereafter hold a position or office under the government of this state, or the government of any city or county of this state, whose term of office is not fixed by law, who is an honorably discharged Union soldier, sailor, or marine, shall be removed from such position or office, except for good cause shown; and that, before he shall be dismissed from such office or position, charges shall be preferred against him, a copy of which shall be served upon him, and a time set for the hearing of the same.

I am unable to see how the resolution brought up by the certiorari in this case violates in any way the provisions of this act. Admitting it to be true, as contended on behalf of the prosecutor, that he holds a position under the government of the city of Orange whose term was not fixed by law, it can avail him nothing, unless he can show that he was removed from such position without a hearing, and without cause; and this he has signally failed to do. Instead, he has made it appear affirmatively that, by virtue of a contract between himself and the

efendant, he assumed the performance of his duties as janitor of school No. 1 for a period of one year from July 1, 1894, to July 1, 1895, and became entitled to the emoluments of that position for the same period. His contract being for a definite time, his right to occupy the position of janitor ceased when the time fixed by the contract expired, and the position became vacant. The board of education, by the resolution under consideration, did not remove the prosecutor from the position which he was holding. They merely filled a position which had become vacant, and, by doing so, they did not in any way violate the provisions of the act of 1895. That act has no application to the case. The writ should be dismissed, with costs.

MAHER v. McGRATH.

(Supreme Court of New Jersey. Feb. 20, 1896.)

JURY TO EMPLOYE—NEGLIGENCE OF FELLOW SERVANT.

Defendant was a contractor for the erection of a brick building, and employed plaintiff, who was a laborer in attendance upon masons so in defendant's employ. Plaintiff, while engaged in such employment, was injured by the fall of a scaffold constructed by said masons, which fall was due to improper and negligent construction. *Held*, that the negligence which produced plaintiff's injury was that of his fellow servants, and his employer was not liable therefor.

(Syllabus by the Court.)

Error to circuit court, Union county; before Justice Van Syckle.

Action by Patrick Maher against Thomas McGrath. Verdict for plaintiff. Rule to show cause. Rule made absolute.

Argued November term, 1895, before the CHIEF JUSTICE and LUDLOW and MAJES, JJ.

John R. Hardin, for the rule. John T. Dunn, opposed.

MAGIE, J. This cause was tried in the Union circuit in the May term, 1892. Plaintiff obtained a verdict, and a rule to show cause was allowed defendant within the regular time. This rule has only been brought on for hearing at this term. The action of the plaintiff was brought to recover damages from the defendant, his employer, for injuries received by the fall of a scaffold on which plaintiff was working. The reasons assigned for a new trial are founded solely on the alleged error of the trial judge in refusing to nonsuit plaintiff, or to direct a verdict for the defendant. The state of the case contains only the evidence given at the trial on behalf of plaintiff, and the charge made by the trial judge. It discloses that the evidence given on behalf of defendant was admitted therefrom by consent of counsel. In reviewing the alleged error of the trial judge, we are therefore confined to a con-

sideration of the evidence appearing in the agreed-upon state of the case. Plaintiff was a laborer in the defendant's employ, engaged in attending upon masons, also employed by defendant, who were constructing the walls of a brick building. The evidence shows that when plaintiff delivered to the masons, upon a scaffold, a hodful of brick, the scaffold fell, and he fell with it, and thereby sustained serious injuries. The cause of the fall was plainly fixed by the evidence to have been the breaking of a "bearer," one end of which was fastened to a scaffold pole, and the other end was supported by the wall on which the masons were working. The bearer supported the scaffold planks, on which the masons stood.

Plaintiff claimed to have established defendant's liability to him for his injuries on the ground that the evidence showed a dereliction of the duty which, as employer, he owed his servants, in two respects, viz.: (1) As to the material with which the scaffold was constructed, and (2) as to the manner of its construction. His case was thus submitted to the jury, with instructions as to a master's duty, which are not complained of, and which seem unobjectionable, if applicable. The only question, therefore, is whether the evidence justified this application. With respect to the materials used in the construction of the part of the scaffold that fell, the evidence does not show that they were furnished by the defendant. On the contrary, it appears that the masons took lumber belonging to a carpenter engaged upon the building, and used it without his knowledge, in the construction of that part of the scaffold. The bearer that broke was thus procured. But it is unnecessary to consider whether defendant is charged with any liability for defects in materials thus procured, for the evidence makes it clear that the fall of the scaffold was due, not to defects in the material, but to defective construction. The bearer used was 3x6, and about 10 feet long. It was so adjusted that the scaffold planks were supported by it on what the witnesses call "the flat," and the proof shows that, if placed "on edge," it would have been sufficient for its purpose. The weight it supported was therefore imposed on its weakest side. This, it appears, is contrary to the usual mode of construction. The only question, then, is whether defendant is liable for this error in construction. It affirmatively appears that defendant personally took no part in its construction, but that it was constructed by the masons, in accordance with the custom of the trade. As the error of construction which occasioned plaintiff's injury was committed by workmen with whom he was working in a common employment, subject to a common danger which all equally knew must result from a negligent construction of the scaffold, the rule which denies the liability of the master for injury received from the negligence of

a fellow servant was plainly applicable. As there was no evidence that defendant was negligent in the selection and employment of the masons engaged in the work, there was no evidence of defendant's liability sufficient to be submitted to the jury. In a case where the evidence was sufficient to establish, *prima facie*, that a ladder was furnished by an employer to be used by his workmen, it was held that the master was bound to take reasonable care to have it safe for such use. *Mills v. Ice Co.*, 51 N. J. Law, 342, 17 Atl. 973. But in this case the scaffold was not a permanent platform furnished by the employer, on which he invited his workmen to stand in doing their work. *Mulchey v. Society*, 125 Mass. 487. It was a temporary and movable platform, to be increased in height, as the work progressed, by the workmen themselves, as their needs required. For an injury received by one workman from the negligence of others in increasing the scaffold height, the employer would be no more liable than he would be for the fall of a ladder furnished by him to his workmen, when the fall was the result of one of them negligently placing it insecurely. For these reasons I think the rule should be made absolute.

STATE (KLING, Prosecutor) v. KEHOE.
(Supreme Court of New Jersey. Feb. 20, 1896.)

PAROL EVIDENCE—MODIFYING TERMS OF NOTE.

In a suit brought by the accommodation maker of a promissory note against the second indorser, for contribution, the former will not be permitted to modify or alter the terms of the contract evidenced by the note by proof that, at the time of the signing and indorsing of the note, there was a verbal agreement between them that the indorser should be liable upon the note jointly with the maker.

(Syllabus by the Court.)

Certiorari to court of common pleas, Bergen county; Van Valen, Bogart, and Wheeler, Judges.

Action by John Kehoe against George Kling. Judgment for plaintiff, and defendant brings certiorari. Reversed.

Argued at November term, 1895, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

J. A. McCreery, for prosecutor. Addison Ely, for defendant.

GUMMERE, J. The plaintiff below, who is the defendant here, brought suit to recover from the prosecutor, who was the defendant below, the one-half of the amount of a promissory note for \$100, of which the plaintiff was the maker, and upon which the defendant was second indorser. The note was dated December 6, 1893, and read as follows: "Four months after date I promise to pay to the order of Charles Donoughey one hundred dollars, at the People's Bank

and Trust Company, Passaic, New Jersey. Value received. [Signed] John Kehoe. [Indorsed] Charles Donoughey. George Kling." Upon the trial below it appeared that the note in question was made for the purpose of assisting Donoughey, the payee, to meet a pressing indebtedness, and solely for his accommodation; and the plaintiff was permitted to prove, against the objection of the defendant, that at the time of the making of the note they verbally agreed with each other that, if Donoughey did not pay the note when it fell due, they would each pay one-half of it. It further appeared upon the trial below that Donoughey failed to pay the note at maturity, and that Kehoe, the plaintiff below, was compelled to take it up, and that after doing so he called upon Kling, the defendant, to contribute his one-half of the amount, which the latter refused to do.

It cannot be denied that the note in question creates a definite contract between these parties, by which, as between them, the maker, Kehoe, became primarily liable to pay the note, and Kling, as indorser, became liable only in case the maker failed to meet it at maturity, and that the admission of evidence showing the existence of a contemporaneous oral agreement such as was testified to on the trial below tended to materially alter the terms of that contract. It is insisted, however, that the ruling of the trial judge in admitting this evidence did not violate the rule which prohibits written evidence from being altered by parol, because this action was not brought upon the note, but upon the contemporaneous oral agreement, and that the evidence which was admitted was not offered for the purpose of contradicting or varying the terms of a written contract, but solely for the purpose of proving the existence of the agreement sued upon. The fallacy of this contention lies in the fact that it assumes that these parties, at one and the same time, entered into two separate agreements relating to the same subject-matter, each equally binding, by one of which Kehoe became primarily liable to pay the whole note, and Kling liable only in the event of Kehoe's failing to perform his contract, while by the other they each became liable to pay one-half of the money due upon it at maturity. Two such agreements are absolutely inconsistent with each other, and cannot by any possibility be both effectuated. If one stands, the other must fall. It was to meet this very condition of affairs that the rule was adopted which prohibits the introduction of oral evidence to vary or alter the terms of a written contract complete in all its parts, and a recovery upon the oral agreement, sued upon in this case, can only be sustained by disregarding that rule. This result, upon principle, would seem to be decisive of the question under consideration, for no rule has been more consistently and

rigorously enforced by the courts of this state than that above referred to. An example of the application of that rule under circumstances similar in many respects to those in the case now before the court will be found in *Johnson v. Ramsey*, 43 N. J. Law, 280. In that case an accommodation indorser upon a promissory note, in a suit brought against him by his indorsee, attempted to show that there was an oral agreement between them, made at the time of putting their names to the paper, that in case either of them was compelled to pay the note the other would contribute one-half of the amount paid. The court, after carefully considering and discussing those cases which hold that, as between an accommodation indorser and indorsee, the form of the note is not conclusive, and that in that connection parol evidence is admissible, declares the true rule to be that an accommodation indorser, by force of his prior indorsement, agrees in writing to pay the whole of the note, so far as his indorsee is concerned, and that he cannot alter that contract by proof of the existence of a contemporaneous oral agreement creating a joint, instead of a successive, liability. It was error for the trial judge, in the case under review, to admit the evidence objected to, and the judgment of the common pleas must therefore be set aside.

SHIELDS, County Collector, v. CITY OF PATERSON et al.

(Supreme Court of New Jersey. Feb. 20, 1896.)

MANDAMUS—RES JUDICATA—CONSTRUCTION OF STATUTE.

1. The relator, a board of chosen freeholders, passed a resolution making its annual appropriations, upon which the defendant, a municipality affected, made a direct attack by certiorari. The attack failed, in respect to the item now under consideration, because none of the reasons filed covered the point of its illegality. The relator now seeks by mandamus to compel payment, based upon this previous adjudication, and is met by an attempt to relitigate the point. *Held*, that the parties to the certiorari record are bound by the adjudication had thereon, and that the judgment of this court, then pronounced, is, until reversed, binding upon the court when acting upon the same matter between the same parties.

2. *Held*, that an act supplementary to proceeding by mandamus (P. L. 1895, p. 339) does not apply to the above state of facts.

(Syllabus by the Court.)

Application by Patrick Shields, county collector of the county of Passaic, against the city of Paterson and others, for mandamus. Writ allowed.

Argued November term, 1895, before LIP-PINCOTT and GARRISON, JJ.

D. C. Bolton, for relator. T. C. Simonton, for defendant.

GARRISON, J. The substantial controversy in this case is between two public trustees,

to wit, the board of chosen freeholders of the county of Passaic, and the mayor and aldermen of the city of Paterson, and the form in which it is presented is an application by the county upon the city for the payment of its proportion of the annual tax appropriation for the fiscal year ending May 31, 1894.

By a stipulation as to facts, it appears that the city must pay to the county \$24,297.70, if it must pay anything, and that the question whether it must pay anything depends upon whether it may dispute the legality of the item appropriating "\$73,000 for payment of debt." It is admitted that the sum thus appropriated was in excess of any debt to which it might lawfully be applied, and that, upon a direct attack, the sum appropriated must be reduced to \$39,456, in which event the city would owe nothing, and this application would fall. The case turns, therefore, upon the right of the defendant, upon an application of this nature, to make an indirect attack upon the resolution passed by the board of freeholders. That this right would not, upon general principles, be accorded, seems to be conceded; but our attention is directed to an act of the legislature, supplementary to proceedings upon writs of mandamus, in these words: "In all proceedings by mandamus, to enforce the collection or payment of a tax or appropriation, it shall and may be lawful to plead and show as a defense that such tax or appropriation is in whole or in part illegal,"—approved March 19, 1895 (P. L. p. 339).

The applicability of this statute to the present case is denied by the relator, upon the ground that the question of the legality of this appropriation is *res judicata*. It is an admitted fact that these defendants did seek, by direct attack, to annul or modify the resolution of the relator,—to annul or modify with respect to certain items, including the one now sought to be again litigated. That attack was by certiorari, and the judgment rendered was that the item of \$73,000 must remain undisturbed. Reference to the opinion in that case (56 N. J. Law, 459, 29 Atl. 331) discloses that the prosecutor therein, who is the defendant here, failed to file any reason charging that this item was in excess of bonded indebtedness; and that, under the general reasons, this infirmity could not lead to a nullification of the action of the county board.

It will not seriously be contended that the legislature, giving to this act the broadest possible potency, evinced any purpose to unsettle the doctrine of *res judicata*, or to prevent its application as theretofore. The only reasonable doubt that can arise is as to the application of that doctrine to a certain class of judgments which, it may be argued, includes cases arising under certiorari. There is, however, a clear distinction between those cases in certiorari in which the action of inferior bodies is reviewable in this court with mere notice to the persons really affected, and those, in which the real parties are in court,

and submit, on the record, a direct issue of the legality of some proceeding of the one that injuriously affects the other. Under our judicial system, the supreme court has a peculiar and exclusive jurisdiction relative to municipal action of the sort involved here. A municipal taxing power promulgates its budget as the basis for a levy. Another municipality, bearing a fixed fiscal relation to the amount thus announced, desires to question the legality of certain items, in so far as they affect its interests. It does so by certiorari, the only writ open to it. The issue is clearly cut, and spread upon the record. Under these circumstances, it is not perceived why the judgment thus pronounced should not be binding upon the same court when acting upon the same matter between the same parties.

The circumstance that the court did not, in point of fact, pass upon the merits of the special items, is without legal weight. The doctrine of previous adjudication binds parties, not only by what they chose to try before a competent tribunal, but also by whatever might have been tried in the form of action in which they were actors.

The conclusion to which I have come is that, notwithstanding the statute of 1895, these defendants cannot make any collateral denial of the regularity of the resolution by which the relator established the appropriation in question.

The writ of mandamus is allowed, in the form suggested by the opinion in *Shields v. City of Paterson*, 55 N. J. Law, 495, 27 Atl. 803.

STATE ex rel. MILLER v. BOARD OF CHOSEN FREEHOLDERS OF CUMBERLAND COUNTY.

(Supreme Court of New Jersey. Feb. 20, 1896.)

BOARD OF CHOSEN FREEHOLDERS—ELECTION OF MEMBERS.

Under the supplement of March 7, 1895, to the borough act of April 5, 1878, the borough of Vineland is entitled to one member of the board of chosen freeholders, but he cannot be elected until the election to be held in the spring of 1896.

(Syllabus by the Court.)

Application by the state, on the relation of Lewis H. Miller, for mandamus to the board of chosen freeholders of the county of Cumberland. Denied.

Argued November term, 1895, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Louis H. Miller and L. Newcomb, for relator. R. P. Tuller, for defendants.

VAN SYCKEL, J. The relator applies for a mandamus directed to the defendants, commanding them to admit him as a member of the board from the borough of Vineland. It is alleged that he was duly elected at an elec-

tion held in the borough on the 12th of March, 1895. The borough of Vineland was incorporated under the act of April 5, 1878. A supplement to that act was passed April 25, 1894, as follows:

"(1) Be it enacted, by the senate and general assembly of the state of New Jersey, that all boroughs of the first class existing within the limits of any of the townships of this state incorporated under the act of which this is a supplement, shall hereafter be entirely separated and independent in all matters of local government from the townships out of which said boroughs have been created, but nothing in this act shall deprive the inhabitants of any of said boroughs of any local option rights which they may now possess by virtue of their township charter.

"(2) And be it enacted, that the legal voters within the said boroughs shall have no right to vote for any officer of the townships out of which said boroughs have been created, nor to vote for any appropriation for any purpose concerning the townships out of which said boroughs have been created.

"(3) And be it enacted, that in all boroughs of the first class incorporated under the act to which this is a supplement, the local voters of said boroughs shall, at each annual election for borough officers, elect justices of the peace, constables, surveyors of the highways, poundkeepers and overseers of the poor for such boroughs, in accordance with the existing statutes, regulating the election and term of office of such officers in townships.

"(4) And be it enacted, that the mayor of each and every borough of the first class incorporated under the act to which this is a supplement shall hereafter be elected to serve for the term of three years.

"(5) And be it enacted, that the legal voters of all boroughs of the first class incorporated under the act to which this is a supplement shall have the right, by vote to designate annually, upon the ballots used in voting for borough officers, such amounts as may be deemed advisable for any and all legal purposes of a local nature in any way connected with said boroughs.

"(6) And be it enacted, that hereafter all boroughs of the first class incorporated under the act to which this is a supplement shall be entitled to one member of the board of chosen freeholders, to be elected in accordance with the existing statutes now regulating the election and length of terms of members of said board of chosen freeholders.

"(7) And be it enacted, that all township officers elected prior to the passage of this act residing within said boroughs shall hold their offices until the expiration of the terms to which they were elected.

"(8) And be it enacted, that all acts and parts of acts inconsistent herewith be and they are hereby repealed.

"Approved April 25, 1894."

A further supplement was passed March 7, 1895, as follows:

"(1) Be it enacted, that all boroughs existing within the limits of any of the townships of this state incorporated under the acts to which this is a supplement, shall hereafter be entirely separate and independent in all matters of local government from the townships out of which said boroughs have been created.

"(2) Be it enacted, that in all boroughs incorporated under the act to which this is a supplement the legal voters of said boroughs shall, at each annual election for borough officers, elect justices of the peace, constables, surveyors of the highways, poundkeepers and overseers of the poor for such boroughs in accordance with existing statutes regulating the election and term of office of such officers in townships.

"(3) Be it enacted, that the mayor of each and every borough incorporated under the act to which this is a supplement shall hereafter be elected to serve for the term of two years.

"(4) Be it enacted that the legal voters of all boroughs incorporated under the act to which this is a supplement shall have the right, by vote, to designate annually, upon the ballots used in voting for borough officers, such amounts as may be deemed advisable for any and all legal purposes of a local nature in any way connected with said boroughs.

"(5) Be it enacted that hereafter all boroughs incorporated under the act to which this is a supplement shall be entitled to one member of the board of chosen freeholders, provided, the population exceeds twenty-five hundred, to be elected, in accordance with the existing statutes, now regulating the election and length of terms of members of said board of chosen freeholders.

"(6) Be it enacted, that in case of the formation of any borough out of the part of any township in this state by virtue of the above act, any member of the township committee, overseer of the roads, or township officer, residing within the limits of the borough, shall hold his said office and perform the duties thereof until the next general election is held for the election of township officers, at which time some other person or persons residing in the remaining part of said township shall be elected in his place and stead, whether the term of his said office for which he was originally elected has expired or not.

"(7) Be it enacted, that all acts and parts of acts inconsistent herewith be and they are hereby repealed, and that this act shall take effect immediately."

This supplement of 1895 was manifestly intended to be a substitute for the supplement of 1894. When the act of March 7, 1895, took effect, the act of 1894 ceased to be of any force or effect, and no action could be taken in virtue of it. There can be no question that

under the fifth section of the act of 1895 the borough of Vineland is entitled to a chosen freeholder. The point to be determined is when the right to elect may be exercised. Under the seventh section of the act of 1894, all township officers elected prior to the passage of that act, residing within boroughs, were to hold their offices until the expiration of the terms for which they were elected. Under the supplement of 1895, they are to hold office only until the next general election is held for the election of township officers. Under the supplement of 1894, the officers who had been elected by the township before the formation of the borough, whether they resided in the territory of the borough, or in that remaining to the township, were to continue in office as officers, not of the borough, but of the township, for the full term for which they had been elected. Under the supplement of 1895, these officers, so far as they resided in the territory of the borough, were to hold their offices only until the next general election of township officers. The object of this legislation was to give the township the right to have a full set of officers residing within its boundaries. The borough was given a like power, and, to effectuate the apparent object of this legislation, the term "township officers" must be held to embrace all officers elected or to be elected by the voters of a township, of which a chosen freeholder is one. The township of Vineland was empowered expressly to elect a freeholder in accordance with the existing statutes regulating the election and length of terms of members of said boards of freeholders. By a supplement passed March 7, 1893, to the borough act of 1878 (P. L. 1893, p. 101), all elections held in the borough are to be conducted under the provisions of the election law approved April 18, 1876 (Revision, p. 335). The law regulating the election is the ninth section of the general election law of 1876 (Revision, p. 338). By that section eight days' notice must be given of such election. When the act of 1895 was passed, only five days intervened before an election was to be held, and there was therefore no opportunity to elect a chosen freeholder for the borough in the year 1895. The election was held March 12, 1895. The language, "until the next general election is held for the election of township officers," in the sixth section of the act of 1895, means the next general election at which township officers could be elected, which was not until the spring of 1896. The right of the borough, under the fifth section, to elect a chosen freeholder, does not accrue until the spring of 1896, because until then a chosen freeholder cannot be chosen in accordance with the provision of the ninth section of the general election law. The election of the relator, therefore, was premature, and he is without title to the office. The mandamus is denied, with costs.

MILLER v. DELAWARE, L. & W. R. CO.
(Supreme Court of New Jersey. Feb. 20, 1896.)

NEW TRIAL—INCONSISTENT VERDICT.

In an action for injury to the person, if the damages awarded be so small that the assessment is inconsistent with the undisputed evidence, the verdict will be set aside at the instance of the plaintiff.

(Syllabus by the Court.)

Action by Mary A. Miller against the Delaware, Lackawanna & Western Railroad Company. Verdict for plaintiff for six cents. Rule to show cause. Rule made absolute.

Argued at November term, 1895, before BEASLEY, C. J., and MAGIE and LUDLOW, JJ.

Parmly, Olendorf & Fisk, for plaintiff. F. McGee, for defendant.

BEASLEY, C. J. The action is for alleged injury to the person of the plaintiff sustained by her in stepping off one of the cars of the defendant. Her claim is that the company neglected to provide, as was customary, a bench for her to alight on, the step being three or four feet from the ground, and, there being an insufficiency of light, she came so heavily down that the ligaments of her knee joint were severely strained. There is considerable evidence showing the serious character of the hurt, and that it was painful and chronic. There was no counter evidence on the subject. The jury rendered their verdict, viz.: "That they find the defendant guilty as charged by the plaintiff, and that they assess the damages of the plaintiff against the defendant, by reason thereof, at six cents." This result of the trial in this case cannot be explained on any ground that will harmonize it with justice or common sense. The only suggestion which has been made by the counsel tending to explain this extraordinary situation of the case is that the jury was convinced that the plaintiff had no cause of action, and that, in a spirit of favoritism for a woman as opposed to a corporation, they reached the conclusion announced by them. But this argument is suicidal, as it places the jury distinctly in the wrong, and on that account their action should be annulled, for so unscrupulous a body should not be permitted to settle the rights of either the plaintiff or defendant. The rule must be made absolute.

DRINKHOUSE v. GREGG MANUF'G CO.
(Supreme Court of New Jersey. Feb. 20, 1896.)

MECHANIC'S LIEN—AMENDMENT—VERIFICATION.

1. The amendments of the mechanic's lien authorized by the fourteenth section of the act can be made at any time before judgment on the claim.

2. Such amendments must be in writing, and signed by the judge, but need not be sworn to.
(Syllabus by the Court.)

Action by Frank F. Drinkhouse against the Gregg Manufacturing Company. Verdict for plaintiff. Rule to show cause. Rule discharged.

Argued November term, 1895, before BEASLEY, C. J., and MAGIE and LUDLOW, JJ.

Bartlett C. Frost and Wm. H. Morrow, for plaintiff. George M. Shipman and Lewis Starr, for defendant.

BEASLEY, C. J. This case calls for a construction of the fourteenth section of the mechanic's lien law. The lien filed by the plaintiff was admittedly defective, in this respect: that it omitted to state the dates of the various items of work and materials furnished. According to the case of *Jersey Co. v. Davison*, 29 N. J. Law, 415, this omission was fatal to the procedure as the statute existed at the time of that decision. Before the trial of the present case this lien claim was amended in the respect mentioned, by the order of a justice of this court. It is now claimed that this amendment is inefficacious, for the reason that the time within which it could be properly made had elapsed. The argument in support of this position is that the eleventh section of the statute specifically prescribes the contents of the claim to be filed, and having, among other particulars, required that it shall exhibit "the amount and kind of labor performed, and materials furnished, and the prices at which, and the times when the same was performed and furnished," concludes with the following declaration, viz.: "That when such claim shall not be filed in the manner or within the time aforesaid, etc., the building or lands shall be free from all lien for the matters in such claim." This was the condition of the law at the time when the decision of this court, above cited, was rendered. That such condition was imperfect, and conducive to frequent frustrations of the statutory policy, is manifest. Imperfections in the particulars of the claim, on numerous occasions, defeated suits brought to enforce this class of demands; and, to make the matter worse, such destructive defects related to matters of mere form. Of the truth of this the present case is an apt illustration. The absence of dates in this lien claim, with respect to the defendant, is and has been of no consequence, for there is not even a pretense that it has, in the slightest degree, led him astray, or impaired his rights; and yet, for the want of an empty formality, he is seeking to defeat the suit, no matter how meritorious it may be. It is plain that a statute permitting such results was in need of reformation; and hence, at the time of the revision of the laws in 1874, the introduction of the fourteenth section, already referred to. This is its lan-

guage, viz.: "That at any time before judgment on a lien claim, a justice of the supreme court, on the application of the claimant of such lien, and on reasonable notice to all parties interested, may order such lien claim to be amended, in matters of substance, as well as in matter of form, whenever it shall appear to him that such amendment can be justly made; and whenever such amendment shall be ordered, the same shall be put in writing and signed by said justice, and shall be then filed in the office of the county clerk." This statutory empowerment, being purely remedial, must be favorably construed, so as to advance the remedy and suppress the mischief.

It has just been indicated what is deemed the object of this section, and the contention now is that the corrections thus authorized cannot be made after the expiration of the year that, in the original act, is the term prescribed for the filing of the lien claim. The statutory provision thus referred to is the thirteenth section, in connection with the eleventh. The former provides "that no debt shall be a lien by virtue of this act, unless a claim is filed as hereinbefore provided within one year from the furnishing the materials or performing the labor for which said debt is due," and the latter, as we have seen, requires that the lien claim thus mentioned shall be possessed of certain designated characteristics. The theory insisted on is that the lien claim ceases to bind the land after a certain designated period, and that it must be amended before that period is spent, inasmuch as, having thus become inoperative, it cannot be revived. But the clear inadmissibility of such a construction is that it is diametrically opposed by the plain terms of the amendatory clause. That declares that the amendments in question may be made "at any time before judgment on a lien claim." No principle is known whereby a space of time thus designated can be constrained by the court. Besides, if the views indicated should prevail, the power to amend would be almost totally worthless, as the defects in these lien claims have been, and, in the nature of the thing, will be, almost always discovered during the progress of the trial.

In addition to these considerations, the next section of the act (that is, section 15) seems to leave no room for doubt with respect to the question under consideration. It has been already shown that section 11 of the original act requires the dates of the different items of work and materials to be set out in the lien claim, and, by reference to the clause, it will appear that, similarly, a description of the curtilage shall be contained therein, and the omission of such description would be as fatal to the procedure as would be, as we have seen, an omission of such dates. As a mistake might sometimes occur in making the description thus called for, its ill consequences are thus ob-

viated in section 15, which declares "that at any time before the entry of final judgment in a suit under this act" a justice of the supreme court may "alter the description of the curtilage as set forth in the lien claim," the effect of such alteration being limited by the following proviso, "that the amendments authorized in this and the next preceding section shall not affect the rights of any bona fide purchaser or mortgagee acquired between the time of filing the original lien claim and that of filing such amendments." It thus appears that all amendments to the lien claim can be made at any time before judgment upon it, and they are to have identical effects. The case of *Wheeler v. Almond*, 46 N. J. Law, 161, is not in point, the proposition thereby established being that the time of issuing the summons to enforce the lien is mandatory, and is not susceptible of amendment under the fourteenth section of the act, the reason assigned being that the power there given "extends only to the amendment of the lien claim," and that the defect then under consideration was "not in the claim." This discrimination seems to imply that, if the defect had been in the lien claim itself, a different result would have obtained. In *Bartley v. Smith*, 43 N. J. Law, 321, no doubt was expressed by the court with regard to the power of the court to amend the claim in any particular at the trial, and the amendment in that case was refused, as an exercise of the discretion vested in the court by the section.

With respect to the objection that the amended lien claim should have been sworn to, the answer is that the statute does not require it. The only authentication called for is that the amendments "shall be put in writing and signed by the said justice." None of the other exceptions taken to the proceedings at the trial appear to call for comment, and there is no ground on which the court can interfere with the verdict. Let the rule be discharged.

EMLEY v. PERRINE.

(Supreme Court of New Jersey. Feb. 20, 1896.)

ASSUMPSIT—GENERAL DENIAL—EVIDENCE.

In an action of assumpsit, in which plaintiff's cause of action was grounded upon a non-negotiable duebill transferred to him by delivery from the payees named therein, a defendant may prove, under the general issue, that said payee had no title to the chose in action at the time of the delivery to the plaintiff.

(Syllabus by the Court.)

Action by Eugene Emley against James H. Perrine. Cause tried in the circuit court, Hudson county, before Justice Lippincott.

This action is in contract, and the declaration contains only the common counts in assumpsit. The bill of particulars declares that the declaration is founded upon the fol-

lowing instrument, viz.: "March 28, 1888. Messrs. Nightengale Bros.: I. O. U. (\$250) two hundred and fifty dollars, for value received. J. H. Perrine,"—assigned by delivery to plaintiff. One of the pleas was the general issue. The verdict being for the plaintiff, the defendant obtained this rule to show cause why a new trial should not be granted. Rule made absolute.

Argued November term, 1895, before the CHIEF JUSTICE and LUDLOW and MAGIE, JJ.

Clarence Linn, for the rule. Benny Bros., opposed.

MAGIE, J. In the course of the trial defendant offered in evidence an assignment for the benefit of creditors, dated December 8, 1890, and made by the firm of Nightengale Bros. and by John and Joseph Nightengale, who composed that firm, to John S. Barkalow. The offer was rejected on the ground that a defense of that character should have been interposed by plea or notice. The rejection of the evidence offered was erroneous. By section 2 of our act respecting assignments for the benefit of creditors such an instrument operates to vest in the assignee all property at its date belonging to the assignors, though not included in the inventory annexed. When the offer was made it had appeared in evidence that the instrument upon which plaintiff rested his claim to recover had been made at its date and delivered to John Nightengale, one of the firm of Nightengale Bros., and had been retained in his possession until November or December, 1893, when it was delivered by him to plaintiff for a consideration. That instrument was nonnegotiable, and the title which plaintiff acquired by such delivery was not a legal, but an equitable, title, which formerly he could only assert by a suit in the name of the payees of the duebill to his use. 1 Daniel, Neg. Inst. § 742. If the present suit is properly prosecuted in his own name, it is by force of the act of March 4, 1890, amending section 19 of the practice act (P. L. 1890, p. 24). But a transferror of non-negotiable paper by delivery, whether entitled to bring actions thereon in his own name or not, can acquire no better title to the paper than the transferror had at the time of the delivery. The assignment offered by defendant showed that the holders of this duebill and implied obligation of defendant had, long before its delivery to plaintiff, parted with all their title thereto, and that such title had thereby vested in Barkalow, their assignee. The evidence of the assignment was clearly relevant and material in respect to the title of the plaintiff to the chose in action on which he sued. Nor was the defendant debarred from relying upon and proving the lack of title of the plaintiff or his transferror because it had not been set up by a plea or notice. By the English system of pleading and practice a defendant

in an action of assumpsit could prove under the plea of the general issue any matter which showed that plaintiff had never had cause of action. 1 Chit. Pl. 419. Upon that plea, until the adoption of the new rules in the reign of William IV., the question always was whether there was a subsisting debt or cause of action at the commencement of the suit. 1 Tidd, Prac. 592. This was the system adopted in this country. Gould, Pl. c. 6, pt. 1, § 48. In this state the right of defense under the general issue in assumpsit has been left unrestrained until the passage of the act which limits such defenses to those specified in response to plaintiff's demand. In the case before us no demand seems to have been made. Defendant was therefore in no mode restrained in his defense, and evidence tending to show that plaintiff had no title to the chose in action sued on was competent. The evidence offered would have shown that the transferror of this chose in action to plaintiff had not, at the time, any title thereto, and therefore could not and did not confer any title on him. For the rejection of this evidence the rule to show cause why a new trial should not be allowed must be made absolute.

STATE (SPRINGER, Prosecutor) v. INHABITANTS OF TOWNSHIP OF LOGAN IN GLOUCESTER COUNTY et al.

(Supreme Court of New Jersey. March 2, 1896.)

SPECIAL TOWN MEETINGS—POWERS—TOWNSHIPS—AUTHORITY AND POWERS.

1. Any of the powers conferred or duties imposed upon a township government can be exercised or performed as well at a special town meeting, called in accordance with the statute, as at the regular annual town meeting, unless it be that the exercise of such powers and duties are expressly restricted to such annual town meeting.

2. The inhabitants of the several townships in this state are municipal corporate bodies and as such are capable of suing and being sued. They can, within the statutes conferring general powers upon them, create debts and liabilities, and settle and pay disputed claims. They can compromise and settle doubtful controversies arising out of the exercise of the powers and rights belonging to them. The law vests them with a discretion in such matters which they are to exercise for the best interests of the corporation, and, if such settlement of existing controversies are made in good faith, and are not of a collusive or fraudulent character, they will be sustained.

3. A dispute between the township collector and the township authorities of the township in relation to the audit and statement of his accounts can be settled and adjusted by the annual town meeting, or by a special town meeting regularly called for that purpose, if such settlement and adjustment be bona fide, and without fraud or collusion.

(Syllabus by the Court.)

Certiorari by the state on the prosecution of William H. Springer against the inhabitants of the township of Logan, in the county of Gloucester, and another, to review a resolution passed at a special meeting of the voters of Logan township. Resolution affirmed.

Argued February term, 1896, before GABRISON and LIPPINCOTT, JJ.

David Pancoast, for prosecutor. Lewis Starr, for defendants.

LIPPINCOTT, J. At a special town meeting of the voters of township of Logan, in the county of Gloucester, held on the 1st day of June, 1895, the following resolution was adopted, viz.: "Be it resolved, whereas Captain John Truitt having faithfully served the township of Logan for past nine years as collector of taxes, and proved to be an efficient officer, who, by his continued efforts each year, collected the taxes assessed with but a small amount of uncollected taxes remaining unpaid, which is a record that cannot be excelled in any other township in the county: Therefore be it resolved, that the report of the auditing committee be received, and that the committee be discharged; and be it resolved, inasmuch as the said collector has annually made his statements to the township committee, showing his receipts and expenditures, who have duly passed and approved said statements, that any and all alleged errors showing any balance or seeming deficiency found by said report to be due to the township from said collector be canceled, and that the township committee and the collector balance their accounts by passing receipts for the same." On June 11, 1895, at a meeting of the township committee in accordance with this resolution, the township committee, by a unanimous vote, executed a release and receipt to the collector, and he executed a release and receipt to the township. This writ is sued out to renew the legality of the resolution, and the subsequent action of the township committee. The facts appear to be that Truitt had been the collector of the township for nine years. Each year the township committee had audited his accounts as correct. At the annual town meeting held on March 12, 1895, a committee of three were appointed to audit the accounts of the township and make their report at the "next township meeting." In the proceedings of the town meeting making this appointment there appears to have been no limit placed upon the committee as to the extent of their examination of the collector's accounts. On May 18, 1895, the committee announced in a communication to the township committee that they were ready to make their report. On the same day the township committee directed the township clerk to call a special town meeting. The township clerk, on the same day, in accordance with the statute, called a special town meeting for the 1st day of June, 1895, stating specifically in the notice that it was called for the purpose of hearing the report of the auditing committee appointed at the last town meeting to audit the accounts of the township, and to take action thereon. In accordance with this notice a special town meeting

was held, at which the foregoing recited resolution was adopted. The report of this auditing committee was presented to this special town meeting, and, as certified in the return to the writ, showed that Truitt had held the office of collector for nine years, and that the committee had examined his accounts for that whole period. The report criticised the manner in which the collector had kept his accounts with the township; that the collector had taken his salary yearly from the amount of the duplicate, when he came to settle with the township, instead of turning over the entire amounts collected to the township treasurer, after making certain other reductions required by law to be paid by the township collector. But this action resulted in no loss to the township. Mistakes to a small extent were found in his accounts, both in his favor and against himself. His accounts showed payments for which vouchers had been lost. There were also vouchers for moneys paid out to which he was entitled to credit, but which, by omissions, he had not included in his accounts. He had in some instances used school moneys for township purposes, and in other cases had used other township moneys for school purposes. In the year 1888 he had charged himself with \$128.32 excess of school moneys. In some instances he paid out his own moneys, without charging them, and then took certain amounts to reimburse himself. He had charged the township during the period of nine years the sum of \$667.32 for commissions for receiving and disbursing state school moneys. The committee reported that he was only entitled to the sum of \$462.08. Several other irregularities were discovered and reported, and while the committee failed to discover any willful misappropriation, or any conversion of moneys to his own use, yet they report, in order to straighten his accounts, he should be charged the sum of \$1,685.02, and that against this sum he should be credited with the sum of \$505.60, which the credits in his accounts did not show, leaving a balance due the township of \$1,185.02. It will again be noticed that his yearly accounts covering this period had been audited and passed by the township committee, and it is quite obvious that grave doubts arose in the minds of the voters at the town meeting whether he was at that time at all indebted to the township, and, if so, whether the indebtedness was recoverable against him, or upon his bond for the faithful discharge of his duties. The report was first passed upon by the town meeting which adopted the resolutions. The township committee, both by its own action and also acting in accordance with the resolution, audited his accounts, passed them, and acquitted him by formal release and receipt. The question arises, then, whether, under the circumstances the resolution of the special town meeting and the subsequent action of the township committee can be sustained. The first objection is that this resolution is

illegal, because it was adopted at a special town meeting. It is clear that the formal call for the meeting was explicit as to the object, and sufficiently broad to include the action taken. It is equally clear that any of the powers or duties conferred upon the township government can be exercised or performed as well at a special town meeting, legally convened, as at the regular annual town meeting. This is expressly provided by the fifteenth section of the general act incorporating townships, designating their powers, and regulating their meetings. Revision 1196, § 15. The special meeting therefore was the "next township meeting" to which the report could be made, and, so far as power is concerned, was as well entitled to settle the collector's accounts as any other town meeting. If the collector was required to account to and settle with the township committee (Revision, p. 1146, § 39; *Id.* p. 1195, § 12), then those requirements have been fully complied with. His accounts have been settled and passed, both at a regular town meeting as well as by the township committee; and, so far as the formality of the auditing, stating, and settlement of his accounts are concerned, there exists no irregularity whatever. *Rulon v. Inhabitants of Woolwich*, 55 N. J. Law, 489, 27 Atl. 906. Neither can there exist, under the circumstances of the case, any doubt of the power of the township meeting, and the township committee, as the governing body, to audit and adjust the accounts of the collector. The inhabitants of the several townships in this state are corporate bodies, and as such are capable of suing and being sued; and as such, within the objects and powers of the incorporating statutes and those conferring powers and imposing duties, they can create debts and liabilities, and as municipal corporate bodies have power to settle disputed claims against them, and to pay them. They can compromise doubtful controversies. This power necessarily grows out of the general powers and rights inherent in the inhabitants of the townships. Revision p. 1194, § 11; 1 Dill. Mun. Corp. (4th Ed.) p. 557, §§ 477, 478, and cases cited in the notes; *Paret v. City of Bayonne*, 39 N. J. Law, 559. The law vests them with a discretion in such matters, which they are to exercise for the best interests of the corporation. These settlements of existing controversies must be made in good faith, and must not be of a collusive or fraudulent character, for over such a disposition of the funds of a township this court will exercise speedy and effectual control. In this case there was a bona fide exercise of power on the part of the township meeting and the township committee in the settlement of the controversy or dispute between the collector and the township authorities. No question has been raised as to the bona fides of their action. *Bradley v. Town of Hammonton*, 38 N. J. Law, 430; *Lewis v. Board*, 37 N. J. Law, 254; *Rulon v.*

Inhabitants of Woolwich, 55 N. J. Law, 489, 27 Atl. 906. The resolution and the action of the township committee are affirmed, with costs.

In re LESLIE.

(Supreme Court of New Jersey. Feb. 20, 1896.)

CORPORATIONS—STOCKHOLDER—DIRECTOR—RIGHT TO HOLD OFFICE—IMPEACHMENT FOR FRAUD—ARBITRATION—WHEN FRAUDULENT.

1. J. and E., each of whom held one-half the stock of a corporation, submitted to arbitration the question as to which should sell to the other his stock, and delivered their certificates, assigned in blank, to the arbitrators, who decided that E. should sell to J., and delivered to J. all such certificates. E.'s certificates were then transferred to J. on the company's books. The award was afterwards set aside. *Held*, that between the date of the transfer of E.'s stock to J. on the company's books, and the date of the issuance of new stock to E. after the award was set aside, E. was not a stockholder entitled to vote at a stockholders' meeting, under General Corporation Act (Revision, pp. 183, 184) §§ 36-41, providing that the qualifications of a stockholder, to entitle him to vote, are that he shall appear to be a stockholder on the company's books 20 days before the election.

2. In an action by E. to set aside an election of directors while his stock was in J.'s name on the company's books, it appeared that after the award J. accepted the assignment of E.'s stock against E.'s protest; that he had the assignment recorded on the company's books, and had the company's affairs adjusted as if the award were valid; and that he resisted E.'s suit to set aside the award. *Held*, that such facts were insufficient to show that the arbitration was devised or carried out fraudulently by J. to deprive E. of his interest in the company.

3. Where one is made a director of a corporation solely to make up the number of directors required by law, his right to hold such office cannot be impeached for fraud at the instance of one who was a consenting party to his admission into the company and his election to the office.

Application by Edward Leslie for an order setting aside elections of Matthew Sweetnam and others as officers and directors of the Leslie Bros. Manufacturing Company. Heard on rule to show cause why the elections of directors of such company held May 16, 1892, and July 3, 1893, should not be set aside. *Rule discharged*.

Argued February term, 1896, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Robert H. McCarter, for applicant. John W. Griggs, opposed.

DEPUE, J. Edward Leslie, a stockholder of the Leslie Manufacturing Company, a corporation of this state, made application to this court for an order setting aside the election of directors and officers of the corporation on the 16th of May, 1892, and July 3, 1893. The application was presented to the court at June term, 1895, and a rule to show cause granted, returnable to the succeeding term of November, with leave to take depositions.

The jurisdiction of this court to entertain and decide the subject-matter of this controversy is conferred by section 44 of the

neral corporation act, which provides that : shall be the duty of this court, upon the plication of any person who may be ag-leved by, or make complaint of, any elec-on of managers or directors of a corpora-on, or any proceeding, act, or matter in or-aching the same, * * * and in a sum-ary way to hear the affidavits, proofs, and egations of the parties, or otherwise in-ire into the matter or causes of complaint, d thereupon establish the election so com-ained of, or to order a new election, or ke such order and give such relief in the emises as right and justice may appear to id supreme court to require." Revision, 184. This section is contained in the sub-ision of the act which regulates elections e officers of corporations, providing for e holding of such elections; prescribing e persons who shall or shall not conduct e inspection of the company's books stockholders; the making out, prior to the ection, of a complete list of all the stock-lders entitled to vote, arranged in alpha-etical order, and the production of such it at the election; the qualifications of rsons entitled to vote, the qualifications r the office of director, etc. The power id duty of the court under section 44 con-rns the regularity, and consequently the alidity, of the election, in conformity with e statutory regulations; and in any com-aint to the court of the election, or of any oceedings touching the same, the grounds f complaint should appear in the applica-on or affidavits, as in *McNeely v. Woodruff*, 1 N. J. Law, 352-355, to the end that, in the reliminary proceedings which give jurisdic-on, it appear what violations of the statu-ry regulations have occurred. In all the ecisions of our courts under the section in uestion, the inquiry has been limited to the nsideration whether or not the election mplaind of has been conducted according o the statutory provisions. Reference will e made only to such of the sections of the ct as have the most important bearing on e disputes in this case. Section 17 pro-ides for the number of directors, not less an three in number, to be chosen annually, t such time and place as shall be provided y the by-laws of the company, to hold office r one year, and until others are elected and ualified in their stead. The directors are o be chosen by the stockholders. And by ection 36 the books of the corporation are ide the only evidence of the persons who e "the stockholders" entitled to vote for d-tors; and, by section 38, no share of stock hall be voted upon which has been transfe-ed upon the company's books within 20 days ext preceding such election. In order that the stockholders" entitled to vote may be scertained, the company's books containing he names of the stockholders shall be open r examination 30 days previous to the el-ction, and a full, true, and complete list of all he stockholders, with the number of shares

held by each, shall be made out, and be open to inspection, at least 10 days before the election, and shall be produced at the time and place of the election. Sections 36-41. The qualifications of a stockholder, to entitle him to vote, are that he shall appear to be a stockholder, on the company's books, 20 days before the election. The qualifica-tion of a person to be elected director is that he shall be a bona fide holder of some of the stock of the company at the time of his election; and if, having been elected, he ceases to be a bona fide holder of stock, he shall thereupon cease to be a director. Sec-tions 47, 48. The books of the corporation are made plenary and exclusive evidence of the right to vote at the election of directors, and a stockholder may be qualified to be a director, and yet not be entitled to a vote at such election. In re *St. Lawrence Steam-boat Co.*, 44 N. J. Law, 530.

The facts that gave rise to this controversy are these: The applicant, Edward Leslie, and his brother, John S. Leslie, were engaged in business under the name of the Rotary Steam Snowplow Company, in which com-pany Matthew Sweetnam was interested, and in September, 1889, was chosen vice presi-dent. Early in 1890 it was proposed to re-or-ganize the company as a corporation, and on the 11th of January, 1890, a certificate of in-corporation, under the name of the Leslie Bros. Manufacturing Company, was made, which was filed in the clerk's office of the county of Passaic on the 15th of January, 1890. In the certificate, John S. Leslie, Ed-ward Leslie, and Matthew Sweetnam were named as incorporators, and the capital desig-nated as \$500,000, divided into 5,000 shares, of the par value of \$100 each, of which 2,250 shares were held by John S. Leslie, 2,250 shares by Edward Leslie, and 500 shares by Sweetnam. The organization was complet-ed at a meeting of the stockholders on the 23d of January, 1890, at which John S. Leslie, Edward Leslie, and Sweetnam were elected directors,—all the stockholders being present at the meeting, and all the stock being voted upon for the directors elected; and John S. Leslie was chosen president; Edward Leslie, vice president; and Sweetnam, secretary and treasurer; and John S. Leslie, general man-ager; and certificates for stock, in the num-ber of shares mentioned in the certificate of incorporation as held by the Leslies and Sweetnam, severally, were issued, and entered in the company's stock book. Subsequently disputes arose between John and Edward, for the adjustment of which these two parties resorted to arbitration, by an agreement under seal, and executed on the 20th of April, 1895. This agreement (after reciting that the two parties owned all the capital stock of the Leslie Bros. Manufacturing Company in equal shares, and differences and controver-sies existed between them in relation to the conduct and management of said company and its business, which rendered it unadvisa-

ble for the parties longer to remain in joint control and ownership of said company, and both of said parties desiring that a separation of their corporate interests should take place, by the absolute retirement of one or the other of the parties from the management and control of the company, and being unable to agree upon the basis of settlement and retirement, and being willing to leave the terms of settlement to arbitrators) contained a covenant by the parties, mutually, to submit the matters in controversy and dispute to two arbitrators named, with power to decide and direct which of the said parties should sell to the other all his capital stock of said company, and the terms upon which said sale should be made, and how and when the same should be paid for, with power to enforce and carry into effect their decision and award by the transfer and delivery to the person whom they should decide should purchase all of the capital stock of the person whom they should decide should sell, and with power to assign, sell, and convey any or all of the capital stock of the person whom they should award should purchase, in order to enforce the performance of the terms and conditions of purchase in accordance with their award, with a stipulation that both parties should deposit with the arbitrators all their capital stock in said company, duly assigned in blank, for the purpose of enabling the arbitrators to carry out and enforce the conditions of their award in accordance therewith. The arbitration agreement contained a further covenant that the parties would perform and carry out the award, and all the terms and conditions thereof, as ordered and directed so to be done; and, in case of the failure of either of the parties so to do, the arbitrators were authorized and directed to perform for the parties, or either of them, the orders and directions of the award, by the delivery of said capital stock to the person who, by said award, should be entitled thereto, upon his performing his part of said award, or by selling, assigning, and transferring the capital stock of either party for the purpose of enforcing against him any part of said award which may require the sale and transfer of any stock in order to raise funds, or for any other purpose, to complete the purchase or payment directed to be made by such party. In compliance with the arbitration agreement, John and Edward each delivered to the arbitrators their certificates of stock, duly assigned in blank. And, although neither the corporation nor Sweetnam was a party to the arbitration, Sweetnam put in the hands of the arbitrators the certificates of the stock issued to him, with an assignment in blank thereon. The arbitrators, by an award dated the 23d of April, 1891, adjudged and determined that Edward should sell and convey all the capital stock formerly held by him, and placed in the hands of the arbitrators for disposal, and all his rights in the company, to John; and they delivered the certificates of

Edward's stock, with the assignment thereon, to John, and on the same day the transfer of Edward's stock to John was recorded on the company's books. On the same day the board of directors, consisting of John and Sweetnam, by a resolution, vacated Edward's office as vice president, on the ground that he was no longer a stockholder. Edward, being dissatisfied with the award, filed a bill in chancery against John for a decree setting aside the award, and directing John to return to Edward the stock the latter deposited with the arbitrators, or stock issued to John in lieu thereof. The course of this litigation will be found in *Leslie v. Leslie*, 50 N. J. Eq. 103, 24 Atl. 319; *Id.*, 50 N. J. Eq. 155, 24 Atl. 1029; *Id.*, 50 N. J. Eq. 332, 31 Atl. 724. The result of this litigation was a decree setting aside the award, and directing John to return to Edward the said stock. The decree in chancery was signed on the 2d of August, 1893, and affirmed in the court of errors and appeals on the 18th of June, 1894. On the 26th of July, 1894, new certificates were issued by the company, for 2,500 shares of stock, to Edward, and delivered to him.

From the 23d of April, 1893, until the 26th of July, 1894, Edward did not appear on the company's books as a stockholder; and from the first-mentioned date until the final decree in the chancery suit, which was June 18, 1894, the legal title in the stock was in John. At the election held May 16, 1892, John S. Leslie, Sweetnam, and John Berwick were elected directors. They held office until the next election, held on July 3, 1893, when they were again elected directors, under which election they would, by statute, hold office for one year, and until their successors were elected. No election has been held since the day last mentioned, and the directors then chosen hold over only until a new election shall be held. The elections of 1892 and 1893 were held and conducted in all respects in conformity with the statute. At these elections Edward was neither qualified to vote, nor to hold office as a director. These elections cannot be set aside on the score of irregularity, or the violation of the statutory regulations.

The contention in behalf of the applicant is that the arbitration proceeding was devised or carried out fraudulently, for the purpose of depriving him of his interest in the company. If this contention was sustained by the evidence, and this court has jurisdiction to grant relief on such grounds, it would be impracticable at this time to restore the company's affairs to the condition they were in in April, 1891, and put the applicant in the office he then held. The utmost the court could do would be to set aside the election under which the directors now hold office, and order a new election. But there is no evidence that the arbitration agreement was obtained from Edward by any fraudulent or unfair means. The condition of affairs which made the retirement of one or the other of the parties from the management and control of the com-

pany was well known to both parties, and is stated in plain terms in the agreement, and the means by which the exclusion of the one or the other of the parties from all interest in the company are plainly expressed in the agreement. No suggestion has been made of misrepresentation or concealment in that respect, nor has any charge been made of unfairness in the selection of arbitrators. No evidence has been given tending to impeach the conduct of the arbitrators as fraudulent, in making the award, or in delivering over to John the certificates of the stock issued to Edward in compliance with the arbitration agreement. The bill in the chancery case contained no charge of fraud, and the chancellor's decree set aside and invalidated the award on two grounds: (1) That the arbitrators exceeded their authority, in including in their award previous dealings between the parties, not within the submission, and also dealings between the complainant and the company, which was not a party to the arbitration; and (2) that the award was uncertain, in that, although the price at which Edward should pay for his stock was fixed, the award did not fix with precision when and in what manner the price should be paid. The effect of the decree in chancery was not to invalidate the award, and all proceedings under it, *ab initio*. The decree took effect as of the time it was signed, and could have no force in constituting Edward a stockholder, and as such entitled to vote at the elections of 1892 and 1893, in the face of the statutory prescription that no stockholder shall be entitled to vote at an election unless he appears to be such upon the books of the company. The only ground on which the imputation of fraud on the part of John can be supported is that after the award he accepted the assignment of Edward's stock, notwithstanding Edward's protest, and that he had the assignment recorded on the company's books, and proceeded to have the affairs of the company adjusted, as if the award was valid, and that he defended Edward's suit to set aside the award. These facts are inadequate to justify a conviction of fraud. Edward's loss of the control of the stock pending the chancery suit was due to the stipulations and conditions contained in the arbitration agreement. His remedy at this time is by proceeding in the manner hereinafter indicated.

The directors elected in 1893 are in office, holding over in default of a later election. The applicant now, being a stockholder duly registered in the company's books, may apply for an election under section 46. That section contains a provision that "in all cases no share or shares shall be voted upon except by such person or persons who may have appeared on the transfer books of the company to have had the right to vote thereon when the election ought to have been held." The decree in chancery was signed August 2, 1893, and, if executed, would have given the applicant relief in season for the regular election

of 1894; but the decree in affirmance on appeal was not signed until June 18th, and the new certificate of stock was not issued to the applicant until the 26th of July, which was too late for the election of 1894. The statute provides for the annual election of directors, and a term of office for one year, unless they are suffered to hold over (Revision, p. 180, § 17); and the company's by-laws provide for an election of directors on the third Monday of May in each year, to serve for the ensuing year. The day fixed for the annual election in the succeeding year came on the third Monday of May, 1895. The applicant was a duly-registered stockholder. No election was held on that day, and at an election ordered for the default in the year 1895 the applicant will have the right to exercise his voting power, in virtue of his interest as a stockholder.

Another ground on which this application is based is that Sweetnam and Berwick, elected directors at the election of 1893, were not bona fide holders of stock at the time of their election, and therefore disqualified to be elected directors. Revision, p. 185, § 44. Sweetnam, at the time of the arbitration, placed his certificates of stock in the hands of the arbitrators, with assignments in blank thereon. He testified that he did this out of friendship for the brothers, and in the hope that he might aid in the settlement of the difficulties between them. When the award was made the certificates were returned to him, and he remains a stockholder on the books of the company. The registry of his stock is prima facie evidence of his qualifications for the office of director, and his right to be a director can be impeached only by showing that the title of the stock was put in him colorably, with a view to qualify him to be a director for some dishonest purpose, in furtherance of some fraudulent scheme touching the organization and control of the company. In *re St. Lawrence Steamboat Co.*, 44 N. J. Law, 530. Sweetnam was one of the corporators of the company, selected as such by the concurrence of both John and Edward. At the first election of directors he was elected by the votes of John and Edward, and a certificate for 500 shares of the capital stock was made, and recorded in the company's books in his name. He testified that he gave value for his stock, in the interest he had in the old company, and in the services he rendered to the new corporation. If he was made a director solely to make up the number of directors required by the statute, his right to hold that office is not impeachable for fraud; at least, at the instance of the applicant, who was a consenting and concurring party to his admission into the company, and his election to the office of director. Berwick's right to hold office is upon a less tenable ground. He was made a stockholder by the transfer to him by Sweetnam of one share of stock. This transfer was made on the 23d of April, 1891, immediately after the promulgation of the award of the arbitrators. He testified that

he held a share in the old company, for which he had given an equivalent, and that the share in the corporation was transferred to him for his former interest, and for the purpose of qualifying him for a director. But it is not necessary to pursue this subject, as it will arise more directly in case of a new election. The application is denied, and the rule to show cause is discharged.

ERDMAN v. MOORE et al.

(Supreme Court of New Jersey. Feb. 20, 1896.)

FIXTURES—WHAT CONSTITUTE—MECHANIC'S LIEN.

1. A heater and range, although but slightly attached to the building, are fixtures, if put in by the owner of the premises with the intention of making them such.

2. An owner of land commenced building a house thereon, and while it was in the course of building made a mortgage thereon, and in the same conveyed the fee to another person, agreeing with the latter to complete the building, and in doing so engaged the claimant to put in the building a kitchen range and heater. *Held*, that the latter was entitled to a mechanic's lien having priority over the mortgage.

(Syllabus by the Court.)

Case certified from circuit court, Camden county, for advisory opinion; Miller, Judge.

Action by Daniel H. Erdman against D. Leonard Moore and others. Case certified.

Argued November term, 1895, before BEASLEY, C. J., and MAGIE and LUDLOW, JJ.

Lewis Starr and Lindley M. Garrison, for claimant. Martin P. Grey, for builders and mortgagee.

BEASLEY, C. J. The questions to be decided relate to the mechanic's lien law. The facts were these, viz.: Moore was the owner of the premises in question, and commenced the erection of a building thereon. Before this structure was finished, he sold and conveyed the property to one Zimmerman, entering into a written agreement with him to proceed and complete the building "in a good and workmanlike manner." This agreement was signed by both Moore, the vendor, and Zimmerman, the vendee. On the day of the conveyance, and before its execution, Moore made and delivered a mortgage on the lot to one Casselman, who, in the following year, assigned it to Souder, one of the defendants, and Zimmerman conveyed the premises to the other defendant, Ellison. After the passing of the title, as mentioned, by Moore to Zimmerman, the former, in execution of his contract, proceeded to complete the building, and in the course of that work employed the claimant, Erdman, to furnish and put in a portable furnace and a portable cooking stove; and it is for doing this that a lien on the building and land is now claimed.

To this demand two defenses are sought to be erected, the first of which is that, after his conveyance of the premises to Zimmerman, Moore, the former owner, could not incumber the property with a lien, and that, in

any event, a lien so imposed could not affect the prior mortgagee. But this objection cannot prevail. The statute provides that, when a building is erected by a person other than the owner, it shall not be liable to a lien, "unless such building be erected by the consent of the owner of such lands in writing." Revision, p. 669, § 4. That the consent thus called for was given in the present instance seems indisputable, for the contract, signed by both the vendor and the vendee, in express terms obliged the former to go on and finish the building then under way. With regard to the mortgage the explanation appears to be equally plain. When the mortgagee took his incumbrance, he knew that the building was erecting, and that any lien that could be legally put upon the premises in the course of the completion of the structure would be superior to his mortgage. With this knowledge he is chargeable, for the statute provides that, upon a sheriff's sale under a judgment upon the lien claims, the purchaser shall acquire the estate which the owner had in the lands at the commencement of the building, and subject only to such mortgages as had been created and recorded prior to that event. The mortgage before us, not having been in existence at the time of the commencement of the building, must be subordinated to the claimant's lien. *Gordon v. Torrey*, 15 N. J. Eq. 114.

The second and remaining question touches the lienability of the claim of the plaintiff. It has been shown that it consisted of a portable furnace, and a portable cooking stove, or range, neither of which was bricked in or otherwise incorporated with the building. The heater rested on a cemented floor, the pipes from it running into the chimney flues, and similarly with respect to the range. From this statement it is clear that neither of these appliances could be deemed fixtures, simply by reason of their physical connection with the building. It must be conceded that such connection was of the slightest character. It would not have injured either of them or the structure in the slightest degree to have removed them. Nevertheless, although accepting this as the necessary inference, in my opinion, this heater and range are, under the proofs before the court, to be considered and treated as parts of the realty. The ground of this conclusion is that it was the intention of the owner of the building to make them such. With regard to such purpose no question has or could have been made. The owner of the property, who started the building, agreed to complete it, and in fulfillment of that contract put in these appliances. They were passed by the conveyance of the land from the vendor to the vendee. The owner of the land, therefore, meant these things to be a complement of the building, and they, from their nature, were fitted for that purpose, and, although slightly attached to the building, thereby, as it is deemed, became part of it. This conclusion has been reached

by applying to the facts before us the legal rule upon the subject, in its modern and most approved form. With regard to such legal principle, it is common knowledge that the legal decisions stand in an attitude of hopelessness variance. All attempts to harmonize them have proved utter failures, and on that account it is felt that nothing would be gained by a special reference to the reported cases. Mr. Phillips, in the last edition of his excellent treatise on Mechanics' Liens, in a few sentences, has expressed what he considered the true rule to be applied in these cases. He says, quoting from a judicial decision: "The weight of the modern authorities establishes the doctrine that the true criterion for determining whether a chattel has become an immovable fixture consists in the united application of the following tests: (1) Has there been a real or constructive annexation of the article in question to the realty? (2) Was there a fitness or adaptation of such article to the uses or purposes of the realty with which it is connected? (3) Whether or not it was the intention of the party making the annexation that the chattel should become a permanent accession to the freehold." And, further, the author remarks: "And of these three tests, pre-eminence is given to the question of intention. Heaters and ranges are fixtures. Whether a given article is a fixture or not depends on the intention; and that, in general, is judged mainly by the method of attachment and the use." Applying the doctrine thus clearly stated to the facts of the present case, no room is left for doubt. The chattels in question have, in a legal view, become consolidated with the realty, and, consequently, the premises are subject to the lien of the claimant. With respect to the case of *Rahway Sav. Inst. v. Irving Street Baptist Church*, 36 N. J. Eq. 62, which was much relied on by the counsel of the mortgagee, it is sufficient to remark that the principle, as just stated, so far from being controverted by it, is expressly admitted, for, in his exposition of the law of the subject, the chancellor says: "There are numerous adjudged cases in which stoves have been held to be fixtures, but it will be found that in all of them there was either actual annexation to the freehold or other evidence of intention to make them permanent additions thereto." Whether the rule thus defined was properly applied to the facts of the reported case is of no importance in our present inquiry. Let the Camden county circuit court be advised of the views above expressed.

STATE (MAYOR, ETC., OF CITY OF NEWARK, Prosecutor) v. INHABITANTS OF TOWNSHIP OF VERONA, IN ESSEX COUNTY, et al.

(Supreme Court of New Jersey. Feb. 29, 1896.)
ASSESSMENT UNDER UNCONSTITUTIONAL LAW.

A street improvement having been made, and the assessments of the costs and expense

thereof imposed upon certain lands under and according to the provisions of a statute adjudged to be unconstitutional, the court will not proceed further to examine and determine any other objections arising to the proceedings, but will set the assessment aside for that reason.

(Syllabus by the Court.)

Certiorari by the state at the prosecution of the mayor and common council of the city of Newark against the inhabitants of the township of Verona, of the county of Essex, and others, to review an assessment for special benefits. Assessment set aside.

Argued November term, 1895, before GAR- RISON and LIPPINCOTT, JJ.

Sherrerd Depue, for prosecutor. Alfred S. Badgley, for defendants.

LIPPINCOTT, J. This writ brings up for review an assessment for special benefits on the lands of the mayor and common council of the city of Newark for the opening and grading of Fairview street, in the township of Verona, in the county of Essex. The lands upon which the assessment was imposed were purchased by the mayor and common council of the city of Newark for municipal purposes, and are held and used for the conduct of the Newark City Home. This institution was established under the name of the Newark Reform School by a supplement to the city charter of the city of Newark approved March 17, 1870 (P. L. 1870, p. 921). The purpose of this school, as prescribed by this supplement, was "the reformation of boys under the age of sixteen years who might be committed to it, as provided in the act, and as near as might be, in conformity with certain provisions of the act entitled, 'An act to establish and organize the State Reform School for juvenile offenders.'" Revision, p. 948. By a supplement to the act of March 17, 1870, approved April 4, 1873 (P. L. 1873, p. 603), it was provided "that the reform school for boys provided for in the act to which this is a supplement may be located and established at any place outside the limits of the city of Newark, provided it be within the county of Essex." By a further supplement to the original act, approved March 27, 1874 (P. L. 1874, p. 535), it was provided that this reform school should be known as "The Newark City Home." In accordance with these legislative enactments, the lands for this public institution were located by the mayor and council of the city of Newark, in the township of Verona, in the county of Essex, upon lands purchased by the city for that purpose. These lands and the buildings thereon are used exclusively by the municipality of Newark for the purposes of this school. This institution is one of the necessary governmental instruments of the city of Newark. It is upon these lands that this assessment for special benefits has been imposed.

Several irregularities have been urged against the validity of this assessment. Treating this property as municipal proper-

ty used exclusively for governmental purposes, the main question argued has been whether it can be subjected to an assessment for a local improvement of this character. These questions cannot be determined upon this proceeding. The improvement and the assessment, as shown by the return and the proceedings, were made by virtue of and in accordance with an act entitled "An act to authorize the improvement of public roads and streets in townships," approved June 20, 1890 (P. L. 1890, p. 497). The fifth section of this act provides that the assessment for benefits shall be made upon the "real estate fronting upon and adjacent to said improvement." This section provides the principle upon which the assessment shall be made. Without this section, no standard of assessment has been fixed by the statute, and the standard or principle thus fixed is notative of the fundamental principle upon which such assessments must be imposed. This section is the life of this act, for without it, humanly, no assessment whatever can be made for an improvement originated and completed in accordance with its provisions, whatever may be said of the right to make an assessment or a reassessment under some other act of the legislature. This act of 1890, in so far as it provided a principle for an assessment of the cost and expense of any improvement of any roads or streets provided for by the act, is unconstitutional, and so adjudged in the case of *New York & G. L. Ry. Co. v. Board, etc., of Township of Kearney*, 55 N. J. Law, 463, 26 Atl. 800. Therefore the court will not proceed to consider or determine any of the other questions raised in the case. The statute under which this improvement and assessment were made having been determined by this court to be unconstitutional, the assessment must be set aside.

MUTUAL RESERVE FUND LIFE ASS'N v. BRADBURY.

(Court of Errors and Appeals of New Jersey.
March 2, 1896.)

EQUITY—PLEADING—RULING ON DEMURRER.

1. When a bill is demurred to, the case must be decided on the issue thus raised.

2. The demurrer cannot be defeated by interpolating the bill with certain suggested amendments at the time of the hearing.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill by John Bradbury against the Mutual Reserve Fund Life Association. From a decree overruling a demurrer to the bill (31 Atl. 775), defendant appeals. Reversed.

J. Frank Fort, for appellant. John Griffin, for respondent.

BEASLEY, C. J. The bill was filed by the respondent, praying to be restored to membership in the association which is the ap-

pellant in this case. To this bill a demurrer was put in on the ground that it disclosed no ground for equitable intervention. The argument of this issue came on for hearing before his honor, Vice Chancellor Pitney, who, at the hearing, said: "The bill is somewhat meager in its statements; so much so, that complainant's counsel suggested an amendment. Without determining whether it is sufficient in its present shape, I will treat it as if amended as suggested." What such suggested amendments were is not shown, but his honor proceeded forthwith to dispose of the case upon a statement of facts partly derived from the bill, and partly, as is conjectured, from the amendments as proposed by the complainant. The result was that the demurrer was overruled. This court is of opinion that this procedure is radically wrong. Never before in the legal practice of this state has a demurrer to a bill been defeated by amendments. In the case before us it was defeated by proposed amendments. If a decree can be thus founded, it is plain that it would not be reviewable by this court, for there would be before us no record raising an issue for decision. The course pursued seems abnormal, and has no semblance of a precedent. Let the decree be reversed.

MEADER v. CORNELL.

(Court of Errors and Appeals of New Jersey.
March 2, 1896.)

APPEAL—REVIEW—SALE—REMEDIES OF BUYER.

1. A writ of error brought up from the circuit court the record of a judgment and the exceptions taken at the trial. The judgment was against the receiver of an Ohio corporation at the suit of a Pennsylvania creditor. *Held*, that the fact that the action had been begun in this state by a foreign attachment levied upon the assets of the receiver, and that the effect of the judgment was to give a preference to the defendant in error over other creditors, could not be considered in this writ of error.

2. A plaintiff in error will not be permitted to raise in this court a point not taken in the trial court.

3. Where an article delivered does not conform to the description under which it was sold, the vendee is not bound to accept, and may recover whatever of the purchase price he has paid.

(Syllabus by the Court.)

Error to circuit court, Union county; before Justice Van Sickle.

Action by Elijah B. Cornell against Alfred B. Meader, trustee of the Blymer Ice-Machine Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Randolph, Condit & Black, for plaintiff in error. R. V. Lindabury, for defendant in error.

GARRISON, J. This writ of error brings up the record of a judgment recovered in the circuit court of Union county. Sundry bills

of exception also exhibit the proceedings had at the trial before the circuit court, where judgment final was entered against Alfred B. Meader as trustee of the Blymer Ice-Machine Company.

The title "trustee," by which the recovery against Meader was limited, is his official designation under the statute law of the state of Ohio, and imports that he was what in this state would be known as the receiver of an insolvent corporation. The corporation whose insolvency had resulted in the appointment of a trustee by the Ohio courts was the Blymer Ice-Machine Company, with which, prior to its going into insolvency, Cornell had contracted for one of its ice machines of a stipulated capacity. Under this contract Cornell had paid to the corporation the sum of \$12,550 while the machine was in course of construction. This sum, *inter alia*, Cornell recovered in the action now before us, which at the time judgment was entered was prosecuted solely against the trustee, the suit against the corporation having been discontinued before trial.

The recovery of this sum in such an action is urged as a reason for reversal upon the ground that payments made to the corporation before insolvency cannot be made the basis of a recovery against the receiver. The distinction between the application of the assets of an insolvent corporation to the payment of debts incurred by the receiver under the order of the court, and the diversion of the trust fund to answer the nonpreferred claim of a general creditor of the corporation, is perfectly clear. It must also be admitted that a judgment that rests indiscriminately upon both of these grounds may do violence to the equitable administration of the assets of the receivership. Accordingly it was argued that this judgment was devoid of legal validity. These considerations are, however, without force upon this writ of error.

Nothing in the record of this judgment discloses the existence of the state of affairs referred to, and no bill of exceptions states that any question with respect thereto was raised at the trial, or that any objection to the submission of the case to the jury was even suggested by the plaintiff in error. On the contrary, the most careful examination of the stenographic notes of the trial shows that such a course was not even hinted at by the party who now seeks to raise it.

The case shows that at the trial the plaintiff was permitted to testify without objection to the payment of the sum in question; that at the close of his case motions were made to strike out several of his claims, but that no motion was made touching the sum under consideration. A motion was made to nonsuit, but none of the grounds specified this sum, or could by any possibility refer to or include it, nor was any such request made upon the motion to direct a verdict. No request to charge covers it, and finally, when

in his charge the trial court directly told the jury, "Cornell will be entitled, if you find for him, in the first place, to recover the amount of purchase money he paid on the machine," no exception was asked for or allowed. Under circumstances such as these a plaintiff in error cannot be permitted to raise here, for the purpose of reversing a judgment against him, a point not taken in the trial court. This is the settled rule. *Oliver v. Phelps*, 21 N. J. Law, 609; *Manufacturing Co. v. Condit*, Id. 659; *Railroad Co. v. Dalley*, 37 N. J. Law, 526; *Railroad Co. v. Page*, 41 N. J. Law, 183; *Trent Tile Co. v. Ft. Dearborn Nat. Bank*, 54 N. J. Law, 599, 25 Atl. 411.

A further contention made upon the argument was that, inasmuch as the vendor could not be placed in statu quo, the vendee could not rescind so as to recover what he had paid. There was, however, strictly speaking, no occasion calling for the doctrine of rescission; the vendee simply refused to accept as any part of his contract an article that failed to comply with the description upon which he bought it. It is settled law that when an article delivered does not conform to the description by which it was sold the vendee is not bound to accept and sue for damages, but may refuse to accept and sue for whatever of the purchase price he has paid. *Wolcott v. Mount*, 36 N. J. Law, 266; *Benj. Sales*, § 600.

Finally, the plaintiff in error argued that the assets of the Ohio receivership cannot be reached in the courts of this state by a general creditor of the corporation not a citizen of New Jersey, and that the payment of this judgment by the process of garnishment will be a fraud upon the other creditors of the insolvent corporation. These contentions assume that the writ of attachment is in some wise before us upon the review of the legal propriety of this judgment, and that the nature of the return made to the writ, and the effect of a judgment thereupon, is within the knowledge and control of an appellate court of law. This is not the case. On the contrary, the defendant in attachment having appeared to the action, the writ is not here for any purpose. As process it served its function, and the cause thereafter proceeds at law without the slightest reference to the mode of its institution.

The record presents simply the case of a judgment obtained upon verdict against a defendant who appeared and questioned at the trial so much of the procedure as he deemed to be in conflict with his legal rights. Despite, therefore, the strenuousness with which this phase of the case was urged, it is futile to follow the proposition, based as it is upon the notion that this judgment can be legalized by reason of the receiver's interest in the subject-matter of the process by which he was brought into court.

The remaining assignments of error raise no questions not covered by the foregoing considerations, and, as none of them disclose

any legal error in the proceedings sent up with this writ of error, the judgment of the circuit court should be affirmed, with costs.

SUN INS. CO. v. GREENVILLE BUILDING & LOAN ASS'N No. 2.

(Court of Errors and Appeals of New Jersey.
March 2, 1896.)

ACTION ON POLICY—MISDESCRIPTION—REFORMATION.

A policy of insurance was, by request of the mortgagee, issued in the name of H. Roobeine as owner,—the loss, if any, payable to the mortgagee, the G. B. & L. Association. It appeared on the trial that H. Roobeine never owned the property insured, but that one Barnet Rubin was the owner. *Held*, that no action at law can be founded upon the policy by the mortgagee until it is reformed in equity.

(Syllabus by the Court.)

Error to circuit court, Hudson county; before Justice Lippincott.

Action by the Greenville Building & Loan Association No. 2 against the Sun Insurance Company. Judgment for plaintiff. Defendant brings error. Reversed.

Collins & Corbin, for plaintiff in error.
Henry Puster and John Griffin, for defendant in error.

VAN SYCKEL, J. This suit was brought by the Greenville Building & Loan Association against the Sun Insurance Company to recover the amount insured by a policy dated August 30, 1893, on a three story frame building, No. 414 Wall street, Elizabethport, N. J. The plaintiff below held a mortgage upon the premises, executed by one Jacob M. Lawton, who subsequently conveyed to Barnet Rubin, subject to said mortgage. On the application of said mortgagee, the policy of insurance was issued by the Sun Insurance Company in the name of H. Roobeine, owner,—the loss, if any, payable to said Greenville Building & Loan Association, as mortgagee. By mistake, the mortgagee gave the insurance company the name of H. Roobeine as the owner, while the fact was that he never was the owner, the title being in a man by the name of Barnet Rubin. The declaration alleges that the insurance company insured H. Roobeine,—the loss, if any, payable to the plaintiff, as mortgagee. The plea is non assumpsit.

The trial judge ordered a verdict for the plaintiff below. In this there was error. The plaintiff failed to sustain the affirmative of the issue joined. The policy purports to insure the property of Roobeine, and it was upon his property the plaintiff claimed to have a mortgage. All this was disproved in the trial, so that there was no sufficient basis of fact upon which to support a judgment for the plaintiff. It seems clear that no action at law can be founded upon this policy until it is reformed in equity.

In another aspect of the case, there was er-

ror in directing a verdict for the plaintiff. In the trial court, evidence was given, on the part of the defendant company that notice was given to the mortgagee, that the insurer, in virtue of a right reserved in the policy so to do, elected to cancel said policy, and that the mortgagee, before the fire occurred, agreed that it should be canceled, and promised to surrender it to the insurance company. This was denied by the mortgagee, but it was a question of fact, which should have been submitted to the jury. The judgment below should be reversed.

McFARLAND et al. v. STANTON MANUF'G CO.

(Court of Errors and Appeals of New Jersey.
March 2, 1896.)

ASSIGNMENT OF PROSPECTIVE PATENTS—VALIDITY IN EQUITY.

1. To constitute a valid sale at law, the vendor must have a present property, either actual or potential, in the thing sold. The rule in equity is different. The equity in the assignee or vendee attaches to the contemplated thing the instant it comes into being.

2. In equity the assignment of future improvements upon a formula, or on a patented process, in connection with the assignment of the formula or patent, is valid.

(Syllabus by the Court.)

Appeal from court of chancery; Bird, Chancellor.

Bill by the Stanton Manufacturing Company against William McFarland and others. Decree for complainant (30 Atl. 1058), and defendants appeal. Affirmed.

Buchanan & Reistab, for appellants. Lowthorp & Oliphant, for respondent.

VAN SYCKEL, J. The bill in this case was filed by the Stanton Manufacturing Company to compel McFarland to convey to complainant company a patent granted to him as assignee of E. W. Stanton, the complainant claiming it under an assignment prior to that to McFarland. By an assignment in writing dated December 1, 1891, Stanton assigned to the said company "all rights and formulas which I had, or may have, pertaining to or about the combination or article known as 'Stanton's Naphtha Soap,' and the making, mixture, and combination thereof, and any and all parts thereof, including all letters patent of the United States now granted or applied for, for the same, or that may hereafter be applied for, including any and all improvements for or about the same, or pertaining to the art of naphtha soap making." The company, soon after the date of this assignment, commenced the manufacture of soap under this formula. October 31, 1893, Stanton filed an application for an improvement in his patent, or for a patent for an additional discovery; and in May, 1893, a patent was granted to him, which he assigned to McFarland. The

assignment to the company was not recorded when McFarland took the assignment, in 3; but I think that the testimony of Bodruff and of Fels, and the testimony of Farland himself, shows that he had none of the previous assignment to the company. The conclusion of the vice chancellor at this point is supported by the evidence. Preceding this, the case turns upon the question whether the company, under the contract here set forth, is entitled to an assignment of the patent held by McFarland. It is common learning in the law that, to constitute a valid sale, the vendor must have a present property, either actual or potential, in the thing sold. *Looker v. Peckwell*, 38 N. H. Law, 253. The rule as to the equitable right to contingent interests and expectations, as to things not in esse, is different. The equitable title to things not in actual or potential existence may pass by assignment, and equity in the assignee attaching to the contemplated thing the instant it comes into being. This distinction between the rule at law and in equity has been clearly recognized in this state in respect to articles not patented. *Smithurst v. Edmunds*, 14 N. J. Eq. 1. In the federal courts the same doctrine has been applied to patented inventions. Where the owner of a patent assigns it to another, together with all future improvements which he may make on such patent, the equitable title to any improvements thereafter made by the assignor vests in the assignee as soon as the improvement is in esse, capable of being identified. This rule is readily enunciated by Chief Justice Waite in *Littlefield v. Perry*, 21 Wall. 226, and by Justice Bradley in *Manufacturing Co. v. L.*, 32 Fed. 697. The assignment of future improvements upon a machine, in connection with the assignment of the patent for such machine, is valid. A naked agreement to assign in gross a man's future labors as an inventor is not good. But where a man pursues a particular invention, secured by a patent, which is open to indefinite improvement, he may stipulate for the sale of future improvements he may make upon it. A subsequent patent, to be within the terms of the contract, must be an improvement upon the original invention. It appears in the case that the formula assigned to the complainant company was not patented, but that circumstance does not affect the result, under the authority of *Smithurst v. Edmunds*, supra. The burden of proof, in the first instance, is upon the complainant company, to show that the patent claimed is an improvement upon the formula which it held by prior assignment. The term "improvement" cannot comprehend every future invention of every possible process for making naphtha soap, however difficult, and independent of, the first formula. The evidence was produced before the vice chancellor to show what the formula held by the complainant was, so that a comparison

of it could be made with the subsequent patented process. The only fact before us to relieve the complainant of the burden cast upon him in this respect is the assignment of the patent by Stanton to McFarland on the 25th day of May, 1893. That assignment recites "that Stanton has invented certain new and useful improvements in the method of an apparatus for producing naphtha soap, for which he has applied for letters patent, and he thereby assigns and sets over to McFarland the patent to be issued under such application." This recital and assignment is sufficient to shift the burden of proof from the complainant company to McFarland, to show that the patented process assigned to him is not an "improvement" on the formula held by complainant, within the legal acceptance of that word. The patent was applied for by Stanton as an "improvement," and so contracted for and taken by McFarland. The decree below should be affirmed, with costs.

DODD et al. v. LINDSLEY.

(Court of Errors and Appeals of New Jersey.
March 2, 1896.)

LIABILITY OF DEVISEE—NEGLIGENCE OF TESTATOR —PARTIES.

A bill in equity cannot be maintained against a residuary legatee or devisee of an estate, to recover from him an alleged loss by an estate of which his testator was executor, by reason of the neglect of his testator as such executor, without making the personal representative of his testator a party to the suit, and calling him to account for the unadministered assets of the estate of which such testator was executor. (Syllabus by the Court.)

Appeal from court of chancery; Pitney, Chancellor.

Action by John H. Lindsley, administrator with the will annexed de bonis non of Stephen H. Dodd, deceased, against Amzi T. Dodd and others. Judgment for complainant (30 Atl. 896), and defendants appeal. Reversed.

Whitehead & Condit and Alfred F. Skinner, for appellants. Coult & Howell, for respondent.

VAN SYCKEL, J. Calvin Dodd, one of the executors of Stephen H. Dodd, deceased, held, as part of the estate of said decedent, a mortgage for \$1,500, which he failed to have recorded, and which, it is alleged, was rendered uncollectible and of no value by reason of such neglect. The complainant below, who is the respondent here, is the sole legatee of Stephen H. Dodd, and by his bill asks to charge Amzi T. Dodd, the residuary legatee and devisee of Calvin Dodd, with the amount lost on said mortgage. The administrator of Calvin Dodd is not made a party to this suit.

In the absence of any valid excuse for not recording the mortgage, Calvin Dodd would

have been liable for the loss which resulted; but no decree could have been made against him, if living, without making him a party. Herein lies the error: that the suit is against the residuary legatee of Calvin, and not against his personal representative. It should have been against the personal representative of Calvin, calling him to account for the unadministered assets, and charging Calvin with the devastavit. Whether the estate of Calvin can be held to respond for the amount of the alleged loss will depend upon the state of the accounts. He may have paid out for the estate which he represented, from his own funds, more than that amount in excess of the assets of the estate. It is not necessary to decide other questions discussed. For the reason given, the decree below should be reversed.

LANDIS v. SEA ISLE CITY HOTEL CO.
et al.

CLASS et al v. LANDIS.

(Court of Errors and Appeals of New Jersey.
March 2, 1896.)

**CORPORATIONS—ACTION AGAINST DIRECTORS—
DECREE.**

Under a bill filed by a stockholder and creditor of a company on behalf of himself and all other stockholders and creditors, praying that directors of the company may be made to respond to said company for losses sustained by it, by reason of their fraudulent conduct, a decree cannot be made for the sole benefit of the complainant

(Syllabus by the Court.)

Cross appeals from court of chancery; Pitney, Chancellor.

Bill by Charles K. Landis against the Sea Isle City Hotel Company, Charles Class, and Michael J. Kelly. From a part of the decree complainant appeals, and from the decree (31 Atl. 755) as against them Class and Kelly appeal. Affirmed as to complainant and reversed as to defendants.

Chas. K. Landis, Jr., for complainant.
Samuel W. Belden, for defendants.

VAN SYKEL, J. These appeals were argued together. The bill filed by Charles K. Landis as a creditor and stockholder of the Sea Isle City Hotel Company, on behalf of himself and all other creditors and stockholders, prays that Charles Class and Michael J. Kelly, who are directors of said company, may be decreed to pay over to the said company all money and property fraudulently held by them under the allegations in the bill, and to pay to the company an amount that will compensate said company for the losses sustained by the company and its stockholders by the wrongful acts of the said defendants. The decree below refuses relief to the creditors, but decrees that two of the defendants, Class and Kelly, shall pay to Charles K. Landis, as a stockholder of said company, the sum of \$500. Class and Kelly

have appealed from the decree against them and in favor of Landis, and Landis has appealed from the decree in so far as it refuses relief to the creditors.

The decree is not in accordance with the prayer of the bill, and cannot be maintained. If there is any evidence to support a decree in accordance with the prayer of the bill,—which is at least doubtful,—it ought to be that the money which the company lost by the fraud or actionable misconduct of the board of directors, or some of them, should be paid to the company for the benefit of all creditors and stockholders. Landis was not entitled to a decree appropriating the amount recovered exclusively to him. One complaint is that the directors did not take a valid title for the lots purchased for the erection of the hotel, but they took possession, and built upon the lots, and thereby acquired an equitable title as against all subsequent claimants. The company therefore was not injured in that respect. The decree, so far as appealed from by Class and Kelly, should be reversed, and so far as it is appealed from by Landis should be affirmed.

NEW JERSEY BUILDING, LOAN & INVESTMENT CO. v. CUMBERLAND LAND & IMPROVEMENT CO.

(Court of Errors and Appeals of New Jersey.
March 2, 1896.)

SUBROGATION OF SECOND MORTGAGEE.

A second mortgagee, making payments on the first mortgage, will, under ordinary circumstances, be subrogated under the first mortgage to the extent of such payments, the residue of the claim of the first mortgagee having priority to the lien acquired by such subrogation.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill by the New Jersey Building, Loan & Investment Company against the Cumberland Land & Improvement Company. Decree for defendant, and plaintiff appeals. Reversed.

Barton B. Hutchinson, for appellant.
James Buchanan, for respondent.

BEASLEY, C. J. This bill was filed to foreclose a certain mortgage given by the respondent to the appellant. There was no dispute with respect to the mortgage, or of its being the first lien upon the property, and following this incumbrance were mortgages and judgments, all of which were admitted to be valid. The contested point was this: The holder of the second mortgage set up in his answer and contended that he had made certain payments on the mortgage of the appellant, who was the complainant in the court of chancery, under a contract by parol with that company that it would release "as much of the land embraced in its mortgage, in proportion to the amount paid or which should thereafter be

paid." That certain sums of money were paid by the second mortgagee on the first mortgage seems to be clear in the proofs, and the vice chancellor, who heard the case, decided that the contract above stated had been, as a matter of fact, entered into, but further holding that, as it did not specify any particular part or parcel of land to be released, it was not capable of performance by a court of equity. Notwithstanding this conclusion, it has been decreed that the moneys thus paid by the second mortgagee to the appellant should be deducted from the amount that shall be realized by a sale under the first mortgage. The theory suggested justifying such a course was that this money had been paid under circumstances that would "make it recoverable in an action at law as for money had and received." But in the opinion of this court the decree thus rendered on the ground mentioned cannot be sustained. A money claim of the kind described has not the least connection with the foreclosure, and therefore could not enter into that proceeding. It would be a settlement of an independent money account between two defendants in a foreclosure bill, and could not constitute any lien upon the mortgaged premises. If a demand of this character had been set up in the answer, it would have been struck out on motion for the reason of its irrelevancy to the matter in litigation. It may not affect the result to be reached in this case, but it is proper to say that this court has not been able, as his honor, the vice chancellor has done, to find any evidence proving the existence of the contract which is set up in the answer. It will be remembered that such contract was to the effect that the appellant would release from the lien of his mortgage a quota of the premises proportionate to the amount of the moneys paid to him by the defendant, the holder of the second mortgage. At the trial the effort of the defendant was to show that he had made this contract with the general manager of the appellant. Upon this subject the testimony was conflicting, and this was the ground of the contest, but it seems to have escaped attention that, even if such contract had been plainly shown between the parties so negotiating, it would have been of no avail, for the reason that the general manager of the corporation had no legal power to enter into it. The board of directors were alone capable to execute that function, and there is nothing to show that the terms of the contract as claimed by the defendant were ever communicated to that body. It seems impracticable, therefore, to rest a decree on the designated grounds. Nevertheless it appears to the court that this second mortgagee should have a decree in his favor for the moneys in question. The principle on which such right rests is a familiar one, and its application in the present instance is plain, although it appears heretofore, in the progress

of this suit, to have escaped observation. The moneys in question were paid on the first mortgage by the second mortgagee, in order to strengthen his own security. Unless such payments are to be regarded as mere gratuities to the mortgagor,—which conspicuously was not the intention,—they of right should be made to inure to the benefit of him who paid them; and this equitable result can be brought about by a resort to the doctrine of subrogation. This method of redress is so opportune to the enforcement of the undeniable equities of the juncture that the subject needs no explanation or discussion. This measure is to be thus applied: A decree should be entered for the first mortgagee for the entire amount of the money due him, without deducting therefrom the sums in question which have been paid by the said second mortgagee, and which decree should be directed to stand as security, in the first place, for the sum due the appellant, minus such payments; and, secondly, as security for the appellant to the extent of said payments made by him. The lien of the appellant will then have priority. The lien of the second mortgagee will be the second one on the premises. The decree appealed from must be reversed, and a substituted one is to be entered in accordance with the view above expressed.

KING et al. v. HOLBROOK.

(Court of Errors and Appeals of New Jersey.

March 6, 1896.)

PARTIES—NONJOINER—WAIVER OF DEFECTS—SUFFICIENCY OF EVIDENCE.

1. Holbrook's action was on a quantum meruit for work done and materials furnished, and at the trial it appeared that the work was done and the materials were furnished by a firm composed of Holbrook and Scofield. Holbrook put in evidence an assignment of the claim in suit, made by himself, in the name of the firm, to himself. *Held*, that it was unnecessary to decide whether the assignment entitled him to sue in his own name under section 19 of the practice act, as amended by the act of March 4, 1890; for, if not, the case was rightly submitted to the jury, the defendants having given no notice of the nonjoinder of Scofield, as required by section 37 of the practice act.

2. Where there is some evidence of work done and materials furnished, raising an implied contract to pay what they were worth, and some evidence from which a jury could infer their value, it is not error to submit the case to the jury; and, if the verdict upon such evidence is excessive, correction must be sought under a rule to show cause.

(Syllabus by the Court.)

Error to circuit court, Hudson county; before Justice Lippincott.

Action by Giles J. Holbrook against Henrietta L. King and others. This action was in contract, and was commenced by attachment. The defendants having entered an appearance, the plaintiff filed a declaration containing the common counts, with a bill of particulars annexed, by which it was shown

that the action was for work done and materials furnished,—part on an express contract, as to compensation, and part on a quantum meruit. To this the defendants put in the plea of the general issue. The verdict being for plaintiff, judgment was entered thereon, and this writ of error was brought. Affirmed.

James P. Northrop and Bloomfield Littell, for plaintiffs in error. Gilbert Collins and Charles Mayer, for defendant in error.

MAGIE, J. In behalf of the plaintiffs in error, it is first contended that the assignments based on the bills of exceptions sealed to the rulings of the trial judge permitting the jury to find a verdict in favor of Holbrook, the sole plaintiff below, disclose error. This contention is put on the ground that the evidence plainly showed that the work done and materials furnished were done and furnished by a firm composed of Giles J. Holbrook, the plaintiff below, and one Charles Scofield. It is insisted that both partners should have joined as plaintiffs in the action, and that it was erroneous to permit Holbrook to recover in his own name. In support of his case, Holbrook produced and put in evidence an assignment in writing, made by himself, in the firm name, and assigning to himself the claim in suit. If this was a valid assignment of the claim to Holbrook, he had a right to bring suit thereon in his own name, under the provisions of section 19 of the practice act, as amended by the act of March 4, 1890 (Laws 1890, p. 24). But this question has not been discussed by counsel, and I deem it unnecessary to express any opinion thereon. Assuming that the assignment was invalid, and conferred no right on Holbrook to sue in his own name, it is clear that the action should have been brought in the name of Holbrook & Scofield. In this respect the contention of counsel for plaintiffs in error is obviously correct. But it is equally obvious that this objection was not so presented as to make the rulings complained of erroneous. By the provisions of section 37 of the practice act, the nonjoinder of a plaintiff cannot be objected to by a defendant unless written notice of such objection has been given within five days after plea filed. Revision, p. 853. This section is, in this respect, in exact accord with the provisions of section 9 of the practice act of 1855 (Laws 1855, p. 288). That section was construed by this court as absolutely precluding a defendant who had not given such notice from questioning at the trial the right of the plaintiff to sue alone, although the defendant would be permitted to show that the contract was joint, and to make any defense to it which he could have made if all the contracting parties were plaintiffs. *Brown v. Fitch*, 33 N. J. Law, 418. That decision has been uniformly followed since. *Lehman v. Hauk*, 42 N. J. Law, 206; *Marts v. Insurance Co.*, 44 N. J. Law, 478; *Smith v. Miller*, 49 N. J. Law, 521, 13 Atl. 39. As

plaintiffs in error did not show that the required notice had been given, the rulings of the trial judge in the respect now complained of were unexceptionable.

It is next contended that there was error in the refusal of the trial judge to nonsuit the plaintiff below. This is pressed upon the ground that he had not offered sufficient evidence of the amount or value of the work done and materials furnished, to go to the jury. But an examination of the evidence discloses that there was proof of work done and materials furnished, and justifying some inference as to the value thereof. It is true that the proofs in these respects are so meager and unsatisfactory that it is difficult to see how the verdict—at least, for its whole amount—could have been supported on a rule to show cause. But we are to deal only with legal errors, and there was no error in permitting the case to go to the jury upon the proofs made.

It is lastly urged that the verdict is against the great weight of evidence, as to which it is only necessary to say that the argument on this point would have been very appropriate upon a rule to show cause why a new trial should not be granted, but is entirely inappropriate upon a writ of error. No errors in law having been discovered, the judgment below must be affirmed.

STATE (WEST JERSEY TRACTION CO.,
Prosecutor) v. BOARD OF PUBLIC
WORKS OF CITY OF CAMDEN.

(Court of Errors and Appeals of New Jersey.
March 2, 1896.)

CERTIORARI—INTEREST OF PROSECUTOR.

In a contest, raised in a certiorari proceeding, between two street railways, each claiming the exclusive right to lay its track in a certain street, the prosecutor failed altogether to show its own interest in such controversy. *Held*, that the prosecutor had no standing in court to question the right of its adversary.

(Syllabus by the Court.)

Error to supreme court.

Certiorari, on the prosecution of the West Jersey Traction Company, against the board of public works of the city of Camden, to review an ordinance. There was a judgment dismissing the writ (30 Atl. 581), and prosecutor brings error. Affirmed.

Thomas E. French and L. M. Garrison, for plaintiff in error. E. A. Armstrong and D. J. Pancoast, for defendant in error.

BEASLEY, C. J. This is a controversy between two street-railway companies, touching their respective claims to lay a track for their cars in one of the streets of the city of Camden. By a certain ordinance passed by the board of works of that municipality, permission was given to the Camden Horse-Railroad Company to construct its road in the street in question. This ordinance was brought before the supreme court by a certiorari, the prosecutor of which was the West

Jersey Traction Company, the plaintiff in error; being a corporation organized under the general law of this state enacted in the year 1893 (P. L. 302). The principal ground of complaint against the ordinance thus placed under judicial scrutiny was that the board of works had awarded the franchise in dispute to the Camden Company without giving the plaintiff in error an opportunity to be heard, although it had filed a petition setting up a superior right to the privilege then in contest. Its contention was that its own petition, and the application for the same franchise, raised a judicial question, which could not be decided by the board of works until a hearing had been tendered to each of the contestants. This being the nature of the controversy, on the return of the certiorari the prosecutor thereof, the West Jersey Traction Company, obtained a rule to take testimony, and in order to show its right to stand as actor in the proceeding, and its title to the franchise in litigation, endeavored to prove that, in accordance with the general act referred to, it had filed a survey and map in the office of the secretary of state which demarked the lines of track it undertook to construct. The object of the production of this evidence was to show that one of the lines so projected ran through the street in question, in the city of Camden. It will be observed, therefore, that without the establishment of this fact this traction company was destitute of all semblance of right to claim for itself the franchise in question, or to dispute the validity of the grant to its adversary. In making this necessary proof the traction company produced a paper purporting to be a survey and map meeting the statutory requisites, certified to by the secretary of state. The introduction of this document was objected to by the opposing party on the ground that the secretary of state had no legal power to so authenticate the instrument as to make it admissible in evidence. In the supreme court it was held, on the plainest principle of the law of evidence, that the paper in question could not be received, and, it being overruled, the plaintiff was left as an actor in court without the competency either to claim or to contest a right. This result necessarily led to the dismissal of the certiorari, and it is that decision that is now before this court on this writ of error.

The contention before us is not that the supreme court fell into an error in overruling the testimony just mentioned,—for it seems to be admitted that the judicial course pursued in that respect was correct,—but that the mistake was in the dismissal of the writ of certiorari. The view on this subject presented in the brief of counsel of the plaintiff in error is that the allowance of the certiorari by the judge who directed it to be issued had the effect to make a *prima facie* case with respect to the right of the plaintiff to stand as the prosecutor of the writ, and, having such status, it could challenge the legal claim of the Camden Company, even if it had failed

to prove its own. The principal case relied on to justify such contention is that of *Avon by the Sea Land & Improvement Co. v. Mayor, etc., of Borough of Neptune City* (N. J. Err. & App.), reported in 32 Atl. 220. This case was decided in this court, and it must be admitted that the opinion that was prepared contains expressions which, if interpreted by the force of these terms alone, and without reference to the facts to which they were applicable, would certainly appear to justify the contest raised at this time by the plaintiff in error. But the legal juncture then to be passed upon did not call for the enunciation of so broad a doctrine as that the allowance itself of the writ of certiorari operates as a decision in favor of the prosecutor, as far as his right to stand in court as a prosecutor is concerned, and that such decision shall suffice, "in the absence of proofs to the contrary." And we do not think that this would be a correct exposition of the rule of practice. When a judge is called upon, in a proceeding *ex parte*, to allow a certiorari, he must be reasonably assured of two things—First, that there is some illegality to be complained of; and, second, that the party seeking the remedy is entitled to it. But the allocatur no more adjudges the one fact than the other. By force of our rule of court, such assurance is required to be made by an affidavit, but such oath has no semblance of juridical testimony. The rules of evidence are not applied to it, and it is used against a party who has no knowledge of its existence. Such a basis as this is incapable of supporting anything in the nature of a judicial decision. All that it lays a ground for is that the judicial officer, resting his opinion upon it, may say that there is presented to him a matter that it is proper to put in the course of legal inquiry. The allowance of the writ can have no greater force than that it can have no effect on the trial of the issue between the litigants; for when the litigation reaches that stage the prosecutor must, if required expressly or impliedly, give his legal status as the actor in the suit. That this must be so is evident when we remember that it is the legal right of a person in the possession of any valuable thing to be exempt from all litigation with respect to it, except such as may be waged by some one having an interest in it; and such an immunity is a valuable legal right, which cannot in any wise be impaired by an *ex parte* decision founded on an *ex parte* affidavit. It is true that in some cases, as our Reports exhibit, the court will infer that the status of the plaintiff in certiorari exists from the fact that in the given case the proof of it is a mere form; as, for example, when a public tax is questioned, as is alleged, by a citizen and taxpayer. Under such circumstances, it may well be reasonably presumed, in the absence of any call for evidence on the subject, that the qualifications of the prosecutor of the writ were assumed and admitted by the parties, *sub silentio*. In the case now before

us the record shows that the right of the plaintiff to prosecute the inquiry was challenged; for, when it offered its testimony in that regard, it was objected to, on the ground of its illegality, by the opposite party. Such an exception was a very plain notice that the plaintiff must make strict proof of its status. Nor should this subject be left without the further remark that, if the rule just discussed had existed in the form and to the extent claimed, it would not have availed on the present occasion. The reason of this is that the fact necessary to be proved to show the prosecutor's status is likewise necessary to show its right on the legal merits of the case. It will be remembered that the plaintiff asserts its case in this wise: That, by filing a survey and map of a certain character in the secretary of state's office, it has acquired a right paramount to the claim of its adversary, and that, although no proof has been made of such filing, nevertheless such fact must be inferred from the allowance of the certiorari. Such a case, it is obvious, rests upon an oath made by one litigant in the absence of the other; the theory being, because the judge decided that the circumstances thus sworn to *ex parte* are sufficient to induce him to order a judicial examination of the matter, that thereby a *prima facie* case is made by the applicant for the process, in its favor, on the trial of the merits. Such an hypothesis needs no argumentative refutation. Such a course of law, even if it had a legislative sanction, would be of no force, as the proceeding would be inconsistent with the fundamental essentials for the dispensation of justice by judicial tribunals. A trial in a court resulting in a judgment in favor of one of the litigants, founded on his own *ex parte* affidavit, would present an anomaly utterly incompatible with our legal system. Let the judgment be affirmed.

(March 5, 1806.)

GARRISON, J. The judgment of the supreme court dismissing this writ of certiorari should be affirmed. The plaintiff in error failed in the court below to maintain by competent proof the burden of its case on the merits. The action of the board of public works in making a quasi judicial decision without notice to the prosecutor was illegal only in case the prosecutor had filed in the office of the secretary of state a survey and map covering the street in question.

In order that the supreme court could nullify the action of the board of works, the prosecutor must establish in the cause the fact that such survey and map had been filed. This it failed to do. The dismissal of its writ was, in view of this circumstance, inevitable, and must be affirmed.

This disposes of the assignment of error.

Whether the plaintiff in error had the requisite status to prosecute a writ of certiorari in this matter is not in controversy. It was not obliged to prove its status to the supreme court, and it did not in any way appear from the testimony that it lacked all legal interest in the pending controversy.

Under circumstances such as these, this court will not adjudicate the question of a prosecutor's right to his allocutor. *Avon by the Sea Land & Improvement Co. v. Borough of Neptune City* (N. J. Err. & App.) 32 Atl. 220.

DE GINTHER v. NEW JERSEY HOME FOR THE EDUCATION AND CARE OF FEEBLE-MINDED CHILDREN et al.

(Court of Errors and Appeals of New Jersey.

March 2, 1896.)

STATUTES—REPEAL—FIRE ESCAPES—DUTY TO PROVIDE.

1. The act entitled "An act to provide for the better security of life and limb in cases of fire in hotels and other buildings," approved March 17, 1882 (P. L. 142), and the supplement thereto approved March 22, 1888 (P. L. 192), are repealed by the act entitled "An act relative to fire escapes," approved March 24, 1890 (P. L. 101).

2. Under the latter act it is not obligatory upon an owner of a building to erect a fire escape until precedent action by the proper authorities of the municipality in which the building is erected, which shall serve to prescribe the number, dimensions, character, manner of construction, and regulation of the fire escapes of the building shall be taken.

(Syllabus by the Court.)

Error to circuit court, Cumberland county; before Justice Reed.

Action by George De Gintner, administrator of Frederick Sage, deceased, against the New Jersey Home for the Education and Care of Feeble-Minded Children and another. The complainant was nonsuited, and brings error. Affirmed.

Charles K. Landis, Jr., for plaintiff in error. Howard Carrow, for defendants in error.

McGILL, Ch. The action of the plaintiff is based upon a requirement of an act of the legislature entitled "An act to provide for the better security of life and limb in cases of fire in hotels and other buildings," approved March 17, 1882 (P. L. 142), and the supplement thereto approved March 22, 1888 (P. L. 192). The supplement was a revision of the original act, its principal design apparently being to extend the application of that act to a greater number of buildings. Its general scheme was to require that persons in control of buildings 3 or more stories in height, and in and about which 30 or more persons should congregate for any purpose, or in which 3 or more families should dwell, should be required to provide a safe external means of escape therefrom, and that the authorities of the municipality in which such building should be erected should designate the number and kind of such escapes for each building, within the contemplation of the law, and notify the person in control of the building thereof, and to make provision that violation of the requirement of the statute, or failure to comply with the notice, should be a misdemeanor punishable by fine, and that one charged with duty to obey the statute, and failing to do so, should be liable to an action by another, having authority to sue, because of death or injury by reason of the absence or want of repair of the means of escape contemplated. By a subsequent enactment, approved March 24, 1890 (P. L. 101), entitled "An act relative to fire escapes," it was, in substance, provided that every building in which 20 or more persons should live or congregate above the first or ground floor should, as the proper authorities might direct, have one or more external,

wrought-iron fire escapes, of the dimensions and character required by such authorities, and that the authorities of each municipality should have power to enforce the provisions of the act. The latter enactment does not expressly repeal inconsistent statutes. It is, however, observed that having a distinct, independent title, it proceeds to deal with the same subject-matter which the acts of 1882 and 1888 deal with. Its scheme is that buildings of prescribed character shall have external, wrought-iron fire escapes, of such number, dimensions, and character, and of such construction and regulation, as the authorities of the municipality within which the building is or may be erected shall prescribe, and that the enforcement of the design of the statute shall rest with such authorities. This scheme differs from that of the former enactments in that those laws prescribe an immediate duty of the person in control of the building to provide a safe external means of escape from a somewhat more restricted class of buildings, and impose a duty, also, upon the authorities of the municipality, to designate the kind and number of escapes, and give notice thereof to the persons bound to erect them. And those statutes also prescribe the penalty for either disobedience of the requirement of the law, or of the notice of the authorities, and make the person failing to obey liable to an action by one having authority to sue because of death or injury by reason of the absence or lack of repair of such means of escape. Thus, it appears that the earlier enactments enjoin independent duties upon the house owner or controller and the municipal authorities, and directly prescribe the accountability of the house owner or controller, while the act of 1890 prescribes a new scheme, which contemplates precedent action by the authorities of the municipality, which shall serve to prescribe the number, dimensions, character, manner of construction, and regulation of the fire escapes, before the duty of the owner so matures that the performance thereof becomes obligatory. "Where there are two acts on the same subject," said Vice Chancellor Van Fleet in *Bracken v. Smith*, 39 N. J. Eq. 169, "the rule is to give effect to both, if possible. But if the two are repugnant, or any of their provisions, the later act, without any repealing clause, operates, to the extent of the repugnancy, as a repeal of the first; and even where two acts are not, in express terms, repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." In *Haynes v. City of Cape May*, 52 N. J. Law, 180, 19 Atl. 176, Mr. Justice Dixon, writing the opinion of this court, stating the rule, said: "But, further, it is a settled rule of statutory construction that when a later law deals generally with the subject-matter of earlier statutes, not simply

as a revision, but as a new and independent enactment, that affords decisive evidence of an intent to abrogate and repeal the older legislation. *Roche v. Mayor, etc.*, 40 N. J. Law, 257; *Bracken v. Smith*, 39 N. J. Eq. 169." These expressions state the rule well established in our courts. *Roche v. Mayor, etc.*, 40 N. J. Law, 257; *Gabler v. City of Elizabeth*, 42 N. J. Law, 79, 81; *Henry v. Camden, Id.* 335; *City of Burlington v. Estlow*, 43 N. J. Law, 13; *Mulligan v. Cavanagh*, 46 N. J. Law, 45, 49; *McCartin v. Traphagen*, 43 N. J. Eq. 323, 331, 11 Atl. 156; *Mersereau v. Mersereau Co.*, 51 N. J. Eq. 382, 26 Atl. 682; *Vreeland v. City of Jersey City*, 54 N. J. Law, 49, 52, 22 Atl. 1052; *Green v. Clarke*, 56 N. J. Law, 62, 27 Atl. 924; *Wilson v. Inhabitants of City of Trenton*, 56 N. J. Law, 469, 29 Atl. 183.

We regard the act of 1890 as a new, complete, and independent legislative dealing with the subject-matter treated in the enactments of 1882 and 1888, intended to provide the whole regulation of that subject-matter, and hence we deem that it repeals those former laws. It is not strictly a repeal by implication, but a repeal because of the institution of a new scheme of control of the subject-matter treated of, which shall prevail to the exclusion, as discarded, of all matter in prior enactments on the subject which is not embraced within it. *Roche v. Mayor, etc.*, *supra*. Mr. Justice Dewey, in *Bartlet v. King*, 12 Mass. 537, 545, said: "A subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on principles of law, as well as in reason and common sense, operate to repeal the former." It appeared at the trial in the circuit court that the township committee of the township of Vineland, prior to the death of Sage, had never taken any such action as the act of 1890 contemplates that it should have taken; and hence the court held that duty had not arisen up the part of the defendants to erect fire escapes, and that the action would not lie. Without intimating that the suit would lie if the township committee had taken appropriate action, we accede to the correctness of the conclusion of the circuit court, and think that for the reason upon which it acted, and because, also, it was not shown by the proofs that the building burned was one in which 20 or more persons lived or congregated above the first or ground floor, the plaintiff was properly nonsuited. The judgment below will be affirmed.

ROPER v. STATE.

(Supreme Court of New Jersey. Feb. 20, 1896.)

FALSE PRETENSES—INDICTMENT—ATTORNEY AS WITNESS.

1. An indictment founded on the statute relating to false pretenses must exhibit a pretense

which, under the circumstances stated, must have an apparent tendency to induce the person defrauded to part with his property.

2. A counselor at law, who was present at a conversation between his client and a third person, is a competent witness, in behalf of the latter, to prove what was said.

(Syllabus by the Court.)

Error to court of general sessions, Hudson county; Hudspeth, Hoffman, and Kenney, Judges.

Osmond W. Roper was convicted of obtaining money by false pretenses, and brings error. Reversed.

Argued November term, 1895, before BEASLEY, C. J., and MAGIE and LUDLOW, JJ.

Hoffman & Herbert, for plaintiff in error. Charles J. Winfield, for the State.

BEASLEY, C. J. The defendant, Roper, brings to this court the record of his conviction before the Hudson sessions of the offense of obtaining money by false pretenses. An examination of this procedure has led the court to conclude that the judgment cannot be permitted to stand. In the first place, the indictment is plainly insufficient. Its defect is that it does not set forth any misstatement that could have caused the prosecutor to part with his money. The substantial statements descriptive of the crime are these: That the defendant knowingly, falsely, and fraudulently represented to the prosecutor, one John J. Renshaw, that the Mutual Land & Building Syndicate was then and there a bona fide building and loan association, and was then and there engaged in transacting a bona fide building and loan business, under and in compliance with the laws of this state; that the Mutual Land & Building Syndicate had then and there \$75,000 on hand, in cash, to loan. After a negation of the bona fide existence of said alleged association and of its pecuniary resources, the narration is continued in these words, viz.: "By color and means of which said false and fraudulent pretenses, and then and there well knowing the same to be false and fraudulent, the said Isman W. Roper, did then and there, willfully, unlawfully, and feloniously, obtain from the said John J. Renshaw three thousand dollars, of the moneys of the said John J. Renshaw, with intent then and there to cheat and defraud him thereof, contrary to the form of the statute," etc. It is difficult to understand how it can be reasonably pretended that the conduct thus imputed to the defendant manifests the commission of a crime on his part. If it be true, as stated, that Renshaw, the person defrauded, parted with his money to the defendant merely because the latter falsely asserted and represented that a certain association, with which neither he nor the de-

fendant had any apparent connection, had a genuine existence, the inducement to his act was not what the law regards as a false pretense. In the case of *State v. Vanderbilt*, 27 N. J. Law, 328, it was declared that a false representation, to be a criminal pretense, within the statute, must be of such a nature as will be sufficient to induce a man to part with his property, and must not be absurd in itself, considered as an efficient cause. And in the present case the alleged criminal pretense belongs to this latter category, for it is undeniably futile, inasmuch as the imputed falsehood as to the status of the association could have, in the absence of other circumstances, no tendency whatever to lead Renshaw to loan his money to the defendant. If A. should falsify in stating to B. that C. was a man of property, such fabrication would not, per se, in any conceivable way, induce B. to part with his property to A. And yet this is the entire criminal case made in this indictment. It is obvious that the facts stated in the indictment have no legal significance. The rule of pleading in these cases is entirely settled. Lord Mansfield, in a case before him, said that the indictment must contain a history of the offense; that is, the essential facts must be set forth to this extent; that is, if the facts stated shall be proved, the defendant's guilt will be established. The same principle is propounded in the well-considered case of *People v. Gates*, 13 Wend. 311, the doctrine exemplified being that "an indictment for obtaining goods by false pretenses, etc., must contain all the material facts and circumstances which the public prosecutor will be bound to prove to produce a conviction." The law is stated to the same effect in 2 East, P. C. 6, 837; 2 Russ. Cr. 305; *Lambert v. People*, 9 Cow. 578. The indictment before the court, on this record, is fatally defective. There is also a second error in this case, that would, of necessity, lead to the same result. In the course of the trial it became important for the defendant to show that in a certain conversation between himself and Renshaw, the person alleged to have been defrauded, he had instructed the latter not to do a certain thing. To make this proof the defendant called a counselor at law as a witness, who testified that on the occasion in question he, as the counsel of Renshaw, the prosecutor, had accompanied him, and was present at the interview between Renshaw and the defendant, and the court, on objection made by the state, excluded the witness on the ground that the conversation in question was a privileged communication, not to be disclosed by the counsel. This ruling was conspicuously erroneous. The conversation in question did not exhibit the least semblance of a confidential communication. The subject is too plain for discussion. Let the judgment be reversed.

ATTORNEY GENERAL v. MAYOR, ETC.,
OF BOROUGH OF ANGLESEA.(Court of Errors and Appeals of New Jersey.
March 2, 1896.)

CONSTITUTIONAL LAW — BOROUGH GOVERNMENT.

1. A statute that authorizes the holding of an election for the acceptance of a scheme of municipal government by the electors of an area of given size and value, upon which resides, for any period of the year, a population of 200, is not a constitutional enactment. The temporary presence of 200 persons not required to be possessed of any element of citizenship is a purely figmentary characteristic, and can in no way be germane to the exercise of local municipal franchises by the inhabitants who are possessed of the constitutional and legislative requirements of electors.

2. "An act for the formation and government of boroughs" (P. L. 1890, p. 58) is unconstitutional.

(Syllabus by the Court.)

Error to supreme court.

Information on the relation of the attorney general against the mayor and council of the borough of Anglesea. There was judgment for defendants, and relator brings error. Reversed.

John J. Crandall, for relator. S. W. Beldon and Morgan Hand, for defendant.

GARRISON, J. This information, exhibited by the attorney general, directly questions the right of the mayor and council of the borough of Anglesea to exercise the franchises of a municipal corporation of this state. The plea to which a demurrer has been filed brought before the supreme court—First, the apparent existence of any legislative authority for the corporate life of the defendant; and, second, the constitutionality of such legislation, if any such were apparently part of the statute law of the state.

The legislation concerned is—First, "An act for the formation and government of boroughs," approved March 12, 1890 (P. L. 1890, p. 58), under which the defendant claims its incorporation; and, second, "An act to repeal an act entitled, 'An act for the formation and government of boroughs,' approved March 12, 1890" (P. L. 1891, p. 11), by which the act of 1890 was expressly repealed, with a saving clause, however, as to incorporations already organized under the repealed act. The difficulties in the way of a lucid conception of a body having organs, the source of whose vital supply has been cut off, is of secondary moment, compared with the practical evasion of the constitutional inhibition against the granting of special franchises that will result if such franchises may be perpetuated in their donees, while at the same time the door is closed to all others by the repeal of the investive act. The resolution of the question thus presented in favor of the relator would not, however, in the least degree, tend to sustain his contention, viz. that, the saving clause being bad, the rest of the act must operate as a naked repealer.

Where part of a statute is unconstitutional, the remaining part may stand only when it will operate in accordance with the apparent legislative intention, and a provision that is unconstitutional and ineffectual as a law is yet to be regarded upon the question of the intention of the lawmaker. In the present case there is nothing to warrant the belief that the legislature would have passed the residue of this statute, as it will stand after the excision of the proviso. Indeed, the contrary is perfectly obvious. The effect, therefore, of holding the proviso bad, would not be to repeal the act of 1890, but to eliminate from the statute book the repealer itself. Pursue, therefore, what course we may, we must ultimately consider whether the act of 1890 is a valid expression of legislative power. The statute in question purports to be a general act conferring extensive governmental powers, including taxation, public improvement, the granting of licenses, and all the machinery of a modern municipality. The governmental scheme thus tendered may become operative only when the following conditions, and all of them, are in conjunction: The area to be included must not exceed two square miles, and must have a real taxable value of at least \$100,000 provided, "during any portion of the year a population of not less than two hundred" resides within such area.

The election by which the act may be accepted, as well as those by which the municipal offices are to be filled, must be held by electors, who, by the constitution of this state, must be male citizens, and, by legislative requirement, must have had certain fixed periods of state and local residence. It will be perceived, therefore, that a population of 200 whose residence may be for any portion of a year, does not, by any necessary implication, include a single person capable of participating in either the preliminary or the subsequent acts of citizenship or of government. All idea of a domicilium, all that presumption of an intention to remain or to return that is intended by the word "resident," is negated by the express limitation that any period of a year will suffice for the sort of "residents" required by this act. As was said by Mr. Justice Lippincott in *Green v. Clarke*, 56 N. J. Law, 69, 27 Atl. 924, when speaking of this same act, "by its terms there need be but one permanent resident within the area." Inasmuch as a day is the shortest period of a year ordinarily recognized at common law, it must be assumed that a fraction of a day was not in the legislative mind. A day, however, in law and in fact, is some period of a year, and would fully comport with the prescribed residence; and inasmuch as a sojourn for such a period, or for any period short of that required by the election laws, would not, even in the case of a male, clothe him with qualifications of an elector, it is not easy to see in what respect the element of belonging to the human species renders the presence of 200 individuals any more germane

to the legislation proposed to be based thereon than would be the presence of a like number of any other animate, or, for that matter, inanimate, objects. The scheme of the act admits of an application by which electors, however few, may vote for this charter whenever 200 persons, not required to be electors, shall have spent 24 hours within an area of given size and value. The object of this temporary presence is no more pertinent than is the extent of its duration. Sunday visitors at a summer hotel, steamboat excursionists, who, by accident or design, have stopped over a day, a camp meeting, or even a gang of unnaturalized day laborers, will amply fill every requirement. Under the scheme propounded, upon the happening of any of these events, the departing sojourners would leave behind them a governmental opportunity, actually called into being by their adventitious presence, with which they could have no rational connection, and in which they would have no necessary, or even probable, participation, while an adjoining district, identical in area, value, and inhabitants, would have no such opportunity, because it had not, by a like chance visitation, been brought within the class to which alone the governmental apparatus in question was peculiarly appropriate.

I confess my inability to see how such a requirement can have any more to do with investing local electors with the power of municipal franchise than if the fortuitous condition were that 200 cattle must graze on the meadows, or 200 pine trees stand in the forest.

The classification adopted has no real basis; it is, at best, a mere figment; and the legislation founded thereon falls under the constitutional interdict, as construed by this court, viz. that distinctions that do not arise from substantial differences constitute no ground of support for legislation. *Hammer v. Richards*, 44 N. J. Law, 667.

The judgment of the supreme court should be reversed.

HYATT v. VANNECK.

(Court of Appeals of Maryland. Jan. 31, 1896.)
TRUSTS—RIGHTS OF BENEFICIARY—WILLS—ELECTION.

1. One having a life estate in real property, with remainder to his daughter in fee, sold the same for \$25,000, his daughter and her husband joining in the deed. He received the purchase money, and, after paying expenses of the sale, invested some \$18,000 of it in ground rents and street-railway bonds, in his own name. He expended \$6,000 in paying off a ground rent and making repairs upon property owned by himself, and, having afterwards married, conveyed this property to his wife. He died some two years later, devising to his daughter the ground rents in question, with a limitation over in case she should die without issue. He mingled the railway stocks with property of his own, and bequeathed part thereof to the daughter and part to his widow, and also gave large amounts of his own property to each. The daughter afterwards sued the widow, and thereby obtained from her

payment of the \$6,000 expended on the property conveyed to her. She then sued her father's executors, claiming \$25,000, less this \$6,000, on the theory that her father committed a breach of trust in making the investments in his own name, and that it was his duty to invest the whole sum for himself for life, with remainder to her absolutely. *Held* that, in view of her acquiescence in the investments at the time, and in the absence of any proof of fraud, negligence, or want of judgment by him, she was not entitled to recover, but that her proper remedy was to reclaim the investments themselves.

2. It being apparent from the provisions of the will that the testator intended that she should have the provisions made for her therein, and nothing more, from his estate, she was bound to make an election either to take under the will, giving full effect to all its provisions, or to renounce it entirely, and claim the investments, which were previously her own.

Appeal from circuit court of Baltimore city.

This was a bill in equity by Amy H. Vanneck, by her husband and next friend, John T. Vanneck, against John H. Wight and George Morris Bond, executors of the last will and testament of Edward Hyatt, deceased, and also against Frank I. Ridgley and Charlotte Hyatt. From a decree in favor of complainant, defendant Charlotte Hyatt appeals.

Argued before BRYAN, McSHERRY, FOWLER, BRISCOE, and ROBERTS, JJ.

William A. Fisher and C. W. Field, for appellant. John P. Poe & Sons, for appellee.

BRYAN, J. This is an appeal from the decree of a court of equity. The cause was heard in the court below on bill and answer, and of course the statements in the answer are admitted to be true. The facts are as follows: Edward Hyatt was seised and possessed for life of a house and lot on Cathedral street, in the city of Baltimore, with remainder in fee to his daughter and only child, Amy H. Vanneck, the wife of John T. Vanneck. The property was sold for \$25,000. The deed was executed by Hyatt and his daughter and her husband, and the money was paid into the hands of Hyatt by the attorney of the purchaser. The money was deposited in bank by Hyatt, and in a very short time afterwards he invested of this amount \$17,904.92 in five ground rents in the city of Baltimore and in five coupon bonds of the Toledo Electric Street-Railway Company. He also expended \$4,000 in paying off a ground rent on a leasehold lot of ground on Franklin street in the city of Baltimore, which belonged to him, and \$2,000 in making repairs and improvements on a dwelling house situated on same lot. He paid \$625 to a broker for negotiating the sale of the Cathedral street house and lot, and \$59.17 for the examination of the titles, the ground rents, and for recording the deeds which conveyed them. The money from the sale of the house and lot was received by Hyatt on the 25th of November, 1892, and all these expenditures were made before the end of January, 1893. In fact, with the exception of about \$2,000, all of them were made before the 5th of Janu-

ry. In May, 1893, Hyatt intermarried with Charlotte, one of the defendants below. In November of the same year, by suitable deeds, he caused to be conveyed to her the fee simple in the house and lot on which the \$6,000 had been expended. He died in November, 1894, having in the previous December duly made his last will and testament, by which he devised to his daughter, Amy Vanneck, the five ground rents above mentioned, with certain limitations over in case she should die without leaving issue or descendants surviving her. He also gave to a trustee, for the use of his wife, 50 shares of the Sherwood Distilling Company, and 17 shares of the same stock for the use of his daughter, stating that he had already given her 33 shares of the stock, and he wished to equalize their holdings. He also gave to his wife and daughter, in equal shares, the money due to him by the Sherwood Distilling Company. He gave his wife and daughter other legacies of small value, and he then gave all the rest and residue of his property of every kind and description to them equally, to be divided between them. After his death, Mrs. Vanneck obtained a decree in equity against Mrs. Hyatt, ordering the sale of the Franklin street house and lot for the payment of the \$6,000, parcel of the \$25,000, which had been invested in it. This sum was paid to her by Mrs. Hyatt. Mrs. Vanneck filed this bill of complaint against Mrs. Hyatt and the executors of the will of Edward Hyatt. She contended that it was the bounden duty of her father to invest the \$25,000 received from the sale of the Cathedral street house for himself or life, with remainder to her absolutely; and that because of his failure to do so before his death she became his creditor for that amount, and that she is entitled to recover from his executors the balance of this sum remaining unpaid, with interest from the date of his death, after deducting \$6,000, paid by Mrs. Hyatt. In the argument at her bar her counsel earnestly insisted that his disposition of the money was a breach of trust on his part. By virtue of the provisions of article 16, § 198, of the Code, either Hyatt, the life tenant, or Mrs. Vanneck, the party in remainder, could have obtained from a court of equity a decree for the sale of the Cathedral street property, and an investment of the proceeds of sale under the sanction of the court for the benefit of the owners according to their several interests. This course was not adopted. On the contrary, they joined in a deed conveying the property to a purchaser. The purchase money was paid to Hyatt. The deed is not exhibited in the record, but it is beyond question that the receipt of the purchase money by Hyatt was by the knowledge, consent, and acquiescence of his daughter. The attorney for the purchaser was an able and experienced lawyer, and no one could suppose that he would have permitted his client to pay \$25,000 to a person not authorized to receive it and to give

a legal acquittance for the payment. It is not, however, alleged in the bill that Mrs. Vanneck did not consent that Hyatt should receive the money, nor is it alleged that she did not know in what manner he invested it. It is alleged that it was his duty to invest it for the benefit of himself for life, with remainder to his daughter. It might be assumed that no man of ordinary intelligence would keep the money lying uninvested and unproductive. He did invest it. As a matter of course, the investment was the property of those who owned the fund, according to the due proportions of their interests. This ownership was not defeated nor impaired by the circumstance that her name did not appear in the deeds and coupon bonds which represented the investment. It is alleged that Hyatt became a debtor to his daughter in consequence of this transaction. Blackstone says that "the legal accception of debt is a sum of money due by certain express agreement." 3 Bl. Comm. p. 154. Such an agreement does not appear on this record. But, however, if Hyatt was guilty of tortious conduct injuriously affecting the rights of his daughter, she would necessarily be entitled to redress in some form of proceeding against his executors. We will, therefore, consider this aspect of the case. It is not alleged that he made the investment in a negligent or injudicious manner. A portion of the fund was invested in ground rents in the city of Baltimore. These, when well secured, are considered the safest and most desirable means of producing income. We have no knowledge of the value of the coupon bonds. But it is not alleged that either they or the ground rents were not worth the amounts of money paid for them. Neither is it alleged that Hyatt concealed, or fraudulently sought to conceal, from his daughter the particulars of the investments; nor even that they were made without her consent, knowledge, and acquiescence. Beyond question she now has full and perfect knowledge on the subject, and, if she wishes to do so, she has it in her power to claim them, and likewise the portion of the money which remains uninvested. It would be unjust to allow her to claim anything more on this account, unless she could show that in taking these investments she would sustain loss through some fraud, negligence, or mismanagement on the part of her father. If they are equal in value to the price paid for them, she cannot sustain the smallest loss or injury. The right to invest the money is admitted in the bill of complaint, but the mode of the investment is impeached for the reason, to wit, that Mrs. Vanneck's name was not used in making it. In our opinion, there is not the slightest circumstance to show any fraud, evil practice, negligence, or want of judgment on the part of Hyatt in this transaction; and we do not think that for any other reason shown in this case his daughter has any right of reclamation against his executors.

Before we leave this subject, as a matter of justice to Mr. Hyatt we must recall the fact that Mrs. Vanneck was his only child, and at the time of the occurrences above mentioned he was a widower. It is very reasonable, therefore, to suppose that he contemplated the probability that she would at his death come into the possession of much the greater part of his property, and that he considered it a matter of the smallest consequence whether her name appeared in the investments or not. If it should become desirable to change them, it would be a great deal more easy to do so if they were solely in his name, inasmuch as his daughter and her husband lived in Canada, and it would involve some inconvenience and delay to obtain the deeds and assignments necessary for making the change. It is more just to adopt this hypothesis than the contrary one, that he intended to defraud his only child, for whom he made a liberal provision by his last will and testament,—being more than one-half of his entire property. The testator gave to his daughter property which he knew to be hers, with a limitation over in favor of other persons. In the residuary clause of his will he mingled property which he knew to be hers with other property not specifically disposed of, and gave it, in equal shares, to his widow and daughter. He also gave his daughter the stock of the Sherwood Distilling Company and the debt due by it. Its value is not shown in the record, but it is evident from the language used that the testator placed a high estimate on it. So far as his intention is concerned, nothing can be clearer than this: that he intended Mrs. Vanneck should have the provision made for her in his will, and nothing more, from his estate. It is not possible that he should have intended that, in addition to this provision, she should have the money derived from the sale of the Cathedral street property. In *Beall v. Schley*, 2 Gill, 181, the law is declared as follows: "From the earliest case on the subject the rule is that a man shall not take a benefit under a will, and at the same time defeat the provisions of the instrument. If he claims an interest under an instrument, he must give full effect to it, as far as he is able to do so. He cannot take what is devised to him, and at the same time what is devised to another, although, but for the will, it would be his; hence he is driven to his election to say which he would take." And the same doctrine has been repeatedly stated in subsequent cases. The principle of election very appropriately applies to the claim made by the complainant. The court below passed a decree to the effect that the executors of Hyatt should pay her \$25,000, less brokers' commissions, amounting to \$625, with interest from the day of the death of the testator, after deducting the \$6,000 paid to her by Mrs. Hyatt. We are obliged to reverse this decree. We hold that the complainant must elect whether she will take the ground rents and the five bonds of

the Toledo Electric Street-Railway Company, and the sum of \$570.08, with interest from the death of the testator, or whether she will take the devises and legacies left to her by the will. The sum of money mentioned is the residue of the \$25,000 left, after deducting the price of the investments, the \$6,000, the brokers' commissions, and the cost of examining titles and recording deeds. And we shall require the complainant to make her election before the first Monday of April next, and file with the clerk of this court an instrument of writing, signed by herself and her husband, or by her counsel, showing that she renounces either her devises and legacies or her claim to the money received from the sale of the Cathedral street property. Decree reversed, with costs above and below, and decree for election.

ELDRIDGE et al. v. DEXTER & P. R. CO.
(Supreme Judicial Court of Maine. June 21, 1895.)

CANCELLATION OF DEED—MISTAKE OF ONE PARTY.

1. If a party can read, it is not open to him, after executing a deed, to insist that the terms of it were different from what he supposed them to be when he signed it.

2. If equity will ever relieve one who has entered into a transaction under a misapprehension of its effect, when the other party merely failed to correct such misapprehension, there being no such peculiar relations between the parties as to place the one who remains silent under any unusual obligation, the principle is well settled that such party who remains silent must himself have appreciated the legal effect of the transaction, and must have known that the other was acting in ignorance of such effect.

(Official.)

Report from supreme judicial court, Penobscot county, in equity.

Bill by Samuel and Benjamin F. Eldridge against the Dexter & Piscataquis Railroad Company. On report. Bill dismissed.

J. & J. W. Crosby, for plaintiffs. J. B. Peaks, for defendant.

WISWELL, J. In February, 1889, the complainants conveyed to the defendant corporation a small strip of land, upon which the defendant's roadbed, for a short distance, has since been built. The consideration named in the deed was \$1. There was no actual consideration. The conveyance was voluntary. The land conveyed was of trifling value, worth from \$10 to \$25.

At the time of this conveyance the complainants owned, and still own, other real estate, adjoining the land conveyed, upon which there is a dwelling house within a few feet of the railroad, and which they allege has been greatly injured by its proximity to the railroad, by reason of the noise, smoke, and dirt resulting in the operation of the road, and also because, in the construction of the roadbed, it became necessary to

build an embankment, which has darkened, and in other ways injured, the house.

The complainants allege, in effect, that this deed was executed by them without knowing its contents; that it was neither read to nor by them, and that the description includes more land than they intended to convey; that they were induced to make this conveyance by reason of false and fraudulent representations, although, perhaps, not intentionally false or fraudulent, and (upon this they more especially rely) that the complainants were entirely ignorant that the conveyance would in any way affect their right to claim and recover compensation for the injury to their remaining property; that the directors of the corporation, who procured a conveyance, were aware of the legal effect of the conveyance upon the complainants' right to recover for injuries to the remaining property, and were aware of the misapprehension of the complainants in this respect, but that they utterly failed to give them any information upon this subject and to correct their misapprehension. They therefore ask this court to cancel the deed, and to declare it void.

No great reliance is placed upon the allegation that the deed was executed without being read. The deed was left with one of the complainants to procure the signature of the other. If it was not read by them, it was their own fault. They were not misled in any way as to its contents.

These complainants are men of intelligence. They were willing to make a voluntary conveyance to the railroad company of the small piece of land needed, because of the advantages that they expected to derive from the extension of the railroad from Dexter to Foxcroft. They knew that they were making a conveyance, and would undoubtedly have been just as willing to give the lot actually described in the deed as the somewhat smaller one that they say they intended to convey.

But in any event this is no ground for equitable relief, either affirmative or defensive.

"If a party can read, it is not open to him, after executing it, to insist that the terms of the deed were different from what he supposed them to be when he signed it. Nor could one who is unable to read be admitted to object that he was misled in signing the deed, unless he had requested to hear it read, and this had not been done, or a false reading had been made to him, or its contents falsely stated." *Metcalf v. Metcalf*, 85 Me. 473, 27 Atl. 457.

The evidence utterly fails to show any such fraudulent representations or concealment of material facts made by the committee of the directors who were engaged in settling land damages, either intentional or otherwise, as would warrant this court, upon any principle of equity, in granting the relief asked for.

This brings us to the next question,—whether the ignorance of the complainants of the effect of the transaction upon their claim for

damages for injuries to their remaining property will entitle them to the relief prayed for. There has been much conflict of authority as to when and under what circumstances ignorance of the law is a cause for equitable relief. But the general rules which have governed courts in granting equitable relief because of a misapprehension of the legal effect of a transaction are nowhere more clearly and satisfactorily stated than in *Pomeroy's Equity Jurisprudence*. We quote from section 843: "The rule is well settled that a simple mistake by a party as to the legal effect of an agreement which he executes, or as to the legal result of an act which he performs, is no ground for either defensive or affirmative relief. If there were no elements of fraud, concealment, misrepresentation, undue influence, violation of confidence reposed, or of other inequitable conduct in the transaction, the party who knew, or had an opportunity to know, the contents of an agreement or other instrument, cannot defeat its performance, or obtain its cancellation or reformation, because he mistook the legal meaning and effect of the whole, or any of its provisions. Where the parties, with knowledge of the facts, and without any inequitable incidents, have made an agreement or other instrument as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, then the above rule uniformly applies. Equity will not allow a defense, or grant a reformation or rescission, although one of the parties—and, as many cases hold, both of them—may have mistaken or misconceived its legal meaning, scope, and effect."

In this case the evidence does not disclose that there were any elements of fraud or other inequitable conduct upon the part of the persons representing the defendant corporation in the transaction. The testimony of the complainant, who met the directors and agreed to the conveyance, in regard to the interview, is as follows: "The whole talk made to me, as I recollect it, was made by Mr. Geo. A. Abbott. He had a sketch in his hand, with just two straight lines, showing the little heater place that perhaps they would want to run across. He says: 'If we buy Mrs. Horton's property, we probably shouldn't touch your land at all. In case we don't buy that, we probably should want to run across this little piece,' which he had the sketch of. He says, 'We have been down talking with N. Dustin & Co. about their damages, and they were not going to claim any.' The remark that I made was that 'we don't want to be meaner than Dustin's folks are.' That is all the conversation that took place at that time that I remember. I assented to that, and Mr. Straw went to writing the deed. Then I left the room. We were not to have any damages. Mr. Straw was present during all the time of this negotiation."

But it is further urged that, if even there were no representations made by the direct-

ors which induced the misapprehension upon the part of the complainants of the effect of the transaction, their mere silence was inequitable, and that it would be unconscionable to allow the defendant to profit by this conveyance.

If it is true that equity will relieve one who has entered into a transaction under a misapprehension of its effect, when the other party merely failed to correct such a misapprehension, there being no such peculiar relations between the parties as to place the one who remains silent under an unusual obligation, the principle is well settled that such party must himself have appreciated the legal effect of the transaction, and must have known that the other was acting in ignorance of such effect. This does not appear in the case under consideration. The interview between the parties was extremely brief, and there is no evidence from which it may be fairly inferred that the directors knew that there was any ignorance or misapprehension upon the part of the complainants of the legal effect of the conveyance, or that the directors themselves gave this matter any consideration whatever.

The relief prayed for, therefore, cannot be granted, and the bill must be dismissed. But the corporation has received some benefit from the conveyance, and we think that, under all the circumstances, it would be equitable that no costs for the defendant should be allowed.

The decree will be,

Bill dismissed, no costs.

EMERY, J., did not sit.

DU PUY v. STANDARD MINERAL CO. et al.

(Supreme Judicial Court of Maine. June 25, 1895.)

TRUST—EQUITY JURISDICTION—NONRESIDENT PARTIES.

1. Where real estate situated in this state has been conveyed by deed in trust, *held*, that the trust is within the equity jurisdiction of this court, and may be dealt with regardless of the residence of the parties in interest. When the trustee under the conveyance voluntarily submits himself to the jurisdiction of the court, both the res and the title to it are in court.

2. Whether a bill in such case will be sustained, and relief given, is a matter of discretion to be considered at the hearing of the parties in the court below: but the jurisdiction of the court is well settled, and its jurisdiction of the res enables the court to execute its own decrees by sale or other apt methods.

(Official.)

Exceptions from supreme judicial court, Sagadahoc county.

Bill by Charles M. Du Puy against the Standard Mineral Company and others, praying that plaintiff may be discharged as trustee, and for the appointment of a new trustee.

The bill having been dismissed in the court

below for want of jurisdiction on the ground that the trust was created outside the state, and none of the parties interested being citizens or inhabitants of the state, the plaintiff took exceptions to the decree dismissing the bill. Exceptions sustained.

The plaintiff filed his bill of complaint on September 24, 1894, and, having proved to the satisfaction of the court that all of the defendants reside out of the state of Maine, but within the United States, and east of the Mississippi river, the court made an order on the 12th day of October, 1894, requiring the defendants to appear and answer the bill within one month from the rule day next succeeding the date of said order, to wit, within one month from the 6th day of November next succeeding the date of said order, and directing that service of said order be made upon the defendants by publication three times in different weeks within 30 days in the Bath Enterprise, a newspaper published within the county of Sagadahoc.

The plaintiff, on the 8th day of December, 1894, filed a motion in writing that the bill be taken pro confesso. On the 5th day of January, 1895, this cause duly came on to be heard, and was argued by counsel, and it was proven to the satisfaction of the court that the plaintiff was a citizen of the state of New York, and that service of said order had been made by publication as therein directed, and that none of the defendants had appeared or had interposed any answer, plea, or demurrer to the bill, but that the defendants Daniel H. Bacon and Frank E. Thompson had by their petition, duly acknowledged and presented to the court, joined in the prayer of the bill of complaint, and requested the court to appoint Edward Sturges Hosmer, Esq., of the city of New York, in the place of the plaintiff, as trustee of the trust set forth in the bill of complaint; and that the plaintiff and the said Daniel H. Bacon and the said Frank E. Thompson had by an instrument in writing, duly acknowledged, waived their right to security for the due execution of the said trust as to their respective interests, aggregating $\frac{702}{1000}$, in case the said Edward Sturges Hosmer were appointed as such trustee, and that a bond in the sum of \$3,120 will be adequate protection to the other beneficiaries for the due execution of the trust as to their remaining interest of $\frac{298}{1000}$. Thereupon, after due consideration, and after reading the said bill and the order of publication, and proof of compliance therewith, and the petition of Daniel H. Bacon and Frank E. Thompson, and the affidavits of Brainard Tolles and Charles M. Du Puy, and the waiver of security above recited, it was ordered, adjudged, and decreed that the bill be dismissed for lack of jurisdiction, on the ground that the trust was created outside of the state of Maine, and none of the parties interested therein or in this suit are citizens or inhabitants of the state of Maine.

Some of the principal portions of the plaintiff's bill are as follows:

"First. On or about the 8th day of August, 1889, the defendant the Standard Mineral Company, being then seised in fee simple absolute of two certain lots, pieces, or parcels of land situate in the town of Georgetown, county of Sagadahoc, and state of Maine, * * * did convey the said two lots, pieces, and parcels of land to your orator, by the execution and delivery of the deed aforesaid, in trust nevertheless: (1) To hold and keep the same until such time as your orator should sell the same, as in said deed provided; (2) to sell the same at such time and place and in such manner as to your orator might seem best, either at public or private sale, for such sum of money as to your orator might seem best; and (3) to apply the proceeds over and above all lawful costs and expenses incurred in the administration of the trust as follows: To keep and apply to the individual use of your orator five hundred and three one-thousandths of the net proceeds of said sale, to pay to Daniel H. Bacon one hundred and sixty one-thousandths of said proceeds; to pay to Frank E. Thompson one hundred and twenty-nine one-thousandths of said proceeds, to pay to I. W. Shuttuck eleven one-thousandths of said proceeds, to pay to A. E. Sumner one hundred and ten one-thousandths of said proceeds, to pay to Elizabeth Little thirty-two one-thousandths of said proceeds, and to pay to Orvillus H. Gilbert fifty-five one-thousandths of said proceeds; the terms and conditions of which trust being more fully set forth in the aforesaid deed. * * *

"Second. Since the delivery of said deed your orator has acquired a lien by way of mortgage upon the share or interest in said proceeds set apart to Daniel H. Bacon and to Frank E. Thompson, to secure payment of two several promissory notes in the aggregate sum of seven thousand five hundred dollars, which are both due and unpaid. Since the delivery of said deed the aforesaid Elizabeth A. Little has intermarried with the aforesaid I. W. Shuttuck, and is now the defendant Elizabeth A. Shuttuck. Since the delivery of said deed the said I. W. Shuttuck has died, and letters of administration of all the goods, chattels, and credits which were of his estate have been duly granted by the surrogate of the county of New York, in the state of New York, where the said I. W. Shuttuck was residing at the time of his death, to the defendant Elizabeth A. Shuttuck. The defendant Anna M. Clayton claims to have derived some right or title to the share or interest in said proceeds set apart to A. E. Sumner since the delivery of said deed, but as to the nature of the right or title, if any, of said defendant to the said part or share, your orator is not informed and makes no allegation.

"Third. Notwithstanding diligent effort to sell the said lands, your orator has not been

able to find a purchaser therefor at private sale, at a fair and reasonable price, or at any price. The said lands are now subject to liens for unpaid taxes for the years 1891, 1892, and 1893. In order to avoid a total loss of the lands, the best interest of all the beneficiaries of the said trust requires that the said lands be sold at public sale as soon as possible. Such sale cannot be made by your orator without danger of sacrificing both his own interest and that of the other beneficiaries, for the reason that none of the other beneficiaries are willing to purchase the said lands at a fair and reasonable price, or at any price; and your orator upon such public sale would be incompetent, as trustee, to bid for or to purchase the said lands, even though such course should be necessary to protect his beneficial interest in the trust estate, and his lien upon the interests of the defendants Daniel H. Bacon and Frank E. Thompson.

"Fourth. The said lands are vacant and uncultivated, and valuable only for quarry purposes, and your orator has derived no profit or income therefrom, and has permitted no waste to be committed in respect thereto, and has not conveyed or incumbered the same, or any part thereof.

"Wherefore your orator prays to be discharged from his office of trustee, and that a new trustee be appointed by this court, and that the aid and direction of the court be given to such new trustee in the execution of the trust set forth in the aforesaid deed of conveyance, and that such new trustee be instructed to sell the lands aforesaid with all convenient speed, and to distribute the proceeds thereof to the persons respectively entitled thereto, and that your orator may have generally such other and further relief as the circumstances and nature of the case may require," etc.

Francis Adams and Nathan Coombs, for plaintiff. Brainard Tolles, for defendants.

HASKELL, J. The real estate mentioned in the bill is situated in the county of Sagadahoc, and was conveyed to the plaintiff by deed, in trust for specific purposes therein named. This trust is within our jurisdiction, and may be dealt with regardless of the residence of the parties in interest. The plaintiff is the trustee, and voluntarily submits himself to the jurisdiction of the court, so that both the res and the title to it are in court. Whether the bill shall be sustained and relief given is a matter of discretion to be considered below, but the power is settled beyond question, as the authorities cited at the bar clearly signify.

The early doctrine laid down by some writers that the remedy in equity is purely personal, and that, as decrees in equity never execute themselves, it is necessary to have jurisdiction of the person in order to make decrees effectual, does not hold true in all

cases, and has been very generally discarded, inasmuch as jurisdiction of the res enables the court to execute its own decrees touching it by empowering an officer of the court to transfer titles, even to real estate, by sale or other apt methods, so that the equitable interests of all concerned may be preserved, and the property applied, or distribution of the assets made, as the respective interests therein may require.

Since the doctrine alluded to obtained, equitable interests have multiplied in the shape of liens created by law, and of resulting trusts, and from many other methods of business that the commercial world has adopted and ingrafted upon the strict rules of the common law; so that it has become imperative that jurisdiction of the res should be sufficient to give adequate relief in all matters where equitable interests have attached. Of course, this jurisdiction must be exercised with great prudence, and only where the court is satisfied that absent parties have knowledge of the proceeding, and have had ample opportunity to intervene and protect their rights.

In this cause the res is within the jurisdiction of the court, and whether the relief sought should be given is a consideration to be determined below, after a careful review of all the rights and interests involved, so that sound equity may be done.

Exceptions sustained. Bill retained for hearing.

STATE v. LYNCH.

(Supreme Judicial Court of Maine. June 21, 1895.)

INDICTMENT—ASSAULT WITH DANGEROUS WEAPON.

1. It is sufficient if the words used in an indictment to charge the commission of a statutory offense are more than the equivalent of the words of the statute, provided they include the full significations of the statutory words.

2. An indictment alleged that the respondent made an assault upon one McRae, "with a deadly weapon, to-wit a loaded revolver in his right hand he the said Charles Lynch then and there had and held did make an assault with an intention him the said Daniel A. McRae then and there with a loaded revolver aforesaid feloniously wilfully and of his malice aforethought to kill and murder against the peace of said state and contrary to the form of the statute in such case made and provided."

Held, that the offense specified in Rev. St. c. 118, § 25, viz, an assault, armed with a dangerous weapon with intent to kill and murder, was set out with sufficient certainty.

(Official.)

Exceptions from supreme judicial court, Knox county.

Charles Lynch was indicted for assault with a deadly weapon, and demurred. The demurrer was overruled, and he excepted. Exceptions overruled.

B. K. Kalloch, Co. Atty., for the State. William H. Fogler, A. A. Beaton, and R. R. Ulmer, for defendant.

WISWELL, J. The respondent demurred generally to an indictment in which the offense is set out as follows: "That Charles Lynch of Vinal Haven in the county of Knox on the twenty-fifth day of November now last past with force and arms at Vinal Haven aforesaid in the county of Knox aforesaid in and upon one Daniel A. McRae in the peace of the State then and there being to-wit at his post of duty in the engine room of the steamer Governor Bodwell then and there being in the body of the county of Knox aforesaid making a landing at the wharf in Vinal Haven aforesaid in the county of Knox aforesaid upon the said Daniel A. McRae with a deadly weapon, to-wit a loaded revolver in his right hand he the said Charles Lynch then and there had and held did make an assault with an intention him the said Daniel A. McRae then and there with the loaded revolver aforesaid feloniously wilfully and of his malice aforethought to kill and murder against the peace of said state and contrary to the form of the statute in such case made and provided."

This is an exact copy, including punctuation, of so much of the indictment as is quoted. The demurrer was overruled, and exceptions taken.

The language of the indictment is somewhat confused, and there are unnecessary allegations, but the question is whether the accusation is set forth with sufficient particularity and certainty to inform the accused of the offense with which he is charged, and to enable the court to see, without going out of the record, what crime has been committed, if the facts alleged are true.

It is also necessary that the indictment should employ "so many of the substantial words of the statute as will enable the court to see on what one it is framed; and, beyond this, it must use all the other words which are essential to a complete description of the offense; or, if the pleader chooses, words which are their equivalents in meaning; or, if again he chooses, words which are more than their equivalents, provided they include the full significations of the statutory words, not otherwise." 1 Bish. Cr. Proc. § 612.

In *State v. Hussey*, 60 Me. 410, it is said: "An indictment should charge an offense in the words of the statute, or in language equivalent thereto." In that case the language used was not equivalent to the statutory words, nor did it have a broader meaning, including the significations of the words of the statute.

We think it is sufficient if the words used in the indictment are more than the equivalent of the words of the statute, "provided they include the full significations of the statutory words."

This indictment is said by the prosecuting attorney to have been drawn under Rev. St. c. 118, § 25, which is as follows: "Whoever assaults another with intent to murder, kill, maim, rob, steal, or to commit arson or bur-

glary, if armed with a dangerous weapon, shall be punished by an imprisonment for not less than one, nor more than twenty years; when not so armed, by imprisonment for not more than ten years, or by fine not exceeding one thousand dollars."

We will separately consider the objections to the indictment raised by the counsel for the respondent.

The statute makes it an aggravation, and provides a more severe punishment, if the person making the assault is "armed with a dangerous weapon." The indictment alleges that the assault was made with a "deadly weapon, to-wit a loaded revolver in his right hand and he the said Charles Lynch then and there had and held."

While "deadly" and "dangerous" are not equivalents, "deadly" is more than the equivalent, and includes the full signification, of the statute word. A dangerous weapon may possibly not be deadly; but a deadly weapon, one which is capable of causing death, must be dangerous.

The indictment does not use the word of the statute "armed." But it alleges that the assault was made with a deadly weapon, to-wit a loaded revolver in his right hand and he the said Charles Lynch then and there had and held." If an indictment alleges that an assault is made with a dangerous or deadly weapon, which the person making the assault had and held in his hand, it is equivalent to an allegation that he was armed with such a weapon. "Armed" means furnished or equipped with weapons of offense or defense. A person who has in his hand a dangerous weapon, with which he makes an assault, is certainly "armed" within the meaning of the statute.

The indictment uses the words "with an intention," instead of the statutory words "with intent." The language of the indictment, in this respect, is exactly equivalent to the words of the statute.

The form of pleading adopted in this indictment is not to be commended. It is always advisable to follow the forms which have received judicial approval, or which have long been in unquestioned use. It is also much safer to employ the words of the statute than those about which a question may arise. But the indictment in this case, although not free from criticism, has set out with sufficient certainty the offense specified in Rev. St. c. 118, § 25, viz. an assault, armed with a dangerous weapon, with intent to kill and murder.

Exceptions overruled.

In re GILROY.

Supreme Judicial Court of Maine. June 24, 1895.)

NATURALIZATION—LEWISTON MUNICIPAL COURT—JURISDICTION—CONSTITUTIONAL LAW.

1. There is no provision of the federal constitution which requires the courts or judges of a

state to perform any duties respecting the admission of aliens to citizenship.

2. Such courts and magistrates may, if they choose, exercise the power conferred upon them by congress, unless prohibited by state legislation. But this is a naked power, and imposes no legal obligations on the courts to assume and exercise them.

3. Chapter 310, Laws 1893, which prohibits any court established by this state, other than the supreme judicial and superior courts, from entertaining any jurisdiction over the naturalization of aliens, is not in violation of any provision of the constitution of the United States.

(Official.)

Exceptions from supreme judicial court, Androscoggin county.

Peter Gilroy petitioned to the Lewiston municipal court to be admitted to citizenship. To an order dismissing the petition, petitioner excepts. Exceptions overruled.

D. J. McGillicuddy and F. A. Morey, for petitioner.

WISWELL, J. An alien applied to the Lewiston municipal court, at its July term, 1894, to be admitted to become a citizen of the United States. The judge of the court declined to entertain the application, and dismissed it, on the ground that, by virtue of chapter 310 of the Laws of 1893, that court no longer had any jurisdiction of naturalization cases. The applicant excepted to this ruling.

By the constitution of the United States (article 1, § 8) it is provided that congress shall have power "to establish a uniform rule of naturalization."

Congress has enacted that an alien, making application for citizenship, shall make a declaration on oath, "before a circuit or district court of the United States, or a district or supreme court of the territories, or a court of record of any of the states having common-law jurisdiction and a seal and clerk," and that he may be admitted to become a citizen by "some one of the courts above specified." Rev. St. U. S. § 2165.

Assuming that the Lewiston municipal court is a court of record having common-law jurisdiction and a seal and a clerk, within the meaning of the statute referred to, the question is presented whether the act of the legislature, approved March 29, 1893, is in violation of or contrary to any provision of the federal constitution. That act provides that the supreme judicial and superior courts shall, respectively, have jurisdiction of applications for naturalization, but that no other court established by the state shall entertain any primary or final declaration or application made by, or in behalf of, an alien to become a citizen of the United States, or entertain jurisdiction of the naturalization of aliens. Laws 1893, c. 310.

There is no provision of the federal constitution which requires the courts or judges of a state to perform any duties respecting the admission of aliens to citizenship. It is well established that such courts and mag-

istrates may, if they choose, exercise the power conferred upon them by congress, unless prohibited by state legislation. *Prigg v. Pennsylvania*, 16 Pet. 622. But this is a naked power, and imposes no legal obligations on the courts to assume and exercise them, and such exercise is not within their official duty, or their oath to support the constitution of the United States. *Ex parte Stephens*, 4 Gray, 559.

The Massachusetts legislature, in 1855, enacted a statute prohibiting any court of the state from receiving or entertaining any primary or final declaration or application of an alien to become a citizen of the United States, or to entertain jurisdiction for the naturalization of aliens. It was held, in the case of *Ex parte Stephens*, *supra*, that this statute was not contrary to the constitution of the United States.

The ruling of the judge of the municipal court was correct.

Exceptions overruled.

GODDARD v. INHABITANTS OF HARPSWELL.

(Supreme Judicial Court of Maine. Dec. 13, 1895.)

TOWNS — LIABILITY FOR TORTS OF OFFICERS — POWERS OF SELECTMEN.

1. A town is not liable for the torts of its selectmen in building a road, when there is no vote authorizing them to take charge of that work.

2. The duty of building roads is devolved by law upon certain public officers, such as highway surveyors or road commissioners. A vote to authorize the selectmen to borrow money for building a road does not empower the latter, as agents of the town, to assume the work of building.

See *Goddard v. Inhabitants of Harpswell*, 24 Atl. 958, 84 Me. 499.

(Official.)

Action in trover by Robert Goddard against the inhabitants of Harpswell for the conversion of some stone used in the construction of a road. The jury returned a verdict for plaintiff. Defendants move for a new trial. Motion sustained.

C. W. Larrabee, for plaintiff. Weston Thompson, for defendants.

EMERY, J. The defendant town was required by law, in consequence of a decree of the county commissioners, affirmed by this court upon appeal, to open and build a certain town way or road within the town. The road was afterwards built, and certain stone of the plaintiff within the location of the road was appropriated, and used in its construction. The plaintiff brought against the town this action of trover for that conversion of his stone.

To connect the town with the conversion of the stone, he adduced the following evidence: (1) A vote of the town "to raise three hundred dollars by assessment, and allow the selectmen to hire a sum, not exceeding

five hundred dollars," to pay "for land damages, and to build the road" (*viz.* the road in question); (2) the acts of three men, the selectmen of the town, in advertising for proposals, and making a contract with one Coombs, of Brunswick, for building the road; (3) the direction by the selectmen to the contractor to make use of the plaintiff's stone as material for the road; (4) the appropriation and use by the contractor of the stone under that direction; (5) the approval by the town auditor of a charge by the selectmen for advertising for proposals, and of a charge for the \$500 hired.

It does not appear whether the selectmen at the time of their action were also either highway surveyors or road commissioners, as they might lawfully have been. If they were, then as to opening and building this road they were public officers, acting for the public, and not mere town agents, acting for the town. In such case, though the town appointed them, and furnished the money for them to expend, it is not responsible for their unlawful acts. *Goddard v. Inhabitants of Harpswell*, 84 Me. 499, 24 Atl. 958; *Hennessey v. City of New Bedford*, 153 Mass. 260, 26 N. E. 999. In the absence of evidence to the contrary, in an action against the town, it is to be presumed that they were acting as such public officers.

If, however, they were not such officers, but were acting, or assuming to act, as selectmen and agents of the town, then it does not appear that the town ever authorized them to do more in relation to this road than to hire the necessary money. The vote of the town, put in evidence, went no further. The approval by the auditor of their charges for advertising for proposals was not a ratification by the town of their direction to the contractor to take the plaintiff's stone. Their general powers as selectmen do not supersede those of highway surveyors or road commissioners. Without a vote of the town empowering them as selectmen or as individuals to take the duty of opening and building this road out of the hands of the regular road officers, they cannot bind the town by their contracts or torts in the premises. *Tufts v. Lexington*, 72 Me. 516; *Bryant v. Inhabitants of Westbrook*, 86 Me. 450, 29 Atl. 1109; *Hennessey v. City of New Bedford*, 153 Mass. 260, 26 N. E. 999. No such vote is shown.

Motion sustained. Verdict set aside.

STILPHEN v. ULMER et al.

(Supreme Judicial Court of Maine. June 29, 1895.)

TRIAL JUSTICE—JURISDICTION—VIOLATION OF GAME LAW.

The statute of 1891 (chapter 95), authorizing the recovery of penalties by complaint for violations of the fish and game laws, directs that such prosecutions may be commenced in any county in which the offender may be found, or in any neighboring county. *Held*, that a trial

justice in Knox county has no jurisdiction of such a complaint, under the statute, for an offense committed in Kennebec county, the offender not being found in Knox county.

(Official.)

Report from supreme judicial court, Kennebec county.

This was an action of trespass by Alfred L. Stilphen for false imprisonment against the defendant, Ulmer, of Rockland, county of Knox, a trial justice, and John L. Thompson, of Newcastle, county of Lincoln, a game and fish warden. Reported. Defendants defaulted.

June 3, 1893, the plaintiff, a resident of Pittston, in Kennebec county, was arrested at his home by the defendant Thompson on a warrant issued by the defendant Ulmer at Rockland, on the preceding day, upon Thompson's complaint for maintaining an illegal fish weir in Dresden, Lincoln county, extending into Eastern river. The plaintiff was taken to Rockland upon this process, found guilty, and sentenced to pay a fine of \$50 and costs taxed at \$20.46, which he paid, and was thereupon discharged. St. 1891, c. 95, § 18, under which the defendants justified, is as follows: "Sec. 18. Officers authorized to enforce the fish and game laws, and all other persons, may recover the penalties for the violation thereof in an action on the case in their own names, or by complaint, or indictment in the name of the state; and such prosecution may be commenced in any county in which the offender may be found, or in any neighboring county."

The defendants further relied, in their argument, on St. 1885, c. 285, and the defendant Thompson, as a warden, on Rev. St. c. 40, § 40.

A. M. Spear and C. L. Andrews, for plaintiff. True P. Pierce, for defendants.

HASKELL, J. Trespass for false arrest. Plaintiff resided and was arrested in Kennebec county upon a warrant issued by a trial justice in Knox county for violating the fish and game laws in Lincoln county. He was taken through Lincoln county into Knox county for trial before the magistrate who issued the warrant, and was fined \$70.46, including costs, which he paid. His arrest continued for the space of 12 hours, but was without malice or evil intent. The court is of opinion that the proceeding was unauthorized and illegal, but that actual damages only may be recovered.

Defendants defaulted for \$100.

DILLAWAY et al. v. ALDEN.

(Supreme Judicial Court of Maine. Dec. 13, 1895.)

GAMBLING CONTRACTS—STOCKS BOUGHT ON MARGINS—VALIDITY.

1. Contracts between a stockbroker and a customer for buying or selling stocks upon a mar-

gin, in the hope of profit from the fluctuation in price, are not illegal, if either party expects the final balance to be liquidated by a delivery of the remaining stocks.

2. If, however, neither party expects any delivery of stocks at any time, but both parties understand that only money is to be paid from one to the other, according to changes in the market price, the arrangement is a mere wager upon changes in price, and is illegal.

3. In this case there were numerous dealings with reference to changes in price, but the broker always kept command of sufficient actual stock to make delivery when demanded, and, at the end of the last deal, did transfer the remaining stock to his customer's order. Such transactions were not wagers.

(Official.)

Report from supreme judicial court, Kennebec county.

Action by Charles F. W. Dillaway and others against George A. Alden on defendant's promissory note given in Boston on six months. Case reported. Defendant defaulted.

The plea was a general issue, and the following brief statement of defense:

"That the note described in the plaintiffs' writ was given without consideration, and is null and void; that it was given by way of settlement and in consideration of contracts made by and between the plaintiffs and the defendant, by way of gaming and wagering, contrary to the form of the statute then and still in force (in the commonwealth of Massachusetts, where said contracts were made and executed) in such case made and provided, and contrary to law in such case; that prior to the making of such note said plaintiffs, as brokers residing and doing business in the city of Boston and commonwealth of Massachusetts, contracted with the defendant to buy and sell, in the commonwealth of Massachusetts, upon credit and margins, certain securities and commodities; that neither the plaintiffs nor defendant, at the time such contracts were made, had any intention to perform said contracts by actual receipt or delivery of such securities or commodities, and payment of the price therefor, and that they in fact were never delivered or paid for, nor did either ever intend that the other was bound to deliver the same, but that in all said contracts the real intent of the parties was to wager on and to speculate in the rise and fall of such securities and commodities, and that the one party was to pay and the other to accept the difference between the contract price of such securities and commodities at the date fixed for executing said several contracts, or when said contracts should be closed, and that there was no intention that said securities or commodities be bought outright, and that such contracts were all gambling transactions, and illegal and void; and that said note was given for such credits and securities and transactions so arising in buying and selling such securities and commodities within said commonwealth of Massachusetts, and if the plaintiffs paid any money for or on account

of the defendant, for which said note was given, they did so knowing that such money was lent and advanced to and for the defendant on account of, and to be used in, gaming and illegal transactions, in which the plaintiffs and defendant were connected; and that the plaintiffs themselves made the application of such moneys, according to their own judgment, in the promotion and furtherance of such gaming and illegal transactions."

"The defendant further averred that he frequently forbade the plaintiffs from buying and selling said securities and commodities on the defendant's account, but the plaintiffs disregarded his directions so made, and fraudulently, and for their own benefit, and for the commission which the said plaintiffs would receive in such transactions as brokers, fraudulently continued to buy and sell said securities and commodities."

S. S. Brown, for plaintiffs. Edmund F. & Appleton Webb, for defendant.

EMERY, J. The material facts found by the court are these: The defendant had an intimate personal acquaintance with one Brown, a member of the firm of Francis B. Dana & Co., stockbrokers in Boston. March 20, 1892, the defendant turned over to this firm 200 shares of St. Louis Southwestern Railway stock, and \$2,000 of Maine Central Railroad 5 per cent. bonds. The stock was the residuum of some prior stock transactions with or through Brewster, Cobb & Estabrook, another brokerage firm in Boston. The Maine Central bonds had been deposited with this latter firm as collateral security for margins. All were turned over to Francis B. Dana & Co., on the defendant's order.

From April, 1892, to March, 1893, Francis B. Dana & Co. apparently bought and sold various stocks on the defendant's account. Their books show numerous such transactions. The defendant appears to be charged with amounts paid for stocks, plus commissions, and credited with proceeds of stock sold, minus commissions. Some few of these seeming transactions were by direct, special instructions of the defendant. The mass of them, however, were under what Dana & Co. claimed to be general authority from the defendant to buy and sell for him at their discretion.

In April, 1893, as the result of these various stock transactions (actual or seeming), the books of Dana & Co. showed a balance against the defendant of some \$12,500, for which, according to their books, they held as security 350 shares of various stocks, and the original \$2,000 of Maine Central bonds. In the meantime Brown had withdrawn from the firm of Dana & Co., and become a member of the plaintiff firm of Dillaway, Starr & Co., of Boston, also stockbrokers. At Brown's request the defendant gave the last firm written instructions to pay the balance

due from him to Dana & Co., and take over his securities in their hands. This the plaintiffs did, April 13, 1893, paying Dana & Co. \$12,511.41. At the request of Mr. Dillaway, the defendant on July 3, 1893, gave the plaintiffs his note for that sum and interest, collaterally secured by the stocks and bonds they had received from Dana & Co. This action is upon that note.

1. The defendant contends and testified that he did not authorize Francis B. Dana & Co., or Brown, to buy or sell stocks on his account, except in a very few specific instances, and, further, that he gave repeated instructions to them to cease operations and close his account. Brown testified to the contrary. The defendant, however, at the end, instructed the plaintiffs to pay the balance of all the transactions, and then gave his note for that balance so paid. So far as the plaintiffs are concerned, the defendant must be held to have ratified the doings of Dana & Co.

2. The defendant again contends that the transactions with Dana & Co. which created the balance against him, and which are the consideration of his note, were wagering contracts, and void by the law of Massachusetts, where they took place, and by the law of Maine, where the balance is sought to be recovered; that Brown knew of this illegality; and that his knowledge affects the plaintiff firm, of which he was a member. Waiving the question whether this illegality, and Brown's knowledge, if established, would be a defense to this note against the plaintiffs, we proceed to inquire whether such illegality is established.

The purchase and sale of stocks for profit (contracts to buy stocks to sell again on a hoped-for rise in price, contracts to sell stocks on a hoped-for fall in price) are not illegal. Speculation is not necessarily gambling. A purely speculative contract is not necessarily a wagering contract. Speculation and speculators may serve a useful purpose, in providing a continuous market, and in differentiating a special class to assume the hazards of fluctuations in prices, and thus relieve the regular trader or producer of that risk. So long as there is a real transaction,—so long as something is actually bought or sold, or is actually contracted for, either for purchase or sale,—there is no wagering, not even if the thing contracted for does not then exist. Nor does a subsequent change in or cancellation of the contract affect its original validity.

When, however, there is no real transaction,—no real contract for purchase or sale,—but only a bet upon the rise or fall of the price of a stock or article of merchandise in the exchange or market, one party agreeing to pay if there is a rise, and the other party agreeing to pay if there is a fall, in price, the agreement is a pure wager. No business is done. Nothing is bought or sold or contracted for. There is only a bet.

Efforts are often made to give such a bet the appearance, if not the nature, of a business transaction. The parties often go through the form of buying or selling, or contracting to buy or sell, with the mutual understanding, however, that the contract is not to be performed, but is to be canceled by the payment of the amount of the change in market price. In such case it is apparent there is no real business transaction, but only a bet, complicated in form, perhaps, but of an unconcealed nature.

Such contracts are to be held valid, however, unless the nullifying understanding is mutual, and is made apparent. The transactions between Dana & Co. and the defendant were, upon their face, actual transactions,—actual buying and selling stocks for the defendant's account. The appearance upon the books of Dana & Co. is of actual transactions. The only evidence tending to show that these transactions were not actually had—that there was no actual buying or selling as entered on the books—is the personal testimony of the defendant himself. That testimony, however, falls short of showing a mutual understanding—an understanding by Dana & Co. as well as by himself—that he was to acquire no right to any stocks bought, and was not to deliver any stock sold. Brown, on the other hand, testifies that every item charged against or credited to the defendant on the books of Dana & Co. was an actual purchase or sale on the Boston Stock Exchange according to the rules and customs of that exchange; that every transaction was followed by a delivery of the stock certificates from the seller to Dana & Co., or to the purchaser from Dana & Co.

It is not claimed that there was a manual transfer of stock certificates each way, each time, and for every share bought or sold during the day, or that they were transferred in the name of the defendant. The labor involved in such frequent transfers and retransfers seems to have been avoided by a sort of clearing-house system among the brokers in the stock exchange, by which, when there were numerous transactions both ways in the same stock, only the balance would be delivered and paid for, as between the brokers. But under this system each broker had each day, within his immediate control, stock certificates to represent the purchases made for his principal. It also appears that these stock certificates were rarely, if ever, assigned to or in the name of the principal, but were assigned to the broker, or in blank. These certificates were not kept in the broker's vaults, but were used by him as instantly redeemable collateral for money borrowed to make advances and carry on business; the broker, however, always keeping within his instant control enough certificates to turn over to his principal on demand, or to deliver to a purchaser when ordered to sell. Brown testified that Dana & Co. always had within their immediate control cer-

tificates representing all the stocks appearing to the credit of the defendant on their books, and could and would have delivered them on demand. When demand was finally made, by the order of April 10, 1893, they at once delivered certificates for all the stocks then standing to the defendant's credit.

These devices of the brokers to facilitate their transactions may bear to the superficial observer the appearance of jugglery, rather than of regular buying, selling, and delivering; but a deeper and longer look will discover that they are appropriate means for the quick and economic transaction of large volumes of legitimate business. All through the various deals is the intention to finally strike a balance, and liquidate it by an actual transfer of stock certificates. At the end, when the deals or transactions are finally closed and the balance is struck, the broker is ready to deliver the requisite stock certificates of his principal's order. In this case, at the end of some two years of numerous operations in the stock market, the stocks represented in the final balance were actually delivered by the transfer of the stock certificates to the defendant's order. The defendant received these certificates as the final result of his stock operations. He has shown that these operations were disastrous to him, but he has not shown that they were not what they purported to be, viz. actual buying and selling stocks through a broker. Hence his defense fails.

For authorities in support of this statement of the law, see *Rumsey v. Berry*, 65 Me. 570; *Barnes v. Smith*, 159 Mass. 344, 34 N. E. 403; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950; *Bangs v. Hornick*, 30 Fed. 97; *Bigelow v. Benedict*, 70 N. Y. 202; *Hatch v. Douglass*, 48 Conn. 116. This last case is almost parallel with the case at bar.

Defendant defaulted.

WHEELER v. BOARD OF COM'RS OF WALDO COUNTY.

(Supreme Judicial Court of Maine. June 20, 1895.)

TAXES—ABATEMENT—CERTIORARI—CORPORATION—STOCK—VALUATION.

1. The judgment of the county commissioners upon a complaint or application for the abatement of a tax is a judicial act; and if, in such a case, they err in matters of law, a writ of certiorari is the proper remedy.

2. By Rev. St. c. 6, § 14, the value of the real estate of a corporation must be deducted from the value of the shares of the stock of the corporation, in assessing a tax upon the latter.

3. It is immaterial whether the tax upon a corporation's real estate is paid in money, or in any other way. In any event, the value of the real estate must be deducted from the value of the stock. A contract, therefore, of a water company with a city, for the payment of its taxes by furnishing water for municipal purposes, should not affect the value of the shares of stock, except to the extent that such contract, like any other, may enhance or depreciate the value of the stock, accordingly as it is beneficial or otherwise to the corporation.

4. This result is not affected by the fact that the word "franchise" is used in the contract. No legislation of this state has authorized municipal assessors to impose a tax upon a corporation by reason of its franchise.

5. The present value of the stock of a business corporation may depend upon the prospect of the future business and success of the corporation, and, so far as this affects the present value of the stock, it should be taken into account in determining the value of the same for the purposes of taxation.

6. The petitioner, a resident of another state, was the owner, on April 1, 1893, of common and preferred stock of the Belfast Water Company which was taxed to him in Belfast for that year. Within the time allowed by statute, he applied to the assessors for an abatement, upon the ground of overvaluation, and upon their refusal to grant an abatement he made application to the county commissioners of Waldo county, as provided by statute, to be relieved from said taxes. The water company had made a contract with the city of Belfast to furnish water for various municipal purposes, "for such sums annually as said city should assess upon the franchise and works, which consist of the plant to supply water as aforesaid."

During the municipal year of 1893, the water company performed its part of the contract. The property and plant of the company, situated in Belfast, was valued by the assessors of that city at \$31,500, and a tax assessed thereon of \$521.40, which amount was offset against that due the water company for supplying water for the purposes named, in accordance with the contract. This property situated in Belfast, with some real estate in an adjoining town, was substantially all the property that the company owned on April 1, 1893. The county commissioners, upon the petitioner's application to them, made the following adjudication: "After due consideration of the facts and arguments of counsel, we find and adjudge as follows: That, as a matter of law, the taxation of the shares of stock of said water company cannot be, in any manner or extent, affected by said contract between said city and water company, or the performance thereof; that said preferred stock, after deducting its proportional part of the value assessed on the land, buildings, machinery, pipes, and other real estate, etc., of said water company, by said city of Belfast and town of Northport, as required by Rev. St. c. 6, § 14, par. 3, had the further value of \$40 per share placed thereon by said assessors, as representing in part the value of said property of said water company, above the value thereof taxed directly to such water company, as aforesaid, and in part the prospective value of such shares; and, therefore, the taxes assessed against the several above-named parties holding said preferred shares were not excessive, and no abatements thereof are granted."

Held, that the adjudication of the commissioners, whereby they placed a valuation upon the stock represented by an assumed value of the corporation's real estate, above the amount at which it was valued by the assessors of the city and town in which it was situated, was erroneous in law.

(Official.)

Report from supreme judicial court, Waldo county.

Petition by Elbert Wheeler against the board of commissioners of Waldo county for certiorari. Writ awarded.

John C. Coombs, Joseph Williamson, and H. M. Payson, for petitioner. J. S. Harri-man and R. F. Dunton, for respondents.

WISWELL, J. The Belfast Water Company, a corporation organized under an act of the legislature, entered into a contract with

the city of Belfast to supply water for drinking fountains, sprinkling streets, flushing sewers, and for other municipal purposes, "for such sums annually as said city should assess upon the franchise and works, which consist of the plant, to supply water as aforesaid."

During the municipal year of 1893, the water company performed its part of the contract. The property and plant of the company, situated in Belfast, was valued by the assessors of that city at \$31,500, and a tax assessed thereon of \$521.40. The amount due the water company for supplying water for the purposes named in this contract, and this tax, were offset against each other, and receipts passed in accordance with the contract. This property, valued at \$31,500, with some real estate in the adjoining town of Northport, was substantially all the property that the company owned on April 1, 1893.

At that date, the petitioner, a resident of another state, was the owner of 100 shares of the common and 25 shares of the preferred stock of the Belfast Water Company. The assessors of Belfast valued the petitioner's 100 shares of common stock at \$1,000 and his 25 shares of preferred stock at \$1,000, and assessed a tax upon each of \$16.

The petitioner, within two years from this assessment, made written application to the assessors for the time being for an abatement, and upon their refusal to make the abatement asked for, he made application to the county commissioners of Waldo county, as provided by statute, to be relieved from said taxes.

Upon this application the county commissioners relieved the petitioner from the taxes assessed upon the common stock, but refused to do so as to the preferred stock, and sustained the valuation placed thereon by the assessors. The petitioner applies to this court for a writ of certiorari, representing that manifest errors of law appear in the records and judgment of the county commissioners, and that, in placing a valuation of \$40 per share on the preferred stock, thereby sustaining the valuation placed thereon by the assessors, they adopted and proceeded upon erroneous principles, in the particulars later alluded to. A copy of the records of the commissioners is annexed to the petition, which, by agreement, is to be considered as an answer.

The record of the commissioners shows that they made the following adjudication: "After due consideration of the facts and arguments of counsel, we find and adjudge as follows: That, as a matter of law, the taxation of the shares of stock of said water company cannot be, in any manner or extent, affected by said contract between said city and water company, or the performance thereof; that said preferred stock, after deducting its proportional part of the value assessed on the land, buildings, machinery, pipes, and other real estate, etc., of said wa-

company by said city of Belfast and of Northport, as required by Rev. St., § 14, par. 3, had the further value of each share placed thereon by said assessors representing in part the value of said property of said water company, above the value thereof taxed directly to such water company, as aforesaid, and in part the pro-rata value of such shares; and, therefore, the taxes assessed against the several above-named parties holding said preferred shares were not excessive, and no abatements thereon were granted."

They say, in their adjudication, that the value of \$40 per share, placed by them on preferred stock, is represented in part by the value of the property of the water company above the value taxed directly to the company,—that is, that the real estate of the water company was worth more than the amount at which it was valued by the assessors of the city and town in which it was situated,—and that such additional value would be, and in fact was, taken into account by them in establishing the value of shares of preferred stock for the purpose of taxation.

This was clearly erroneous. The taxable property of the corporation must be taxed to the corporation. By Rev. St., c. 6, § 19, "property of corporations, 'both real and personal, is taxable for state, county, city, town, school district and parochial taxes, to be assessed and collected in the same manner and with the same effect as upon similar taxable property owned by individuals.'"

By Rev. St., c. 6, § 14, par. 3, "machinery employed in any branch of manufacture, goods manufactured or unmanufactured, and real estate belonging to any corporation, except when otherwise expressly provided, shall be assessed to such corporation in the town or place where they are situated or employed; and in assessing stockholders for their shares in any such corporation, their proportional part of the value of such machinery, goods and real estate, shall be deducted from the value of such shares."

Real estate must be taxed to the owner or person in possession. The water company was the owner, and was in possession of the property taxed to it, and the "proportional part of the value of such * * * real estate, shall be deducted from the value of such shares."

The commissioners, in placing a value upon these shares, did deduct their proportional part of the value assessed on the company's real estate, and assumed that this real estate had an additional value. This assumption was unwarranted. The statute requires a deduction of the value of the real estate, not the amount assessed thereon.

"All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof." Const. Me. art. 9, § 8.

The property of this corporation was assess-

ed by the assessors of the city and town in which it was situated. There was no appeal therefrom, and it must be assumed that the requirements of law were observed, and that the property was assessed "according to the just value thereof."

The water company's real estate having been first taxed to the corporation, and then taken into account, to some extent, in fixing the value of the shares, it resulted in double taxation. This is not only contrary to the spirit and policy of the law of taxation, but also to the statute above quoted.

The commissioners further say that this value of \$40 per share is represented, "in part, by the prospective value of such shares."

It is undoubtedly true that the present value of the stock of a business corporation may depend very largely upon the prospect of the future business and success of the corporation. The stock of a corporation which is not earning its operating expenses very frequently has a present substantial value because of the prospects for increased business and earning capacity in the future. *Com. v. Hamilton Manuf'g Co.*, 12 Allen, 298; *National Bank of Commerce v. New Bedford*, 155 Mass. 313, 29 N. E. 532. We think that nothing more than this was meant by the commissioners in their adjudication.

Nor do we think that the taxation of the shares can be effected by the contract referred to, except to the extent that such contract may enhance or depreciate the value of the stock, according to whether it is beneficial to the company or otherwise. It can make no difference whether the tax on the company's property is paid in money, or by supplying water for certain municipal purposes, for which, by contract, the company is to receive an amount equal to the taxes assessed for the year, or whether the tax has been paid in any way or not.

This result is not affected by the fact that the word "franchise" is used in the contract. The assessors of Belfast did not attempt to assess any tax upon the franchise of the corporation. No legislation of this state has authorized municipal assessors to impose a tax upon a corporation on account of its franchise,—the powers and privileges granted to it by the sovereign power of the state. The state may impose such a tax, as has been frequently done and upheld; or assessors, in placing the valuation upon the shares of a corporation, should take into account the value of the franchise, because the value of the franchise necessarily affects the value of the shares, which, by statute, are taxable to the owner thereof.

We find no error of law, therefore, in the proceedings of the commissioners, except that they included, in the value of the stock, the value, to some extent, of the company's property, which is by law taxable to it; but this is one which may be, and should be, corrected by certiorari. The valuation was based upon erroneous principles.

"Certiorari does not lie on account of mistake or mere error of judgment. Nor can an error in the amount of an assessment or tax laid by the proper authority, when there is no error in the principle of apportionment, be corrected by certiorari; otherwise, if the assessment be made on erroneous principles." *Spel. Extr. Relief*, § 1967, and cases cited.

"The judgment of the county commissioners, upon a complaint for the abatement of a tax, is a judicial act, and, consequently, a mandamus does not lie to compel them to revise such a decision. If, in such a case, they err in matters of law, a writ of certiorari is the proper remedy." *Gibbs v. County Com'rs*, 19 Pick. 298.

In *Haven v. County Com'rs*, 155 Mass. 467, 29 N. E. 1083, which was a petition for a writ of certiorari to quash the proceedings of county commissioners in refusing to abate a tax, the writ was granted, because the commissioners received incompetent testimony upon the question of value.

In *Levant v. County Com'rs*, 67 Me. 429, it is said: "The law not having expressly provided any remedy for correcting the errors of the board of county commissioners in their adjudications relating to the abatement of taxes, parties aggrieved by their decisions in matters of law, may, under the general authority contained in the above provisions, seek redress in this court."

Although the amount involved is small, the principle is of sufficient importance to lead us to the conclusion that, by reason of the erroneous basis adopted by the commissioners, in placing a value upon the preferred stock, the petitioner did not receive substantial justice; and that so much of the proceedings as relate to the adjudication sustaining the tax upon the preferred stock should be quashed, and the matter heard anew.

Their decision, in relieving the petitioner from the tax upon the common stock, involves no question of law. It was simply an exercise of judgment over which we have no right of review, and may stand.

Writ of certiorari to issue.

CLORAN v. HOULEHAN.

(Supreme Judicial Court of Maine. Nov. 29, 1895.)

ATTORNEY—AUTHORITY—DEBT—DISCHARGE.

1. It is provided by Rev. St. c. 82, § 45, that "no action shall be maintained on a demand settled by a creditor, or his attorney intrusted to collect it, in full discharge thereof, by the receipt of money or other valuable consideration, however small."

2. A claim was intrusted to an attorney for collection by a person representing himself to be the authorized agent of the creditor; and after a careful investigation of the claim the attorney accepted one-half of the demand in full satisfaction and discharge of the whole debt. The creditor, having refused to ratify the settlement, brought an action against his debtor to recover the full amount of his claim. *Held*, that the

question for the jury was not whether the attorney had special authority to compromise the claim, but whether the claim had been intrusted to him by the plaintiff; not whether the attorney exceeded his authority, but whether he had any authority at all from the plaintiff.

3. Upon a motion for a new trial, the court are of opinion that in view of the existing method of effecting sales of merchandise and making collections by the aid of traveling salesmen, and the mutual confidence that underlies the established usages in all departments of modern mercantile life, few business men would hesitate to act upon the presumption created by the facts and circumstances in this case, that the person who intrusted the bill to the attorney for collection was the duly-authorized agent of the plaintiff; also, that, if this evidence was not sufficient to require the court to submit the question to the jury, the corroboration afforded by the newly-discovered evidence renders it sufficient, and that the defendant is entitled to have the jury pass upon this evidence, in connection with that introduced at the trial.

(Official.)

Exceptions from superior court, Kennebec county.

Assumpsit by Patrick W. Cloran, against Peter A. Houlehan. There was a verdict for plaintiff, and defendant brings exceptions, and moves for a new trial. Motion sustained.

Emery O. Beane and Fred E. Beane, for plaintiff. George W. Heselton, for defendant.

WHITEHOUSE, J. This is an action of assumpsit to recover the sum of \$60 for 1,000 cigars sold and delivered to the defendant, at Gardiner, by F. J. Roberts, a traveling salesman for the plaintiff, whose place of business was in Lynn, Mass.

The defendant admitted the receipt of the goods, but denied that there was anything due on the bill in suit; claiming that \$30 of the account had been paid to the plaintiff's agent, F. J. Roberts, and the balance to the plaintiff's attorney, C. L. Andrews of Gardiner, who was said to have been subsequently employed by another traveling agent of the plaintiff to collect the claim, or the balance due on it.

The verdict was for the plaintiff for the full amount claimed, viz. \$60.64; and the case comes to this court on exceptions, and a motion to set aside the verdict as against the evidence, and also a motion for a new trial on the ground of newly-discovered evidence.

It was not in controversy that Mr. Andrews was employed as an attorney at law to collect the claim, by some one representing himself to be the authorized agent of the plaintiff, and that in pursuance of this employment, after a careful investigation of the matter, Mr. Andrews, in good faith, accepted from the defendant the sum of \$30 as "payment in full" of the plaintiff's claim, and forwarded a check for that amount to the plaintiff. But the plaintiff repudiated this settlement, and returned the check to Mr. Andrews, with directions to restore the money to the defendant. The defendant, how-

ever, declined to accept it, when thus tendered to him. After the lapse of a year and a half the plaintiff employed other counsel to commence this suit.

It is provided by section 45 of chapter 82 of the Revised Statutes that "no action shall be maintained on a demand settled by a creditor, or his attorney intrusted to collect it, in full discharge thereof, by the receipt of money or other valuable consideration, however small." It was not controverted that Mr. Andrews drew \$30 in money on the check received from the defendant, and that, in accordance with the terms of the receipt given to the defendant at the time, this payment was mutually understood to be an extinguishment of the whole debt. If, therefore, Mr. Andrews was the plaintiff's attorney "intrusted to collect the demand," it had been settled, and this action subsequently brought upon it could not be maintained, whether the prior payment of \$30 alleged to have been made to Roberts had in fact been made or not. The question for the jury, therefore, was not whether Mr. Andrews had special authority to compromise the claim, but whether he was the plaintiff's "attorney intrusted to collect it"; not whether he exceeded his authority, but whether he had any authority at all from the plaintiff.

Upon this branch of the case the presiding judge instructed the jury as follows: "It was claimed by the defendant at the outset that the whole bill had been paid; that thirty dollars was paid to Mr. Roberts, the agent of the plaintiff; and that thirty dollars more was paid by check to Mr. Andrews, an attorney for the plaintiff. But in order to show that a payment to an agent, or one who is claimed to be the agent, was a payment to the principal, it was necessary to show that the agent had authority to make such settlement; and in this case, inasmuch as the defendant's proof, in my opinion, fell short of showing authority on the part of Mr. Andrews to collect the bill, and the evidence showing that whatever he did as the agent and attorney of the plaintiff was repudiated by the plaintiff, and he was requested to return the check, I have excluded testimony upon that point, as insufficient to show that Mr. Andrews had in fact authority from the principal to accept payment in the way testified to by him. So that is laid out of the case."

The plaintiff had employed four different travelling agents, who successively visited the defendant's place of business, in Gardiner, during the two years prior to the alleged settlement of this claim; but neither Mr. Andrews nor the defendant was able to state the name of the person who left the claim in question in Mr. Andrews' office for collection. It is in evidence, however, that on the day the claim was left with Mr. Andrews a man appeared in the defendant's place of business, in Gardiner, acting as the plaintiff's agent for the collection of bills; and

It subsequently appears from the description of this man given by the defendant, and the description by Mr. Andrews of the man who employed him to collect the bill, that the two agents were one and the same person. He had in his possession the necessary data to enable him to make a correct statement of the defendant's account, together with other bills of the plaintiff against other parties, and such printed bill heads as were uniformly furnished by the plaintiff to his agents. E. F. Cloran, the plaintiff's son and book-keeper, who was himself a traveling salesman for the plaintiff at one time, testified that their agents were authorized to collect bills, but not to settle for less than the face of the bills without special permission from the house. It further appears from the testimony of this witness and of F. J. Roberts that it was in the usual course of the business for the plaintiff's agents to employ an attorney at law to enforce the collection of doubtful or disputed claims. Mr. Andrews testified that he received one letter, if not two, directly from the plaintiff's house, but had been unable to find either of them after careful search, and gave his recollection of the contents of one of them as follows: "I think the contents were that they declined to accept any such settlement as I had made in the matter, and wished me to return the money to Mr. Houlehan and bring action on the case."

In view of the existing method of effecting sales and making collections by the aid of traveling salesmen, and the mutual confidence that underlies the established customs and usages in all departments of modern mercantile life, few business men would hesitate to act upon the presumption, created by the facts and circumstances above stated, that the person who intrusted the bill to Mr. Andrews for collection was the plaintiff's duly-authorized agent. The contents of the letter received by the attorney directly from the plaintiff's house show a clear and distinct recognition by the plaintiff of the attorney's general authority to collect the bill, with further directions to commence an action upon it. If this evidence was not sufficient to require the court to submit to the jury the question whether Mr. Andrews was the "plaintiff's attorney intrusted to collect the bill," we think the corroboration afforded by the newly-discovered evidence should render it sufficient. Since the trial both Mr. Andrews and the defendant have seen and conversed with the person who on the same day called at the defendant's place of business and left the bill in question with Mr. Andrews for collection, and identified him as Homer Bush, who, according to the testimony of E. F. Cloran, was then the plaintiff's authorized agent. We think the defendant is entitled to have a jury pass upon this evidence, in connection with the other evidence introduced at the trial tending to show that the settlement of the demand in

suit was made by the plaintiff's "attorney intrusted to collect it," and that the entry should be:

Motion sustained. New trial granted.

GRAND TRUNK RY. OF CANADA v.
BOARD OF COM'RS OF CUMBER-
LAND COUNTY.

(Supreme Judicial Court of Maine. Nov 29,
1895.)

RAILROADS—COUNTY COMMISSIONERS—REPEAL OF
STATUTE—EFFECT.

1. Whenever the jurisdiction of a tribunal over any subject-matter depends wholly upon a statute, a new act repealing the statute, or so amending it as to transfer the jurisdiction to another tribunal, without any reservation as to proceedings then pending, will have the effect to invalidate all such proceedings, at whatever stage they may have arrived. If final decision has not been rendered, or final relief granted, before the amendatory act went into effect, it cannot be rendered or granted after the amendatory act.

2. A petition to the county commissioners, under Rev. St. c. 51, § 34, for gates at railroad crossings, is not an "action," within the meaning of Rev. St. c. 1, § 5.

3. On petition of the municipal officers of Pownal, the county commissioners of Cumberland county adjudged that a flagman was necessary at the intersection of the railway with a certain highway in that town. But by an amendment to the statute which took effect after the hearing before the commissioners, and prior to their decision, jurisdiction of the subject-matter embraced in the petition was taken from the county commissioners, and conferred upon the railroad commissioners, without any saving clause respecting proceedings then pending. *Held*, that the amendment to the act invalidated the decision of the county commissioners subsequently rendered.

(Official.)

Petition by the Grand Trunk Railway of Canada against the board of county commissioners of Cumberland county for certiorari. Writ awarded.

A. A. Strout and C. A. Hight, for petitioners. C. A. True, Co. Atty., for respondents.

WHITEHOUSE, J. On the 14th day of February, 1893, the municipal officers of Pownal presented to the county commissioners of Cumberland county a petition based on section 34 of chapter 51 of the Revised Statutes, representing that public safety required the maintenance of gates across a highway in that town, at its intersection with the Grand Trunk Railway, and asking for a decision upon the reasonableness of such request. The petition was entered at a term of the court of county commissioners holden on the 21st day of February, 1893. A hearing thereon was had on the 5th day of April, 1893, and on the 5th day of June, following, the county commissioners adjudged and decided that a flagman at the crossing in question was necessary for the public safety, and ordered the railway company to station a flagman there.

The railroad company now prays for a writ of certiorari, alleging as cause for error, *inter alia*, that the county commissioners, at the time of rendering this decision, on the 5th day of June, 1893, had no jurisdiction of the subject-matter embraced in their adjudication, and that they acted entirely without authority of law.

It is not in controversy that when the original petition was presented, and at the time the hearing thereon was held, on the 5th day of April, the county commissioners had jurisdiction of the subject-matter by virtue of section 34, c. 51, of the Revised Statutes, above cited. But that section was amended by chapter 205 of the Public Laws of 1893, by the substitution of the word "railroad" for the word "county," in the fifth line thereof. Thus jurisdiction of the subject-matter embraced in these proceedings was taken from the county commissioners, and conferred upon the railroad commissioners, without any saving clause respecting proceedings then pending. This amendatory act of 1893 took effect on the 28th day of April, after the hearing on the petition in question before the county commissioners, but prior to their decision, on the 5th day of June.

It is a well-established and familiar rule of law that, whenever the jurisdiction of a tribunal over any subject-matter depends wholly upon a statute, a new act repealing the statute, or so amending it as to transfer the jurisdiction to another tribunal, without any reservation as to proceedings then pending, will have the effect to invalidate all such proceedings, at whatever stage they may have arrived. If final decision has not been rendered, or final relief granted, before the amendatory act went into effect, it cannot be after. *Williams v. Commissioners*, 35 Me. 345; *County Com'rs, Petitioners*, 30 Me. 221; *Inhabitants of Mochawhoc Plantation v. Thompson*, 36 Me. 365; *South Carolina v. Gaillard*, 101 U. S. 433; *Endl. Interp. St.* § 479.

It is true that section 5, c. 1, Rev. St., provides that "actions pending at the time of the passage or repeal of an act are not affected thereby"; but the word "actions," in this statute, does not include a petition pending before the county commissioners, founded on section 34 of chapter 51, such as is here under consideration. The amendatory act of 1893 cannot have simply a prospective operation, like some new positive enactment, for the effect of the amendment was to repeal one provision and substitute another. *Inhabitants of Webster v. County Com'rs*, 63 Me. 29, 64 Me. 434. See, also, *County Com'rs, Petitioners*, 30 Me. 221; *Belfast v. Fogler*, 71 Me. 403.

On the 5th day of June, 1893, the county commissioners had no jurisdiction of the subject-matter in question, and their adjudication was without authority of law.

Writ of certiorari to issue.

HATTIN v. CHASE.

(Supreme Judicial Court of Maine. Dec. 14, 1895.)

CONTRACT—PERFORMANCE—WAIVER—DAMAGES.

1. The plaintiff claimed a balance due for constructing a drain across the defendant's farm under a general contract to "dig a drain two feet wide, two feet deep, and fill it full of rocks, at one dollar per rod." *Held*, that if the contract had been as claimed by the plaintiff, the law would imply an undertaking on his part to perform the work in a reasonably workmanlike manner, having regard to the general nature and situation of the drain and the purpose for which it was manifestly designed; and it is an equally well-settled rule that under such circumstances the defendant, in the same action, is entitled to have deducted from the contract price, by way of recoupment, all damages arising from a disregard of the obligations imposed by law in the performance of the contract, as well as those occasioned by a violation on the part of the plaintiff of the express terms of the contract.

2. Whether there was a waiver by the defendant of all objections to the drain arising from the plaintiff's unskillful and defective performance of the work is a question of fact for the jury, to be determined with reference to the intention of the defendant, the subject-matter of the contract, and all the facts and circumstances disclosed by the evidence. It was not claimed that the defendant's continued possession of the farm during the winter was any evidence of such waiver. *Held*, that an instruction to the jury that the partial payment of \$50 on account of the work, made even with full knowledge of the defects in the drain, must be deemed, as a matter of law, to be a waiver of all objections to it, and a final acceptance of the work, is erroneous.

3. A partial payment under such circumstances would be competent evidence to be considered by the jury in connection with all the other facts; but it would by no means be conclusive, and under some circumstances would obviously have very slight tendency to establish such a proposition. A dissatisfied party often makes only a partial payment for the specific purpose of protecting his rights under a contract by thus reserving an opportunity to assert a claim for damages for imperfect performance.

(Official.)

Exceptions from superior court, Kennebec county.

Assumpsit by Wilson M. Hattin against Flora M. Chase. There was a verdict for plaintiff, and defendant brings exceptions. Sustained.

H. M. Heath and C. L. Andrews, for plaintiff. L. T. Carleton, for defendant.

WHITEHOUSE, J. This is an action of assumpsit to recover a balance alleged to be due from the defendant for the construction of a drain on her farm.

It was not in controversy that the plaintiff dug a drain 91 rods long across the defendant's land, and filled it with stones, under an oral contract by which he was to receive a compensation of one dollar per rod, and that in March following the completion of the work in December he received from the defendant the sum of \$50 in part payment therefor. At the trial the defendant claimed that by the express terms of the contract the plaintiff engaged to construct a "good

nice drain, two feet wide and two feet deep, and lay an under-drain, and fill it with suitable rocks, and build it in a workmanlike manner"; but contended that the contract was disregarded by the plaintiff, and that the work was so defectively and imperfectly done that the drain was practically unserviceable, and that the payment of \$50 was greatly in excess of the value of the drain as it was in fact constructed. The defendant further contended that she never accepted the work, and never intended to waive any of her rights under the contract; and it is not stated that there was any evidence of an acceptance or waiver unless the part payment of \$50, and her continued possession of the farm during the winter, can be deemed such evidence. It was not claimed, however, that mere occupation of the farm would amount to an acceptance.

Upon this branch of the case the presiding judge instructed the jury as follows: "If that fifty dollars had been paid with the full knowledge of the defendant as to the manner in which the drain was constructed, it would be an acceptance of the drain as built, and would be a waiver of a giving up of any objection that the defendant might have had as to the construction of the drain, and he would be liable to pay the balance for its construction. * * * So I say that if she or her agent knew precisely how the drain was constructed at the time that fifty dollars was paid, and no objection was made, it was an acceptance." Subsequently the presiding judge read an instruction, requested by the defendant, to the effect that it was incumbent upon the plaintiff to prove a substantial performance of his part of the contract to enable him to recover, and that, if he failed to do this, he was not entitled to recover; and said to the jury: "I will give you that in connection with what I have already said to you as to waiver and acceptance."

The testimony was conflicting in regard to the precise terms of the contract, the plaintiff claiming that his agreement was a general one to "dig a drain two feet wide and two feet deep, and fill it full of rocks, at one dollar per rod," without any express provision as to the manner of building it, or the quality of the work. But this issue is not involved in the decision of the question of law presented by the instructions given, for it is an elementary principle that, if the contract had been as claimed by the plaintiff, the law would imply an undertaking on his part to perform the work in a reasonably workmanlike manner, having regard to the general nature and situation of the drain and the purpose for which it was manifestly designed. As stated by Mr. Bishop: "The law, interpreting the contract, adds to its general words, in the absence of special ones, or of special facts controlling the particular case, his promise to bring to the work ordinary skill and capacity, together with integrity therein and faithfulness to the interests of

his employer." Bish. Cont. § 1416. And it is equally well settled and familiar law that under such circumstances the defendant, in the same action, is entitled to have deducted from the contract price by way of recoupment all damages arising from a disregard of the obligations imposed by law in the performance of the contract, as well as those occasioned by a violation on the part of the plaintiff of the express terms of the contract. "Whatever the nature of the contract, however numerous or varied the stipulations, * * * and whether they are all written or only partly written, or partly expressed and partly implied, the range of the right of recoupment is coextensive with the duties and obligations of the parties, respectively, both to do and forbear, as well those imposed first by the language of the contract as those which subsequently arise out of it in the course of its performance. It extends to damages resulting from negligence where care, activity, and diligence are required, and from ignorance where knowledge and skill are required." 1 Suth. Dam. 279. See, also, Wat. Set-Off, c. 10 ("Recoupment") §§ 458-465; Austin v. Foster, 9 Pick. 341; Cota v. Mishow, 62 Me. 124.

In the case at bar the defendant was entitled to have the plaintiff's compensation adjusted with reference to the terms of the agreement, which she claims was never repudiated or broken by her. But she received the benefit of the services performed under the agreement, and, although the plaintiff may have failed to construct and complete the drain according to the obligations imposed by the terms of the agreement and created by the law, yet, if he endeavored in good faith to perform, and did substantially perform, the agreement, he was entitled to recover for his services the contract price, after deducting so much as they were worth less on account of such imperfect performance of the contract. *White v. Oliver*, 36 Me. 92, and authorities cited; *Morgan v. Hefler*, 68 Me. 131; *Gleason v. Smith*, 4 Cush. 484; *Moulton v. McOwen*, 103 Mass. 587. Or, as the rule is often stated with less practical accuracy, he is entitled to recover the fair value of his services, having regard to and not exceeding the contract price after deducting the damages sustained by the defendant on account of the breach of the stipulations in the contract. *Blood v. Wilson*, 141 Mass. 25, 6 N. E. 362; *Powell v. Howard*, 109 Mass. 192.

Whether there had been a waiver by the defendant of all objections to the drain arising from the plaintiff's unskillful and defective performance of the work was a question of fact for the jury, to be determined with reference to the intention of the defendant, the subject-matter of the contract, and all the facts and circumstances disclosed by the evidence. The instruction that a partial payment for the work, made even with full knowledge of the defects in the drain, must be deemed as a matter of law to be a waiver

of all objection to the drain, and a final acceptance of the plaintiff's work, was clearly erroneous. A partial payment, made with full knowledge of the condition of the work, and without objection to it, would be competent evidence for the consideration of the jury, in connection with all the other facts and circumstances, as having some tendency to show such waiver and acceptance; but it would by no means be conclusive, and, under some circumstances, would obviously have very slight tendency to establish such a proposition. A dissatisfied party often makes only a partial payment, and withholds a balance for the specific purpose of protecting his rights under a contract by thus reserving an opportunity to assert a claim for damages for imperfect performance. It was a misdirection to instruct the jury that a partial payment, made even under the circumstances stated, was ipso facto such an acceptance and waiver as would preclude the defendant from claiming damages by way of recoupment for violation of the contract on the part of the plaintiff. *Davis v. School Dist.*, 24 Me. 349; *Andrews v. Portland*, 35 Me. 475; *White v. Oliver*, 36 Me. 92; *Moulton v. McOwen*, 103 Mass. 587; *Flannery v. Rohrmayer*, 46 Conn. 558; *Button v. Russell*, 55 Mich. 478, 21 N. W. 899.

Exceptions sustained.

CITY OF GARDINER v. INHABITANTS OF MANCHESTER.

(Supreme Judicial Court of Maine. Jan. 10, 1896.)

PAUPER—COLLUSIVE MARRIAGE—MINOR CHILDREN—SETTLEMENT.

1. A marriage is valid without any certificate of intention being obtained as required by law, when solemnized by a duly-authorized magistrate.

2. A female pauper, having a settlement in Manchester, was married in 1878 to a pauper having a settlement in Gardiner. *Held*, that under the statute then in force (Rev. St. 1871, c. 24, § 1), if the marriage was collusive, for the purpose of changing the settlement of the wife, and so inoperative for that purpose, the children would take the settlement of the husband.

3. The pauper status of the children of that marriage is determined by the law as it stood at the date of the marriage.

Held that, the father's settlement being in Gardiner, the children, who were then minors, and who were born illegitimate before the marriage, having become legitimate by the subsequent marriage, and those born subsequently, had their pauper settlement in Gardiner, by derivation from the father.

Held, that the evidence fails to establish the allegation that the marriage was procured to change the wife's settlement. She therefore took her husband's settlement, which was in Gardiner.

4. *Houlton v. Ludlow*, 73 Me. 583, affirmed. (Official.)

Report from supreme judicial court, Kennebec county.

Assumpsit by the city of Gardiner against the inhabitants of Manchester to recover for pauper supplies. Judgment for defendants.

W. C. Atkins, city solicitor, A. M. Spear and W. D. Whitney, for plaintiff. H. M. Eath and C. L. Andrews, for defendants.

STROUT, J. Action for pauper supplies furnished to Elizabeth M. Hutchinson and her seven minor children. The contention is whether the pauper settlement was in Gardiner or Manchester. It is admitted that on June 28, 1878, Elizabeth M. Howard had a pauper settlement in Manchester; and George

Hutchinson, a pauper settlement in Gardiner. On that day the parties were married. They had previously lived together, and children had been born of that cohabitation. It is claimed by plaintiff that the marriage was procured by Isaac N. Wadsworth, then chairman of defendant town, for the purpose of changing the settlement of Elizabeth M. Howard from Manchester to the town in which her husband had a pauper settlement. It appears that the marriage was solemnized by Mr. Wadsworth without any certificate of intention of marriage being obtained as required by law, and he thereby became liable to the penalty provided by the statute. The marriage, however, was valid. *Damon's Case*, 6 Me. 150; *Milford v. Worcester*, 7 Mass. 55. Its only infirmity was in its effect upon the pauper settlement of the wife. The marriage occurred in 1878. At that time Rev. St. 1871, c. 24, § 1, was in force. That statute did not contain the clause in the present revision, that no derivative settlement is acquired or changed by a marriage so procured." That clause was added in 1883. The status of the children, as to settlement, is determined by the law as it existed at the date of the marriage. At that time a marriage procured to change a settlement affected only the settlement of the wife, and not that of her children by her husband. This construction is in accordance with the language and intent of the statute then in force. It has been expressly so held by this court in *Houlton v. Ludlow*, 73 Me. 385; *Minot v. Bowdoin*, 5 Me. 210.

At the time of the marriage the wife had minor children by Hutchinson. The subsequent marriage made these children legitimate, and gave them the settlement of the father. Rev. St. 1871, c. 24, § 1, cl. 3. The children born subsequently took the settlement of the father, by Rev. St. 1871, c. 24, § 1, cl. 2, and Rev. St. 1883, c. 24, § 1, cl. 2. The father's settlement being in Gardiner, the children, who were then minors, and who were born before the marriage, having by the subsequent marriage become legitimate, and those born subsequently, had their pauper settlement in Gardiner, by derivation from the father. The two children born since the amendment of the law in 1883 are unaffected by that amendment. The pauper status of the parents, and derivative settlements of their children, were established by the law existing at the date of the marriage.

The pauper settlement of the wife depends upon the question whether the marriage was procured to change her settlement by the agency or collusion of the officers of Manchester. If not, then she took the settlement of her husband (Rev. St. 1871, c. 24, § 1, cl. 1), if he had one in this state. He did then have a settlement in Gardiner.

Was the marriage fraudulently procured? For it would be fraudulent, if procured for the purpose of changing a settlement. Fraud is never presumed, but must be proved, not necessarily by direct and positive testimony, but the evidence must be sufficient to satisfy the mind of its existence. As early as June, 1870, the intention of marriage between the parties was duly entered in the clerk's office of Gardiner; but no certificate was issued, because the mayor forbade the issue. But no proceeding was had thereunder, as provided by Rev. St. 1871, c. 59, § 8. The parties continued to live together as husband and wife till their marriage, in 1878. Meantime children had been born to them. It may well be that the mother was anxious to make her children legitimate by marriage, and to escape a possible prosecution for illegal cohabitation, as well as the disgrace attending the illicit connection. She is the only witness who testifies to the circumstances inducing and attending the marriage. Wadsworth, the justice who solemnized the marriage, is dead. Mrs. Hutchinson says that, prior to the marriage, neither Wadsworth, nor any other town officer of Manchester, or any one from Manchester, had ever suggested the marriage; that it was wholly her own matter; that she told Wadsworth she wanted him to marry them; that Gardiner would not give her a certificate; that she had children, and desired to be married; that she did not ask his advice, and he gave none. Such a statement would appeal strongly to a humane man, and might induce him to perform the marriage service without a certificate, to relieve the woman from disgrace, and legitimize her children, notwithstanding the statute penalty. She was not then a pauper. And Wadsworth, even if he knew of this statute, could very well have done what he did, without thought of the question of settlement of one not then, and perhaps never to be, a pauper. An honest and humane motive, under the circumstances, and the information communicated to him, is more consistent with the facts, than a dishonest and fraudulent one.

It is true that after Wadsworth had been compelled to pay a fine for marrying without a clerk's certificate of intention, and for failing to return the marriage within the statute period, the town of Manchester reimbursed him his outlay, upon the ground that the marriage had in fact transferred the settlement of the wife from Manchester to Gardiner. And it is strongly argued that this act of the town is indicative of a previous collusive and fraudulent act on the part of

Wadsworth to procure the marriage for that purpose. But the act of the town is equally consistent with an honest action of Wadsworth in marrying the parties, and the subsequent knowledge of the town that the marriage did in fact change the settlement of the wife, and thereby relieved the town from a possible or probable future liability, and that, as Wadsworth had been subjected to loss, it was fair for the town to indemnify him. It would be going too far to treat this act of the town as satisfactory evidence of the wrongful procurement of the marriage, in the absence of all other evidence, and contrary to the positive testimony of Mrs. Hutchinson that neither he nor any other officer of Manchester in any way advised, suggested, or procured the marriage, but that it was entirely her own act, and of her own volition.

In *Minot v. Bowdoin*, supra, the jury were instructed that "If a municipal officer of the town made use of the facts of the situation, either by way of advice, argument, persuasion, or inducement, made use of any means to induce the marriage for the purpose of changing the settlement, in such a sense that but for such act of the municipal officer the marriage would not have taken place, * * * then the marriage was procured by agency of the municipal officer to change the settlement." Of this instruction this court said, "It determines what is required to invalidate such marriage, so far as relates to the settlement of a pauper, and, by necessary and obvious implication, negatives the idea that the mere honest giving of good advice would in any way affect such settlement." If Wadsworth knew the marriage would change the woman's settlement, at the time he performed the marriage ceremony, such knowledge would not bring the case within the statute. To have that effect, something must have been done, by word or act, which induced the marriage, and without which it would not have taken place.

Upon the evidence, the plaintiff fails to show that the marriage was procured to change the settlement. It follows that the wife took the settlement of her husband, which was in Gardiner.

The case comes to us on report, and there must be judgment for defendants.

SMITH et al. v. BLAKE.

(Supreme Judicial Court of Maine. Jan. 8, 1896.)

LEASE—CONSTRUCTION—PAROL EVIDENCE—RECEIPTS.

1. The meaning and construction of written contracts is to be ascertained from the language used.

2. In a lease which reserves an annual rental of \$2,700, and contains a covenant of the lessee to pay the said rental in equal quarterly payments of \$625 each, the erroneous division of the reserved rent does not have the effect to reduce the rent to \$2,500. Taken as a whole, a lease thus written satisfactorily shows that the

rent reserved was \$2,700, and that its erroneous subdivision into quarters was merely a mathematical mistake.

3. *Held*, that parol evidence is not admissible to control or explain the provisions of the lease, but the receipts given for rent are open to explanation.

(Official.)

Report from supreme judicial court, Cumberland county.

Action by James Hopkins Smith and another against Joseph H. Blake. Case reported. Judgment for plaintiffs.

The account annexed to the writ is as follows:

Portland, Me., September 1, 1894.

Joseph H. Blake to James Hopkins Smith and Henry St. John Smith, Dr.

To use and occupation of plaintiffs' land, tenements, and messuages, viz. of that portion of Widgery's wharf, with the buildings thereon, in said Portland, owned by said lessors, together with the rights of way thereto pertaining, belonging to said lessors, from the 23d day of August, A. D. 1892, to the 23d day of August, A. D. 1894, at \$2,700 per annum, as per written lease.....	\$5,400
Contra, credit by cash.....	5,000

Balance due	\$ 400
Interest thereon from the several dates when the installments thereon became due, as per written lease, to date of writ	25

Total \$ 425

The writ was dated September 1, 1894. The plea, the general issue.

The plaintiffs put in the following lease, and stopped:

"This Indenture, made the twenty-third day of August in the year of our Lord one thousand eight hundred and ninety-two, witnesseth: That James Hopkins Smith of the city, county, and state of New York, and Henry St. John Smith of Portland, county of Cumberland and state of Maine, do hereby lease, demise, and let unto Joseph H. Blake of Portland, in said county of Cumberland and state of Maine, that portion of 'Widgery's Wharf,' so called, with the buildings thereon, situated in the said Portland, now owned by the said lessors, together with the rights of way thereto pertaining belonging to said lessors,—the premises to be kept in repair by said lessors in such manner as in their judgment is required. To hold, for the term of seven years from the twenty-third day of August in the year of our Lord eighteen hundred and ninety-two, yielding and paying therefor the rent of twenty-seven hundred dollars per annum. And the said lessee do so covenant to pay the said rent in equal quarterly payments as follows: Six hundred and twenty-five dollars on the twenty-third day of each November, February, May, and August, during the whole of said term, and to quit and deliver up the premises to the lessors or their attorney, peaceably and quietly, at the end of the term aforesaid, in as good condition and order—reasonable use and wearing thereof, loss by

, or inevitable accident excepted—as the ne are or may be put into by the said sor, and to pay all water rates, and not ke or suffer any waste thereof. And that will not assign or underlet the premises, any part thereof, without the consent of : lessors in writing, on the back of this se. And the lessors may enter to view d make improvement, and to show the mises to persons wishing to hire or to purchase, and to expel the lessee, if he shall fail pay the rent aforesaid, whether said rent demanded or not, or if he shall make or Ter any strip or waste thereof, or shall l to quit and surrender the premises to the sors at the end of said term, in manner resaid, or shall violate any of the covants in this lease by said lessee to be permitted.

And it is further agreed that, in case said emises shall be destroyed or damaged by e or other unavoidable casualty, so that the ne shall be thereby rendered unfit for use d habitation, then, and in such case, the it hereinbefore reserved, or a just and proportional part thereof, according to the nature and extent of injuries sustained, shall suspended or abated until the said premises shall have been put in proper condition : use and habitation by the said lessors, or ee presents shall thereby be determined d ended at the election of the said lessors, their legal representatives.

And it is further agreed that the premises all not be occupied, during the said term, : any purpose usually denominated 'extra-zardous,' as to fire, by insurance companies. * * *

J. W. Symonds, D. W. Snow, and C. S. ok, for plaintiffs. Seth L. Larrabee and elville A. Floyd, for defendant.

STROUT, J. On the 23d day of August, 1892, aintiffs leased defendant certain wharf operty for seven years, "yielding and paying therefor the rent of twenty-seven hundred dollars per annum." "And the said lease do so covenant to pay the said rent in equal quarterly payments, as follows: Six hundred and twenty-five dollars on the twentieth day of each November, February, ay, and August during the whole of said rm." And in the reddendum the lessors e given the right "to expel the lessee if he all fail to pay the rent aforesaid." And in e fire clause it was provided that, in case loss or damage by fire, "the rent hereinfore reserved" should be abated or suspended until the premises should be restored. he question is whether the rent under the ase is \$2,700 yearly, or \$2,500, the amount four quarterly payments of \$625 each.

The meaning and construction of written ontracts is to be ascertained from the language used. Parol testimony may be admitted to explain a latent ambiguity, but not e patent upon the terms of the contract.

So the circumstances in which the parties were placed at the time of making the contract, and collateral facts surrounding it, may be shown. 1 Greenl. Ev. § 297. Mere inaccuracy of language does not constitute an ambiguity of either class. In such cases, parol evidence is inadmissible to show the intention of the parties. The language of this lease is explicit, and the question in issue cannot be determined from parol evidence of what was said and done at the time of the contract, but must be ascertained from the lease itself.

In a letting for a series of years, the leading idea, as to rent, is the yearly rental. Its subdivision into frequent payments is a matter of mathematics, and a secondary subject of thought. It is common knowledge that, in the great majority of leases, and in negotiations for them, the rent stated and talked about is the yearly rent. In this lease the grant is made, "yielding and paying therefor the rent of twenty-seven hundred dollars per annum." The gross yearly sum was clearly in the minds of the parties, and clearly stated. The tenant's covenant was "to pay the said rent in equal quarterly payments." And the covenant would have been complete if it had stopped there. And in that case, no doubt could have existed that the rent per year was \$2,700; but the covenant proceeded, unnecessarily, to add, "As follows, six hundred and twenty-five dollars" each quarter. This unnecessary addition, disagreeing in the amount with the rent immediately before reserved, which the lessee covenanted to pay, is, manifestly, a clerical error. It is to be construed as if it read, "The tenant covenants to pay the rent reserved in equal quarterly payments, which are, or are equal to, six hundred and twenty-five dollars per quarter." If such was the language, there could be no doubt that the annual rent was \$2,700, and the attempted division into quarters was simply a mathematical error, which should be rejected, or corrected.

"The great rule for the interpretation of written contracts is that the intention of the parties must govern. This intention must be ascertained from the contract itself, unless there is an ambiguity. In ascertaining the meaning of the parties, as expressed in the contract, all of its parts and clauses must be considered together, that it may be seen how far one clause is explained, modified, limited, or controlled by the others." Applying this rule, it appears that the rent reserved in the grant was \$2,700; that the tenant covenanted to pay "the said rent in equal quarterly payments"; that in the reddendum he was to be expelled if he failed to "pay the rent aforesaid"; and in the fire clause the stipulation is, "the rent hereinbefore reserved." The rent reserved in the grant was \$2,700. The erroneous division of that rent into four parts cannot modify or control the express rent reserved and mentioned in the grant, the

reddendum, and the fire clause, but is controlled by them.

But it is said that the parties, by their acts, have given a construction to the contract in accordance with defendant's construction. Such acts, if done understandingly, with full knowledge of all the facts, are sometimes of controlling force. It appears that six quarters' rent, at the rate of \$625 each, were paid to Henry St. John Smith, one of plaintiffs, and receipts were given in each case for three months' rent. But it also appears that the contract for lease was made with the other plaintiff, James H. Smith, and that Henry was not familiar with its terms. Henry says that, at one time, defendant called to pay the rent, and showed him the lease, folded so as to show the \$625 per quarter, but not to show the \$2,700 reserved rent; and that he looked at it, and, supposing it to be right, accepted the money, and gave the receipt, which defendant had previously prepared. This is denied by defendant, though he admits showing Henry the lease; Henry not having present plaintiffs' duplicate. But, in May, 1894, when defendant offered to pay the rent to Henry, he had discovered the mistake, and declined to receive the money. The matter ran along till August 23, 1894, when defendant, by letter to plaintiffs, proposed to tender \$1,250, two quarters' rent then being due, unconditionally, and without prejudice to any claims plaintiffs might have for any larger or different sum; and, on August 27, 1894, \$1,250 was paid to James, and a receipt given for the amount, "on account rent due under written lease." Thereafterwards the receipts were given "on account of rent."

Defendant claims that, when the \$1,250 were paid, it was a settlement of all claims to the date of payment, and a waiver by agreement of any claim under the lease for a yearly rent in excess of \$2,500. But this claim is negatived by defendant's letter to plaintiffs, of August 23, 1894, and the terms of the \$1,250 receipt, and all subsequent receipts.

The plaintiffs are men of large affairs, and it is not difficult to understand how they might be misled by the quarterly amounts stated in the lease. Their receipts in full for several quarters are open to explanation. Upon all the evidence, we are satisfied that they were misled, perhaps by a lack of caution, but the defendant has not been prejudiced thereby.

"A court of law should read a written contract according to the obvious intention of the parties, in spite of clerical errors or omissions which can be corrected by perusing the whole instrument." *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. Law, 132, 26 Atl. 140.

It is the opinion of the court that the rent reserved by this lease is \$2,700 per annum, and that the naming of \$625 as the quarterly payments is a clerical error, which should be,

and is, corrected by perusal of the whole lease. The suit is for the difference between \$2,500 per annum, which has been paid, and \$2,700 per annum, which should have been paid; and the plaintiffs are entitled to recover it.

Judgment for plaintiffs.

COOK v. MORRIS.

(Supreme Court of Errors of Connecticut. May 28, 1896.)

DEMURRER—PLEADING OVER—MOTION FOR NON-SUIT—ERROR IN GRANTING.

1. Where a demurrer to a complaint for insufficiency is overruled, and defendant pleads over denying the allegations thereof, he cannot, on trial, raise the question of the sufficiency of the allegations by motion for nonsuit.

2. A demurrer to a complaint for insufficiency must specify the reasons why it is insufficient.

3. A complaint against an executor, whose testator died in 1891, for \$25,000 for services performed in 1876, at the testator's request, in tutoring and procuring the graduation of a law student, plaintiff's classmate, and a brother of testator's sister-in-law, alleged the agreement, performance by plaintiff, and demand for payment; that, on demand, testator said he had provided payment by will; that plaintiff relied thereon, and accepted it as a settlement, and, in consideration thereof, promised to and did forbear suit during testator's life on the demand. On trial it appeared that the services were worth only a few hundred dollars; that the only motive suggested was testator's desire to have this law student for his private lawyer; that this student was not mentioned in the will; that a negotiation which plaintiff claimed he made with the dean of the law school by promising an endowment from testator to the school was denied by the dean, and consisted simply in the dean's having sent for plaintiff and told him that he had seen the testator and the arrangements were all right, and that, if the recitations of the student were all right, he would be graduated; that testator, "an honest man, of great integrity," left the main portion of a large estate to charitable uses, but none to the law school or plaintiff. There was evidence that testator, on the student's graduation being reported to him, embraced plaintiff, and told him he had made a codicil to his will giving him \$25,000; that the only communication plaintiff had with testator after the alleged settlement was a brief interview shortly before his death, though plaintiff was most of the time harassed by debts. *Held* error to grant a nonsuit for want of evidence to support the issues raised by denial of the allegations of the complaint, or because the evidence disclosed the improbability of the facts testified to.

Andrews, C. J., dissenting.

Appeal from superior court, New Haven county; Ralph Wheeler, Judge.

Action by J. Hazelton Cook, Jr., against Luzon B. Morris, executor, on a claim against the estate of defendant's testator for services rendered testator in tutoring a law student. From a judgment of nonsuit, plaintiff appeals. Reversed.

Rufus S. Pickett and Daniel Davenport, for appellant. John W. Alling and James H. Webb, for appellee.

HAMERSLEY, J. This is an appeal from the judgment of the superior court, as in case

of nonsuit, rendered during a trial to the jury, upon the motion of the defendant, and against the will of the plaintiff, after the plaintiff had adduced his evidence and rested his case. As the record does not disclose the particular reason which induced the court below to grant the motion, we will consider such grounds of nonsuit as apparently might have been the basis of the court's action:

1. The claim made by the defendant that there is no evidence to go to the jury in support of the facts put in issue by the complaint and answer, in connection with the claim that such facts, if proved, are legally insufficient to support any cause of action. The complaint alleges in the first count that one Daniel Hand died December 17, 1891, leaving a will, by which the defendant was appointed his executor; that the will was duly proved February 8, 1892, and the defendant thereupon duly qualified as such executor, but that said will contained no provision for the payment of the sum of \$25,000, or any part thereof, to the plaintiff; that said Hand did not in his lifetime pay said sum, nor any part thereof, to the plaintiff; that the plaintiff duly presented to said executor his claim against the estate for the payment of said sum of \$25,000; and that the executor notified the plaintiff that he disallowed the claim, and refused to pay it. These allegations were admitted by the answer. The other allegations are in substance as follows: (1) In January, 1876, said Daniel Hand agreed with the plaintiff that, if he "would tutor and make arrangements so as to graduate" one Hollis T. Walker from the Yale Law School, he (the said Hand), in consideration of said services resulting in the graduation of said Walker in the summer of 1876, "would give said plaintiff the sum of \$25,000." (2) The plaintiff entered into said agreement, and did tutor and make arrangements for graduating said Walker. (3) About July 1, 1876, said Walker graduated from said law school. (4) "Soon thereafter said plaintiff called upon said Daniel Hand for a settlement for services rendered as per said contract, and said Daniel Hand told said plaintiff that he had placed in his will the amount of \$25,000, payable to said plaintiff upon his (Daniel Hand's) death." (5) The plaintiff believing said statement to be true, and in consequence of the fact that said Hand was then about 75 years old, "thereupon agreed with said Daniel Hand to accept as a settlement the terms as above stated." The second count contains the same allegations stated more in detail, and further alleges a promise by the plaintiff to forbear prosecuting his claim during Hand's lifetime, and actual forbearance, as induced by the promise of Hand to pay by will. The answer directly traversed each of these allegations, and these allegations and denials constituted the issues put to the jury for trial.

The burden resting on the plaintiff to make out a *prima facie* case, within the meaning of our statute authorizing a nonsuit, was

satisfied, if his testimony, assuming it to be true, and drawing from it every favorable inference of fact that might reasonably be drawn, contained any substantial evidence supporting the affirmative of the issues so put to the jury for trial. We have carefully examined the testimony reported in the record, and are satisfied that there was evidence (if the testimony could be treated as true) to go to the jury in support of the facts so put in issue. Indeed, we do not see how there can be any serious doubt of this when the testimony is considered, independently of its apparent untruthfulness, and of the questions of pleading suggested by the loose construction of the complaint. The defendant, however, relies in support of the nonsuit upon the claim that the facts alleged, if proved, are legally insufficient to support a judgment; and the attempt to demonstrate this claim pervades his whole argument. His claim is that "the nonsuit was granted because the evidence showed no cause of action that could be enforced by a court, because whatever cause of action, if any, was testified to, was without any legal consideration to support it"; and he further maintains that the want of consideration appears in the complaint, and that the insufficiency of the complaint is ground for nonsuit.

During a trial to the jury, the legal sufficiency of the material facts put in issue by the allegations of the complaint and denials of the answer cannot be questioned; and by "material facts," in this connection, is meant facts constituting a part of the plaintiff's case as he presents it. The legal sufficiency of such facts must be settled by demurrer before the issues are joined and put to the jury, or else, after the verdict is returned, by a motion in arrest of judgment or by a writ of error. Such rule has been considered necessary to the orderly conduct of an action, and is firmly established by former decisions of this court. *Canterbury v. Bennett*, 22 Conn. 623; *Adams v. Way*, 32 Conn. 167. This rule has not been changed by the practice act. The elimination of all questions as to the legal sufficiency of the facts alleged on which issues are actually joined, from the trial to the jury of the issues so joined, if not more essential, is certainly as essential to the orderly conduct of an action under the new system of pleading as under the old. *Trowbridge v. True*, 52 Conn. 197; *Merwin v. Richardson*, Id. 233. In *Powers v. Mulvey*, 51 Conn. 433, it was held that, under the practice act, the denial of all the facts alleged in a pleading is an admission that such pleading is sufficient in law, and the court says that a party cannot have "the benefit of both a traverse and demurrer to the same facts at the same time." *Todd v. Munson*, 53 Conn. 391, 4 Atl. 99, explains that it does not follow from *Powers v. Mulvey* that a plaintiff is necessarily entitled to a judgment because he has proved

the allegations of a complaint manifestly insufficient in substance. Undoubtedly, in such case the legal sufficiency of the pleadings and findings of the jury to support a judgment may be raised after verdict by a motion in arrest. But *Todd v. Munson* does not modify the well-established rule that a party cannot go to trial upon the issues made by his denials of allegations that may be demurrable, but are material as constituting a part of the plaintiff's case as he presents it, and, upon that trial, claim the benefit both of a demurrer and traverse to the same facts. Such allegations are not "wholly immaterial to the right claimed by the pleadings," within the meaning of section 10, art. 3, of the rules of court established under the practice act.

In this case the defendant did demur to the legal sufficiency of the complaint, stating his ground of demurrer as follows: "Because, if each count is to be regarded as containing only one cause of action, growing out of the alleged breach of the promise of Daniel Hand to pay the plaintiff by will, or at his death, it appears that the contract of Daniel Hand, in such case, was not to be performed in one year from the time it was made; and also because no sufficient facts are alleged in either count to constitute such cause of action, or to entitle the plaintiff to the relief sought in his complaint." This demurrer was overruled. It appears from the memorandum of decision appended to the record, and referred to in the order overruling the demurrer, that the insufficiency of the complaint as a ground of demurrer was not presented by the defendant in his discussion of the demurrer, and that this ground was not passed upon by the court, but was treated as abandoned. If, however, the demurrer to the insufficiency of the complaint must now be treated as overruled, and not simply as withdrawn by the defendant, we think it was properly overruled. As it was not confined to the prayer for relief, but included the whole of the complaint, it did not comply with the statutory provision that "all demurrers shall distinctly specify the reason why the pleading demurred to is insufficient." But if the defendant had properly demurred to the complaint, distinctly specifying the reasons for its insufficiency argued before us, and the court below had overruled such demurrer, he would not in that case have been in position, during the trial of issues raised by his denial of the material allegations of the complaint, to raise the question of the legal sufficiency of those allegations. The law gives him a different remedy. If the court erred in overruling the demurrer, he might stand on his demurrer, and, upon appeal from the final judgment, obtain a reversal; or, if he preferred first to take the chance of a verdict in his favor, he might, after verdict against him, obtain a reversal of the judgment upon appeal. But when he answers over, and denies the alle-

gations, he goes to the trial of the issues thus raised with the questions of law settled, until the decision of the court is reversed in the proper manner; and he cannot during that trial raise the questions decided against him on demurrer, by a motion for nonsuit after the allegations in issue have been proved.

2. The other ground on which the nonsuit might have been granted is the impossibility that the facts testified to are true; in other words, that the testimony for the plaintiff contains in itself a demonstration of its untruthfulness, so conclusive that the court may treat it as furnishing no evidence whatever. We are not prepared to say that a nonsuit can in no case be granted for such reason. If, for instance, in this case, the plaintiff had offered evidence that his conversations with Hand, which constitute the whole of his material evidence, had taken place while the plaintiff was in his class room at New Haven and Hand upon his lawn at Guilford, it might fairly be claimed that there was no evidence to go to the jury. In the supposed case the testimony is demonstrated by its conflict with well-known physical laws to be untrue. The claim is made that in the case, as it appears upon the record, the testimony is demonstrated to be untrue by its conflict with the recognized laws controlling human action. The plaintiff's case involves a contract made by a thrifty and saving man, who had accumulated by his own efforts a large fortune, by which contract he agrees to pay \$25,000 for services extending over a few months, and which might readily be procured for a few hundred dollars. Hand had no motive to benefit the plaintiff, to whom he had spoken but once before the contract was made. The plaintiff also proves that Hand had no motive for making such expenditure on behalf of Walker, who was a brother of Hand's brother's wife. Walker lived until 1891, the year that Hand died. Hand's will was made in 1872, and modified by 14 codicils, the last made in 1889. By this will and these codicils, moderate provision is made for several nephews and nieces, cousins, grandnephews, and grandnieces, but no mention is made of Walker. The only motive suggested for such unaccountable extravagance is that Hand wanted this law student for his private lawyer. The case not only involves the payment of \$25,000 to the plaintiff, a classmate of Walker, but a negotiation with the dean of the Yale Law School (contradicted by the dean, whom the plaintiff felt obliged to produce as a witness) for promoting the graduation of Walker in consideration of Hand giving Yale College \$25,000, and probably making further gifts. As expressed by the plaintiff: "It was, so to speak, to soap the wheels, grease the wheels a little, not only the \$25,000, but the money that was gradually to rain down on the college,—a continual stream." The plaintiff, an undergraduate, opens this negotiation with the dean, who says, "Send

Mr. Daniel Hand to me." Mr. Hand responds to the request, and, after the interview, the man tells the plaintiff: "I have seen Mr. Hand. The arrangements are all right, and, provided you tutor him so that he recites in his recitations all right, Walker will graduate in 1876." The \$25,000 to Yale College and the like sum to the plaintiff were never paid by Hand, described as "an honest man, of great integrity," who left the main portion of his large property to charitable uses. The case further involves the plaintiff, immediately after he had earned his \$25,000 by the graduation of Walker, accepting, in satisfaction of his existing right to the payment of \$25,000, the statement of Hand (accompanied by a warm embrace and kiss, in the presence of a roquet party on the lawn) that he had made a codicil to his will giving him \$25,000; and the absence of any communication between the plaintiff and Hand on this subject during the 15 years that Hand survived, except a brief interview shortly before Hand's death, the plaintiff during most of the time being in straits for money and harassed by debts. The taking place of the foregoing transactions are necessarily involved in the plaintiff's case. There are other matters incidentally involved scarcely less extraordinary. It would be folly to deny that this story so conflicts with the experience of human life and the acknowledged motives which govern human action as to make it highly improbable. It contains in itself a suggestion of incredibility. Yet it cannot be said to be impossible in the same way that a conversation between two persons, unaided by the telephone, who are 15 miles apart, is impossible. We know that the laws which govern human actions are subject to occasional exceptions, which seem little short of miraculous.

But the defendant claims that a story so highly improbable cannot be regarded as substantial evidence, unless supported by testimony of the highest character, and becomes practically impossible when supported, as in this case, by witnesses whose reliability is questioned. This is true; but when we must be asked to take the case from the jury because the credibility of the witnesses is not sufficient to justify belief in the story they tell; and this credibility of the witnesses is the very matter which the law says must be submitted to the jury. The court could say it is legally impossible for this story to be true, however credible the witnesses who testify to it may be, here might then be no substantial evidence to go to the jury; but we cannot say this, and a nonsuit cannot be granted because the court is satisfied that the witnesses are not credible. If this testimony had been submitted to the jury, and a verdict rendered for the plaintiff, the court, satisfied that the credibility of the witnesses had been so taken upon their examination and cross-examination as to demonstrate that in believing such a story on such testimony the

jury must have acted under some mistake or prejudice, might not hesitate to set aside the verdict. But a motion for nonsuit cannot be permitted to operate as a motion to set aside a verdict against evidence. The latter is a proceeding by which the court may give relief for a palpable mistake made by the jury in weighing evidence submitted to them. The former is a proceeding by which the court may take a case from the jury when, admitting the truth of the evidence submitted by the plaintiff and every favorable inference that may be drawn from it, the issues must, nevertheless, be found against the plaintiff by force of some legal principle, the determination of which is within the province of the court, and not of the jury, or when the facts testified to are so clearly without that logical relation to the facts in issue, legally essential to any probative force, as, in point of law, to constitute no substantial evidence of the fact in issue, and so a verdict may be set aside which is rendered upon the same evidence upon which the court has already refused to grant a nonsuit. *Bennett v. Insurance Co.*, 51 Conn. 512. A nonsuit for such cause has a very limited range, and should be sparingly used. It is never a matter of right, and should rarely, if ever, be granted where there can be any doubt, unless the evidence of the plaintiff distinctly raises a question of law determinative of the plaintiff's right of action. Where the granting must depend in any appreciable degree upon the court's passing upon the credibility of witnesses, the nonsuit should not be granted. And, ordinarily, as a matter of practice, where the nonsuit can settle no principle of law essential to the plaintiff's right of action, the consideration of ending the litigation by the verdict of a jury should control, and the trial should go on. Strictly, a nonsuit is a mode of putting the plaintiff out of court without trial, as the result of his own voluntary action. By former practice, when the evidence submitted by the plaintiff was in law insufficient to maintain the issue joined, the defendant might demur to the evidence, and, on this demurrer, the court might render judgment. It is said that the practice of nonsuiting a plaintiff against his will upon his failure to prove his case is a substitute for a demurrer to evidence. This is not quite true. The main purpose of demurrer to evidence was to raise questions of law that could conveniently be raised in no other way, and it essentially differed from a nonsuit, in that the judgment following the demurrer ends the litigation, whereas a judgment, as in case of nonsuit, is no bar to another action. When provision was made for reviewing questions of law by motions for new trial and reservations, the demurrer to evidence gradually passed out of our practice; and, if such a demurrer has been filed during the present century, no instance appears in our reports

It is held in many cases of high authority that the court has no power to order a peremptory nonsuit against the will of the plaintiff; that the plaintiff has a right by law to a trial by jury and to have the case submitted to them. See language of Chief Justice Marshall in *Elmore v. Grymes*, 1 Pet. 469. The involuntary nonsuit for insufficiency of evidence was unknown to the common-law practice of this state. It was not until 1852 that a statute was passed authorizing the court to grant a motion for nonsuit when it "should be of opinion that the plaintiff had failed to make out a prima facie case." Gen. St. § 1109. This statute was held not to impair the right of trial by jury. *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 478. There have been but few cases brought before us under this statute, but we think they all point to a very limited field for its operation. The question is in each case as stated in *Thames Steamboat Co. v. Housatonic R. Co.*, 24 Conn. 49: "Is the plaintiffs' evidence sufficient, in point of law, to make out a prima facie case in their favor?" We are not disposed to extend the statute, even in such an extreme case as the present one, so as to permit a nonsuit in any case where the facts claimed as presenting the question of law may depend upon the credit to be given witnesses, or may depend upon inferences of fact to be drawn from the testimony, as to which inferences the parties may reasonably differ.

If the court below granted the nonsuit on the ground that the allegations of the complaint, if proved, would not support a judgment, it erred, because the insufficiency of the complaint cannot be taken advantage of in that way. If the court granted the nonsuit on the ground that the testimony and the inferences of fact from the testimony, giving full credit to all the witnesses, and drawing the most favorable inferences of fact that can reasonably be inferred, furnished no evidence to go to the jury in support of the issues actually presented by the allegations of the complaint and denials of the answer, we think the court misapprehended the effect of the testimony. If the court granted the nonsuit on the ground that there was no evidence to go to the jury, because the testimony for the plaintiff disclosed the impossibility of the existence of the facts testified to, we think such conclusion is not fully justified by the extraordinary character of the story told, but involves passing upon the credibility of witnesses; and therefore the plaintiff was entitled to have the verdict of the jury, however barren such right might be. A party has the same right to submit to a jury a weak case as he has to submit a strong one. To distinguish between worthless and sufficient testimony is the very purpose for which juries are impaneled. The presumption is they will decide correctly. If they make a

palpable mistake, the verdict can be set aside. There is error in the judgment of the superior court. The other judges concurred, except ANDREWS, C. J., who dissented.

PLUMB v. CURTIS.

(Supreme Court of Errors of Connecticut. April 5, 1895.)

ACTION FOR GOODS SOLD AND DELIVERED — ACCOUNT BOOKS AS EVIDENCE — SALE TO AGENT — EVIDENCE OF AGENCY — DECLARATIONS OF AGENT — UNAUTHORIZED ACT — RATIFICATION — PLEADING AND PROOF — VARIANCE — OBJECTIONS TO EVIDENCE — WAIVER — WITNESS — EXPLAINING TESTIMONY — INSTRUCTIONS.

1. Under Gen. St. § 1041, providing that in all actions for a book debt the entries of the parties in their books are admissible, and Practice Act, § 31, making them admissible in all actions for the recovery of a book debt, an account book kept by the plaintiff in an action for goods sold and delivered is admissible, not only to show that the goods charged to defendant therein were sold, but were sold to him.

2. In an action for goods sold, it appeared that they were delivered to a third person, and charged to defendant; and defendant admitted that such person was his agent during a portion of the time covered by the sales, and claimed payment for goods bought during such time, but denied agency for the remainder of the period. *Held*, that declarations of the agent made at the time of the first sales, though in defendant's absence, were admissible to show the nature of his agency. *Andrews, J., dissenting.*

3. Objections to evidence on the ground of variance will not be considered on appeal, where the only objection made to such evidence below was that it was hearsay.

4. The objection that a bill of particulars does not furnish sufficient information as to the nature of the claim in suit must be made by a motion to make more specific.

5. In an action for goods sold, where it appeared that all the goods had been delivered to a third person, and charged to defendant, and defendant admitted that such person was his agent during a portion of the period covered by the sales, but denied agency for the remainder of the period, and it was shown that the goods delivered during the latter period were of the same nature as those delivered during the former period, evidence that the agent had no property was admissible to show that it was improbable that plaintiff would have changed his credit from defendant to such agent personally.

6. Allowing a witness to explain or modify his testimony after it has been denied by other witnesses is within the discretion of the court.

7. In an action for the price of house-building materials delivered to a third person, and charged to defendant, defendant admitted that he authorized such person to purchase material for the erection of three houses, and claimed payment for materials so bought, but denied agency for the purchase by such person of materials for the erection of other houses, which had been also charged to defendant; but there was some evidence that defendant ratified the purchases made for such houses. *Held*, that a request to charge that, if such third person was not authorized by defendant to purchase material for the latter houses, no recovery could be had, if plaintiff furnished them to such third person without inquiry as to the extent of his authority, but relied on his authority to order materials for the first group of houses, was properly denied, since it ignored the evidence as to ratification.

8. In an action for the price of materials delivered to a third person for use in the erection of several buildings, and charged to defendant,

defendant admitted agency for the purchase of materials for one group of the buildings, but denied any agency as to the others. It was shown that defendant had agreed with such third person to furnish him with part of the working capital for the erection of such other buildings, in consideration of a promise by such third person to turn over to him the first payments made by the owners of the buildings under the building contracts, and that thereafter he became alarmed at the condition of such third person's accounts, and procured an order from him that payments on the contracts should be made directly to defendant. *Held*, that a request to charge that plaintiff could have no greater right to recover by reason of defendant having obtained such order was properly refused, since the weight of such evidence was for the jury.

9. In such action a request to charge that, unless such third person was authorized by defendant to order the materials for the last group of houses, an oral promise by defendant to pay for them would be a promise to pay the debt of another, and hence within the statute of frauds, was properly denied, since it assumed that the materials were originally supplied on the credit of such third person, and that he continued to be a debtor for them.

10. In an action for goods sold and delivered, plaintiff may show that they were delivered to a third person, who was acting as defendant's agent, and that defendant ratified his acts, without an allegation to such effect in the complaint.

Appeal from court of common pleas, Fairfield county; Curtis, Judge.

Action by Lewis F. Curtis against Hanford O. Plumb. Judgment for plaintiff, and defendant appeals. Affirmed.

George P. Carroll, for appellant. Henry T. Shelton, for appellee.

BALDWIN, J. There was no error in permitting the plaintiff to put his shop books in evidence for the purpose of proving, not only that the goods therein charged to the defendant were sold and delivered, but that they were sold to the defendant. Gen. St. § 1041, provides that, "in all actions for a book debt, the entries of the parties in their respective books shall be admissible in evidence." They are admissible as tending to show the truth of the statements entered. Entries of sales to the defendant tended to prove that such sales had been made to him. *Smith v. Law*, 47 Conn. 431. The statute, in its original form, was applicable only to an action peculiar to the jurisprudence of Connecticut,—that of debt on book. St. 1821, p. 93. In such a proceeding the party's books were deemed the principal and most satisfactory evidence, his own testimony being received merely as supplementary. *Swift, Ev.* 81; *Terrill v. Beecher*, 9 Conn. 344; *Butler v. Iron Co.*, 22 Conn. 335, 360. The Practice Act, § 81, made them admissible in all actions for the recovery of a book debt. It is a legitimate exercise of legislative power to give greater effect to any particular kind of evidence than it possessed at common law. *State v. Cunningham*, 25 Conn. 195, 203.

The entries of the sales charged in 1890, and the testimony with respect to Simeon Plumb's statements, when he gave the first

order, that he was acting for the defendant, and desired the charges made to him, and a pass book kept for him, and of the defendant's promises made in 1890 to pay for the goods then charged, and his request that the pass book might be left with him for examination, were properly received, notwithstanding the fact that such payment was admitted by the pleadings. They were evidence of the manner in which the dealings between the parties commenced, and that the defendant recognized the authority of Simeon Plumb, at one time, to act as his agent in ordering goods of the plaintiff. The plaintiff's claim was that such an agency existed in 1890, and continued unchanged till June, 1891. The evidence in question was relevant, not because it supported the plaintiff's allegations as to an indebtedness for goods sold in 1890, since his reply admitted that no such indebtedness existed, but because it tended to support a recovery for the later charges, by showing the circumstances under which the goods were sold, and the appearance of authority which the defendant had given to Simeon Plumb to buy them on his behalf. The court was fully justified in admitting proof of the declarations of Simeon Plumb at the time of the first purchases, though made in the defendant's absence, as to his right to act for the defendant, in view of the fact that the defendant recognized the agency by calling for the pass book and paying for the goods so ordered. The jury might fairly infer from his conduct that he had authorized Simeon Plumb to make the declarations in question, for they were truly descriptive of the nature of his agency, as admitted by the defendant. As to how far, when received, they might be considered by the jury as proof of a larger agency than that which the defendant admitted, was another question, which was not brought up by an objection which related only to their admissibility.

The defendant contends further that, as these declarations could only be important as tending to show sales to a principal through an agent, neither they, nor any of the evidence relating to the agency of Simeon Plumb, were admissible under the complaint, which was for goods sold to the defendant, and made no mention of the intervention of any agent in the transaction. The rules under the practice act (rule 2, § 1, Prac. Bk. p. 12) allow the common counts to be "used for the commencement of an action, when any of these counts is an appropriate general statement of the cause of action," but provide that the defendant shall not be required to plead until the plaintiff files "a proper bill of particulars, or such further statement by way either of a substituted complaint, or of amendment, as may be necessary to show his cause of action as fully as is required in other cases; and such statement, where the demand is founded on

an express contract, whether executory or executed, shall set forth the terms of the contract"; and that "where a bill of particulars, only, is filed, all the counts not applicable thereto shall be struck out by amendment." The bill of particulars filed in the present case was applicable, so far as appeared upon its face, either to the third, fourth, sixth, or ninth of the common counts. Prac. Bk. p. 60, form 85. The rule was not complied with by striking out the other counts by amendment, but no objection was taken by the defendant on that account. Under the ninth count, which was upon an account stated, it was unnecessary for plaintiff to allege the circumstances under which the indebtedness was contracted. Whether it was through the intervention of an agent, or not, was immaterial, so long as the account as rendered was accepted as correct by the defendant. As respects the other counts, it should—and, had the defendant demanded it, no doubt, would—have been specifically alleged that the indebtedness was contracted by Simeon Plumb, as agent for the defendant. Prac. Bk. p. 14, rule 3, § 1. No objection, however, was taken on this ground to the admission of any of the evidence as to the existence of such an agency. The general objection to the admission of Simeon Plumb's declarations as to the extent of his authority, made in the absence of the defendant, was evidently based on the ground that it was hearsay, and it is so treated in the reasons of appeal. It was not such as to direct the attention of the trial court to any question of variance, and that question, therefore, cannot now be raised upon it here. Rule 17, § 1; 58 Conn. 584, 26 Atl. xv.

At the close of the testimony the defendant asked that the jury might be instructed that there could be no recovery, under the pleadings, for any goods sold in 1891 on the order of Simeon Plumb, acting as or being his agent. Such an instruction was properly refused. The evidence of agency having been received without any objection on the score of variance, it was too late to ask the court, in its charge, to withdraw it from the consideration of the jury. At common law a contract made by an agent could be declared on as if made directly by the principal. The practice act laid down a new rule, but it was one purely of form. If the bill of particulars did not give the defendant such information as he deemed necessary of the nature of the claim in suit, it was his duty to move to have it made more specific. His omission to do this was a waiver of the informality. *Vila v. Weston*, 33 Conn. 42, 48; *Nothe v. Nomer*, 54 Conn. 326, 8 Atl. 134; *Santo v. Maynard*, 57 Conn. 157, 17 Atl. 700.

The plaintiff was allowed, against the defendant's objection, to testify that Simeon Plumb was a man of no property, so far as he knew. It was not disputed that all the goods charged to the defendant had been ordered by

Simeon Plumb, and sold on credit. The plaintiff claimed that he had extended this credit to the defendant, and was justified by the circumstances in so doing. The defendant denied that Simeon Plumb had any authority to buy on his credit the goods charged in 1891, and the main controversy was as to this point. Unless excluded by some rule or principle of law, any fact may be proved which logically tends to aid the trier in the determination of the issue. Evidence is admitted, not because it is shown to be competent, but because it is not shown to be incompetent. No precise and universal test of relevancy is furnished by the law. The question must be determined in each case according to the teachings of reason and judicial experience. *Thayer, Cas. Ev. 2, 3*. "If the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury." *Insurance Co. v. Weide*, 11 Wall. 438, 440. The question as to its admission or rejection addresses itself to the court as one to be answered with a view to practical, rather than theoretical, considerations. The guiding principle is well stated in *Stephen's Digest of the Law of Evidence* (page 38, c. 1) in these words: "The word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events, one, either taken by itself, or in connection with other facts, proves or renders probable the past, present, or future existence or nonexistence of the other." The jury, in the case at bar, were to determine whether it was probable that the plaintiff, after charging all the materials furnished on the order of Simeon Plumb for the construction of three houses in Bridgeport, to the defendant, as the principal for whom Plumb acted, and for whom it was not denied that he had authority to act, proceeded to furnish like materials for the construction of five other houses in Bridgeport on the order of Plumb, and to charge them to the defendant, when he really gave credit to Plumb, and dealt with him as the only party to the transaction. According to the common course of human conduct, a merchant is not likely to continue for several months to make almost daily sales, on credit, of goods worth in the aggregate several hundred dollars, to a man who, so far as he knows, is destitute of any means to pay for them. *Inglis v. Usherwood*, 1 East, 515, 524; *O'Brien v. Norris*, 16 Md. 122. If he has been selling to him the same line of goods previously, as an agent for a responsible principal, and claims that the sales in question were made in the same way and under the same circumstances, any evidence which renders a change of credit improbable is relevant to an inquiry as to whether such a change was made. We think the plaintiff's testimony, taken in connection with the other evidence already in the case, fairly tended

to throw light on the matter in controversy, and was properly received.

The court erred in sustaining the plaintiff's objection to the introduction of the defendant's ledger, on which there were credits to the plaintiff for the goods furnished in 1890, but none for those furnished in 1891. Under Gen. St. § 1041, entries in the books of each party, relative to such a transaction, are equally admissible. The objection, however, was subsequently withdrawn, and the ledger put in evidence. It is apparent that no injury could have resulted to the defendant from its temporary exclusion, and this consequently furnishes no ground of appeal.

Several witnesses testified in behalf of the plaintiff to conversations with the defendant in which he promised to pay the charges which were the subject of the action, and they declared that they gave all that he said, on these occasions, which they remembered. The defendant afterwards testified that what they had stated was untrue, and that he did not make any such promises. The same witnesses were recalled in rebuttal, and after giving certain evidence, proper at that stage of the case, were asked if they wished to change their testimony in chief, in view of the denials which had been made. They did not profess that their remembrance had been refreshed in any way since they had been on the stand before. The court admitted the inquiry, against the defendant's objection, and this is set up as a reason of appeal. The finding does not show what answers were elicited. They may have been a simple negative. They may have been such as to modify materially the testimony which the witnesses had previously given. They may have been such as to repeat and amplify it. A witness who desires an opportunity to correct a statement which he has made upon the stand, in view of contradictory testimony subsequently introduced, has a right to be heard for that purpose, but it should be sought at the earliest convenient time. It does not appear how long the denial by the defendant was made before the close of the evidence offered in his behalf. It may be that nothing intervened between that and the testimony in rebuttal. The law leaves the order of the admission of testimony to be regulated by the discretion of the trial court. For aught that appears, this discretion was wisely exercised in this instance; but, whether wisely or not, there is nothing in the record to take the case out of the ordinary rule that in such matters the decision of the trial court is not the subject of review.

The defendant asked the court to charge the jury that, unless Simeon Plumb was actually authorized by him to order materials for the five houses not erected on his land, there could be no recovery for their price, if the plaintiff supplied them without inquiry of him as to the extent of Simeon Plumb's authority, but relied on the authority the latter had to order materials for the first

three houses, or on what he declared his authority to be as respects the others. This instruction was properly refused, since it failed to notice or explain the effect of a ratification by the defendant, or of an appearance of authority from him such as to raise an estoppel. The plaintiff claimed to recover on the ground both of an actual agency, and of acts on the part of the defendant which estopped him from denying such an agency, and of a ratification; and there was evidence in support of each of these claims, before the jury.

After explaining the claim of the defendant that the agency of Simeon Plumb was confined to the purchase of materials for the three houses first built, the court instructed the jury that, if such were its limits, then, if the plaintiff dealt with Simeon Plumb without ascertaining the extent of his agency, he dealt with him at his peril, and that, in determining whether Simeon Plumb was the defendant's agent throughout the transaction, they were not to consider the acts of Plumb as tending to prove that agency, but that authorization or ratification by the defendant could be proved only by his own acts and conduct. Exception is taken to these instructions because they did not sufficiently specify what conduct or acts on the part of the defendant would warrant the jury in finding the issue against him. The court had previously called their attention to all the testimony as to the acts and conduct of the defendant, and told them that it tended to support the plaintiff's claims, but that it was for them to say whether it proved them or not. There was no necessity for dissecting the plaintiff's evidence, and apportioning each item to the particular claim to which it might seem to the court most applicable. The general principles of law which governed the case were clearly stated, and the jury would have been confused, rather than enlightened, by any attempt to marshal the testimony in formal divisions. The defendant argues that the jury should have been told that the evidence of the authority from him to Simeon Plumb to buy materials for the first three houses could furnish no basis for an inference that the plaintiff had a right to believe the agency extended to the other five. But as we have already said, in discussing the admissibility of Plumb's declarations to the plaintiff when the first purchases were made, the manner in which the course of dealing between the plaintiff and Plumb began was one of the circumstances to be considered in determining what appearance of authority he had been given by the defendant. The question was not what inference it might warrant, standing alone, but what inference might be warranted by the whole mass of evidence, of which it formed an indistinguishable part.

It is also urged that the jury should have been told that no conduct, acts, or words of the defendant, after all the materials had been furnished, could be sufficient to lead the plaintiff to assume that the defendant was

responsible, in such a way as to make him liable in this action. Such an instruction would have been misleading and improper. There was no claim that conduct or declarations after the goods were supplied could be the foundation of any estoppel, but it is obvious that they might amount to a ratification, and, if so, would tend directly to support a recovery.

The parties stipulated upon the trial that it should be taken as a fact that the last five houses were built under contracts between Simeon Plumb and the respective owners of the several lots on which they were erected, and that he received and receipted for their payments on these contracts until April, 1891, when he gave the defendant orders upon them to make all remaining payments to him. The defendant offered evidence tending to prove that Simeon Plumb asked him to advance the working capital for the construction of these five houses, and divide the profits, which he declined to do; that he agreed to advance him, weekly, funds to pay the workmen, provided he would turn over to him the first payments on the contracts, to such extent as might be necessary to reimburse him, with interest; that in April, 1891, becoming alarmed at the condition of their accounts, he got the orders above described, but did not assume the contracts; and that he never collected on the orders enough to pay him for his advances. The defendant requested the court to instruct the jury that the plaintiff could have no greater rights of recovery by reason of the defendant's having obtained these orders. This instruction was properly refused. The evidence in question might fairly be weighed by the jury in determining whether these five building contracts were really, and from the beginning, those of Simeon Plumb, as the defendant claimed, or those of the defendant, as the plaintiff claimed. The court properly declined to instruct the jury that, unless Simeon Plumb was in fact authorized by the defendant to order the materials furnished for the last five houses, any oral promise to pay for them would be a promise to pay the debt of another, and within the statute of frauds. This request necessarily assumed both that these materials were originally supplied on the credit of Simeon Plumb, and that he still continued to be a debtor for them. *Dillaby v. Willcox*, 60 Conn. 71, 22 Atl. 491. But this was the very point in issue, and the evidence upon which the plaintiff relied to support his action tended to show, not simply that the defendant had in fact authorized the purchases in his behalf, but that, whether this were so or not, he was estopped to deny the existence of such authority, and had also ratified the transaction. The same claim is presented in a different form by the complaint that the jury were not instructed, as requested, that no oral promise by the defendant to pay for materials for these five houses, which had been or were being ordered by

Plumb without authority from him, would be such conduct, acts, or words as would justify the plaintiff in assuming that the defendant was responsible for the materials so ordered. If, while they were being ordered in his name, the defendant orally promised the plaintiff to pay for them, this would plainly be evidence tending to justify the plaintiff in assuming that the defendant was responsible, as the real principal in the transaction.

The defendant requested the court to instruct the jury that if Simeon Plumb had in fact no authority to order the materials for these five houses, the plaintiff could not recover for anything furnished after notice of such want of authority, nor for anything furnished before the defendant knew that Simeon Plumb was buying upon his credit of the plaintiff for these houses. This instruction was properly refused, for it ignored the effect of a ratification, of which some evidence had been submitted. The defendant might have told the plaintiff that Plumb had in fact no authority to contract for him, and still have proceeded to ratify the purchases. Nor does the validity of a ratification depend on the time when the party ratifying learned of the transaction which is ratified.

The defendant asked the court to instruct the jury that the plaintiff could not recover on any promises made by the defendant to pay for materials previously sold and delivered on the order of Simeon Plumb, for use in the last five houses. There was no error in refusing to comply with this request. The complaint is not founded on any special promise. It rests upon a liability for goods bargained, sold, and delivered, and materials furnished, and upon an account stated. The real importance of the promises which the plaintiff claimed that the defendant had made was in their bearing upon the questions of ratification, acceptance of the goods, assent to the prices charged, and admission of the correctness of the account as rendered. A recovery was sought, not on the promises, but for the purchases, to establish a liability for which the promises were proper evidence. It is true that an express promise, founded only on a past consideration, not moved by a previous request, will not support an action; but, in the case at bar, not only is the action brought to recover for the consideration, but there was evidence, of which these promises formed a legitimate part, from which the jury had the right to infer a previous request,—that is, a request by Simeon Plumb as the authorized agent of the defendant.

Exception is taken to a part of the charge in which the jury were told that their verdict should be for the plaintiff, if the defendant, by his acts and conduct, recognized the acts of Simeon Plumb as his own acts, although such recognition was after they were completed, and all the materials had been furnished and delivered. Up-

on this point the plaintiff contends that a ratification, to support a recovery, unless brought in to make out an estoppel, must rest on a voluntary acceptance of benefits at a time when it is open to the party ratifying to accept or reject, or on some other legal consideration moving from the plaintiff. Such is not the law with respect to the ratification of an unauthorized act of one assuming to do it as agent for the party ratifying. *Wilson v. Tuman*, 6 Man. & G. 236, 241. The action in such a case is founded on the original act, and the question of consideration can only be important with regard to that. It is otherwise where there is no claim of agency, but the ratification is of the act of a mere stranger, done on his own account and in his own name. *Hamlin v. Sears*, 82 N. Y. 327, 331.

Of the other errors assigned, none seem to us to have sufficient merit to require their discussion, except one based upon the form of the complaint. This is, in substance, that under the charge the jury were at liberty to return a verdict for the plaintiff on the ground of an estoppel, precluding the defendant from denying that Simeon Plumb made the purchases in question as his agent, although the existence of such an estoppel had not been alleged. The practice act allows acts and contracts to be stated according to their legal effect, but in so doing the pleading should be such as fairly to apprise the adverse party of the state of facts which it is intended to prove. Prac. Bk. p. 14, rule 3, § 1. The plaintiff's complaint alleges an indebtedness for goods sold. He was prepared to support it by evidence tending to show three things: That the goods were purchased for the defendant by an authorized agent; that they were purchased by one whom he had a right, from the defendant's conduct, to regard as his authorized agent; and that the defendant had confirmed the purchases by a subsequent ratification. It would not have been good pleading to set out the evidential facts on which he relied to establish any of these positions. The legal effect of each was the same, in making the defendant a debtor to the plaintiff for the price of the goods. At common law an estoppel in pais was never regarded as in itself a substantive ground of recovery, to be put forward in pleading as part of the plaintiff's case. It was merely a mode of shutting off a defense. A plaintiff who sued upon a cause of action, the existence of which the defendant was equitably estopped from denying, stated the facts necessary to constitute the cause of action in his complaint as if they existed, and, if a denial were pleaded, did not reply specially, stating the matter of estoppel, but simply introduced it in evidence to support his original averments. *Hawley v. Middlebrook*, 28 Conn. 527, 536. It is unnecessary for us to determine what might have been the duty of the plaintiff, had he relied simply on a

liability by estoppel, or simply on a liability by ratification. He did in fact claim an original liability, and, in drafting his complaint, might fairly regard the greater as including the less. No separate count, founded on the matter of estoppel, could have been added, for it would not have been for a separate and distinct cause of action, as distinguished from a separate and distinct claim for relief founded on the same transaction. Prac. Bk. p. 12, rule 2, § 4. *Craft Refrigerating Mach. Co. v. Quinnipiac Brewing Co.*, 63 Conn. 551, 561, 29 Atl. 76. The practice act was adopted to promote simplicity, rather than complexity, in pleading. As it allows special replications and rejoinders to be filed, there is not the same reason which exists in some of the other states, in which a different system of code pleading is found, for anticipating defenses in the complaint, as is done in the charging part of a bill in equity. In actions for goods sold, the common counts may be used whenever they are "an appropriate general statement" of the cause of action. Prac. Bk. p. 12, rule 2, § 1. They were such in the present case, and, as the defendant did not move to have the statement made more specific, it is to be presumed, as has been already said, that it gave him all the information he deemed necessary for his protection. There is no error in the judgment appealed from. The other judges concurred, except ANDREWS, C. J., who dissented as to the admissibility of the declarations of Simeon Plumb at the time of the first purchase.

LINKS et al. v. CONNECTICUT RIVER BANKING CO. et al.

(Supreme Court of Errors of Connecticut. June 7, 1895.)

CORPORATIONS—DISSOLUTION—RECEIVER—ACTIONS—AMENDMENT.

1. Where, under the jurisdiction given by Gen. St. §§ 1942, 1965, for winding up the affairs of a corporation, on petition of stockholders, a decree dissolving a corporation and appointing a receiver has been made, and right of action against delinquent stockholders has thus, by provision of section 1322, been vested in the receiver, creditors cannot sue such stockholders on the refusal of the receiver to sue them, though action is brought in the same court in which the winding up proceedings are pending, but they should in such proceeding apply for removal of the receiver, or order to compel suit to be brought, and, being denied redress, should appeal.

2. A receiver cannot, in the absence of a statute to the contrary, be sued without leave of the court, which appointed him, granted in the cause in which he was appointed.

3. Refusal to allow amendment of a complaint, adding a count, seven months after commencement of action, and after two successive demurrers to the complaint had been sustained, is not reviewable: courts being given power by Gen. St. § 1027, to restrain amendments so far as may be necessary to compel the parties to join issue in a reasonable time for trial.

Appeal from superior court, Hartford county; Robinson, Judge.

Action by Thile Links and others, creditors of the Enterprise Manufacturing Company, for which a receiver had been appointed, against the Connecticut River Banking Company and others, to compel payment by defendants of their unpaid subscriptions to the capital stock of the Enterprise Manufacturing Company. Demurrers were sustained to the complaint, and leave to cite in the receiver as a defendant and to amend the complaint denied. Plaintiffs appeal. Affirmed.

Charles J. Cole and Hugh O'Flaherty, for appellants. Charles E. Perkins and Arthur F. Eggleston, for appellees.

BALDWIN, J. The plaintiffs state a strong case for equitable relief, but they have mistaken their remedy. By Gen. St. §§ 1942, 1965, the superior court, as a court of equity, had power to wind up the affairs of the Enterprise Manufacturing Company, and decree its dissolution, on a petition by stockholders in the company, showing due cause, and, on complaint of any person aggrieved by such doings, to grant such relief as the nature of the case might require. The plaintiffs allege that proceedings of this nature were had, resulting in a decree dissolving the corporation, appointing a receiver, and ordering him to collect all debts due to it forthwith; and that, under this decree, they have proved in those proceedings claims against the corporation to a large amount, which have been allowed by the court. It would seem from the statements in the complaint that the selection of a receiver was inconsiderately made. The demurrer admits that the company was insolvent, and that he was a stockholder who had paid nothing on his stock, a director who had falsely and fraudulently certified under oath, in the organization certificate, that all the stock had been fully paid up in cash, and the secretary of the company at the date of the decree. These circumstances were doubtless unknown to the superior court when he was appointed, and if brought to its attention, on a motion for his removal, would be such as to require immediate action to that end. But, while their existence is conceded in the case at bar, it cannot be assumed in passing upon the questions involved in the proceedings in the other action. The plaintiffs made the Enterprise Manufacturing Company and the receiver of the company, as such, garnishees in their writ, but not defendants. He was made a defendant individually and in his own right, as a delinquent stockholder, and joined in the demurrer; but this cannot affect his rights, as receiver, to be heard before he is condemned.

The plaintiffs allege that he has refused to sue any of the delinquent stockholders, or to allow them to sue in his name, upon giving him sufficient indemnity; that he is acting in collusion with the other stockholders; that he has abandoned all title to their unpaid subscriptions; and that the superior court has

refused to order him to sue, or to let them sue in his behalf. In determining the effect of such a condition of things upon the plaintiffs' rights to the remedy they seek, we are again, and for the same reason, compelled to regard it as not established for the purpose of determining what relief they might obtain or should have obtained in the receiver suit, after a decision by the receiver to abandon the stock claims as not worth pursuing. As creditors of the corporation, whose claims had been proved and allowed under the decree, they had the right to be heard there upon any of the doings of the court or the receiver, by which they might claim to be aggrieved. They had the right to ask for the removal of the receiver, but they have not done this. They had the right, should any decree be passed in the progress of that cause, which as to them was a final one, and was unfavorable to their interests, to bring it before this court for review upon appeal. *Trustees v. Greenough*, 105 U. S. 527; *Neville v. Carriage Co.*, 47 Conn. 167; *Leonard v. Insurance Co.*, 65 Conn. 529, 33 Atl. 511. The Enterprise Manufacturing Company has been dissolved, and its rights of action against its delinquent stockholders have passed to its receiver. Gen. St. § 1322. The administration of its estate is in the hands of the superior court for Hartford county, but only in the exercise of its jurisdiction over the cause in which the receiver was appointed. It can no more make orders to affect that cause, while sitting to hear another, between different parties, pending in the same county, than if it were a different court, or in session in a different county. These distinctions are not merely formal; they are essential to the administration of justice. An estate in the possession of a receiver must be administered in the presence of those who were parties to the appointment, or they would be denied their day in court.

The plaintiffs sought to improve their situation by applying to the court, in the present suit, for an order under which the receiver could be made a codefendant. This application was properly refused, the leave of the court in the receiver suit not having previously been obtained. A receiver appointed by judicial authority cannot, in the absence of a statute to the contrary, be subjected to suit without the leave of the court whose officer he is, granted in the case in which he was appointed. *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008. He is presumed to be acting according to the will of that court; and to sue him is necessarily to bring in another court to take part in the disposition of the estate which has been put in his charge. The rule that, where a court has once acquired jurisdiction over a particular subject-matter, it retains it free from interference by any other court, is that which governs; and cases affecting legislative receiverships or receivers of national banks are therefore inapplicable as authorities.

The refusal to allow the amendment of the

complaint, by adding, seven months subsequent to the institution of the action, and after two successive demurrers had been sustained, a second count, constitutes no ground of appeal. Gen. St. § 1027.

There is no error in the judgment of the superior court. The other judges concurred.

STATE ex rel. OAKLEY v. FOWLER.

(Supreme Court of Errors of Connecticut. June 22, 1895.)

CITY AND TOWN COLLECTORS OF HARTFORD—FILLING VACANCIES.

Under Gen. St. 1866, p. 729, § 94, providing that when a vacancy shall exist in either the office of city collector or of town collector of the taxes of Hartford, the remaining collector shall discharge the duties of the office for the unexpired term, and that, in case a vacancy shall exist in both offices, "the same shall be filled for the unexpired portion of said term, by a major vote of the selectmen of said town, and the aldermen of said city, at a meeting specially called and warned by the mayor of the city for that purpose," there being a vacancy in both offices, they should be filled by a majority of those present at a joint meeting of the selectmen and the aldermen. Per Baldwin and Hamersley, JJ., dissenting.

Dissenting opinion. For majority opinion, see 32 Atl. 162.

BALDWIN, J. (dissenting). On May 6th, 1894, Frederick S. Brown died, while holding the two offices of collector of taxes for the town of Hartford and collector of taxes for the city of Hartford. His term of office, as respects each of these positions, would have expired at the close of that day, and he had been reappointed to each for the next term of two years, beginning on May 7th. It was provided by law (Gen. St. 1866, p. 729, § 94; Gen. St. 1888, § 3902) that whenever a vacancy should exist in either of these offices the remaining collector should discharge all the duties of the vacant office for the unexpired portion of the term; and that, in case a vacancy should exist in both of said offices, "the same shall be filled for the unexpired portion of said term, by a major vote of the selectmen of said town, and the aldermen of said city, at a meeting specially called and warned by the mayor of the city for that purpose." Until May 11, 1894, a vacancy existed in both of said offices, and on that day the selectmen undertook to fill it, as respects that of collector of town taxes. In my opinion, if Gen. St. 1888, § 63, authorizes the appointment of such a collector by the town or the selectmen, in case of a vacancy in both the offices of collector of town taxes and collector of city taxes in Hartford, it is only when there has been a failure to pursue or an unreasonable delay in pursuing the other mode of selection specially provided for by section 3902. That mode, I think, was the action of a majority of those present at a joint meeting of the selectmen of the town and the aldermen of the city, to be specially

called and warned by the mayor of the city for that purpose, agreeably to the requirements of section 94, tit. 64, c. 2, of the Revision of 1866. The provisions of that chapter appear to me to have been drawn in contemplation of the probability that both these offices would ordinarily be filled by the same person. That result might naturally be looked for in view of the necessarily close relations of the town and city to each other, the practical identity of interest, and the convenience of the taxpayers. By section 93, repeated in Gen. St. 1888, § 38, the official term of each collector is made the same, thus prolonging that of the collector of the town of Hartford a year beyond that of the collector of any other town in the state; while by section 95, Gen. St. 1866, the first selectman of the town and the mayor of the city are required to provide one and the same office for the payment and collection of both town and city taxes, half of the expense of which is to be paid by each municipality. The provision for a joint meeting of representatives of each municipality, to be controlled by a major vote of those participating in it, was well adapted to secure prompt and decisive action in an event which rendered a speedy election of the highest importance. To construe section 94 as contemplating two meetings—one of the board of selectmen, called by their own authority to choose a town collector, and another of the board of aldermen, called by the mayor to choose a city collector—seems to me not only to do violence to the natural meaning of the language employed, but to deprive the statute, so far as concerns town collectors, of any substantial effect. Without it, the selectmen could have acted alone under Gen. St. 1888, § 63, and no legislation was needed to declare that they could elect by a major vote. As to the objection that no provision is made for organizing the joint meeting, or for recording or certifying to its doings, it would lie equally to holding the joint meeting of the general assembly for the choice of a governor, required by article 4, § 2, of our constitution. Gen. St. 1888, § 63, provides that if any town office in any town shall be vacant, the vacancy may be filled by the town in town meeting, and that until such action is had it may be filled by the selectmen. The defendant was chosen town collector by the selectmen on May 11th, only five days after the decease of Mr. Brown. The relator founds his claim to the office of city collector upon a vote of the board of aldermen, passed on November 26th. The city charter gives the common council power to prescribe the manner of filling vacancies occurring in any city office; but if, under that authority, any ordinance could have been framed for supplying temporarily a vacancy in the office of city collector, in a case proper for the action of a joint meeting of the selectmen and aldermen, none having, in fact, been enacted, the aldermen were, in my view of the law,

incompetent to act alone. The relator therefore appears to me to have no interest in maintaining this action, except such as belongs to him as both a freeman and an alderman of the city. That interest, however, I should deem sufficient. *Com v. Commissioners of Philadelphia*, 1 Serg. & R. 382; *State v. Martin*, 46 Conn. 479, 482. The information also is filed by the state's attorney, in his own proper person, as well as at the relation of Mr. Oakley, and both are parties to the reservation. I therefore concur in the advice given to the superior court, and in holding that the death of Mr. Brown created a vacancy in both offices, to be filled by the selectmen and aldermen pursuant to section 94, tit. 64, c. 2, of the Revision of 1866; but I dissent from the opinion of the court as to the right, under that section, of the selectmen to choose a town collector, and of the aldermen to choose a city collector, in separate meetings; nor am I prepared to assent to the views of the majority of the court in respect to what would have been the effect on the vote of the selectmen for the defendant as town collector, if otherwise valid, of his being one of the board, or of his participation in that action.

HAMERSLEY, J. (dissenting). I concur in the opinion of Judge BALDWIN in so far as it relates to the appointment as city collector of the relator, Oakley. I think no advice should be given upon the question of the right of the town collector *ex officio* to perform the duties of the city collector, and the legality of Fowler's appointment as town collector. The latter question may depend on facts about which the record is silent, and which it is evident were not considered by the parties when they agreed upon the finding; and therefore a hearing should be had before final judgment on the question of Fowler's title is rendered. It is obvious that in the absence of any personal interest in the relator, there may be grave question whether the public interest would justify further prosecution of the information; and I think the state's attorney and the superior court should not be embarrassed in their action on that question by any premature expression of opinion from this court. I dissent from the advice given by the court.

COOK v. RAYMOND.

(Supreme Court of Errors of Connecticut. June 7, 1895.)

TRESPASS—TAKING OYSTERS—NATURAL OYSTER BEDS—PAROL EVIDENCE—TITLE—HOW QUESTIONED—AMENDMENT OF STATUTE.

1. Act April 14, 1881, placed all shell fisheries within the area described under the exclusive jurisdiction of the state, and empowered the commissioners of shell fisheries to grant franchises for cultivating shell fish therein; placed all shell fisheries not within such area within the jurisdiction of the towns in which they are located, and authorized the towns to grant franchises for cultivating shell fish within the latter

area; provided for the record of future grants that might be made by the state or towns; forbade all future grants of franchises in any natural oyster or clam bed; validated all designations and transfers of oyster grounds previously made, except designations made of natural oyster beds, which remained void, and directed such commissioners to cause a survey to be made of all natural oyster beds within the area of the state jurisdiction, and to locate and delineate such natural beds on such map, and report to the general assembly. Act April 23, 1885 (Pub. Acts 1885, p. 525), accepted and established the locations and designations under state jurisdiction made by such commissioners, specifying the boundary of each natural bed. *Held* that, in an action for trespass on plaintiff's oyster bed, claimed under a designation made prior to Act April 14, 1881, such statutes did not prevent proving by parol evidence, the fact that the ground designated was, at the time of designation, a natural oyster bed. *State v. Nash*, 25 Atl. 451, 62 Conn. 47, distinguished.

2. Pub. Acts 1893, c. 110, directs the shell fish commissioners to mark certain established oyster beds with state buoys, and provides a penalty for displacing such buoys, and that "no buoys shall be so set or lines so run as to include within the natural or public beds any private or designated grounds." The act does not purport to amend Gen. St. § 2328, nor to displace or alter existing legislation. *Held*, that such act did not amend such section, so as to exclude from the natural oyster beds established by such section any ground the shell fish commissioners may leave out in buoying one of such beds as directed by the act.

3. The mode of questioning the title of a claimant to a designated natural oyster bed is not limited to a proceeding, under Gen. St. § 2356, for the removal of stakes from an oyster bed which has been improperly staked out, in the absence of anything in such section preventing the public from exercising its right of fishing on natural oyster beds which individuals attempt to appropriate under a pretended designation; but it may be done by defendant in an action by such claimant in the nature of trespass for unlawfully entering on plaintiff's oyster ground, and taking and carrying away oysters and clams.

4. Gen. St. § 2356, provides that the court, when ordering the removal of stakes inclosing an oyster bed improperly staked, shall, if oysters have been planted or improvements made in good faith before the petition for removal was brought, allow a reasonable time for the removal of such oysters and improvements. *Held* that, in an action of trespass for unlawfully entering on plaintiff's oyster ground, and taking and carrying away oysters and clams, where it appears that such ground is a natural oyster bed, and that plaintiff in good faith planted some of the oysters taken by defendant, plaintiff cannot recover the value of such oysters.

Case reserved from court of common pleas, Fairfield county; Curtis, Judge.

Action by Oliver Cook against William Raymond, in the nature of trespass, for unlawfully entering on plaintiff's oyster ground, and taking and carrying away oysters and clams, commenced before a justice of the peace, and taken on appeal by defendant to the court of common pleas. Case reserved, on facts found, for the advice and consideration of the supreme court of errors. Judgment for defendant advised.

Levi Warner and J. Belden Hurlbutt, for plaintiff. John H. Perry and Russell Frost, for defendant.

HAMERSLEY, J. The complaint is in the nature of an action of trespass. The de-

defendant justifies. The main fact in issue is the validity of the plaintiff's title to the oyster plantation described in the complaint. The material facts bearing on the question of title are as follows: The ground in question was designated to individuals, for the planting and cultivation of oysters thereon, between February 4, 1879, and February 10, 1881, and the rights acquired by such designation were, prior to the alleged trespass, conveyed to the plaintiff. At the time of designation the ground designated was a natural oyster bed and a natural clam bed (this fact was found upon parol evidence, objected to by the plaintiff because the evidence was parol, and received subject to the objection). The designated ground constitutes the westerly end of one of the natural beds under state jurisdiction, known as "Roton Point and Fish Island Natural Beds," located and described in section 2328 of the General Statutes. Pursuant to the provisions of chapter 110, Pub. Acts 1893, the state shell fish commissioners caused the Roton Point and Fish Island natural beds to be buoyed, leaving out the ground now in question (evidence of this fact was objected to by the defendant as immaterial, and admitted subject to the objection). Upon the facts so found, judgment must be rendered for the defendant.

The designation of a natural oyster bed is void, and cannot affect the right of the public to take oysters on such ground. The fact that ground designated was, at the time of designation, a natural oyster bed, may be proved by parol. *Averill v. Hull*, 37 Conn. 320. The plaintiff claims that, since the legislation of 1881 and 1885, parol evidence of such fact is inadmissible, and cites *State v. Nash*, 62 Conn. 47, 25 Atl. 451, in support of his claim. By the act of April 14, 1881, the legislature placed all shell fisheries within the area therein described under the exclusive jurisdiction and control of the state, and empowered the commissioners of shell fisheries to grant, in the name of the state, franchises for cultivating shell fish within that area. It placed all shell fisheries not within that area within the jurisdiction and control of the towns in which they are located, and authorized the town authorities to grant franchises for cultivating shell fish within this area of town jurisdiction. It provided for the record of future grants that might be made, either by the state, or by the town. It forbade all future grants of franchises in any natural oyster or clam bed. It validated all designations and transfers of oyster grounds previously made, except designations made of natural oyster beds, such designations remaining after the passage of the act, as they were before, absolutely void. It directed the shell fish commissioners to cause a survey to be made of all the natural oyster beds within the area of state jurisdiction, and to locate and delineate such natural beds on said map, and report to the general assembly. In 1885 the locations and designations of the natural oyster beds

under state jurisdiction, as made by the commissioners of shell fisheries pursuant to the act of 1881, were, by the act of April 23, 1885 (Pub. Acts 1885, p. 525), "accepted, ratified, established and confirmed by the state as follows, to wit," specifying with mathematical accuracy the boundaries of each natural bed, including the Roton Point and Fish Island natural beds. *State v. Nash*, supra, holds that "the effect of these enactments is that, in a proceeding like the present (i. e. a criminal complaint for taking oysters from a plantation within the state jurisdiction, and designated by the shell fish commissioners since 1885), and in a case where the grant of the franchise to private parties has been made since such enactment, while the fact that such ground is a natural oyster bed would render the grant invalid, the only proof of such fact which is admissible by way of collateral attack is, not by parol evidence, but by showing that such ground is embraced in the locations and descriptions contained in the statute of the natural oyster beds under state jurisdiction." Neither the precise point decided, nor the reason of the decision, affect the present case. *State v. Nash* is dealing with a collateral attack upon a designation. Here we have a direct attack. The validity of the designation is the very thing, and substantially the only thing, put in issue by the pleadings. There is no way by which the validity of a designation of a natural growth oyster bed, made prior to April, 1881, can be attacked more directly than in an action of trespass, where, as in this case, the plaintiff alleges a special title to the locus in quo by virtue of the designation, on which allegation issue is joined. Again, *State v. Nash* is confined to grants made by the state since the law establishing state jurisdiction of shell fisheries, and holds that, in a collateral attack on such grants, evidence that the ground covered by the grant is in fact a natural oyster bed must be confined to showing that the ground in question is embraced within the locations and descriptions of natural beds contained in the statute. Such record evidence of the fact that, at the time of designation, the ground in question was not a natural oyster bed, cannot be collaterally attacked. But, when there is involved the validity of a grant made by a town, prior to the establishment of state jurisdiction, and prior to the establishment of any statutory or authoritative record of natural oyster beds, there is then no evidence that can be produced of such grounds being at the time of designation a natural oyster bed, except parol evidence. The conditions are then exactly the same as when *Averill v. Hull*, supra, was decided. Analogy between the two cases is impossible; but, if it were possible, it would not benefit the plaintiff, because it appears that the ground covered by his designation is embraced within the statutory description of natural oyster beds.

The plaintiff, however, claims that chap-

ter 110 of the Public Acts of 1893 amended section 2328, so as to exclude from the natural oyster beds established by that section any ground the shell fish commissioners may leave out in buoying one of those beds as directed by the act. Such effect cannot be given to the act of 1893. This act does not purport to amend section 2328, nor to repeal or alter any existing legislation. On the contrary, it treats the existing statutory description of the Roton Point and Fish Island beds as conclusive. It is simply administrative, and directs the shell fish commissioners to mark those established beds, and two others named, with state buoys, and provides a penalty for displacing such buoys. The plaintiff's claim is based wholly on the following sentence: "No buoys shall be so set or lines so run as to include within the natural or public beds any private or designated grounds." The object of this direction, and the meaning of the language used, may, as claimed, be open to doubt; but it is certain that this phrase cannot be construed as authorizing the shell fish commissioners, in executing an order to place buoys for marking the natural oyster beds as established by law, to alter that law, and to make a new statute establishing the natural oyster beds within the state jurisdiction.

The plaintiff claims, in his brief, that the question whether the locus was a natural oyster bed could not be raised under the pleadings in this case, because the proceeding under section 2356, for the removal of stakes from an oyster bed which has been improperly staked out, is the only way in which the plaintiff's title can be tested. If the plaintiff can properly raise this question upon the record before us, and if section 2356 applies to an oyster bed within the exclusive jurisdiction of the state, the claim is nevertheless unfounded. There is nothing in section 2356 which prevents the public from exercising its right of fishing on natural oyster beds which individuals attempt to appropriate under a pretended designation. The provisions of this section have been in force in their present form since 1870, and their meaning has been settled. In the case of *In re Clinton Oyster Ground Committee*, 52 Conn. 10, the act of 1870 was treated as furnishing a specific remedy against trespass on public grounds, in addition to the right of any one to take oysters from grounds so illegally designated, and to defend against prosecution, or action for such taking, by showing that the ground was a natural oyster bed. *Town of Clinton v. Bacon* was a petition for an order for the removal of stakes, under section 2356. The ground in question had been designated and staked out in 1863, and had since been continuously kept inclosed; but, during all that time, it had been a natural oyster bed. In

advising a judgment for the plaintiff, this court holds that the proceeding is not an action to test the title, but is in the nature of an equitable proceeding to remove a cloud upon the title of the state, and says: "The pretended designation is void, and the title of the public to the ground is not affected by it; but it, and the stakes set up by the defendant as evidence of it, constitute a cloud upon the title to the ground, and tend to deter the public from the enjoyment of it." 56 Conn. 519, 16 Atl. 548. In *White v. Petty*, 57 Conn. 582, 18 Atl. 253, the court says: "The purpose of the statute of 1875 [act of 1870] is not, as the defendants claim, to provide a way for the trial of questions of title, but to effect the removal of stakes improperly set up, by means of which the public are deterred from exercising their rights upon ground belonging to them." In *State v. Bassett*, 64 Conn. 217, 29 Atl. 471, in a prosecution for willful trespass upon a designated bed, parol evidence of title in the state by reason of the ground being a natural oyster bed, and the consequent invalidity of the designation, was admitted, and its admissibility was unquestioned.

The plaintiff also claims that section 2356 of the General Statutes, in providing that the court, when ordering the removal of stakes inclosing an oyster bed improperly staked, shall, if oysters have been planted or improvements made in good faith before the petition for removal was brought, allow a reasonable time for the removal of such oysters and improvements, gives to persons who in good faith trespass upon an oyster bed belonging to the public the right to recover in an action of trespass the value of any oysters they may plant on such bed, and which may be mingled with oysters lawfully taken therefrom, and claims that, since some of the oysters taken by the defendant were proved to have been planted by the plaintiff in good faith, the plaintiff is entitled to a judgment for the value of such oysters. The value of all the oysters taken is found to be one dollar, and it appears that the plaintiff did not prove whether the planted oysters mingled with those taken were two or more, or that they had any value; and the plaintiff does not state the amount of the judgment which he claims. The result, however, would be the same, if the finding showed the number of cents which represent the value of the planted oysters. This provision of section 2356 was intended to protect, from the injury of a sudden and forcible ejection, a trespasser upon public grounds who has acted in good faith. It does not restrict the rights of the public in the use of natural oyster beds.

The court of common pleas is advised to render judgment for the defendant. The other judges concurred.

CHILLINGWORTH v. EASTERN TINWARE CO. et al.

(Supreme Court of Errors of Connecticut. June 22, 1895.)

PERSONALTY—EVIDENCE OF OWNERSHIP—MORTGAGE—BY WHAT LAWS GOVERNED.

1. The presumption from the giving by a corporation of a mortgage on personalty that it was then the owner thereof, and continued such till the property was attached, a year later, by plaintiff, as the property of the corporation, is overcome by evidence that, at the time of the attachment, another was in exclusive possession thereof, claiming it as its own.

2. A chattel mortgage made in New York by a New York corporation to a creditor of that state, on personalty in Connecticut, is not governed by the laws of New York relative to mortgages given in contemplation of insolvency, the corporation being empowered to do business in Connecticut, its principal business being carried on there, the property mortgaged being machinery in permanent use in its factory in that state, and the mortgage being executed as required by the laws of Connecticut, and being recorded there.

Appeal from superior court, New Haven county; George W. Wheeler, Judge.

Action by Felix Chillingworth against the Eastern Tinware Company and others. There was a judgment of nonsuit, which the court refused to set aside, and plaintiff appeals. Affirmed.

James H. Webb and John A. Garver, for appellant. Henry Stoddard, for appellees.

TORRANCE, J. This is an action to recover damages for the conversion of personal property to which the plaintiff claimed title under an execution sale. The defense was a general denial. On the trial below, the plaintiff claimed that the property described in the complaint was formerly the property of the United States Stamping Company, a manufacturing corporation organized under the laws of the state of New York, and carrying on business in Portland, in this state; that in November, 1888, one Samuel H. Smith brought a suit against said stamping company in the superior court for Middlesex county, in this state, and attached therein said property in Portland, as the property of said corporation; that afterwards, in February, 1891, judgment by default was rendered in said suit in favor of Smith for \$30,000; that upon said judgment an execution was issued and levied upon the attached property in March, 1891; and that in April, 1891, said property was duly sold under said execution to the plaintiff. The evidence offered by the plaintiff in support of these claims was mostly documentary.

One of the important questions in the case was whether the United States Stamping Company, at the time of the attachment or the levy and sale aforesaid, owned or had any interest in the personal property described in the complaint; and, to prove that it had, the plaintiff, among other matters, put in evidence the fact that said corpora-

tion in July, 1887, made and delivered a chattel mortgage of said property to August Pottier, to secure an indebtedness from it to him of nearly \$80,000. This was substantially all the evidence offered by the plaintiff on this point in the case. He also offered evidence tending to show that this chattel mortgage was executed by said corporation in contemplation of insolvency, and claimed that, if the mortgage was so executed, it was void under the laws of New York. The defendants claimed that the chattel mortgage was valid. After the plaintiff had rested his case, the defendants moved for judgment as in case of nonsuit, on several grounds, among which were these two on which the court granted the motion, namely, that the evidence did not show prima facie that the stamping company owned or had any interest in the property at the time of the attachment or levy and sale under which the plaintiff claimed, and because, assuming the validity of the chattel mortgage aforesaid, the evidence showed that the levy under which the plaintiff claimed ignored the existence of said mortgage, and was therefore invalid. The court below rendered judgment as of nonsuit, and refused, on motion made for that purpose, to set it aside, and the plaintiff appealed to this court.

The first question is whether the plaintiff's evidence fairly tends to show that the stamping company owned the property at the time in question. As before stated, the plaintiff's case, upon this point of it, rests chiefly upon the evidence relating to the execution and delivery of the chattel mortgage. We think it must be conceded that the evidence upon this point, if it stood alone and uncontradicted, does fairly tend to prove that the stamping company was the owner of the property in July, 1887; and, in the absence of anything to the contrary, the presumption would be that this ownership continued up to the time of the attachment and the levy of the execution. But this evidence as to the execution and delivery of the chattel mortgage does not stand alone, and the defendants claim that its probative force is entirely overcome by the other evidence introduced by the plaintiff in the case. That other evidence in substance consists of the following matters: The organization in September, 1888, of the Eastern Tinware Company, one of the defendants, under the laws of New York, for the purpose of manufacturing tinware in Portland, in this state, of which corporation Joseph Scheider, the other defendant, was and is the president; the certificate of attachment in the case of Smith v. United States Stamping Co., dated November 22, 1888, which recites that the land in Portland, on which the property here in dispute was then located, formerly stood of record in the name of the United States Stamping Company, "but has recently been

transferred to the Eastern Tinware Company," and further reciting that the property here in dispute, and which was then attached, was then "situated in the buildings on the premises formerly owned and occupied by the United States Stamping Company in said Portland, but now occupied by the Eastern Tinware Company, and consisting of machinery, tools, implements, etc.," and further reciting that the Eastern Tinware Company had "the charge and possession" of the personal property attached at the time of the attachment; evidence showing an execution sale to Rebecca E. Ingersoll, in August, 1888, of all the right, title, and interest of the United States Stamping Company in and to substantially all of the property here in dispute; and also evidence tending to show that, at the time of the execution sale to the plaintiff, the Eastern Tinware Company claimed to own the property in dispute, and then refused to permit the plaintiff or the officer to go into the building, or to interfere with or remove any of the property. It furthermore appears from the record, by statements of plaintiff's counsel, that the Potier mortgage was foreclosed, and the property covered by it (which is the property here in dispute) sold under such foreclosure on the 4th of August, 1888, and that the title to said property, under said foreclosure sale, ultimately became vested in the Eastern Tinware Company, prior to the Smith attachment, in November, 1888. These statements of counsel are not, strictly speaking, evidence in the case, and they were made, principally, in the hearing upon the plaintiff's motion to reopen the case. Nevertheless, we think they should be taken into account in determining whether the court below erred in granting the nonsuit. They were made in open court, for the purpose of giving to the court in this informal way such knowledge of the matters as the counsel possessed, and for the legitimate purpose of influencing the action of the court. Of course, these statements of counsel for the plaintiff as to the foreclosure of the chattel mortgage, and as to the title thereby acquired vesting in the plaintiff, must be taken in connection with his claim that the mortgage was void, and therefore all the proceedings under it were of no effect as against Smith or the plaintiff, who claims under him.

The foregoing is the substance of the evidence in the case bearing against the presumption that the ownership of the stamping company continued till the time of the Smith attachment. Taking it altogether, and assuming the validity of the chattel mortgage, we think it entirely overcomes the presumption in question; and, even if we assume the invalidity of the chattel mortgage, we still think the other evidence in the case tends fairly to show that the Eastern Tinware Company, at the time of the attachment, was in exclusive possession of this

property, claiming it as its own, and that such evidence overcomes the presumption relied upon by the plaintiff, and leaves him substantially in the position of one having no material evidence upon a vital point in his case.

The conclusion here reached makes it, perhaps, unnecessary to examine the second ground upon which the nonsuit was granted, involving the question as to the validity of the chattel mortgage of July, 1887; but as that was a prominent question in the case, and may come up again if another suit is brought, and has been fully argued before us, we have deemed it advisable to express our views, briefly, upon that question.

The mortgage in question was made by a New York corporation to a creditor of the same state, and it fairly appears from the evidence that the instrument was made and executed in New York on the 13th of July, 1887. Whether it was delivered in New York or in Connecticut does not, perhaps, clearly appear, but for our present purpose it is perhaps fair to assume that it was delivered in New York. Upon this point in the case the plaintiff's claims, briefly stated, are these: This mortgage was made in the state of New York by a New York corporation, in contemplation of insolvency. Its validity is to be determined by the law of the state where it was made. By that law it was utterly void; and, that being so, neither recording it in Portland nor any other subsequent act could give it any validity. We think it must be conceded, upon the evidence as it stands, that the mortgage was made in contemplation of insolvency, within the meaning of the New York statute, and also that it comes within the language of the New York statute which declares such a transfer to be utterly void. 3 Rev. St. (8th Ed.) p. 1729, § 4.

The plaintiff's claim is based upon two assumptions, namely, that the mortgage must be regarded as a New York transaction, entered into with reference to the laws of New York, and that it comes within the spirit of the New York laws, and would be held by the courts of that state to be void. With regard to this last assumption it may be questionable whether the New York courts would hold that a mortgage of real estate or personal property situated outside of that state comes within the spirit of the law, and we are not aware of any case there where it has been so held. In *Roe v. Jerome*, 18 Conn. 138, a New York attorney purchased in New York an inland bill of exchange for the purpose and with the intent of bringing a suit upon it in Connecticut. His act in so doing came clearly within the language of the New York law, which made such a purchase, for the purpose of bringing suit upon it, a misdemeanor punishable by fine and imprisonment and disbarment; but this court held that such a purchase for the purpose of bringing suit upon it in Connecticut was not with-

in the spirit of the law, and was not prohibited. In this view of the matter, it is perhaps not clear that the New York courts would hold the mortgage to be void; but, however this may be, we think the transaction must be regarded as a Connecticut transaction, entered into with reference to Connecticut law, and that in this aspect of it our courts must regard it as a valid transaction, whatever view the courts of New York might take with regard to it. The mortgagor was, indeed, a New York corporation, but it was empowered to do business in this state, and, for some years prior to the mortgage, its principal business had been carried on here, and, so far as the evidence shows, nearly all its property was here. At and before the time of the mortgage it owned valuable real estate here, on which, at the time of the mortgage, all the property covered by the mortgage was situated, consisting of machinery, fixed and movable, and tools and implements of divers kinds, in permanent use there, in connection with the business carried on in Portland. The mortgage described all of the property as property situated in Portland in the factory of the mortgagor. It was made, executed, witnessed, and acknowledged as required by our law. On the day after its execution, it was duly recorded on the Portland land records, as required by our law; and it was executed before a commissioner for this state in New York. The mortgage affected no property in New York, and was not intended to have any operation or effect upon property there situated. It affected, and was intended to affect, Connecticut property only, and to have its entire beneficial operation and effect as a security here. Under these circumstances, the mere fact, if it be so, that the instrument was formally executed and delivered in New York, is not of itself decisive of the question as to what law shall control in determining the validity of the mortgage.

The general rule that the *lex loci contractus* shall govern in this matter is, theoretically at least, founded upon the presumed intention that the parties contracted with reference to that law; and when the contract is to be performed elsewhere, or is to have its entire beneficial operation and effect elsewhere, then the law of the latter place is to govern, because, in the absence of anything to the contrary, it is presumed that the parties so intended. "The rules already considered suppose that the performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance." Story, *Conf. Laws*, § 290. "Contracts are to be construed and interpreted according

to the laws of the state in which they are made, unless from their tenor it is perceived that they were entered into with a view to the laws of some other state." *Blanchard v. Russell*, 13 Mass. 1, 5. In *Greathead v. Walton*, 40 Conn. 226-236, this court said: "If the law of New York would not, under the circumstances, impose any liability on the defendant, we must take it for granted that the parties entered into this contract with reference to the laws of Connecticut, under which, certainly, a liability was incurred. 'Natural justice,' says Mr. Justice Blackburn in his work on Sales, 'mutual convenience, and the practice of all civilized nations, require that contracts, wherever enforced, should be regulated and interpreted according to the law with reference to which they were made.'" This principle was applied, also, in *Mason v. Fuller*, 36 Conn. 160, where a marriage solemnized in the state of Massachusetts, and entered into with reference to Connecticut law, was, for the purpose of determining the property rights of the parties, held to be a Connecticut marriage.

Suppose the instrument in question had been made, executed, and delivered in New York to the mortgagee, with the understanding between the parties that the property therein described was to be delivered in Connecticut next day, and in accordance with that understanding the property had been actually so delivered next day; could there be any doubt in such case that the law of this state would govern as to the validity of the instrument? We think not. The case supposed is substantially the case of *Mead v. Dayton*, 28 Conn. 33. There the contract of sale was made in Connecticut, with an agreement, for the express purpose, known to both parties, of evading our insolvent laws, that the property should be delivered in New York, which was done. The court held it to be a New York transaction, the validity of which was to be determined by the laws of that state. In the case at bar no actual delivery of the property was made in this state, nor was such a delivery probably contemplated at the time of the sale; but this was only because the recording of the mortgage in Portland was a substitute for such delivery, and was the legal equivalent thereof. That act, so far as there was any real value to the mortgage, was the consummating act, and must have been so regarded by the parties.

Under the circumstances disclosed by the evidence in the case as it stands, we think the mortgage must be regarded as if the transaction, begun in New York, had been performed and completed here, in Connecticut; and, under our law, we think the corporation might prefer in this way one of its creditors, and that the preference where there was no actual fraud (and none was claimed or appears to exist in this case) could only be set aside by proceedings in in-

solvency. *Glove Co. v. Jennings*, 58 Conn. 74, 19 Atl. 239.

This view of the case renders it unnecessary to consider the other grounds upon which the defendants asked for a nonsuit. There is no error. The other judges concurred.

REITER v. McJUNKIN.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

ADVERSE POSSESSION—MAINTENANCE OF FENCE.

The maintenance by owners of adjoining lands of a line fence up to which each claims and occupies is a concession by each of the open and adverse possession by the other of that which is on his side of such fence, which, after 21 years, will give title.

Appeal from court of common pleas, Allegheny county; Porter, Judge.

Ejectment by George W. Reiter against James McJunkin. From a judgment for plaintiff, defendant appeals. Reversed.

J. McF. Carpenter, for appellant. Miller & McBride, for appellee.

WILLIAMS, J. This is a controversy between neighbors over a very narrow strip of land lying along the boundary line between them. Their farms are on adjoining warrants. The elder of these was located in 1773, by an ancestor of the defendant, and the title to the farm on which he now resides has been in the descendants of the warrantee continuously from the time of its original location to the present. The warrant on which the plaintiff's farm is was located about 1790, as an adjinder of the elder warrant, and the line as run in 1773 became thereby the boundary of the younger warrant. There was evidence tending to show that for more than half a century both farms had been continuously occupied by their respective owners, and that a fence had been maintained as a division or line fence between them, up to which each had claimed and occupied without the slightest objection on the part of the other. The line of the fence which extended along most of the common boundary was intended and assumed to be upon the warrant line, and the improvements along it had been made to conform to it on both sides. In 1800 the plaintiff acquired his title to the farm lying within the younger warrant. The fences along the line were then standing as they had stood for many years before, but he conceived the idea that they were not, as to the part of the line involved in this litigation, standing on the exact site of the line of 1773; and this action of ejectment was brought for the avowed purpose of compelling the removal of the fence to what he regarded as the true line of the original warrant survey. The case was tried in the court below as depending on the answer to the question, Where was the line of 1773 actually run? The assignments of error complain of this

mode of trial, and of the refusal of the court below to submit to the jury the question whether the owners of these farms had not by their treatment of the line fences established for themselves the location of the line. The maintenance of a line fence between owners of adjoining lands by their acts, up to which each claims and occupies, is a concession by each of the open, adverse possession by the other of that which is on his side of such division fence, which, after 21 years, will give title, though subsequent surveys may show that the fence was not exactly upon the surveyed line. There was evidence given by both the parties upon which the defendant was justified in asking the submission of this question to the jury; and if the fact had been found to be that a division fence had been maintained by the owners of these farms for more than 21 years before this suit was brought, which had been built and maintained as a line fence, extending over that part of the line now in controversy, we think the verdict should have been in favor of the defendant. The value of such a fence does not rest upon the acts of him who alleges its existence merely, but upon its recognition and maintenance, by the owners of the farms which it separates, as the line between them. After 21 years of occupancy up to a fence on each side as a line fence, it is not material to inquire whether the fence is on the right line or not. *Brown v. McKinney*, 9 Watts, 567. If this question had been submitted to the jury, and they had found against the defendant upon it, then it would have become the duty of the jury to inquire into the exact location of the warrant line established in 1773, and to have adopted it as the boundary line between these farms. But they should have been directed to inquire, in the first place, whether the owners of the land on both sides of this line had not, in effect, agreed upon its location, built their division fence accordingly, and held and occupied respectively up to the fence as their common boundary for more than 21 years before this suit was brought. If this fact had been found for the defendant, he was entitled to a verdict, regardless of the true location of the warrant line. The judgment is reversed for the reason now stated, and a venire facias de novo is awarded.

CITY OF PHILADELPHIA v. WEST PHILADELPHIA INSTITUTE.

(Supreme Court of Pennsylvania. Jan. 10, 1896.)

QUASHING OF APPEAL.

When no exceptions were filed in the court below, and there is no order from the court to file the stenographer's notes, directed to the stenographer, it is proper to quash the appeal.

Appeal from court of common pleas, Philadelphia county; Bregy, Judge.

Claim for taxes by the city of Philadel-

phia against the West Philadelphia Institute. From a judgment for defendant, plaintiff appeals. Appeal quashed.

Chester N. Farr, Jr., and John L. Kinsey, for appellant. Henry J. Hancock and Henry T. Dechert, for appellee.

PER CURIAM. Appeal quashed. No exceptions filed in court below. No order from the court below to file the stenographer's notes, and directed to the stenographer.

HUFFMAN FARM CO. v. RUSH et al.
(Supreme Court of Pennsylvania. Jan. 20, 1896.)

PAYMENT TO PARTNER—SUFFICIENCY—PARTNER'S JOINT LIABILITY.

1. Where a partner joins with another in a purchase of firm property, payment to the partner, by such copurchaser, of his half of the purchase price, discharges so much of the sum due.

2. The liability of a member of a firm on a contract made by him jointly with another to pay a certain sum to the firm is not discharged by reason of his membership of the firm.

Appeal from court of common pleas, Allegheny county; Porter, Judge.

Action by the Huffman Farm Company against John R. Rush and others for the price of certain cattle. From a judgment for plaintiff, defendants appeal. Reversed.

T. C. Lazear, D. F. Patterson, and J. M. Garrison, for appellants. Sol. Schoyer, Jr., and Iams & Brock, for appellee.

DEAN, J. The Huffman Farm Company, plaintiff, was a partnership, organized in 1884 in Greene county, Pa., to carry on the business of farming and stock raising in Nebraska. They then purchased land in the last-named state, and cattle wherewith to stock it. The partners were six in number, among them William T. Lantz, who was cashier of a bank in Waynesburg, Greene county. In July, 1885, John R. Rush had a bill of \$650 against the partnership for feeding the cattle the first winter. For this he was pressing Lantz, who seemed to be the active member of the partnership, for payment. Lantz proposed to sell the cattle to him for \$8,000, and credit the bill on the purchase money. Rush declined to buy the whole stock at any price, but agreed to purchase, and did purchase, a half interest, estimating the entire value at \$7,000, and the half at \$3,500, he to receive a credit of \$500 in payment of his bill. His dealings were principally with Lantz, who acted for the partnership, and to him he paid the purchase money. At the time of the Rush purchase, Lantz bought the other half interest in the cattle from the partnership, thus making himself and Rush the owners of the whole. The weight of the testimony seems to show the sale to Lantz and Rush was, so far as concerned the partnership, intended to be a

joint one. The partners thought Lantz and Rush were joint purchasers of the cattle. Whether Rush so intended is at least doubtful. There was little dispute as to the fact that Rush had paid the full half of the purchase money to Lantz as a member of the partnership. Four or five years afterwards, Lantz became insolvent. The plaintiffs, averring Lantz and Rush to be joint purchasers, and that Lantz had not accounted to his copartners for any part of the purchase money, brought suit against them jointly in assumpsit for the whole \$7,000. Rush filed affidavit of defense, denying his purchase was a joint one with Lantz, and averred that his was a separate, independent transaction, whereby he purchased from the partnership, through Lantz, a partner, the undivided half interest for \$3,500, and had paid the plaintiffs, through Lantz, in full for the same. At the trial the court instructed the jury: (1) That if they found, from the weight of the evidence, Rush's purchase was an independent or individual purchase of the one-half interest from the partnership, and that he had paid to Lantz, as one of the partners, the purchase money, there could be no recovery against him; but (2) if the purchase were a joint one of the whole stock, then payment to his copurchaser, Lantz, although the latter was one of the vendor partners, was a mispayment, and, as a joint purchaser, he was still liable for the whole. Under this instruction the jury found for plaintiffs the sum of \$10,672.17, being the \$7,000 with interest from date of purchase; and from judgment entered on the verdict Rush now appeals, assigning for error the instruction of the court.

The following is the language of the instruction complained of: "But if you find the contract of sale was a joint one to Lantz and Rush for \$7,000, entered into by them, and that the property was delivered to them, that would put Lantz in such a position, with regard to his other partners and with regard to Rush, Rush having knowledge of the facts, as to make a payment by Rush, the man who was jointly liable with Lantz for the whole amount, to Lantz, as not a proper credit upon the claim of the firm, because the circumstances would negative any authority of Lantz, to act for his other partners in the firm generally with regard to this property. If you find that the sale was to them jointly, then each of them would be liable for the whole amount,—that is, together jointly liable for the whole amount,—and payment by one to the other would not be a good payment as against the firm. If, therefore, gentlemen, under the evidence in this case, you find this sale to have been one made to these men upon their joint undertaking, we say to you that there is no evidence in the case which would warrant you in finding that the amount has been paid." The court excluded as a payment the \$500 feed bill, because, under the rules, it had not

been pleaded as an offset. The language quoted is complained of as error. Is the complaint well founded? The liability of defendant as a joint promisor with Lantz depended on whether the purchase was a joint one. On this, as already noticed, there was conflicting testimony, and the jury have found they were joint purchasers of the cattle. Therefore, if no money had been paid by Rush, as between him and the partnership, he would have been liable for the whole amount. But it is not disputed he paid Lantz, not including the \$500 feed bill, \$3,000, which, as between him and Lantz, his copurchaser, was his share of the purchase money. The question, then, is, not as to his liability on the original express or implied joint promise, but whether, as between him and the partnership, he has, by the payment of \$3,000 to Lantz, discharged the debt to that amount as against himself. It is not questioned that Lantz was one of the partners who owned the cattle; nor do we think it can be questioned that the deal was really negotiated through him, he acting for all the partners with their express or implied consent, he first fixing the price and terms of payment. Montgomery, one of the plaintiffs, when called into the bank where the sale was consummated, to hear the terms of it, says that the sale had been then agreed upon, and no writing was drawn up, although time was to be given. The whole negotiation had been conducted by Lantz. The partners met, among them Lantz, and all verbally assented to it. To quote the words of the witness: "It was a kind of contract in honor. We all had confidence in one another at that time." Dr. Braden, another of the partners, testified the land company had no officers and no treasurer, and no one was specially designated as the treasurer, but the business was principally done by Lantz. Then these questions were put to him: "Q. Well, in reference to the partnership, who was the active member, if any one was more active than another? A. Well, I would say that Mr. Lantz was the active financial member of the firm. Q. Did you ever know of anything of importance being done by the firm without his consultation and advice? A. No, I never did. * * * Q. Well, then the active man in Pennsylvania in the management of the interests of this partnership was Spragg, wasn't it? A. No; Lantz was at the head of the matter, and no one did anything except that they had first consulted with Lantz about it." Then in connection with this testimony is that of Rush that Lantz was the business man of the company, as he understood, and at the time he purchased the cattle and paid for them Lantz was solvent, and cashier of a bank. Then Lantz testifies that Rush stated to Hoge, another of the partners, in Lantz's presence, that he (Rush) had bought a half interest in the cattle, and that a feed bill of \$500 due Rush was to be credited on the price. Lantz

asked Hoge if he was satisfied, and Hoge said to Rush that whatever Lantz did was all right. We notice only part of the testimony on this subject tending to show the formal assent of the copartners and the relation of Lantz to the partnership. If believed, it shows he was the active manager and director of the business. He had the full confidence of his copartners, and not only had he the authority implied from his membership, but he had more responsible duties than these imposed upon him. He was in fact, by their consent, the business head and treasurer of the partnership. Nor is there any evidence that this confidence of his copartners was withdrawn until after his insolvency, in 1891. Another fact possessing significance in this connection is that the sale was made the 14th of July, 1885, the money to be paid in a few months; yet suit is not brought against Rush until 1st of July, 1891,—almost six years afterwards. No settlement of accounts of the partnership between Lantz and his copartners was ever had. The appellant might well ask, was this because the other members trusted their copartner as a partner, during his solvency, and only sought recovery by suit from his copurchaser when collection from Lantz, their partner, was hopeless? If, as is the law, any one of several copartners has the right to receive money payable to the partnership, and such payment discharges the debtor, why does not Rush's payment of the \$3,000 to Lantz discharge that much of the debt incurred by him in the joint purchase? Take the verdict of the jury as establishing the fact of a joint purchase; that did not create an antagonism between Lantz and the partnership, which would divest him of his implied authority as a partner to receive money due the partnership. He could do nothing to mitigate the terms of the joint promise, for that would antagonize the partnership, but he could acquiesce in and receive a payment from his copurchaser, according to its terms, of money due the partnership. When Rush handed to him, as one of the vendors, \$3,000 on the purchase, the fact that a balance still remained unpaid, which, as between the purchasers, was in equity due from him (Lantz), did not disqualify Lantz from receiving what was due from a third person (Rush), for it was to the interest of the partnership to receive money due from a debtor, no matter whom, and Rush must pay to some one of them. It will be noticed that at this time Lantz was entirely solvent, the partnership was still in existence, and he was the same active, prominent member of it, fully trusted by his copartners. True, the general rule is that it is against public policy to permit an agent, without the full knowledge and consent of his principal, to enter into relations adverse to his principal's interest, or where his own personal interests would be antagonistic to those of his principal. But no antagonistic

interest was created by the partner's receipt of a debt due the partnership creditor, because it replenished the partnership funds to that amount. Nor does the fact that the money was not paid over to the other partners by Lantz affect the right to receive it. At that date, there was no more certainty that any one of the others would account for and pay over the money than that Lantz would. All were solvent. His failure afterwards, and inability to account for and pay over this money, was no more prejudicial to his copartners than would have been his failure to pay any other money received by him. This shortcoming sprang, not from an antagonistic interest created by the joint contract, made with full consent of all the partners, but from a want of fidelity to duty as a partner, wholly independent of the contract. Nor did the receipt of the money affect the contract liability of the joint promisors, for each still stood bound for all that remains unpaid, and, in addition, Lantz was bound to account for the \$3,000 he had received. The only effect of the payment to the partner was to discharge the joint debtors as purchasers to the amount of \$3,000 from their joint liability; and they ought to be discharged from this, for in contemplation of law the creditor—the partnership—got the money. We know of no case which holds that a copartner cannot receive money from a stranger to the partnership, and give acquittance of a partnership debt, because he happens to be jointly interested in the contract to pay. A partner is more than a mere agent. The latter's authority is determined by the terms of his appointment, the former's by the partnership relation and the nature of the business. All the cases cited by the learned counsel for appellee bear on the authority of a mere agent to assume relations antagonistic to his principal. We concede that, if the transaction were collusive between Lantz and Rush to defraud the partnership the payment would not discharge Rush; and, if Lantz had not been an active manager of the business, with the consent of his copartners, this fact might be some evidence of collusion; but there is no evidence tending to show want of good faith in the payments. We think, therefore, the learned judge of the court below fell into error when he instructed the jury that Rush's payment to Lantz was a mispayment, from the mere fact that Lantz was his copromisor in the contract. The jury should have been instructed that, if the payment was made in good faith by Rush to Lantz, because he was a member of the partnership, and had, ostensibly, authority to receive the money, such payment operated as a discharge of the debt, as against Rush, to the amount of the payment, and fixed Lantz's liability to account for it as a copartner.

The second assignment of error is without merit. It is argued that, as Rush's half was actually paid to the partnership, Lantz being

solvent, and a partner contracting with his own firm, they thereby accepted him as a partner for the other half of the money, which it was his duty to pay to himself; therefore, in contemplation of law, the partnership also received that money, and Rush owes nothing. In other words, as soon as the contract was made, Lantz's half of the price was paid, because he was a member of the firm with whom he contracted. Or, to go further, every debt, whether evidenced by note, bond, or verbal promise, payable by a partner individually to the partnership of which he is a member, is paid as soon as contracted, because of his implied authority as a copartner to receive money due the partnership. The trouble with this argument is that Lantz's contract, according to the verdict, was that he, jointly with Rush, in a few months would pay the Huffman Farm Company \$7,000. The only method of discharging that obligation was by payment to the farm company, according to the contract, the money. Rush actually paid him, as a representative of the company, \$3,000. Lantz has actually paid nobody anything, nor has there been any change in his contract relations with the company, except that Rush's indebtedness is reduced to the amount of his payment. There is nothing to put in operation any principle of law, outside the law of the contract, which leaves him still a debtor. The cases cited,—Bowman's Appeal, 62 Pa. St. 166, and others,—deciding that the appointment by a decedent of his debtor as executor is a discharge of the obligation, and the amount, by operation of law, becomes an asset of the estate, have no application, because the relation of debtor and creditor in such cases is changed by the death of the creditor, the debtor thereby becoming his representative. By operation of law, the contract is at an end; the debt is paid, and becomes an asset. If there had been a dissolution of the partnership, and Lantz had been appointed receiver, then, under the principle cited, Lantz would probably have been paid the partnership debt by operation of law, and he would have been accountable, as receiver, for the amount, as an asset. But here there was no change from his situation as a debtor under his contract, to that of representative of his creditor. As the case must go back for retrial, any defect in the pleadings which excluded consideration of the \$500 feed bill can be cured by amendment; therefore we will not further notice the third assignment.

As to the fourth assignment, we think a reasonable construction of the act of 14th April, 1838, to effect its manifest intent, would bring this suit within its provisions.

The fifth assignment, which complains of the refusal of the court to peremptorily direct a verdict for defendant, has been, in effect, overruled by what we said on the first and second assignments. The judgment is reversed and a v. f. d. n. awarded.

KAUSS v. ROHNER.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

SERVICES RENDERED DECEDENT—AGREEMENT FOR COMPENSATION—LIMITATIONS.

1. The right to recover on a contract by which plaintiff was to have decedent's estate, upon the latter's death, in consideration of her services, did not accrue until the latter's death.

2. Act June 11, 1891, allows a surviving party to testify to any relevant matter which occurred before the death of the other party, if such matter occurred between himself and one who testified against him at the trial, "or if such relevant matter occurred in the presence of such other living person." Held that, where a witness called by defendant administrator testified to a conversation which occurred in his presence between plaintiff and decedent touching the contract in issue, plaintiff was properly allowed to state what this conversation was.

3. In an action against decedent's estate for compensation for services rendered by plaintiff while living in decedent's family from childhood to maturity, it was error to charge: "If she [plaintiff] worked faithfully and honestly, what were her services worth to this old man and woman? On your oaths and consciences, on the spirit of honor and fairness, on the spirit of right and justice, what ought she to get from this estate?"—this setting up a wrong standard by which to estimate her wages.

Appeal from court of common pleas, Butler county; John M. Greer, Judge.

Action by Mary Kauss against John Rohner, administrator of John George Kauss, deceased. From a judgment for plaintiff, defendant appeals. Reversed.

W. H. Lusk, for appellant. Lev. McQuiston and J. C. Vanderlin, for appellee.

FELL, J. While much of the testimony intended to establish a contract to compensate the plaintiff for the services she rendered the decedent consisted only of the proof of loose declarations of testamentary intention, there was enough that was direct and positive to justify the submission of the question of the existence of a contract to the jury. Proof of the contract did not entitle the plaintiff to recover the value of the estate. *Hertzog v. Hertzog*, 34 Pa. St. 418; *Graham v. Graham's Ex'rs*, Id. 475; *Pollock v. Ray*, 85 Pa. St. 428. But it overcame the presumption, arising from the existence of the family relation, that the services were performed without the expectation of reward, and enabled her to recover, on a quantum meruit, the reasonable worth of her services. As the right to compensation did not mature until the death of John Kauss, the statute of limitations interposed no bar to the recovery of any part of the claim.

It was not error to permit the plaintiff to testify. A witness called by the defendant had testified to a conversation which occurred in his presence between the plaintiff and the decedent touching the contract relation between them. In contradiction of this testimony, the plaintiff was allowed to state what this conversation was. Her examina-

tion was limited to the conversation which had been detailed by the preceding witness, and no new matter was introduced. By the act of June 11, 1891, a surviving party is made competent to testify to any relevant matter which occurred before the death of the other party, if such matter occurred between the party himself and a person who is living, and who testifies against him at the trial, "or if such relevant matter occurred in the presence or hearing of such other living and competent person." To this should be added the construction given in *Re Roth's Estate*, 150 Pa. St. 261, 24 Atl. 685, that the surviving party is not competent unless the living witness has been called, and then to such matters only as he has testified to. The act applies to conversations or occurrences which took place in the presence or hearing of the witness who has testified, and whom it is proposed to contradict. *Thomas v. Miller*, 165 Pa. St. 220, 30 Atl. 928. See, also, *Krumrine v. Grenoble*, 165 Pa. St. 98, 30 Atl. 824. The living witness to the conversation between the decedent and the plaintiff having testified, the plaintiff was competent to contradict him, and to state her recollection of what was said.

The plaintiff's claim was not without substantial merit, but she was entitled to recover, if at all, only upon her strict legal standing, and to the extent of the market value of the services which she performed. The case belongs to a class requiring the most thorough scrutiny, and in which jurors should be carefully instructed and restrained. In this respect, we feel constrained to hold that the charge of the learned judge was inadequate, and to some extent misleading. That portion of the charge which is the subject of the seventeenth assignment of error set up a wrong standard, by which to estimate her wages, and, instead of confining the jury to the proper grounds for recovery, tended to incite them to follow their own inclinations, and to do what the decedent had failed to do, give the plaintiff practically the whole estate. In addition to board, clothing, care, education, and full maintenance the verdict gives her wages at a rate exceeding three dollars a week from the time she was six years old, and for no reason more apparent or convincing than that given by one of her principal witnesses to justify his estimate of the value of her services, that "she ought to have it." This result could not have been reached by any fair calculation, and we assume that it would not have been if proper instructions had been given. The standard was the market value of what she had furnished, and to this the jury should have been confined by clear, distinct, and guarded instructions; and they should not have been permitted, under color of wages, to have found the value of a bargain which she could not, and was not attempting to, enforce. The seventeenth assignment of error is sustained, and the judgment is reversed, with a venire de novo.

YODERS v. TOWNSHIP OF AMWELL.
(Supreme Court of Pennsylvania. Jan. 6, 1896.)

ACTION AGAINST TOWNSHIP—DEFECTIVE BRIDGE—REMOTE AND PROXIMATE CAUSE.

While crossing a bridge 12 feet wide and 14 feet long, plaintiff dropped her hat from the buggy, and, after having passed 14 feet beyond the bridge, the driver stopped to get the hat, giving the reins to plaintiff's older sister. The horse then took fright, and backed the buggy on the bridge, and off one side thereof. *Held*, that the negligence of the township in not maintaining guard rails on the bridge was the proximate cause of the injuries received by plaintiff, the possibility of a horse taking fright being something which the township was bound to guard against.

Appeal from court of common pleas, Washington county; McIlvaine, Judge.

Action by Olive B. Yoders, by her next friend, George W. Yoders, against the township of Amwell. From a judgment for defendant, plaintiff appeals. Reversed.

John C. Bane, for appellant. J. C. Ewing and McCrackens & McGriffin, for appellee.

DEAN, J. In Amwell township, Washington county, is located a public road, leading from another, called "Brush Run Road," to the National Pike. It is a shorter cut from the country and a number of villages into the town of Washington than other better-maintained roads, and, while not so generally traveled as the others, yet in the winter and spring is much used. It is known as the "Mike Moniger Road." On it is a bridge of one span over a small stream. The bridge is 9 feet between the abutments, and the floor extends over them, making it 14 feet long. The width of plank roadway is about 12 feet; height of floor above bed of stream, about 5½ feet. The approaches on each side are short, and somewhat steep. The roadway curves just at the bridge. In consequence, more care is demanded in crossing than if it were straight. The bridge itself was wholly unprotected by guard rails, though there was some protection of the approaches at one end by a fence. The general direction of the road is north and south. At the north end of the bridge is a high bank, with projecting rocks, covered with bushes and briars. On the one side of the bridge a spring runs over the rocks, making the usual sound of a waterfall. One of the witnesses stated "it was a scary place." The plaintiff is 15 years of age, the daughter of a farmer living in the township, and through his farm runs the road. On the 28th of June, 1894, in the evening, a young man, W. A. Watson, called at the home of plaintiff with a one-horse buggy, and took her with an older sister, Mary, to a "church sociable." About midnight, the three started to return home in the buggy, Watson driving. The night was dark. Just as they got on the bridge, the plaintiff accidentally dropped her hat from the buggy; but, when told of it, Watson, as a matter of prudence,

drove over the bridge first, and stopped about 14 feet from the plank on the north end. Then, giving the line to Mary, the older sister, he got out, and went back to pick up the hat. Mary had knowledge of horses; also, had some experience in driving. Immediately after Watson started back for the hat, the horse turned to the side of the road in the direction of the rocks and bushes. Mary pulled him back by the lines into the road. Just then, he took fright, and quickly backed the buggy on the bridge, Mary endeavoring to urge him forward. The buggy was backed off the side of the bridge, the two girls falling backward into the top, the buggy on them, and the horse partly on the buggy. Before the buggy was off the bridge, Watson ran up, caught the horse by the head, and ineffectually tried to stop him from backing. The plaintiff was seriously injured. Alleging this resulted from the negligence of the township in not maintaining guard rails on the bridge, she brought this suit for damages. The facts, so far as we have stated them here, were not in dispute at the trial. The learned judge of the court below instructed the jury, in answer to defendant's first written point, that, on the undisputed evidence, the negligence of the township was not the proximate cause of plaintiff's injury, and therefore plaintiff could not recover; and the jury accordingly found for defendant. From the judgment entered on that verdict plaintiff now appeals, assigning for error the peremptory instruction of the court.

The two questions on which the issue turns, are: (1) Was the township negligent? If so, (2) was that negligence the proximate cause of plaintiff's injury? The answer to the first question was for the jury; but, as the learned judge of the court below, on the undisputed facts, declared, as matter of law, any negligence of defendant was not the proximate cause of the accident, we must assume, for purposes of the case before us, defendant negligently left an open roadway, only 12 feet wide, without guard rails, on a bridge used by the traveling public. The duty of defendant must be measured by the ordinary and usual demands of the traveling public in that locality. Travel by vehicles of extraordinary weight, or by animals of extraordinary or strange habits, the authorities were not bound to foresee and provide for. But, as to the ordinary methods of travel by horses, buggies, and wagons, they ought to have foreseen and made reasonable provision for the safety of the public on the highway. If this horse had taken fright when on the bridge, and, because of the absence of guard rails, backed the buggy off, we think no one, in the face of our numerous adjudicated cases, would have questioned the answerability of the defendant. In *Lower Macungie v. Merkhoffer*, 71 Pa. St. 276, one of the animals shied, and the team was precipitated into an ore excavation alongside the road, where there were no guard rails.

The township was held liable. In *Newlin Tp. v. Davis*, 77 Pa. St. 317, the bridge had no guard rails. The horse became frightened at a piece of plank, and backed off. The township was held liable. In *Scott Tp. v. Montgomery*, 95 Pa. St. 444, from some unknown cause, the horse suddenly shied, and sprang off the road down a steep bank. There was no barrier or guard rail. The defendant was held answerable. In *Hey v. City of Philadelphia*, 81 Pa. St. 44, the horse took fright at the whistle of a locomotive, sprang over a wide roadbed, down a declivity, into the river. There was no guard rail. The city was held responsible. And so we might cite many other cases to the same point. The absence, in view of the circumstances, of reasonable safeguards for ordinary travel, was held, in all of them, to be the immediate and proximate cause of the injury. If, then, the defendant would have been answerable for damages resulting from its negligence, had the horse, from fright, plunged over or backed off the bridge, when being driven over it, does the fact that he backed the buggy on, and then off, the bridge, after being 14 feet beyond it, relieve defendant from liability? When, as here, the facts are not disputed,—at least not controverted,—the conclusion is often a matter of law for the court; and it may be conceded, on these facts, the application of the maxim, "*causa proxima non remota spectatur*," is not free from difficulties. In cases of mere negligence, aggravated by no element of malice, to ascertain whether the negligence be the proximate cause, it is stated by Paxson, J., in *Hoag v. Railroad Co.*, 85 Pa. St. 293: "The injury must be the natural and probable consequence of the negligence,—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer." And, as is remarked by Black, C. J., while discussing the same doctrine, in *Pittsburgh v. Grier*, 22 Pa. St. 54: "It is not the law that men are responsible for their negligence only to the extent of the injuries they knew would result from it. If it were, there could be no recovery except for malicious wrongs."

As already noticed, it cannot be questioned, under the authorities, that defendant might and ought to have foreseen the danger to ordinary travel over a narrow bridge without guard rails. It is alleged, however, that the special facts take this out of the cases of ordinary and foreseeable travel. Do they? It may at once be conceded that, if the travelling public always or generally drove only very gentle and easily managed horses, in daylight, at a slow gait, over very narrow bridges, such an accident as here happened would not have been the natural and probable consequence of the neglect to put up guard rails, for then the circumstances in this case would have been extraordinary. But no such limited use of a public highway would be made in any township in the state, and this the au-

thorities well knew. That it would be traveled night and day by those driving gentle and spirited animals—some that would take fright, others that would not,—was known to them. If, with such knowledge, this accident might or ought to have been foreseen, and with reasonable care have been provided against, then, was their negligence the proximate cause of the injury? It is argued that defendant could not foresee the exceptional movement of a frightened horse, but this assumption does not determine whether negligence of defendant was the proximate cause, for a provision for safety did not depend on seeing so far. Of all our domestic animals, the horse is probably the most intelligent; yet, among all of them, he is most subject to fright. A bit of white paper, stirred by the wind in the roadway, will startle and sometimes render him uncontrollable. What movement he will make in one of his paroxysms of terror, human intelligence cannot anticipate, and, still worse, because of his superior strength and agility, cannot control. Such facts are within the common observation of mankind. It is the habit of the horse, not, his particular movement in the exercise of it,—which last is beyond human foresight,—that defendant ought to have known and provided against. The conclusion of appellee is founded on wrong premises, in substance these: The township authorities were not bound to make provision against that which they could not reasonably foresee. That a horse would back a buggy on and off a bridge which he had already crossed could not reasonably have been foreseen. They did not foresee such exceptional conduct, and their neglect to provide against what no one could foresee was not, therefore, the proximate cause of the injury. The unforeseeable backing of the horse was the proximate cause, and the absence of guard rails only rendered more serious the consequences. But, from the established facts, the premises from which to determine the application of the rule are not correctly stated in appellee's proposition. They should be stated thus: The township authorities were bound to foresee and reasonably provide against a common danger to ordinary travel on that highway. It is well known that one of such dangers arises from the habit of fright in the horse, and it is just as well known that, when frightened, no one can foretell his conduct. The presence of guard rails would have been a protection from the danger of going over the bridge, no matter what the movement of the horse. Therefore, the habit of the horse being known, they ought to have put up the guard rails, and their neglect of duty in this particular was the proximate cause of the injury. Or, to express it in another form: The fright of the horse was ordinary, and to be expected. That his conduct when in fright would be unreasoning, insane, and unlooked for was also to be expected. If it were otherwise, it would have been extraordinary, because contrary to

common observation. The township authorities should have guarded against that which was to be expected, and it will not excuse the negligence of the supervisors, or make that negligence the remote cause, to assert they could not foresee the particular freak of conduct in a terrified horse.

The cases cited and most relied on, by the court below and appellee, are *Chartiers Tp. v. Phillips*, 122 Pa. St. 601, 16 Atl. 26, and *Herr v. City of Lebanon*, 149 Pa. St. 222, 24 Atl. 207. But neither is in conflict with *Newlin Tp. v. Davis*, supra, and its many kindred cases. As stated by our Brother Mitchell, in *Haverly v. Railroad Co.*, 135 Pa. St. 50, 19 Atl. 1013, in speaking of the apparent conflict in the cases in the application of the rule in determining whether the negligence was the remote or proximate cause of the injury: "The different results which were reached in them, depended, not on any different view of the law, but of the facts. * * * But whatever the result of the views taken of the facts in these cases, the principles of decision are the same in all."

In *Chartiers Tp. v. Phillips*, our Brother Green, in stating this court's view of the facts, on which view alone the judgment is founded, says: "It is beyond all question that the direct and immediate cause of the plaintiff's injury was the overturning of the wagon in which he was riding. It is equally certain that the wagon was upset by the sudden falling of the animal that was drawing it. What caused the mare to fall is not clear, and is not explained by the plaintiff's testimony. She did not take fright, was not running away, but, on the contrary, was moving very slowly through a mud puddle. She got entirely through, and then, to use the language of the plaintiff, 'the mare just fell over, and fell with her head and neck right across the fence.' The fence gave way, and the plaintiff was precipitated down the bank by the side of the road, and was injured. Of course, the fence, whether sufficient or insufficient to sustain the force of the fall, had nothing to do with producing the fall. The defendant alleged, and gave evidence to prove, by the declarations of plaintiff to a number of witnesses, that the mare was harnessed with a collar too small for her, and that it choked her, and this choking was the real cause of her falling. If this was the true cause, it is difficult to understand how defendant could be held responsible for the fall or its consequences." The extraordinary and impossible to be foreseen circumstance of the choking, which is not a habit, but which occasioned the fall, is put prominently forward as the controlling fact which determined the proximity of the cause. It is even strongly intimated that, if the mare had plunged down the declivity from fright, or while running away, an outbreak of the habit of the average horse, the conclusion would have been different. In determining whether a conclusion of law, in any adjudicated case,

is a precedent in a subsequent one, the value of the first, usually, is measured by its similarity or dissimilarity to the second in its controlling facts. And even if the court announcing the conclusion misapprehends or mistakes the facts, the conclusion, to be of any value as a precedent, must be taken as applicable to the facts as assumed by the court. They, as concerns the judgment, are the facts, and, whether existing or nonexisting, either prompt or compel the conclusion of law that determines the judgment. For that reason, it would be a waste of time to notice the controversy here between counsel as to what were the facts in *Chartiers Tp. v. Phillips*. For our purpose, and as a precedent in all cases after it was decided, the facts as stated in it by this court must be taken as correct. On the facts as assumed in the opinion, notice the ruling: "The defendant, in the fourth point, asked the court to charge the jury that, if the accident was caused by the uncontrolled struggle of a choking horse, or from this cause concurring with a defect in the highway, their verdict must be for defendant. To this, the court replied: 'Refused, unless the plaintiff, by his negligence, contributed to or was the cause of the uncontrollable struggle of the horse.' The vice of this answer is that the court confounded the effect of an independent cause of the accident with the effect of plaintiff's contributory negligence, and really held that it required a combination of the two in order to relieve the defendant from the responsibility for the accident. Now, the contributory negligence of plaintiff, alone, and by itself, if it existed, was sufficient to discharge the defendant from all liability. So, also, if the accident was produced by an intervening and independent cause, for which defendant was not responsible, that, too, would relieve defendant from liability. The point should have been affirmed as it stood." So, on the facts, as viewed by this court, there was error in this particular. Then, again, to quote from the opinion discussing the third assignment of error: "Although the choking of the mare, resulting from a too tight collar, was the immediate cause of the accident, it is practically held to be no defense, unless plaintiff had knowledge of it, or ought to have known it. * * * Whether he had or had not knowledge of the smallness of the collar, and that it was choking the horse, the effect of the choking, as productive of the accident, would be precisely the same, and hence, if, as an independent producing cause of the accident, it would suffice to relieve the defendant from responsibility, it would accomplish that result without any reference to the plaintiff's knowledge." So, on the two assignments of error noticed, the judgment was reversed. The facts bore but little semblance to those in this case.

Herr v. City of Lebanon, supra, opinion by our Brother Williams, the second case cited and relied on by appellee, approaches, in similarity of facts, *Chartiers Tp. v. Phillips*.

The roadway was wide, and in excellent condition. There was a descent on the lower side of the street, and no guard rail. The horse drawing the vehicle, whether from sickness or because the vehicle was too heavily loaded, choked and fell, and struggled to regain its feet. In its struggles, the driver could not control it. Each time it got partly up, it fell again, and each time nearer the edge of the bank, until it went over; and it went over, not in the ordinary use of the street, but because of its inability to manage its load. The point of the reasoning, in vindication of the judgment, is that, in view of the peculiar facts, the defendant was not answerable for the damage resulting proximately from the struggles of a choking, overladen horse; and, while the absence of a barrier probably rendered the injury more serious, it was in no sense the cause of it. The decision in the same case holds with and cites *Hey v. City of Philadelphia*, *supra*, that "It is the duty of road officers to provide roads suitable for ordinary travel, conducted in the ordinary manner, and to provide such safeguards as may be needed to meet the risks of such travel." The cause in each of these cases, whether produced by the fault of the driver or not, was out of the ordinary, was so rare as to be extraordinary; and on that, as a controlling fact, the application of the rule is based. It was as improbable of foresight as if a vicious person had suddenly and maliciously seized the horse by the head and pulled him over. As to the other cases cited by appellee, in *Worrilow v. Upper Chichester Tp.*, 149 Pa. St. 40, 24 Atl. 85, as a fact, there was no negligence on part of the defendant. In *Schaeffer v. Jackson Tp.*, 150 Pa. St. 145, 24 Atl. 629, and *Kieffer v. Hammelstown Borough*, 151 Pa. St. 310, 24 Atl. 1090, both were decided on the ground that the particular causes of the accidents were out of the ordinary, and such as could not have been foreseen and guarded against.

We do not see, however, in any reasonable view of the particular circumstances which immediately preceded this accident, that they were the efficient cause of it, and that the negligence of defendant only made the injury more serious. The plaintiff, when injured, was in the ordinary, lawful use of the highway. While so using it, she dropped her hat, as the horse stepped on the bridge. Watson, exercising care, did not stop on the dangerous structure, but 14 feet beyond, and then returned to pick up the hat. Then the horse took fright, backed but a few steps on and off the bridge. This was but incident to the ordinary use of the highway. It was not maintained for horses only that never took fright. The ordinary horse might take fright as he approached the bridge, run on, and plunge off it. He might frighten at the fluttering birds in the briars on the rocks, or at the noise of the waterfall, as alleged here, for these objects were continually present at that place, and, consequently, after he had

crossed the bridge, might back on and off it. Speculating on the doctrine of proximate and remote cause in supposed or hypothetical cases seems to have been a sort of intellectual recreation with text writers on the subject, since the *Squib Case* in 2 W. Bl. 893. With many, the rule laid down in *Hoag v. Railroad Co.*, *supra*, would be criticised as lacking in scientific precision; but approximate certainty in the administration of justice, on evidence in an issue, is all we can hope to attain to. The same rule was, in substance, though in somewhat different language, adopted in many cases before *Hoag v. Railroad Co.* In terse language, without leaving room for theorizing where the evidence is conflicting, and no fault is attributable to the plaintiff, it brings the jury at once to the ascertainment of the controlling fact,—was the consequence such as, under the circumstances, might and ought to have been foreseen and provided against? It eliminates all speculation as to the cause of the cause, which often is merely interesting, and aids not in determining just responsibility. As is said by Strong, J., in *Insurance Co. v. Boon*, 93 U. S. 130, the proximate cause is the dominant, controlling one, and not those which are mere incidents. The dominant cause here was a bridge negligently dangerous to the ordinary horse, at all times when he displayed one of his common characteristics. True, his fright was an incident without which the dominating cause could not have operated to produce the injury; but the same may be said of most of the incidents connected with the trip on the highway that evening. If plaintiff had not dropped her hat, if Watson had not stopped to get it, and so running back to the originating cause, going to the "sociable" behind a horse, instead of on foot,—all were in a certain sense causes of the injury, without which the accident would not have happened, but, occurring in the ordinary, lawful use of the highway, the law regards them as but incidents, and still holds the neglect of duty as the dominating or proximate cause. The judgment is reversed, and a v. f. d. n. is awarded.

TODD et al. v. WHEELER et al.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

CONTRACT FOR ROYALTIES—MANUFACTURE OF STEEL.

Manufacturers of steel known by a certain name agreed with plaintiffs, who had assisted them in the development of the process of manufacture, to pay the latter one cent per pound for all such steel sold by the former. *Held*, that plaintiffs were not entitled to the specified royalty upon other steel sold by the same manufacturers merely because, in the process of manufacturing both steels, oxide was reduced into metallic chromium by the same process, the steel referred to in the contract being high in carbon and low in chromium, and very hard and brittle, and the other being high in chromium and

low in carbon, and having great cohesion on impact.

Appeal from court of common pleas, Allegheny county; F. H. Collier, Judge.

Bill by James Todd and Frank L. Slocum against C. Y. Wheeler and the Sterling Steel Company to compel defendants to account for moneys due under a certain contract for royalties. From a decree for plaintiffs, defendants appeal. Reversed.

Knox & Reed, W. F. McCook, S. W. Cunningham, and J. W. Kinnear, for appellants. Breck & Vaill and Henry C. Todd, for appellees.

DEAN J. The defendants were manufacturers of different kinds of steel in Pittsburgh and Allegheny county. Plaintiffs are chemists and metallurgists. In 1889 plaintiffs undertook to assist in introducing into defendants' factories a process whereby could be turned out a self-hardening steel. Mr. Wheeler, president of the Sterling Steel Company, had been a practical steel worker for many years, and had tried to make a high carbon steel, containing not less than 3 per cent. of carbon, but had failed in securing the desired results. On making his unsuccessful efforts known to Dr. Slocum, one of plaintiffs, Slocum suggested a method by which the experiments theretofore made by Wheeler, if carried further by a chemical combination suggested by him, would result in success, but he declined to give his personal attention to the matter for want of time, and named Mr. Todd as one capable of taking charge of the operation as an assistant. Todd assented, and spent at Mr. Wheeler's works some time in experiments, with a satisfactory result. The manufacture of this quality of steel was then begun by defendants, and was named "Sterling Double Special Steel." In their advertisements and labels, defendants described it by that name. The special quality of the steel made by this process consisted in the high amount of carbon and low amount of chromium it carried, so that, while it could be chilled or hardened at a low red heat, it would withstand in forging, without injury, a high red heat, and still be very tough in the hardened state. It was especially and to a great extent only valuable as tool steel. When the steel had proved a success on the market, Todd solicited payment of Wheeler for plaintiffs' services. After some negotiations, they entered into a written agreement, of which the following are the material stipulations, the Sterling Steel Company and Wheeler being parties of the first part, and Slocum and Todd parties of the second part: "The said parties of the second part have assisted in the development of, and are informed as to a part of the secret used in, the process of manufacturing the steel known and put upon the market as 'Sterling Double Special.' The said parties of

the first part wish to protect such part of said secret, and to protect their manufacture of said steel. Now, therefore, in consideration of the premises * * * the said parties of the first part hereby agree to pay unto the said James Todd, one of, and agent for, the parties of the second part, the sum of one cent (1c.) per pound for every pound of said steel made, sold, and collected for, so long as said secret is not discovered, and similar steel made and sold on the market by others; it being understood and agreed that if such steel is made and sold by any other party or parties then the said parties of the first part shall cease paying to said parties of the second part the royalty or sum above named, and all contractual relations between the parties hereto arising out of this agreement shall cease. It is further understood and agreed that the said parties of the first part shall make a full and complete return of said sales in writing to said Todd at the end of each quarter, and pay to him the amount then due. It is further understood and agreed that, should this steel be made and sold under any other name, or in any other place, by or under authority of the said parties of the first part, that a full and accurate account shall be kept of said sales and a return made to said parties of second part, as provided for above." There was also appended this additional stipulation, signed by Todd and Slocum alone: "The undersigned parties of the second part, whose signatures are appended to this clause, agree and bind themselves not to impart to any one whomsoever any part of their knowledge of the secret referred to in this agreement, during the time they receive the royalty herein named, and they further agree to the changing of the word 'same' on the twentieth line of the first page of this agreement to 'similar.'" The same year—in the fall of 1890—Dr. Slocum was permanently employed by defendants as chemist under a special contract, and so continued to be employed pending this suit. While his name is joined as one of the plaintiffs, he disclaims any right of action. The defendants continued to recognize the contract by payment of royalties to Todd on "double special steel" down to April, 1893, when they stopped payments, and in October of that year served formal notice upon him, denying liability, and an intention to make no further payments. On February 19, 1894, Todd, joining with him his co-contractor, Slocum, filed this bill, setting out the contract, and averring: (1) That plaintiffs continued the use of the process described in the contract, manufacturing by the same process substantially the same kind of steel, but calling it "C. Y. W's. Choice" (C. Y. Wheeler's Choice) and "Wheeler Sterling Armor-Piercing Projectiles"; (2) that they had ceased and refused to pay plaintiffs the royalties stipulated; (3) that there was then due and unpaid to plaintiffs for royalties a

large sum. The prayer was for an accounting by defendants, and decree for payment of balance due.

The answer admitted the contract as set out, but averred that it was entered into for the sole purpose of protecting defendants against a disclosure of the secret by plaintiffs to outside parties, and that it therein stipulated, if a similar steel was made and sold by other parties, payment of royalties was to cease; that at the date of the notice similar steel was made and sold by others; that the contract was intended to be terminable by either party at any time; that it ceased to be valuable to defendants, and notice of termination was accordingly given; that up to the date of the notice in October, 1893, there was a balance on "double special steel" of only \$47.15 due plaintiffs, which was by the answer, with interest and costs, tendered them; that plaintiff's process for manufacture of "double special steel" was used exclusively in the manufacture of tools, and had not been used in the manufacture of projectiles for cannon, or for other purposes constituting the business of defendants. The cause was heard before Judge Collier under the new rules, sitting in equity. He found as facts: (1) That the secret of the process by which "double special steel" was manufactured had not been discovered, and no similar steel had been made or sold in the market by others. (2) That the defendants had manufactured and sold steel produced by Todd's method of process under the name of "Sterling Double Special Steel," and "C. Y. W's. Choice," and "C. Y. Wheeler's Choice," and had accounted to and paid to plaintiffs for a part only of the steel so manufactured. (3) That defendants had manufactured by plaintiffs' method "double special steel," and sold it under other names and have not accounted to plaintiffs, nor paid therefor under the contract; and that they had made, by the same process substantially, projectiles for cannon and armor-piercing projectiles, for which they had not accounted. From these facts the learned judge, as a conclusion of law, found that defendants should account to plaintiffs for all steel known as "double special steel," made since the month of March, 1890, and should pay the contract royalty for the same; and further, that defendants should account to plaintiffs under the contract, for all steel since the same month, named "C. Y. W's. Choice" (C. Y. Wheeler's Choice), the "Wheeler Sterling Armor-Piercing Projectiles," and pay to plaintiffs the contract royalty for the same. To these findings of fact and legal conclusions, defendants filed exceptions, which, after hearing by the court, were dismissed, and on July 13, 1895, by final decree, they were ordered to file account within 20 days. From this decree they bring this appeal, assigning 11 errors. The questions raised by them involve principally a construction of the contract, but also in part the determination of a fact.

The plaintiffs rest their case on the contract, and aver they are the inventors of a new method of manufacturing aluminum chromium steel, which method they made known to defendants, and is the method referred to in the contract. What was this method? Mr. Todd, after stating that Mr. Wheeler solicited him to make experiments in the production of a high carbon steel, and for that purpose gave to him entire control of their works, says: "I went to the works a number of times over a period of several months. Was there a great deal. Shortly after undertaking the experiments,—we had been attempting to reduce the chromium with charcoal, as others had been doing,—I concluded that it wouldn't do; that the charcoal would leave some of the green oxide there, which was very bad for the steel. I commenced to look around for some better method. I struck upon the method of using aluminum containing a small amount of silicon, and in carrying out the experiments I reduced the metal as far as possible with charcoal in the pot, mixing the green oxide of chromium and the charcoal together, and putting the pot into the furnace, and exposing it to heat." Further on in his testimony he states the sole object in the "double special steel" process was to get the steel as high in carbon and as low in chromium as possible. The following are excerpts from Mr. Wheeler's testimony: "I related to Dr. Slocum the line of experiments I had pursued at Hussey, Howe & Company's works when I was manager there, and told him where I had failed, and asked him if he could suggest some way of holding the combined carbon, and he said, 'Yes,' that the books showed that a small amount of chromium would allow the combined carbon to remain and still be steel; that it would show the peculiarity of very hard, close grain, and the susceptibility of being highly heated without apparently destroying the carbon. I asked him then if he would undertake to help me out on that point, and he said that he would. We talked, of course, in long detail, but that was the substance of the talk." He then narrated his conversation with Dr. Slocum at a subsequent date thus: "At that time we concluded that there must be some other way of getting it in better, so we discussed all methods of introducing it, including by aluminum, and it was suggested, I think, by Dr. Slocum, that aluminum, which had greater affinity for free oxygen than any known metal, should be used, to reduce not only the chromium to its metallic state, so steel would take it up, but to eliminate the free oxygen out of the steel, which would again allow us to carry a high carbon. Aluminum was in common use then, and is now, to eliminate the free oxygen." He further says: "I had worked on it for four or five years before that, and simply held it in abeyance for the one point that I wanted. The other points had been

up and talked over. Dr. Slocum furnished this point just in ordinary conversation, as he would anything of a technical nature that was of interest." The following testified to by Dr. Slocum: "The process of adding a small amount of chromium to steel was well known as a method of putting a high per cent. of carbon as combined iron and still remain steel; and the method of getting this chromium by using it in the oxide instead of from the chromite stone, which, at that time, nearly all of was made with. Chromium comes in nature as a chromium iron stone containing oxide and chromic oxide, combined together, and these heretofore had been melted in a blast furnace or crucible to produce an alloy of about 50 per cent. chromium and 50 per cent. iron carbon. This made more or less trouble on account of the high silicon it contains, the silicon being found in the ores; and I suggested to Mr. Wheeler the use of an oxide of chromium,—a pure material to start with, instead of the raw material as it comes in the market. That was a known fact." In the light of the testimony of these witnesses, parties to the contract, the preliminary statement in the contract is unmistakable in meaning: "The said parties (Slocum and Todd) have assisted in the development of, and are informed as to a part of the secret used in, the process of manufacturing a steel known and put upon the market as 'Sterling Double Special.'" By the written agreement, neither Todd, nor Todd and Slocum together, after the method had proved success, claimed to be the inventors or discoverers of the process which resulted in the "Sterling Double Special." By their own language there is a necessary implication of disclaimer as the sole discoverers of the process. In all this voluminous testimony there is nothing that seriously contradicts Wheeler's statement, and Slocum's testimony is pointedly corroborative. The plaintiffs were not the sole inventors or discoverers of the process, as averred in the bill, but, as stated in the contract, they had assisted in the development of, and were informed as to a part of the secret used in, the process.

Then comes the second statement of reasons for entering into the contract: The said parties (Wheeler and the Sterling Steel Company) wish to protect such part of said secret (that is, the part known to Slocum and Todd), and so protect their manufacture of said steel. Now, in consideration of the remises, Wheeler and the steel company agree to pay Slocum and Todd for every pound of steel sold and collected for one cent per pound, only, however, "so long as said secret is not discovered, and similar steel made and sold on the market by others." The contract obligation of Wheeler and the steel company was, further, that they were to pay the royalty "if this steel" should be sold by defendants under any other name, or at any other place by their authority.

And this obligation to pay was to cease: (1) If the secret was discovered. Then, of course, others would manufacture and put upon the market a steel identical in quality with this one. (2) If a similar steel—one resembling this—should be made and sold upon the market by others; that is, a steel carrying a high carbon and low chromium. By the contract, the parties had in mind two distinct contingencies by which their rights and liabilities in the future were to be determined. Their efforts had resulted in the production of the steel "known and put upon the market as 'Sterling Double Special Steel.'" For this, one cent per pound was to be paid; further, the plaintiffs were to be paid should this steel be made and sold under any other name. The plaintiffs were not longer to be paid if a similar steel was made and sold on the market by others. They were to pay for the "double special," and for "this steel," alone; that is, a steel of the same nature or character, into the manufacture of which the new process entered. They were to cease paying if a similar steel—that is, one resembling it in quality—were put upon the market by others, without regard to the process entering into its production. And that these parties so understood the significance of the two words is shown by their change of the agreement. They had first used the word "same"; but then, obviously on reflection, concluded it did not express their meaning; so by a written memorandum on the contract they substituted for it the word "similar." As it first stood, according to the language used, the one cent per pound was to be paid as long as identically the same steel was not placed on the market. By the change defendants were only to pay so long as no other steel resembling the "double special" in quality was placed on the market, no matter by what process the other attained its quality. In other words, the manifest intent of the parties was that defendants should pay only so long as the monopoly lasted by reason of the secret process of which Slocum and Todd were in part informed; and it is the plain implication that Slocum and Todd did not longer intend to exact payment. In view of the agreement, it is not material that the reduction of oxide of chromium by the use of aluminum was known by some chemists and metallurgists in Europe before Mr. Todd's experiments. The parties contracted on the assumption the method was not known, or at least not in use, in this country; and the introduction of a small amount of silicon into the process seems to have been first suggested by Mr. Todd. But that the larger part of the product of defendants after May, 1893, so far as the proportions of carbon and chromium were concerned, was entirely different from that of "Sterling Double Special Steel," cannot for a moment be doubted, in view of the evidence. Mr. Todd testifies, the peculiari-

ty of "double special steel" was "that it would carry a much larger percentage of carbon than ever had been attained, if necessary"; that, according to the comparative tests made by him and Wheeler of Wheeler's best grade of steel and the "double special," the latter, running very high in carbon, was not as brittle as the Wheeler steel; further, that defendants advertised the "double special" as containing more carbon than any other steel known or invented. Mr. Wheeler testifies that the "double special" was of three grades, A., B., and C., the first containing $3\frac{1}{4}$ per cent. of carbon, the second 2%, and the third 2 per cent.; that by the "double special" process he made projectiles from each of these grades, and on a test made by the government every one proved an absolute failure. They possessed no cohesiveness or toughness. They then went on experimenting with projectiles, and finally were successful by using 10 or 15 times as much chromium as in the "double special," and making them low in carbon, instead of high. This steel was the complete antagonism of the "double special," so far as concerned the proportions of chemical elements contained in it. The oxide of chromium, however, used in its manufacture, was reduced to a metallic state by the use of aluminum and carbon, as in the manufacture of "double special." The method, in one particular, of reaching the manufactured product, was more than similar; it was the same; while the physical characteristics of the product were wholly dissimilar; "double special" being noted for its brittleness, and therefore worthless as a projectile. Nor is there any evidence tending to contradict these facts.

We have, then, as tending to show the projectile steel is "Sterling Double Special," the fact that the particular method of reducing the oxide of chromium to a metallic state in the "double special" was also used in the manufacture of the projectile; but then we have on the other side the opposing facts that by the use of opposite proportions of carbon and chromium an exactly opposite quality of steel resulted. The "double special" was worthless for projectiles, the projectile steel was worthless for tools. Clearly, this product was not what they meant by "should this steel be made and sold under any other name." It was not the "double special" which was advertised to possess the distinctive quality of being high in carbon and low in chromium, for it was low in the first and high in the last. To have sold it as such, after the characteristics of the "double special" were established, would have been a fraud upon the public. We are clearly of the opinion that a fair construction of this contract, in view of the undisputed evidence, relieves defendants from any liability to account to plaintiffs for any projectile steel as "Sterling Double Special Steel." This, not because other parties had put upon the market "similar steel," but because projectile

steel was not, by the contract, "this steel"; that is, "Sterling Double Special." The evidence as to other parties putting on the market similar steel projectiles is immaterial. The projectiles made by defendants not being the "Sterling Double Special Steel," or "this steel" under another name, as specified in the contract, their nonliability to pay arises not from a right to cease paying, but because no liability to pay ever commenced. What we have said is just as applicable to the steel known as "C. Y. W.'s Choice" and "C. Y. Wheeler's Choice." Under the contract and uncontroverted facts neither brand was "Sterling Double Special Steel." They were wholly different in every essential quality necessary to identification with the "double special," and defendants owe no account for them to plaintiffs. Plaintiffs have a right to claim only for the use of and keeping secret the process in making "Sterling Double Special Steel."

The error of the court below is in holding to one mark alone as sufficient to identify the steel manufactured by defendants as "double special steel" under the contract. As an illustration, take the testimony of Mr. Clapp, a chemist and expert called by plaintiffs. He testified that two steels, possessing by analysis entirely different proportions of chemical elements, one high in carbon and low in chromium, the other high in chromium and low in carbon; one very hard and brittle, the other having great cohesion on impact,—yet if, in the manufacture of both, chromium oxide were reduced into metallic chromium, by the same process, the steels would be the same. Although there was much expert testimony contradictory of this view, the court below adopted it as the correct one from which to determine the liability of defendants to account. It may be, among chemists, technically correct to fix the sameness of a manufactured product by a single part of the process entering into its manufacture, without regard to the chemical analysis, its physical characteristics, or its fitness for the purpose intended; but the parties here did not contract on expert opinion of chemists as to what, though widely different, would scientifically be the same. Wheeler had striven for a very hard tool steel. The plaintiffs effectually aided him in producing it. Then it was agreed this production should be put upon the market as "Sterling Double Special Steel," and plaintiffs should be paid one cent per pound, not only for the "double special," but for "this steel" under any other name. The "double special" was not sold under any other name. The learned judge lost sight of the manifest intention of the parties as evidenced by the undisputed facts and their language in the contract when he made the issue to turn on a technical definition. Therefore the decree which directs defendants to account for projectile steel, "C. Y. W.'s Choice" and "C. Y. Wheeler's Choice," is reversed, and set aside.

In so far as said decree directs an accounting under the contract for "Sterling Double Special Steel," the decree is affirmed, and an accounting directed under the contract in accordance with our interpretation of it.

Appeal of HARTMAN.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

ASSIGNMENT FOR CREDITORS—PROPERTY COVERED—TRUST FOR ASSIGNOR'S CHILDREN.

A provision in a will directing the payment of the yearly income of the estate to the husband of testatrix "until all of my children shall have arrived at the age of 21 years, said income to be disposed of by my husband at his discretion, with the hope and belief, however, that he will use the same in such manner as will be advantageous to our children," does not vest in the husband such a beneficial interest as will pass under a voluntary assignment made by him for the benefit of his creditors.

Appeal from orphans' court, Allegheny county.

Petition by Frank D. Hartman, voluntary assignee of John O. Slemmons, praying for a citation to the Safe-Deposit & Trust Company, executor of Caroline A. Slemmons, the late wife of John O. Slemmons, requiring it to exhibit an account of the moneys that had come into its hands since the time of the voluntary assignment; the purpose being to subject the part of the decedent's estate belonging to John O. Slemmons to the claims of his creditors. From a judgment dismissing the petition, petitioner appeals. Affirmed.

The opinion of the court below (Hawkins, Judge) was as follows: "While it is true that the net income of the trust estate is directed to be disposed of in the discretion of testatrix's husband, it is plain from the whole will that her children were the intended objects of her bounty, and he but the trustee. The estate is, in the first instance, given in trust to be equally divided 'among her children.' The trust is then directed to be managed as the trustee shall 'consider most' to their 'advantage,' and, when all shall have attained twenty-one years, distribution to be made to them with all convenient speed of the proceeds of the 'entire estate,' 'so that my [her] intentions hereinbefore expressed that my [her] children all share equally * * * be fully carried out, * * * and the objects of my [her] bounty may then have, each of them, entire control of their several separate estate.' The gift being expressly to them, and the management of the trust for their 'advantage' alone, the inference is that they were intended to have the benefit of the whole. A gift of the corpus is a gift of the income. True, the disposition of the income is intrusted to the discretion of the father, but this followed the express gift of the whole

residuary estate to the 'children,' and was coupled 'with the hope and belief, however, that he will use the same in such manner as will be advantageous' to them, and was limited in duration to their minority. The mere direction that the income should be 'paid' to the father, and used in his discretion, was not intended to cut down their beneficial estate, but related simply to the manner of use by the children. The testatrix had already made in express words, and independently, provision for him; and, if she had intended to give him any beneficial interest in this, would doubtless have said so. The express gift to the children alone excludes any implication of an intent to vest a beneficial interest in him. The manifest purpose was to give him, as head of the family, control of the income, so that he might use it in his discretion as he might deem 'advantageous' to the children until the youngest should attain majority. No beneficial interest was given him, or intended to be given him. But, concede that a beneficial interest was given Mr. Slemmons, was it such as could pass under a voluntary assignment? The children are expressly given a right of residence with their father, and impliedly a right of maintenance in the mansion house. Can any one take the place of the father as the head of the family, or in determining the amount of 'income' that may be used to the 'advantage' of the children, or when the mansion shall be sold? To ask these questions is to answer them in the negative. These are matters of personal trust, as to which there can plainly be no substitution. Concede, even, that the bequest of income is to the husband, with but a precatory trust in favor of the children, would it pass without specific mention in the assignment? The father would, in that event, be under a moral obligation which he might repudiate; but should he be presumed to have violated his wife's trust and disappointed her 'children's' just expectations in the interest of his individual creditors? Is there not as much reason to declare this a question of personal privilege as the plea of usury, coverture, statute of frauds, and the like, of which creditors can take no advantage? What equity have the creditors? Their demand involves at least a breach of moral duty on the part of their debtor, and injury to 'children' for whose 'advantage' the testatrix expressed her 'hope and belief' the income should be used, and ought not in equity and good conscience to be made nor allowed. *Shay v. Sessaman*, 10 Pa. St. 432."

J. M. Stoner and Cassidy & Richardson, for appellant. H. A. Miller, for appellee.

PER CURIAM. The decree in this case is affirmed on the opinion of the learned court below.

DUFF v. PATTERSON et al.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

EJECTMENT — DELIVERY OF POSSESSION — AMENDMENT OF WRIT — STAY OF EXECUTION.

The præcipe and writ in an ejectment suit describing the land erroneously, the defendants filed a disclaimer of any land described in such writ. A verdict was directed for plaintiff, and judgment entered thereon, and a habere facias possessionem was issued, which was returned unexecuted because of the errors in the description. Six months later, without notice to defendants, plaintiff procured an amendment of the record so as to correct the description, and issued an alias writ. *Held*, that the action of the court in staying the latter writ and striking off the amendment would not be disturbed.

Appeal from court of common pleas, Allegheny county.

Ejectment by Levi Bird Duff against A. C. Patterson and Georgia Patterson. From a decree staying a writ of habere facias issued by plaintiff after the rendition of a judgment in his favor, and striking off an amendment of the record, plaintiff appeals. Affirmed.

J. S. & E. G. Ferguson and William Blakeley, for appellant. A. C. Patterson, for appellees.

PER CURIAM. The record in this case, as presented to us, is lacking in sufficient completeness to indicate with certainty its condition at the time of trial. The præcipe and writ contained several errors in describing the land for which the action was intended to have been brought; and, doubtless on that account, the defendants filed a disclaimer of "any estate in the lands described in the plaintiff's writ, * * * as the same is a different tract or parcel of land from that of the defendants' lands." A verdict for plaintiff for six cents and costs was directed by the court, and judgment was subsequently entered thereon, and a habere facias possessionem issued. That writ was returned unexecuted because of the errors in the description. About six months thereafter, without notice to defendants, the plaintiff procured an order of court amending the record, and thereupon issued an alias habere facias. Subsequently rules taken by defendants to stay the alias habere and to strike off the amendment were made absolute by the court. We are all clearly of opinion that there is nothing in the record that would justify us in disturbing this action of the court. Defendants were certainly entitled to notice of the application to amend. It may well be that, in the altered condition of the record, they would wish to withdraw their disclaimer. The filing of that at the trial narrowed the issue to the question of possession, and consequent liability for costs. *Lane v. Harrold*, 66 Pa. St. 319. Withdrawal of the disclaimer, in connection with the amendment of description, would introduce a new issue, not passed upon at the trial. The verdict and judgment would necessarily fall with the change of issue, and hence there

would be nothing to sustain in the habere facias. We find nothing in the record that requires notice. The decree staying the writ of habere facias, and striking off the amendment, is affirmed, and the appeal dismissed, with costs to be paid by plaintiff.

CROFT v. JENNINGS.

(Supreme Court of Pennsylvania. Jan. 13, 1896.)

CONVERSION—EVIDENCE.

The liquidating partner of a firm made a bill of sale to plaintiff of certain patterns to secure the latter's claim for wages, and an approval thereof was marked on the bill by the attorney of a large execution creditor of the firm. Thereafter the liquidating partner made to this creditor a bill of sale of all the patterns which had belonged to the firm, including those conveyed to plaintiff, which had remained in such partner's possession. The said creditor then sold all the patterns, including those of plaintiff, the purchaser taking possession. *Held*, that such creditor was liable as for a conversion of plaintiff's patterns.

Appeal from court of common pleas, Allegheny county; Stowe, Judge.

Action by Harry W. Croft against W. K. Jennings, executor of J. F. Jennings, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

Marcus A. Woodward and W. K. Jennings, for appellant. Knox & Reed and Edwin W. Smith, for appellee.

GREEN, J. The leading and most important facts in this case are entirely undisputed. It is not at all controverted that Croft, who had been in the employment of Livingston & Co. for a long time, had a perfectly legitimate claim against that firm, of about \$600, for wages, and for \$200 of that amount he was entitled to a lien against their goods. On or before April 18, 1887, John F. Jennings held a judgment against Livingston & Co. for \$40,000, and an execution for \$24,416 had been issued. On the last date, W. H. Burt, who was a liquidating partner of Livingston & Co., made a bill of sale to Croft of a lot of patterns to secure his claim for wages. This bill of sale was approved, and so marked on the bill, by W. K. Jennings, the attorney for J. F. Jennings in the execution proceedings. The patterns sold to Croft were at the shops of Livingston & Co. and were a part of a large stock of patterns used in their foundry business, which was conducted in a building on Washington avenue; and they were left there in charge of Mr. Burt, the liquidating partner. After the bill of sale to Croft was made, the execution in favor of J. F. Jennings was stayed, and on April 28, 1887, Livingston & Co. made a transfer of all their stock of patterns at the shops to J. F. Jennings. On June 13, 1887, B. F. Jennings, as attorney in fact for his father, J. F. Jennings, sold, for the sum of \$5,000, all the patterns in the shops, including those already sold to Croft,

to the Enterprise Hardware Company. This bill of sale was prepared by Burt, who had made the previous bill of sale to Croft, and who said, when he was asked why he included the patterns he had already sold to Croft, that he supposed that Croft's claim had been settled. There is no doubt, also, that the Enterprise Hardware Company took possession of all the patterns, including those previously sold to Croft, and that Jennings received the full consideration for them. The sale to the Enterprise Hardware Company was made on June 13, 1887, which was less than two months after the sale to Croft. It seems to us that the question whether that sale of Croft's patterns was made inadvertently was an entirely immaterial question. The fact of the sale established a conversion, and no demand was necessary in order to sustain a recovery. The learned court below left to the jury the question whether Jennings intended to sell the Croft patterns when he made the sale to the Enterprise Hardware Company; charging that, if he did not so intend, the jury should return a verdict for the defendant. This was certainly as favorable an instruction as the defendant could possibly expect. But the jury found a verdict against the defendant, and therefore decided that the sale of the Croft patterns was intentional; and, in view of the testimony of Burt, their finding was entirely justified. We have, then, the clear case of one selling the goods of another, in his possession, delivering the possession to the purchaser, and receiving the purchase money to his own use. Why should not such a person be bound to pay to the true owner the value of the goods? The objections to a recovery were of the most technical character, and altogether untenable. The actual taking of possession by Croft was not at all necessary to maintain the action. There was no question of constructive fraud, as against creditors of Livingston & Co., by retention of possession by the seller, in the case. The question is directly between the parties, and, as to them, Croft's title was perfectly good, under his bill of sale. In the case of *Boyle v. Rankin*, 22 Pa. St. 168, the facts were that two partners, being indebted to another, assigned to him a stock of merchandise, accounts, bonds, notes, judgments, and accounts of the firm, as a collateral security that they would give him a bond and approved security for the debt within five days thereafter. It was held that the assignment, though unaccompanied by possession, was valid, as between the parties, and that, the promised security not having been given within the time specified, no creditors having intervened, the possession could be enforced by an action of replevin. In *Janney v. Howard*, 150 Pa. St. 339, 24 Atl. 740, we said: "A sale without delivery of possession divests the ownership of the vendor, as between him and his vendee. *Hetrick v. Campbell*, 14 Pa. St. 263. And the purchaser may, if the possession be withheld, maintain replevin for the goods.

Boyle v. Rankin, 22 Pa. St. 168." As this principle cannot be questioned, a further citation of authorities is unnecessary. The plaintiff here became, by virtue of his bill of sale, the owner of the patterns, as between him and his vendor, who was the defendant's testator. When the latter sold the goods to a stranger, delivering the possession, he certainly made himself liable as a trespasser, and no demand was necessary to entitle the plaintiff to recover the value of the goods. We see no merit in the assignments of error, and they are all dismissed. Judgment affirmed.

WHITE et al. v. ROSENTHAL.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

ACTION FOR DECEIT—PURCHASE OF GOODS—MISSTATEMENT OF FINANCIAL CONDITION.

1. The statement by an intending purchaser of goods that his financial condition was at least as good as that shown by a statement made the previous year, is fraudulent if in fact his indebtedness arising from purchases of goods is ten times as great as it was the previous year, though he has the goods so purchased as part of his assets.

2. On an issue as to whether goods were purchased under fraudulent representations as to the purchaser's pecuniary standing, evidence of purchases subsequently made was admissible, in connection with evidence of previous purchases, to show a general scheme on his part to obtain large quantities of goods, and then profit by his insolvency.

Appeal from court of common pleas, Allegheny county; McOlung, Judge.

Action by James F. White & Co. against David Rosenthal. From a judgment for plaintiffs, defendant appeals. Affirmed.

J. T. Buchanan and J. S. & E. G. Ferguson, for appellant. A. Blakeley, A. M. Blakeley, and W. A. Blakeley, for appellees.

DEAN, J. The plaintiffs' action was for deceit. The statement avers: That plaintiffs were wholesale dealers in dry goods in New York City, and defendant was a retail dealer in same goods in Pittsburg. That on 9th of August, 1892, defendant called upon plaintiffs to make a purchase of goods on credit, and represented that he had taken inventory the previous year of his assets and liabilities, and his financial condition was as follows:

Stock on hand in his Pittsburg store	\$18,675 00
Cash on hand	2,350 00
Good book accounts	12,350 75
Unincumbered real estate	4,360 00

Total assets \$37,735 75

—That he was indebted on open account, bills payable, and borrowed money in the amount of \$7,525. He further stated there were no judgment notes against him, and that he was not liable as surety, guarantor, or accommodation drawer, and that he knew of no claim that would affect his financial standing. That on the faith of these repre-

representations defendant obtained from plaintiffs \$1,000 worth of goods on credit. That said representations were false, and known to be so by defendant, and were made with intent to cheat and defraud plaintiffs of their goods, in which he was successful, and plaintiffs claimed damages in the amount of \$1,000. This statement clearly avers a good cause of action. The evidence to sustain and in denial of it was very contradictory; the material point in dispute being whether defendant had made the false statement on 9th of August, 1892, when this particular bill was purchased. Prior to September, 1891, defendant had made a written statement to plaintiffs in exact accord with that set out in the declaration of claim. Bryce Gray, a partner in the plaintiff firm, testifies that on the 9th of August, 1892, when the last purchase was made, he called defendant into his private room, where, in answer to his questions, he positively stated his financial condition was, if anything, better than the year before, when he made the written statement. Rosenthal, the defendant, positively denies this, and asserts Gray asked him nothing about his financial condition at that time, and he made no statement concerning it. The written statement seems to have been substantially correct as of the time it was made, but afterwards defendant greatly enlarged his business, with no increase of capital, so that his purchases of goods were principally on credit. He admits that they amounted to about \$65,000, all on credit, at this last visit to New York. His own evidence shows that his financial condition had greatly changed in the year between the written statement and the last purchase. Assume, as argued, that his actual indebtedness had not greatly increased before his last visit to New York, nevertheless he went there with the avowed purpose of purchasing \$60,000 worth of goods on a credit from 30 to 90 days, and on the very day of the interview with Gray had bought a large portion of this amount. His actual indebtedness was then not less than \$30,000, which he intended should be \$60,000 before he left, and his intention was carried out. If he, under such circumstances, represented to Gray his financial condition was, if anything, better than the year before, it was a gross falsehood, for, instead of owing \$7,500, he owed, or, as he knew, in a day or two would owe, ten times that amount. True, his assets would be increased by the value of the stock on hand, but this value was wholly problematical, depending on success in the venture of largely increased business with no corresponding increase of capital. In view of the evidence and its contradictory character the court fully and fairly submitted it to the jury to inquire: (1) Was a representation made to induce the credit? (2) Was it knowingly false? (3) Did plaintiffs rely on it? On the answers to these interrogatories turned the

verdict. The jury found for plaintiffs on each. They may have erred, but clearly the court did not.

The assignment of error to the admission of evidence of debts created by purchases of goods after the 9th of August would be well made considered apart from its connection with other evidence tending to establish the deceit. The plaintiffs had shown purchases made on credit in June and July; these were followed by showing continued purchases down to September, aggregating nearly \$90,000, on credit; then insolvency, resulting in a sale of the entire stock for less than \$20,000, and the store eventually put in name of defendant's wife. Plaintiffs claimed that all of the transactions, taken together, indicated a scheme conceived by defendant to obtain large quantities of goods on credit from plaintiffs and others by false representations, and then, in an indirect way, profit by a bankruptcy. In this view the evidence was inadmissible, not as tending to establish that indebtedness was created by the subsequent purchases, but that these purchases constituted part of one scheme to defraud, conceived by him before he practiced it on plaintiffs to their injury. We see nothing in the assignments of error which calls for further notice, and the judgment is accordingly affirmed.

HAHNE et al. v. MEYER.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

Appeal from court of common pleas, Allegheny county.

Case stated by Charles C. Hahne and others against A. F. Meyer. From a judgment for plaintiffs, defendant appeals. Affirmed.

George H. Quail and Charles W. Ashley, for appellant. Charles A. O'Brien, for appellees.

PER CURIAM. In this case stated, judgment was rightly entered in favor of the plaintiffs, and against the defendant, for \$1,500. There is nothing in either of the assignments of error that requires special notice. Neither of them is sustained. Judgment affirmed.

HUCKESTEIN et al. v. KAUFMAN et al.

Appeal of FRAZIER.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

ARBITRATION AND AWARD—CONCLUSIVENESS.

1. Where the parties, by agreement in writing, submit their "differences" to arbitrators mutually chosen, whose award shall be "final and conclusive," the courts, in the absence of fraud or misbehavior on part of the arbitrators, will not inquire whether the award was warranted by the evidence submitted.

2. Though a particular item was not in dispute, and was therefore not within the terms of the submission, if it was presented to the arbitrators, and it was considered in making up their award, the party who presented it is estopped from denying their jurisdiction to consider it.

3. The finding by an auditor, as a fact, that

an undisputed item was submitted by a complaining party to the arbitrators, and was passed on by them, will not be disturbed, unless for manifest error.

Appeal from court of common pleas, Allegheny county; Porter, Judge.

Action by John Huckestein, doing business as Huckestein & Co., against Jacob Kaufman, Isaac Kaufman, Morris Kaufman, and Henry Kaufman, doing business as Kaufman Bros., and J. Kaufman & Bros. From a decree confirming the auditor's report distributing the amount of the verdict, which was paid into court, John Frazier, doing business as Frazier Bros., appeals. Affirmed.

James Bredin and Thos. Patterson, for appellant. W. B. Rodgers and J. N. Beal, for appellees.

DEAN, J. The defendants, Kaufman & Bros., contracted with John Huckestein, a builder doing business as Huckestein & Co., for the erection of a building on Fifth avenue in the city of Pittsburg, for the price of \$15,000, to be increased by any changes or additions subsequent to the contract, or during the progress of the work. This price, by subsequent additions, was largely increased. The first contract between the parties was made on the 15th of June, 1892, and this, owing to important changes in design and height of building, was followed by three others within 60 days thereafter, whereby the design of the building was greatly changed. Before any of the subsequent contracts with Kaufman & Bros. were reduced to writing, Huckestein on 29th of June, 1892, sub-contracted the carpenter work to John Frazier, doing business as Frazier Bros. By this contract, Frazier agreed to do all the carpenter work and furnish all the materials therefor, according to specifications, for the price of \$15,000, subject to increase or diminution by change of plans and material. The price was largely increased by subsequent additions. All of the work and material to be subject to the approval of the supervising architect of Kaufman & Bros. Payments were to be made Frazier as the work progressed, according to the estimate of value by the architect, as follows: When the second-floor joists are in place, two-thirds of the value of the work up to that point; a like two-thirds when third-floor joists are in place; and so on, making six distinct payments when the plastering was finished. Then the seventh and final payment was to be made when all the work was completed to the satisfaction of the architect. This payment, it was stipulated, might be made by an order drawn by Huckestein in favor of Frazier on Kaufman & Bros. This last payment was not to be made until the architect certified that the work and material were approved and accepted by him. The building was completed on 13th February, 1893, and Kaufman & Bros. took possession. In the meantime, a number of payments had

been made to Frazier by Huckestein, but the seventh and last had not been made, nor had the amount of it been determined. The contract of Huckestein embodied a stipulation that, before final payment to him by Kaufman & Bros., the building was to be delivered free from all liens. There was also a provision for arbitration, if any dispute arose between owner and contractor concerning the value of any changes or additions to the original contract, and the decision of the arbitrators was to be final and binding on each of the parties. Kaufman refused to make final settlement and payment to Huckestein until he procured from Frazier a release of right to file a mechanic's lien. This obstacle to a settlement with Kaufman brought Huckestein and Frazier into negotiations as to balance due Frazier. On the 2d of June, 1893, they met at the office of T. Baird Patterson, Esq., counsel for Frazier, who drew up an agreement, which was there signed by them. In this it was agreed that, in consideration of an order for \$6,750, given to Frazier by Huckestein on the Kaufmans, and release by Frazier of right of lien, Huckestein would at once proceed to obtain payment from Kaufman of the full amount yet due, over and above the order, on his contract as principal contractor, and, in case the order was not paid by the Kaufmans, would protect Frazier's claim, and press arbitration against them for the full amount payable under the contract, and, on the determination of this suit, then all differences between Huckestein and Frazier should be submitted to arbitration, as provided in the written contract between Huckestein and Frazier, such award to be final. In a subsequent agreement of 27th July, 1893, it was further agreed that Frazier should have the right to present and prove before the Huckestein-Kaufman arbitration a bill of \$1,971.98, for extra work on the building, for which Huckestein denied liability; but, as the architect claimed this bill should be presented through the principal contractor, Huckestein consented it might be so presented, without any acknowledgment of liability therefor on his part. Huckestein filed a lien against Kaufman for the sum claimed by him as principal contractor, including the work and material of Frazier, the subcontractor. As both parties seem to have anticipated, Kaufman refused payment of the \$6,750 order given to Frazier. Huckestein therefore assigned to Frazier that amount of his lien as a protection of his claim, until the final determination of the Kaufman arbitration. Notwithstanding his agreement with Huckestein, in consideration of the \$6,750 order, to file no liens, acting under the advice of counsel, Frazier, on the 19th of September, filed liens against the building, showing a balance due him of \$16,630.84. Thereafter, Huckestein gave notice to Kaufman that he had revoked the \$6,750 order given to Frazier, and also notified Frazier

that he revoked both order and assignment to him of \$6,750 of lien. Huckestein, without proceeding to judgment on his lien, brought an action of assumpsit against Kaufman, and recovered a judgment of \$28,000. In the meantime, however, under the arbitration clause in the contract between Huckestein and Frazier, the latter had demanded an arbitration, and on September 8, 1893, they entered into a written agreement, reciting that differences had arisen between them as to the amount due Frazier "for work done and materials furnished in doing the carpenter work, in the erection and construction, additions, alterations, and improvements of the Kaufman buildings. * * * Now, for the purpose of adjusting said differences, it is hereby agreed to refer the same to three arbitrators," as provided in the building contracts. Thereupon Frazier chose John Trimble, and Huckestein Charles Simon, and the parties further agreed upon John W. Pryor as the third arbitrator, and that the arbitrators thus selected should proceed at once to ascertain the amount due Frazier "for the work done and materials furnished in and about said Kaufman buildings, taking into consideration the work omitted and changes made, and the award so made shall be final and conclusive upon all parties of all accounts arising out of the work done and materials furnished in and about said buildings." On the 11th of September, three days afterwards, the arbitrators met, and, at that and many subsequent meetings, heard the parties and their proofs, and made this award: "We do now find, under the submission to us, there is due from Huckestein & Co. to Frazier Bros., the sum of \$3,539.58, and we award that sum." And thus matters stood when Huckestein obtained his judgment in assumpsit against Kaufman for \$28,000. The Kaufmans then paid the amount of the judgment into court for distribution to those entitled. As Huckestein had made assignments of different amounts of his lien to a number of creditors besides Frazier, by agreement of counsel and decree of the court the distribution and all questions arising out of the same were referred to Thomas Herriott, Esq., who, after full hearing, passed on all the questions of fact and law, and made report to the court. In this, he found the amount payable to Frazier to be \$3,539.80, the amount awarded by the arbitrators. Frazier filed exceptions, which the court overruled, and confirmed the report absolutely. From this decree, Frazier appeals to this court.

In arriving at the amount due Frazier, the auditor found that his full claim had been submitted to the arbitrators, and that, under the terms of the submission, he was concluded by their award. Frazier contended, in substance, the order for \$6,750 on Kaufman was intended as a payment, was not in dispute, and was not submitted to the ar-

bitrators, but their award of \$3,539.80 was for extra work not included in the order; and, although appellant prefers eight assignments of error, they are all ruled by a decision on this one contention. The appellant argues that as, at the arbitration, the order for \$6,750 was not a matter in dispute between the parties, therefore it was not within the terms of the written submission. There is no doubt that, where parties have submitted disputes or differences to arbitration and award, either party may show that a particular transaction was not in dispute, and was not submitted. Here the written submission states, "Differences have arisen," and for the purpose of adjusting said "differences" they are referred to the three arbitrators. The claim of Frazier on Huckestein was for payment of the amount unpaid him on his subcontract, including the \$6,750 covered by the order. If the Kaufmans had secured payment of this to Frazier, or he had accepted them as his debtors, it might have appeared that this sum was no longer at variance between them. But the Kaufmans refused to honor the order, leaving the original relation of debtor and creditor between Huckestein and Frazier unaffected. The debt was still owing and unpaid by Huckestein to Frazier at the date of the arbitration, and was entirely within the control of Frazier. If, then, having the power so to do, he laid the items embraced in this order before the arbitrators, to be passed upon by them in the adjustment of the balance due him from Huckestein, and they did consider and pass upon them, he is estopped from now setting it up as a debt outside of and in addition to the award. Whether in "difference" between them or not, he made it a matter in difference by submitting it. As to the fact, this is the finding of the learned auditor in the court below. "It is clear that Frazier Bros., in presenting their claim, presented their whole claim. It is also clear, from the bill which Huckestein & Co. presented to the arbitrators, showing what they admit to be due to Frazier Bros., that they do not admit the items which Frazier Bros. claim went to make up the order of \$6,750. It is a significant fact, also, that if the order for \$6,750 was not submitted to the arbitrators, and they were not to pass upon it, this fact is not mentioned in their report, as the only amount which is admitted by all parties to be undisputed and due to Frazier Bros., viz. the amount of \$1,726, is included in the sum awarded by the arbitrators to Frazier Bros., and a note is added at the bottom of the award to call special attention to this fact. The auditor therefore thinks that, from the papers in the case, and the papers admitted to have been before the arbitrators, he is compelled to find that the arbitrators did consider the amount due to Frazier Bros. for all claims of every kind for work done by them upon the Kaufman buildings. In so ruling, he feels that an admitted claim for

\$6,750 is reduced to \$3,539.58, and he is satisfied that the claim should not have been so reduced. However, as the parties have seen fit to select their own court for the trial of matters in dispute between them, he does not see how it is possible, at this time, to interfere with the judgment of that court."

The whole argument of appellant is directed to demonstrating that the arbitrators made a mistake in their award. It is, in effect, urged that, instead of awarding Frazier \$3,539.58, they should have added to that sum the amount of the order, \$6,750. But, as the auditor correctly says, the courts cannot review the award of the court constituted by the parties themselves, and whose determination they stipulated should be final. No fraud or misbehavior is alleged. The only question before the auditor was the one on which he passed, viz. did Frazier submit, as part of his claim, to arbitration, the items embraced in the order? He finds that they were submitted, and this finding is based on ample evidence. There was testimony that the sole consideration for the order was the agreement that Frazier should not enter a lien. In violation of his agreement, he did file liens, although Huckestein had assigned to him, of his lien, for his (Frazier's) protection, an amount of his (Huckestein's) lien equal to the face of the order. When notified that, in thus acting, he was violating his agreement, he replied that he intended to protect himself for his whole claim. When he demanded an arbitration, accompanying the demand was a bill of items including his whole claim, and in it the very items covered by the order. Huckestein, Boyd, and the arbitrators testify the items embraced by the order were submitted by Frazier, and passed on in making up the award. The testimony of Frazier that the order was not submitted, and formed no part of the award, is vague and unsatisfactory. The testimony of his counsel, Mr. Patterson, on the same point, is direct and positive; but it is flatly contradicted by Huckestein and Boyd and the two arbitrators. Besides, the testimony of the latter is corroborated by Frazier's own itemized claim. Not only was there evidence to warrant the finding of fact by the auditor, but any other finding would have been against the decided weight of the evidence. This finding of fact, in the absence of manifest error, is conclusive. The assignments of error, in view of the very full and clear report of the auditor, hardly demanded the thorough examination we have given them; but appellant's counsel pressed so earnestly upon us the allegation that his client had been wronged to the extent of \$6,750 that we have been moved to a careful review of the whole case, with the voluminous testimony appended. We are satisfied appellant suffered no wrong, either by the decision of the auditor or the approval of his report by the court below. If any wrong was done him, it was by a court of his own selection, and, in part, of his own crea-

tion. To that court, the arbitrators, he submitted his whole claim. If they erred in passing on the merits of it, the error is beyond our reach, for he formally stipulated, in writing, their decision should be final. All the assignments of error are overruled. The decree of the court below approving the auditor's report is affirmed, and appeal dismissed, at costs of appellant.

KRAUSE v. STEIN.

(Supreme Court of Pennsylvania. Jan. 13, 1896.)

EXECUTION OF INSTRUMENT—MENTAL CAPACITY.

1. The fact that one suffered much from pain at the time of executing an instrument, and was frequently under the influence of morphia about that time, does not justify a finding that she was not in a condition mentally to clearly understand and comprehend her affairs, or to execute a paper of this kind.

2. The fact that before the paper was executed it was not read over to or by the maker, is immaterial, provided the paper contained precisely what she wanted to do.

Appeal from court of common pleas, Allegheny county; White, Judge.

Bill by John Krause, executor of the last will and testament of Mary Kapp, deceased, against Morris Stein. From a decree for plaintiff, defendant appeals. Reversed.

James Fitzsimmons and Joseph Friedman, for appellant. W. J. Barton, Robert Malone, and Charles F. McKenna, for appellee.

GREEN, J. This proceeding was a bill in equity, filed by the plaintiff, as executor, etc., of Mary Kapp, deceased, against Morris Stein, for the purpose of having set aside a certain sealed instrument acknowledging that the plaintiff's testatrix had received full payment and satisfaction of a mortgage for \$2,000, held by her as mortgagee, against the defendant, as mortgagor. The instrument in question was duly signed and sealed by the mortgagee, and was also acknowledged before a magistrate, and recorded. The allegations of the bill of the facts upon which the decree to set aside the instrument was asked are four: (1) That the paper was executed without consideration; (2) that it was executed without a full understanding or knowledge on the part of the mortgagee of the meaning and effect of the instrument; (3) that at the time of the execution of the paper, Mary Kapp, the mortgagee, was of unsound mind, and mentally incapable of understanding business of any kind, and had been so for some time prior thereto; and (4) that while in a state of incapacity the paper had been procured from the mortgagee by the mortgagor, by the exercise of undue influence.

Two of these allegations may be dismissed at once. It was not pretended that the mortgage was paid off, and that the acknowledgment of satisfaction was made for that reason. It was claimed to be a voluntary gift of the debt by the mortgagee to the mort-

gagor, and all the evidence in the case was to that effect. As a matter of course it was in the power of the mortgagee to make such a gift, and it therefore did not need any consideration to support it. The allegation of undue influence has not a particle of testimony to sustain it. All the testimony shows that the defendant had nothing whatever to do with the obtaining of the release. Not a witness testifies to a solitary act or declaration of the defendant, even by way of request or solicitation by the defendant, or that he ever exchanged a word with the deceased on the subject. The learned court below found in favor of the plaintiff, but not upon any such ground. The case was heard directly by the court below without the intervention of a master, and the instrument was annulled upon two findings of fact in the following words: "First. From the evidence in the case I find that the release referred to in the bill and answer was not duly and properly executed, and is invalid for that reason; that it was not read over to Mrs. Kapp, or sufficiently explained to her, so that she would know what she was doing. Second. That at the time that the paper was executed, and extending over a day or two before, and from that time on to her death, she suffered so much from pain, and was so frequently under the influence of morphine, that she was not in a condition mentally to clearly understand and comprehend her affairs, or to execute a paper of this kind." So far as the first of these findings is concerned, it can very readily be determined whether it is justified by the testimony or not. There was but one witness who testified to the execution of the instrument, and he was the scrivener who prepared it. His name was J. C. Williams, and he was a justice of the peace in the neighborhood. After testifying that he had known Mrs. Kapp since he was a boy, and that he was sent for by her, he said that he went to her house on a Saturday morning, and was taken to her room, and asked her if she knew him. "She said she did. She told me her business,—what she wanted done. Q. State what she told you, just as nearly in her language as you can give it? A. She said that Mr. Houserman, the old shoemaker, owed her some money on a lot, and that Mr. Stein owed her some money, and she wanted to relieve them of any further payment of that money; that she could die happier if that was done before her death. She said that the papers were in a box on the bed; a tin box on the bed, against the wall. Q. In her room? A. In her room, in the bed she was in; and we would find all the papers in relation to the matter in that box. The lady that was in the room reached over the bed and got the box, and brought it to the window." After testifying further that they looked in the box for the necessary papers, and found some of them, he advised that as to Mr. Houserman a deed should be executed for the lot on which he owed some of the purchase money, and that

Mrs. Kapp and her husband could sign it, and that they agreed to that, and he accordingly prepared such a deed, and they executed it. He was asked: "Q. What did she say with respect to Mr. Stein? A. Well, she said her desire was to release Mr. Stein. Q. From what? A. From the—what he owed her. She spoke of a mortgage and a note. Q. Did she say how much the mortgage was? A. If I remember rightly, \$2,000. Q. Well, now, what direction did she give you then with respect to that? A. She wanted the same arrangements made with Mr. Stein as with Mr. Houserman." He then explained why he did not go back on Saturday because the doctor said she was worse in the afternoons than in the mornings and that he went back on Monday. He saw her then, and said: "I asked her if she was in the same mind she was on Saturday, and she said 'Yes,' that she was; and she told me to sign, and that she would make her mark. She raised her knees up in the bed under the covers, and I laid the paper down lightly, and she caught hold of the pen and made her mark. * * * Q. Did you read it over to her before you took the acknowledgment? A. Yes, sir. Q. And what did she say after that, when you read it over to her? A. She said it was just what she wanted to do. It she hadn't, of course I wouldn't have insisted on her signing it. Q. You had no interest in it at all? A. No, sir; none at all. * * * Q. Did she say anything at all that indicated she didn't know what she was doing? A. No, sir. She appeared very weak, but rational." The witness said further it was between 2 and 3 o'clock in the afternoon when he took the acknowledgment, and that he had asked her lawyer to prepare the paper for him, as he did not feel able to prepare it himself, and that it was so prepared. On cross-examination he was asked: "Q. Did you explain to her the meaning of that paper? A. Yes, sir. She told me what she wanted done. Q. Did you explain to her what the meaning of that paper was? A. Yes, sir. Q. What did you say to her? A. I don't remember the exact words. I told her I had come with the paper she had requested me to draw up in regard to the Stein case, and just about that time her daughter-in-law and Mr. Kapp came in. The daughter-in-law came in first, and then the old gentleman, and there was quite a confusion there for a little bit. Q. Then what occurred? Did she sign it then? A. Then I asked the daughter-in-law to remain and witness the signature, and she refused to do it. She touched the pen, and made her mark. * * * Q. When did you read it to her? A. I didn't read it to her. I explained to her that it was the paper that was drawn up to release Mr. Stein, as she had requested on Saturday, from the mortgage. Q. Didn't you say, in answer to Mr. Fitzsimmons, that you had read it to her? A. I don't remember. I don't remember the reading of it. I don't think I took the time to read it. I wouldn't be posi-

tive. Q. Did you tell her that the paper was to be recorded? A. I don't know that I did. I don't remember. Q. Did you ask her if she acknowledged that to be her act and deed, and desired it to be recorded as such? A. I think I did. Q. Do you know whether you did or not? A. I wouldn't be positive. I think I did at the time. Q. You think you told her what it was, and she said to you that she would make her mark after it? A. Yes, sir; she did. Q. Did she touch the pen? A. Yes, sir." There is no other witness who testifies as to what took place at the execution of the paper. The nurse was in just before, but went out when Williams came in with the paper. There was some evidence that Kapp, the husband, was in part of the time, but none that he said or did anything. But there was another witness examined who had knowledge of Mrs. Kapp's intention. It was John McNeal, a justice of the peace, for whom she sent before she sent for Williams. He testified that he went into the room, "and Mrs. Kapp reached her hand to me, and says: 'It's pretty near the end. I am pretty near the end.' And I don't mind what I said, but I said, 'I understand you sent for me.' 'Yes, I did,' she says. 'I want to change my will,' and she spoke very well. She says, 'I want to forgive Morris Stein.' Q. Did she point to him? A. She pointed that way with her hand. She says, 'I want to forgive Morris Stein what he owes me.' And I says, 'I came prepared to write anything of that kind.' And says I: 'Have you the will here? I could put it in a codicil.' And she says— I don't recollect whether she says, 'I have my will made long ago,' or what; but it wasn't there. And I says: 'Here's four or five witnesses. I guess it will do.' And I repeated to her, 'All you want to change in that will, you want to forgive Morris Stein what he owes you?' and 'Yes,' she says; and then I went to go out, and bid her good-bye, and as I went out of the door she held her finger out, and says, 'Mind, if I should happen to get better, he must pay me.' Q. That is all that was said? A. Yes, sir. Q. Did she say what he owed her? A. No. She said, 'All he owes me.' That's the words she said. * * * Q. Did she know you when you went in? A. Oh, yes. She named me. She said she wanted to see me. * * * Q. Did she shake hands with you? A. She shook hands with me, and pressed my hand very cordially. Q. How did she appear to be,—all right? A. She appeared to be, I might say, all right, and intelligent, as far as I could judge. I think she was." The witness explained that he could not write anything at the time for want of writing material, and that he could not go back on Monday, as he was serving on the jury in court.

The question arising upon the testimony is, can a finding that the paper executed "was not duly and properly executed, and is invalid for that reason; that it was not read over to Mrs. Kapp, or sufficiently explained

to her, so that she would know what she was doing,"—be sustained? We cannot see how. The paper was certainly duly and properly executed. Her name, written by the justice, was there, with her mark properly made. The execution was duly attested. It was a sealed instrument, and no formalities were omitted. It is impossible to say it was not duly and properly executed. As to its being read over to her, the witness said at first that he did read it to her, but said afterwards that he did not, or that he did not remember that he did; but he adhered to his statement that he did fully explain it to her. This, however, is not of so much importance, as the paper did contain precisely what she said she wanted to do. In our judgment, it is quite impossible to sustain the first finding of the learned court below. It must be remembered that the paper was an executed deed, and that such papers cannot be set aside for light and trivial causes. In this case there was not a particle of testimony showing or tending to show the least degree of fraud, mistake, imposition, or undue influence, and the paper expressed exactly what the party signing it said she wanted to have done. There was no confidential relation between the parties, and there is no other circumstance to show that Mrs. Kapp did not understand fully what she was doing.

The second finding does not declare that Mrs. Kapp was of unsound mind when she executed the instrument, and, if it did, it would be without any testimony to support it. The fact that she suffered much from pain, and was frequently under the influence of morphia, does not, in any point of view, justify a finding that "she was not in a condition mentally to clearly understand and comprehend her affairs, or to execute a paper of this kind." There was no testimony in the case that there was any excessive use of morphia, or that her mind was impaired by its use. And there is no standard of incapacity that is not at least mental unsoundness that will suffice to avoid an executed deed. The physician who attended Mrs. Kapp was examined at much length for the plaintiff, but he gave no testimony either of excessive use of morphia or of mental incapacity from that or any other cause. He said she was under the influence of an opiate, and he did not think she was in a fit condition to transact business, at that time; but he admitted on cross-examination that her disease was not a mental disease, but a disease of the liver, and it did not affect her mind except as pain affected it. But his statement was the mere expression of an opinion, which was of no consequence against the actual facts attending the execution of the paper. Courts do not permit solemn deeds to be annulled upon any such weak and flimsy testimony as is found in this record. The orphans' court and this court are in the constant habit of refusing to grant issues upon wills in cases where the testimony is vastly more voluminous and

much stronger and more emphatic than any evidence appearing in this record. Forcible illustrations of this character will be found in the following cases: *De Haven's Appeal*, 75 Pa. St. 337; *Cauffman v. Long*, 82 Pa. St. 72; *Wainwright's Appeal*, 89 Pa. St. 220; *Wilson v. Mitchell*, 101 Pa. St. 495; *Combs' & Hankinson's Appeal*, 105 Pa. St. 155; *Eddey's Appeal*, 109 Pa. St. 400, 1 Atl. 425; *In re Napf's Estate*, 134 Pa. St. 492, 19 Atl. 679. We are clearly of opinion that if this case had been tried before a jury, and a verdict rendered against the defendant, the court below should have set aside the verdict; and, failing in that, it would have been our duty to reverse the judgment for that reason. The decree of the court below is reversed, and plaintiff's bill is dismissed, at the cost of the appellee.

In re PEPPER'S ESTATE.

(Supreme Court of Pennsylvania. Jan. 20, 1896.)

Appeal from court of common pleas, Philadelphia county.

Proceeding to settle the account of Joseph Norris, substituted trustee under a deed of Charles Rockland Pepper. From a decree dismissing exceptions to the auditor's report and confirming the same, Edward Pepper, M. D., appeals. Affirmed.

R. L. Ashhurst and S. Dickson, for appellant. John S. Gerhard and Geo. Tucker Bispham, for appellee.

PER CURIAM. Pursuant to agreement of counsel, decree affirmed, and appeal dismissed, with costs to be paid by appellant.

TOWT v. CITY OF PHILADELPHIA et al.

(Supreme Court of Pennsylvania. Jan. 20, 1896.)

Appeal from court of common pleas, Philadelphia county; Willson, Judge.

Action by William P. Towt against the city of Philadelphia and McCaulley Bros., for injuries to a horse caused by defects in a wharf owned by said city and leased to said firm. From a judgment for defendants, plaintiff appeals. Affirmed.

Joseph L. Tull, for appellant. E. Spencer Miller and John L. Kinsey, for appellee city of Philadelphia. William J. Smyth, for appellees McCaulley Bros.

PER CURIAM. We find nothing in this record that would justify us in sustaining any of the assignments of error, nor do we think that either of them presents any question that requires discussion. Judgment affirmed.

FREEMAN v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Jan. 20, 1896.)

CONTRACT—SUIT BY THIRD PARTY.

The holder of coupons representing interest upon railroad bonds has no right of action on an agreement by the lessee of the railroad to apply the net earnings to the payment of the interest coupons, and to buy up the cou-

pons if the net earnings should not be sufficient to pay them; such holder of coupons being a stranger to the contract and the consideration.

Appeal from court of common pleas, Philadelphia county; Thayer, Judge.

Action by Henry G. Freeman against the Pennsylvania Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The opinion of the president of the common pleas was as follows (Thayer, P. J.):

"By an indenture dated February 21, 1872, between the Danville, Hazleton & Wilkesbarre Railroad Company, of the first part, and the Pennsylvania Railroad Company, of the second part, the first-named company leased to the Pennsylvania Railroad Company, for the term of thirty-three years, its railroad, which extended from Sunbury, in Northumberland county, to Tomhicken, in Luzerne county, together with all its depots, stations, buildings, appurtenances, and property, real and personal, and all its corporate rights and franchises. The consideration for the lease was the covenants and agreements therein contained on the part of the lessee. The Pennsylvania Railroad Company, on its part, covenanted that they would, during the demised term of thirty-three years, maintain, operate, and manage the leased road, and collect the tolls, freight charges, and all other dues which should accrue, and apply the same in the manner following: (1) To the cost of repairing, maintaining, operating, and running the road, including the wages of all employés, and the cost of all necessary materials, repairs to locomotives, and the cost of the customary car service. (2) To apply the surplus, if sufficient for purpose, to the payment of the coupons for interest on the first mortgage bonds of the Danville, Hazleton & Wilkesbarre Railroad Company maturing after April 1st, 1872; but if the said earnings are not sufficient, after payments mentioned in item 1, to pay said coupons for interest, and taxes, then the party of the second part covenants and agrees that they will advance such sums of money, from time to time, and purchase said coupons, and all of said coupons so purchased shall be held by the party of the second part, with all rights and liens incident to the same, as security for the sum so advanced: provided, however, that the party of the second part shall not foreclose the mortgage securing said coupons until the expiration of this lease.' (3) To pay any surplus remaining after the payments mentioned in items 1 and 2 to the party of the first part. The Pennsylvania Railroad Company further bind themselves to keep accurate accounts of all the business, tonnage, receipts, revenues, expenses, and disbursements of the leased road, which shall be subject to the examination of the president of the Danville, Hazleton & Wilkesbarre Railroad Company, which company shall also be furnished monthly with detailed statements showing the gross

amount earned by the road, and the receipts from passengers, from freights, from United States mails, and all other sources. In article 3 of the indenture it is agreed and understood that the intention is that the Pennsylvania Railroad Company shall use the Danville, Hazleton & Wilkesbarre Railroad for the control of the traffic by the Pennsylvania Railroad to and from New York over the Philadelphia & Erie Railroad. The whole object of the lease, as thus frankly disclosed by this article, and which is, indeed, apparent from the whole instrument, was to enable the Pennsylvania Railroad Company to control, manage, and operate the road for thirty-three years as a part of its own system, to make it a link in its western connections; that company securing to the lessors the net profits arising from freights over their road, after payment of all expenses, including that portion of the lessor's indebtedness which was represented by the coupons already referred to.

"The Danville, Hazleton & Wilkesbarre Railroad Company had in 1867 issued construction bonds, amounting in the aggregate to \$1,400,000, secured by a mortgage upon the road and all the property and franchises of the company. The interest upon these bonds was represented by coupons. The present plaintiff, Henry G. Freeman, is the holder of certain of these coupons, amounting to \$4,550. In his statement filed in this case he avers that the defendant, the Pennsylvania Railroad Company, guaranteed the payment of these coupons. This is an inaccurate statement, for the agreement and lease of February 21, 1872, between the two companies, upon which the plaintiff relies, shows conclusively that the defendants did not enter into any contract of guaranty with the plaintiff, or with the holders of these bonds or coupons, nor into any contract whatever with them or with him. They were entire strangers to the transaction, and had no part in the agreement whatever. The arrangement made between the two companies was a private one, which concerned nobody but themselves, and in which nobody but themselves had any part or voice whatever. The indebtedness represented by these bonds and coupons had been incurred, and the bonds issued, five years before the agreement entered into with the Pennsylvania Railroad Company. They could not have been negotiated upon the credit of the Pennsylvania Railroad Company, for that company had never in any way assumed any obligation for their payment. The agreement and lease entered into between the two companies in 1872 was in no sense a guaranty to the plaintiff, or the holders of the coupons. The Danville, Hazleton & Wilkesbarre Railroad Company were alone responsible to the holders of the bonds and coupons.

"But it is contended for the plaintiff that the subsequent agreement of the defendants with the Danville, Hazleton & Wilkesbarre

Railroad Company to apply the surplus earnings to the payment of the coupons, in relief of the indebtedness of the latter company, and the alternative promise to buy up the coupons if the surplus earnings should not amount to sufficient to pay them, imposes an obligation upon the defendants which can be enforced by the plaintiff, notwithstanding he is a stranger to the contract. To establish this, the plaintiff relies upon that class of cases in which it has been held that a person who is not a party to a contract may sometimes maintain an action upon it in his own name, where he is the only one who is beneficially interested in its performance, and where the party with whom it was actually made has ceased to have any real interest in it. It is quite clear that the case of the plaintiff cannot be brought within the scope of these decisions, or be drawn, by any ingenuity of argument, within the operation of the reasons upon which they are founded. The rigid rule of the common law was that no man could sue upon a cause of action arising out of an agreement to which he was not a party, and for which he had not contributed to the consideration. In later times the courts of law, borrowing a leaf, as they frequently did, from the records of the administration of justice by the courts of equity, recognized an exception to this general rule; holding that if one pay money to another for the use of a third person, or, having money belonging to another, agree with that other to pay it to a third person, an action may be sustained by the only person beneficially interested, but that where the contract is for the benefit of the contracting party, and the third person is a stranger to the contract and the consideration, no action can be maintained by the third person, but only by the promisee. This distinction was long since established in the English courts and has been fully adopted in our own. There is no necessity to fumble among the ancient cases; for since the judgment of the supreme court in *Blymire v. Boistelle*, 6 Watts, 183, which has long been a leading case upon the subject in Pennsylvania, and in which the point was very ably discussed by Sergeant, J., the rule there laid down has been recognized as well settled and uniformly followed. There have been cases, perhaps, in which the distinction has not been applied with entire exactness, and the tendency of which has been to obscure somewhat the just limits within which the rule may be properly applied. But the grounds upon which it rests, and the circumstances which define the boundaries of the distinction, are now too well understood to leave room for any ambiguity or doubt. The cases are quite numerous. Among the more recent are *Torrens v. Campbell*, 74 Pa. St. 470, in which the rule is declared by Chief Justice Mercur to be that where the contract is for the benefit of the contracting party, and the third person is a stranger to the considera-

tion, no action can be maintained by the third party. *Robinson v. Reed*, 47 Pa. St. 115, is to the same effect; and so are *Campbell v. Lacock*, 40 Pa. St. 448, and *Kountz v. Holthouse*, 85 Pa. St. 235. The point was very ably considered and discussed by Sharswood, J., in *Mississippi Cent. R. Co. v. Southern R. Ass'n*, 8 Phila. 107, and by Judge Williams in *Adams v. Kuehn*, 119 Pa. St. 84, 13 Atl. 184, where the true point of the rule is very clearly presented and applied; and the real distinction, as in *Blymire v. Boistie*, 6 Watts, 182, is held to be that 'where one person enters into a contract with another to pay money to a third, or to deliver some valuable thing, and such third party is the only party interested in the payment or delivery, he can release the promisor, or compel performance by suit. If, on the other hand, a debt already exists from one person to another, a promise by a third person to pay such debt is for the benefit of the original debtor to whom it is made, and can only be released or enforced by him. If it could also be enforced by the original creditor, the promisor would be liable to two actions for the same debt, at the same time, and upon the same contract.' To apply this doctrine to the case in hand, nothing can be plainer than that the promise relied on by the plaintiff not having been made to him, and he being no party to the contract or the consideration, but the contract, on the contrary, having been made for the benefit and relief of the Danville, Hazleton & Wilkesbarre Railroad Company, the other contracting party, alone, and they being the party beneficially as well as nominally interested in the performance, and who furnished the whole consideration, no privity of any kind exists between the plaintiff and the defendants. The present plaintiff has therefore no part nor lot in this contract, and can maintain no action thereon. The lessors have a beneficial interest in the contract made with the Pennsylvania Railroad Company, upon which the present plaintiff has undertaken to bring a suit in his own name; for, if the Pennsylvania Railroad Company have broken their promise, the obligation of payment still rests upon the Danville, Hazleton & Wilkesbarre Railroad Company, and they may maintain an action against the defendants for the breach, and may recover, unless the defendants have a defense thereto. If the defendants have such a defense, it is to be set up in an action to be brought by the Danville, Hazleton & Wilkesbarre Railroad Company against them upon their agreement. They are not called upon to set it up in an action brought by a person who is a total stranger to the contract, who furnished no part of the consideration for it, and who, whatever indirect interest he might have in the transaction between the two companies, has no cause of action against the defendants, but must look to his original debtor and the mortgage security for the only redress he is

entitled to. Judgment for the defendants on the demurrer."

George P. Rich and Henry C. Boyer, for appellant. David W. Sellers, for appellee.

PER CURIAM. All that need be said in vindication of the judgment for defendant on the demurrer will be found in the clear and convincing opinion of the learned president of the common pleas, and on it we affirm the judgment. Judgment affirmed.

JOHNSTON et al. v. CALLERY.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

SALE OF LAND — EXISTING INCUMBRANCES — APPROPRIATION BY RAILROAD.

1. A survey on the ground made by a company invested with the power of eminent domain, followed by selection and proper adoption of a line for the proposed road, fastens a burden upon the property sufficient to relieve a vendee from his contract to purchase free of incumbrances.

2. All unequivocal traverses or denials of material allegations in support of the claim, and all material allegations of fact contained in affidavits of defense, must be accepted as verity.

Appeal from court of common pleas, Allegheny county; Kennedy, Judge.

Action by Anna D. Johnston, Harvey Childs, Jr., and William E. Littleton, executors and trustees of the estate of Ross Johnston, deceased, and Mary E. Sloan, against James D. Callery for the price of land. From a judgment for defendant, plaintiffs appeal. Dismissed.

Knox & Reed and George E. Shaw, for appellants. Wm. D. Evans and George C. Wilson, for appellee.

STERRETT, C. J. It may be conceded that a prima facie case for the plaintiffs is presented in their statement of claim and exhibit appended thereto. The questions for consideration are, therefore, whether any of the material averments therein are sufficiently traversed or denied by the affidavits of defense, or whether any independent ground of defense, sufficient to carry the case to a jury, is presented in said affidavits. If so, judgment for want of sufficient affidavit of defense was rightly refused. In passing on such questions as these, the invariable rule is that all unequivocal traverses or denials of material allegations in support of the claim, and all material allegations of fact contained in affidavits of defense, must be accepted as verity. *Kuerr v. Bradley*, 105 Pa. St. 190. Referring to the facts of that case, it was there said: "The cause cannot be tried on the affidavits of the parties. It is sufficient if the affidavit distinctly declares that the clause under which the defendant claims is in, and forms a part of, the contract, and is omitted from the copy filed. How or in what manner he may establish this, or

whether he can establish it at all, will hereafter appear."

Among other things, the contract of May 2, 1893, provides, in substance, that the plaintiffs shall, on or before June 1st following, convey to the defendant the land described therein "clear of all incumbrances." After stating, "This sale is being made subject to the approval of Prof. William M. Sloane, one of the M. E. Johnston heirs," the contract contains this further qualifying clause: "Possession to be given on delivery of deed, subject to leases to present tenants. Purchaser to receive all rents from the delivery of deed." In brief, it is an agreement to sell, subject to approval, etc., and, at a future day, convey in fee to defendant, clear of all then existing incumbrances, plaintiffs in the meantime to retain possession and receive the rents. After substantially reciting the agreement, and averring that, in pursuance thereof, they tendered defendant "a good and sufficient deed of conveyance of the property described in said agreement of sale, and then and there demanded the consideration money," which he refused to pay, the plaintiffs renew their tender, and further say "they have kept and performed all acts, agreements, and covenants which they were bound to keep and perform under the contract or agreement aforesaid." It is not our purpose to refer at length to defendant's averments in relation to the servitude or incumbrance on the land in question, alleged to have been created by the action of the Pittsburgh & Connellsville Railroad Company in surveying, locating, and adopting a route for a branch railroad across the land prior to tender of conveyance by plaintiffs, and even before the agreement in suit was executed; also, in relation to when and how he was first informed of said incumbrance, and what, upon further investigation, he learned in regard thereto, etc.; also, to defendant's express denial "that plaintiffs kept and performed all acts, covenants, and agreements which they were bound to keep under the contract," and his denial of all averments contained in plaintiffs' statement in conflict with those contained in the affidavits of defense. Our consideration of all these matters has led us to the same conclusion reached by the court below,—that there is sufficient in the affidavits to carry the case to a jury.

The successive steps necessary to be taken by a railroad company, invested with the power of eminent domain, in acquiring, first an inchoate, and finally an absolute, right or title to a roadway upon or through the land of a private owner, were fully explained by our Brother Williams, in *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co.*, 141 Pa. St. 407, 21 Atl. 645. Briefly stated, they are: (1) Entry on the land, for the purpose of exploration, usually made by engineers

and surveyors, who, after running and marking one or more experimental lines, report the result of their work on the ground, with necessary maps and profiles, to the company employing them. (2) The selection and adoption, by the board of directors, of a line, or one of the lines, so run, as and for the location of the proposed road. (3) "Payment to the owner for what is taken, and the consequences of the taking, or security that it shall be paid when the amount due him is legally ascertained." The survey on the ground, followed by selection and proper adoption of a line for the proposed road, as was said in the above-cited case, "makes what was before experimental and open, a fixed and definite location. It fastens a servitude upon the property affected thereby, and so takes from the owner and appropriates to the use of the corporation." It gives to the latter a standing to settle with and make compensation to the owner for the property thus taken and appropriated to its own use, and, in case they cannot agree, to give adequate security for the payment of damages when legally ascertained. Until such compensation is made, or, in lieu thereof, approved security is given, the title of the owner is not divested. "As against him, the corporation, by its act of location, can acquire only a conditional title which ripens into an absolute one upon making compensation." *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co.*, 141 Pa. St. 415, 21 Atl. 645, and cases there cited. As was said in that case (page 416, 141 Pa. St., and page 645, 21 Atl.): "The act of location is at the same time the act of appropriation. The space covered by the line as located is thereby seized and appropriated to the purposes of the construction and operation of the railroad by virtue of the power of eminent domain, and nothing remains to be done except to compensate the owner. After the act of location by the company, the owner or the company may proceed at once to secure an ascertainment of damages. Until such act, neither can do so; for no right of damages vests in or accrues to the owner until there has been an appropriation of his property by the corporation. *Davis v. Railway Co.*, 114 Pa. St. 308, 6 Atl. 736." To the same effect are *Neal v. Railroad Co.*, 2 Grant Cas. 137; *Wadhams v. Railroad Co.*, 42 Pa. St. 303; *Beale v. Railroad Co.*, 86 Pa. St. 509.

Further consideration of the questions involved is unnecessary. We think the averments contained in the affidavits of defense bring the case within the principles above referred to,—sufficiently so, at least, to warrant the discharge of the rule for judgment, and send the case to a jury for full ascertainment of all the material facts. Appeal dismissed, at the costs of the plaintiffs, without prejudice, etc.

FORNEY v. WEIGLEY.

(Supreme Court of Pennsylvania. Jan. 20, 1896.)

REVIEW ON APPEAL.

Where the evidence is conflicting, the verdict will not be disturbed on appeal.

Appeal from court of common pleas, Philadelphia county.

Action by James Forney against William W. Weigley. From a judgment for plaintiff, defendant appeals. Affirmed.

Samuel C. Perkins and Chas. F. Eggleston, for appellant. W. Horace Hepburn, for appellee.

PER CURIAM. This suit was brought to recover a single item of \$506.84, with interest from May 25, 1894, the correctness of which was virtually conceded. The defense consisted of several counterclaims, aggregating \$3,940, for which amount, less credits of \$905.12, including plaintiff's claim in this action, the defendant, in the outset, claimed a certificate in his favor. During the trial, however, he withdrew, by leave of court, the last item (\$2,000) of his counterclaim. The controversy was thus restricted to the remaining nine items, all of which were disputed, and as to some of them the statute of limitations was pleaded. The testimony was conflicting, and presented a case that was clearly for the jury. It was submitted to them with instructions which appear to be substantially correct and adequate, and a verdict in favor of plaintiff for \$322.95 was returned. This necessarily implies a finding against the defendant as to the whole of his counterclaim, except the sum of about \$230. An examination of the record, with special reference to the several assignments of error, has failed to convince us that any of the specifications should be sustained. We find no substantial error in any of the rulings complained of. The case depended mainly on questions of fact, which have been determined by the verdict. There is nothing in either of the assignments of error that requires discussion. They are not sustained. Judgment affirmed.

YOUNG v. GRAND LODGE OF SONS OF PROGRESS.

(Supreme Court of Pennsylvania. Jan. 20, 1896.)

BENEVOLENT SOCIETIES—CONSTITUTIONAL PROVISIONS—SUSPENSION OF SUBORDINATE LODGE.

Where the constitution of an endowment society provides for a certain procedure as precedent to the suspension of a subordinate lodge and its members from all share in the endowment fund for nonpayment of assessments made by the supreme authorities of the society, a member of such lodge cannot be deprived of his share in the fund unless the suspension of the lodge was in accordance with such constitutional requirements.

Appeal from court of common pleas, Philadelphia county; Thayer, Judge.

Action by John L. B. Young against the Grand Lodge of the Sons of Progress for benefits accruing to plaintiff upon the death of his wife. From a judgment for plaintiff, defendant appeals. Affirmed.

The opinion of the president judge (Thayer, J.) upon the question reserved was as follows:

"The plaintiff was a member of Harmony Lodge, No. 40, of an order called 'Sons of Progress,' consisting of a large number of confederated lodges, each with a constitution of its own, and each managing its business in subordination to and under the control of a supreme power called the 'Grand Lodge of the Sons of Progress.' The grand lodge is a representative body, wherein all the subordinate lodges are represented, each lodge being entitled to at least one representative, lodges having sixty-seven members being entitled to two, and one additional representative for every additional thirty-three members. Past grand masters are also members of the body. Const. art. 5. The grand lodge, which is an incorporated body, is, according to article 1 of its constitution, 'the supreme executive power of the order.' By the same article it has power to make laws for the guidance of the order, to grant charters to new lodges, to suspend or revoke the same, and to decide appeals coming up to them, either from subordinate lodges or individual members thereof. By article 9 the grand lodge has an additional function, which is to raise and disburse what is called an 'endowment fund.' This fund is raised by an assessment of the individual members of all the subordinate lodges, each subordinate lodge being required to collect from its own members, and to forward to the secretary of the grand lodge, the amount of the assessment ordered by the grand lodge whenever a death happens of a member of the order. The fund thus collected is appropriated by the grand lodge as follows: When a member of the order in good standing dies, the sum of \$1,000 is, by the constitution, to be paid to his widow, orphans, or designated heirs. In like manner, when the wife of a member in good standing dies, the husband is to be paid \$500 out of the endowment fund. To raise this fund, whenever a member of the order dies, each subordinate lodge is assessed by the grand lodge \$1 for each member in good standing belonging to it, and whenever the wife of a member in good standing dies each subordinate lodge is assessed 50 cents for each member in good standing belonging to it. Each subordinate lodge is required to collect these assessments from its individual members, and to forward the amounts to the secretary of the grand lodge, who transfers them to the hands of the treasurer of the grand lodge. The treasurer then pays, out of this fund, to the individuals entitled, the amount due, upon the happening of the death. Thus it will

perceived the grand lodge is not only the governing body of the order, and a court of appeals for each subordinate lodge and every individual member thereof, but they are also trustees and dispensers of the endowment fund. The subordinate lodges collect, and pay out of their several treasuries such sick benefits to their members as they may be severally entitled to under the laws of the lodge; each lodge being entitled to make its own by-laws upon that subject. But the assessments made for the endowment fund are, as already stated, collected from their several members, upon the requisition of the grand lodge, and forwarded to the secretary of that body. It will thus be seen that, by the constitution of the order, each member of each lodge who pays his dues and is in good standing is not only entitled to receive sick benefits from his own lodge, but also to participate in the endowment fund held by the grand lodge, and the grand lodge accordingly issues a certificate to that effect to each member of the order (article 11).

"The plaintiff in the present case is the holder of such a certificate. By it the grand lodge binds itself to pay, out of the endowment fund, to his wife, Sarah V. Young, \$1,000 upon his death, 'according to the provisions of the laws governing said fund,' and it is admitted by the defendants that, by virtue of section 4 of article 9 of the constitution, they are bound to pay to the plaintiff, out of the endowment fund, \$500 on the death of his wife, unless his right to such payment has been legally lost (although this is not stated in the certificate). It is for the recovery of this sum this suit is brought, the plaintiff's wife having died on August 28, 1891. The uncontradicted evidence on the trial showed that the plaintiff has paid his dues regularly to his lodge, and is in good standing, and that there are sufficient monies in the endowment fund held by the grand lodge to pay the plaintiff's claim. The defense made was that Harmony Lodge, No. 40, to which plaintiff belonged, had neglected to pay into the grand lodge certain assessments made by the latter upon the lodge upon the occasion of certain deaths which had occurred among members of the order. Some of these defaults had occurred before the death of the plaintiff's wife, and the defendants contended that, by reason of such defaults on the part of Harmony Lodge, No. 40, the lodge and all its members, including the plaintiff, had forfeited all claims upon the endowment fund held by the grand lodge. On the other hand, it was stated by several witnesses examined for the plaintiff that the officers of the grand lodge had condoned these defaults upon the part of the lodge, and had promised to indulge the lodge, and give them time to pay up. The defendants relied upon the provisions of section 9 of article 9 of the constitution, relating to the endow-

ment fund. Section 9 declares that 'lodges not complying with this law within thirty days from date of notice of the death of a member, or a member's wife, shall forfeit their claim on the endowment fund, and shall be informed by the grand secretary that they will forfeit their charter thirty days after the date of said notice, unless immediate obedience be paid thereto, and the executive committee are empowered to take charge of the forfeited charter and effects of said lodge.' The defendants contended that Harmony Lodge, No. 40, had incurred the penalties of this clause of the constitution, and that all its members, including the plaintiff, had thereby forfeited, ipso facto, all claim upon the endowment fund. There are other clauses, however, of the constitution, as now appears, to which the attention of the court was not at all directed upon the trial, which are extremely pertinent to this question, and which have a most important bearing upon it. Section 13 of article 9, which is to be read as if it were a part of section 9, as it relates to the very same subject, provides, as a remedy for the defaults mentioned in section 9, for the suspension of the delinquent lodge from any participation in the endowment fund, and its reinstatement on payment of the amount due within 30 days of the suspension. By article 1, § 3, of the constitution, the power of suspension is expressly reserved to the grand lodge itself. The steps which precede the suspension of a delinquent lodge, and the manner in which it is brought about, are clearly pointed out in article 7, § 5, of the constitution, which provides for a standing committee on the endowment fund consisting of seven members. When the grand master receives notice of the refusal of any lodge, for any cause, to pay the amount required by law as its share to an endowment, he is required to refer the matter to this committee, who are to examine witnesses, call for papers, and investigate the case, and they are provided with large powers for that purpose. They are then required to report the results of their inquiries, with all the evidence taken in the case, to the grand master, who is thereupon directed to convene a special meeting of the grand lodge 'to take action' upon the report of the committee. Such an investigation and proceeding implies, of course, notice to the delinquent lodge to be put on trial, first before the committee on the endowment fund, and afterwards before the grand lodge itself, at the meeting to which it is summoned by the grand master 'to take action upon the case.'

"Upon the trial of this case, not a tittle of evidence was given by either side of any such proceedings to forfeit the rights of the members of Harmony Lodge, No. 40, or their claims upon the endowment fund. The sections of the constitution to which I have just alluded were not even referred to by the learned counsel on either side of the case, and they have only been brought to my no-

tice by a careful and deliberate reading of the whole constitution since the trial was had. Yet it must be evident, to any one familiar with the rules of law upon this subject, that claims upon the endowment fund by any member of any subordinate lodge could only be forfeited by a strict observance on the part of the grand lodge of the methods of procedure pointed out in their constitution, and not otherwise. As I have already stated, there was not a particle of evidence given on the trial of any such proceedings as are required by the constitution as preliminary to a forfeiture. The contest resolved itself, on the trial, into a question whether Harmony Lodge, No. 40, had paid up its assessments or not, and, if not, whether the officers of the grand lodge had forfeited the rights of the subordinate lodge, or had agreed to waive the forfeiture, and to give them further time. Whether there had ever been any real forfeiture, by methods such as alone the constitution of the society recognizes, is a question which does not appear to have occurred to any one. There was much desultory and contradictory evidence in regard to suspension and forfeiture, and in regard to what had been done or not done by the officers, but no evidence whatever was given to shed any light upon the question whether the grand master had ever reported the lodge as a defaulting lodge to the committee of seven on the endowment fund; whether the committee of seven had ever instituted any examination, or had examined any witnesses, or given any notice, or made any report; or whether any special meeting of the grand lodge had ever been convened to 'take action' upon the report, or had ever acted in the matter at all, and, if so, in what manner.—every one of which steps the constitution required to be taken, and every one of which it was necessary to prove, before a forfeiture could be established.

"Doubtless, the position assumed by the defendants, that the right of the members of the lodges which constitute the order to participate in the endowment fund depends upon the compliance of the lodges to which they severally belong with the requirements of the constitution as to collecting and forwarding assessments, of which they are duly notified by the grand lodge, is correct; for section 9 of article 9 expressly provides that the claims of a defaulting lodge upon the endowment fund—that is, of the members of a defaulting lodge, for the lodge, as a lodge, in its collective capacity, can have no such claims—may be forfeited by a noncompliance by the lodge with the requirements of the constitution. The reason of the provision is that the subordinate lodges are the instruments by which the treasury of the endowment fund is replenished, and by means of which, alone, the grand lodge is enabled to make good its undertaking to pay the members of the order the sum allotted to each by the constitution upon the occurrence of a

death. If the lodges are careless or delinquent in collecting and forwarding to the grand lodge the assessments, the treasury of the endowment fund is crippled, and may be unable to meet the just demands made upon it. The object of the provision is evidently to impose upon the members of each subordinate lodge the duty of seeing that their officers comply with the requisitions for assessments made by the grand lodge. Hence, the claims of the members upon the endowment fund are made to depend upon the fidelity of the several lodges to which they belong in obeying the requisitions of the grand lodge for assessments, and in promptly forwarding the proceeds. Being thoroughly understood by the members, it is neither an unjust nor an unwise provision. Each subordinate lodge is represented in the grand lodge, and they are severally protected by their representatives there from any unfair demand, or any abuse of authority. But, while it is clear that the rights of the members of the order, so far as regards the endowment fund, thus depend to a certain extent upon the fidelity and good faith of the several lodges to which they belong, it is equally certain that their rights cannot be forfeited for the misconduct of their several lodges, or their officers, unless those lodges are proceeded against in the manner pointed out by the constitution. The officers of the grand lodge have no right to forfeit any charter, or to suspend any lodge from the benefits of the endowment fund. That can only be done, for sufficient reasons, by a vote of the grand lodge itself, at a meeting regularly called by the grand master to review the report of the committee of seven, and to act upon it, agreeably to the constitution. These views, although clearly set forth in the articles of the constitution to which I have already referred, seem to have been entirely lost sight of upon the trial, and the provisions of the constitution relating to them were not even adverted to. It is necessary, therefore, and only an equal measure of justice to both parties, that there shall be a new trial, the case having been tried on irrelevant issues. The real question in the case, viz. whether there ever was any actual suspension and forfeiture of the rights of the members of Harmony Lodge, No. 40, by the grand lodge itself, in accordance with the rules, formalities, and methods laid down in the constitution,—by which alone such suspension and forfeiture could have been lawfully effected,—was not touched upon by either side, either in the evidence or upon the argument. It is necessary, for the just determination of the rights of the parties in this case, that the facts relating to this vital question in the case should be made to appear.

"With the chart now laid down the cause of the parties upon the new trial ought to be a very plain and simple one; for it must be obvious, from what has been said, that the result must depend upon the ability of the de-

endants to show, by competent testimony, that the rights of Harmony Lodge, No. 40, to participate in the endowment fund, were regularly suspended and forfeited in the manner pointed out by the constitution, and by a strict adherence to all the forms and provisions prescribed by that instrument. If they cannot show that, it is plain that the plaintiff must recover. Rule absolute."

Edward Willard and Amos Briggs, for appellant. James Collins Jones and Lewin W. Barringer, for appellee.

PER CURIAM. In this case, a verdict for plaintiff was taken subject to the following question of law reserved: "Whether, under the constitution, its member had any claim upon the endowment funds after the expiration of 30 days from July 8, 1891, there being no evidence of any forfeiture declared or found in pursuance of the constitution and by-laws of the association." That question, having been considered by the court in banc, was resolved in favor of the plaintiff, and judgment against the defendant was accordingly entered on the verdict. We find nothing in the record that would justify us in sustaining any of the assignments of error, nor do we think that either of them requires special notice. The questions involved therein, so far as they are material, are sufficiently answered by the learned president of the court below, in his clear and exhaustive opinion disposing of the reserved question, etc. We are quite content to adopt his construction of the constitution of the association, and we therefore affirm the judgment on his opinion. Judgment affirmed.

MURPHY v. TAYLOR.

(Supreme Court of Pennsylvania. Jan. 20, 1896.)

STATEMENT OF CLAIM—WORK AND MATERIALS— AFFIDAVIT OF DEFENSE.

1. A statement of a claim for work done and materials supplied must aver the amount or sum that each item is reasonably worth.

2. In an action for work done and materials supplied, the affidavit of defense is sufficient if it alleges that defendant has a just, full, and true legal defense to the whole of plaintiff's claim, and that she made a contract with plaintiff for the work and materials to be furnished, for a certain sum, payable on completion of the work, and that since the completion of the work she has always been ready and willing to pay him said sum, but that he always refused to accept it.

Appeal from court of common pleas, Philadelphia county.

Action by William J. Murphy against Emily D. Taylor to recover for work done and materials furnished. From a judgment for plaintiff, defendant appeals. Reversed.

W. D. Neilson, for appellant. Melick & Potter, for appellee.

STERRETT, C. J. While it is averred in the statement that "defendant is indebted to v.33A.no.19—66

plaintiff in the sum of \$116.44 * * * for work done and materials supplied in making alterations to her house, as set forth in an itemized statement thereto annexed, marked 'Exhibit A,' and * * * that the said materials were furnished and the work done at her instance and request, and upon her promise to pay for the same," it is nowhere averred that the prices set opposite the respective items of work "done and materials supplied"—among which are "1 laborer, ½ day, \$2," and "100 feet white pine, \$10,"—are either correct, just, or reasonable, or that defendant agreed to pay said prices. If plaintiff believed or expected to be able to prove that \$2 for one laborer half a day, and other prices set opposite the respective items in Exhibit A, were either just or reasonable, it would have been an easy matter for him to have said so. A claim, such as his, for the value of "work done and materials supplied," cannot be regarded as complete without an averment of the amount or sum that each item is reasonably worth. In substantiating such a claim before a jury, it would be necessary, not only to prove each item of work done and materials furnished, but also how much each was reasonably worth. As was well said in *Fritz v. Hathaway*, 135 Pa. St. 274, 280, 19 Atl. 1011, "As to all matters of substance, completeness, accuracy, and precision are as necessary now to a statement as they were before to a declaration in the settled and time-honored forms."

But assuming, for argument's sake, the sufficiency of plaintiff's statement, we have no doubt that the averments contained in the affidavit of defense are quite sufficient to carry the case to a jury. After averring "that she has a just, full, true, and legal defense to the whole of the plaintiff's claim," the defendant, evidently still referring to the "work done and materials supplied," which constitute the basis of plaintiff's claim, says, in substance, that on or about October 1, 1892 (the time named in plaintiff's statement), she made a verbal contract with plaintiff to do said work and furnish the necessary materials for the sum of \$35, payable on completion of the work; that ever since the completion of the work she has always been ready and willing to pay him said sum agreed upon, but he has always refused to accept the same. We are of opinion that this is the only construction of which the affidavit of defense is fairly susceptible. Judgment reversed, and a procedendo awarded.

RYND v. PITTSBURG NATATORIUM et al. (No. 229.)

(Supreme Court of Pennsylvania. Jan. 13, 1896.)

SURETY ON CONTRACTOR'S BOND—RIGHT TO FILE LIEN.

A surety on a contractor's bond conditioned for the performance of the contract and

the delivery of the building to the obligee free from all charges, liens, mechanics' liens, or other incumbrances, cannot enforce a lien against the property for materials furnished the contractor.

Appeal from court of common pleas, Allegheny county; Ewing, Judge.

Scire facias on a mechanic's lien filed by B. F. Rynd against the Pittsburg Natatorium and others. From a judgment for plaintiff, defendants appeal. Reversed.

A. M. Neeper, for appellants. J. Charles Dicken and Levi Bird Duff, for appellee.

GREEN, J. There is nothing in the original contract between Kountze Bros. and the defendant that would prevent the plaintiff from filing his lien and recovering upon it. The ninth article of the agreement provides that "before final settlement the parties of the second part shall furnish the party of the first part a release of liens, properly signed, and attested to by all parties that would have a legal right to file liens against said building." Instead of this being a covenant against liens, it is a full recognition of the right to file liens by anybody having furnished labor or materials. But the plaintiff entered into another and entirely different contract directly with the defendant, and the question at issue arises upon that contract. He joined as surety in a bond with Kountze Bros. to the defendant, the condition of which was "that, if the said principal obligors shall well and faithfully perform said contract, and complete and deliver said building to said obligee, its successors or assigns, on or before the first day of March, 1890, free from all charges, claims, liens, mechanics' liens, or any incumbrance or debt in the nature of a lien or charge, of any kind whatsoever, without any fraud or further delay, then this obligation to be void; else to be and remain in full force and virtue." If the plaintiff can recover upon a mechanic's lien against this building, the condition of the bond would be violated, and he would thereupon become bound upon a breach of condition to reimburse to the defendant whatever the defendant was obliged to pay him as a mechanic's lien creditor. He voluntarily made himself a surety for the original contractors that he would indemnify the defendant against "all charges, claims, liens, mechanics' liens, or any incumbrance or debt in the nature of a lien or charge, of any kind whatsoever." This is not a mere undertaking not to file a lien, but a contract by this particular plaintiff that the building shall be delivered to the defendant free of all charges, claims, liens, mechanics' liens, or any incumbrance or debt in the nature of a lien or charge of any kind. To perform this contract, there must be no debt, charge, or lien of any kind at the time of delivery. How, then, can the plaintiff have a lien himself without being bound to remove it, just as much as if it were held by a stranger?

But if he is bound to remove it he certainly cannot be permitted to enforce it. This very question was decided in *Benedict v. Hood*, 134 Pa. St. 289, 19 Atl. 635, where the plaintiff, with others, joined in a guaranty that the original contractor would faithfully perform all the covenants of his contract with the owner. One of these covenants was that the contractor would not permit any person to file a lien, and that the last installment of the contract price should not be payable until after a full release of all liens had been delivered. We held in that case that the words were sufficient to prevent the filing of a lien by any one. That part of the decision has been since overruled; but we also held that the plaintiff was disabled from filing a lien because of his liability on the guaranty, and that he thereby waived his right to any lien. In the case of *Iron Works v. O'Brien*, 156 Pa. St. 172, 27 Atl. 131, in which *Benedict v. Hood* was overruled as to the sufficiency of the words to create a positive covenant against all liens, we nevertheless held that the case was rightly decided on the ground that the plaintiff, being a surety for the faithful performance of the contractor's agreement, could not file a lien himself. Our Brother Mitchell, delivering the opinion, said: "The contracts in that case (*Benedict v. Hood*) and in this, so far as relates to the filing of liens, are substantially the same, but there was in that case an additional feature in the fact that the plaintiff, a subcontractor, was surety for the faithful performance by the contractor of his covenants, one of which was that he would not suffer any liens to be filed. The case, therefore, was rightly decided on the ground of waiver by the plaintiff of his right to any lien, and it is on this ground only that it can be sustained in the face of more recent and fuller adjudications." It will be observed that the present case is much stronger on this point than *Benedict v. Hood*, for here the contract is not a mere guaranty that the contract of the principal should be faithfully performed, in general terms, but is a direct specific contract made by the plaintiff himself with the defendant that the building should be delivered to the defendant free of all liens, claims, debts, or charges in the nature of liens of any kind whatsoever. It is not a question whether this particular claimant would be debarred from filing a lien as a subcontractor by force of the terms of the contract between the contractor and the defendant, but whether he may himself become a lien creditor in the face of his contract of suretyship that the building should be delivered free of all liens or charges. The distinction is broad, and perfectly clear. When the necessary legal effect of his contract as a surety is that he would be bound to discharge a lien in his own favor the moment it was obtained, he must be held to have waived all right to file such a lien. For these reasons we must reverse the judgment

on the first and third assignments of error. The other assignments become of no importance. Judgment reversed.

GANNON'S EX'RS v. CENTRAL PRESBYTERIAN CHURCH OF MCKEESPORT.

(Supreme Court of Pennsylvania. Jan. 13, 1896.)

MECHANIC'S LIEN—SURETY ON CONTRACTOR'S BOND.

Where a building contract provides as a condition precedent to the final payment that there shall be no legal claims against the contractor for work or materials furnished, a surety on the bond of the contractor cannot enforce a lien for work or materials.

Appeal from court of common pleas, Allegheny county; F. H. Collier, Judge.

Scire facias on mechanic's lien by Francis Gannon, trading as the Diamond Lumber Company, against the Central Presbyterian Church of McKeesport, owner or reputed owner, and D. M. White, contractor. Plaintiff having died, his executors were substituted. From a judgment for defendants, plaintiffs appeal. Affirmed.

John E. Speer and J. McF. Carpenter, for appellants. John D. Shafer and Boyd Crumrine, for appellees.

GREEN, J. In this case the contract between the original contractor and the defendant contained the following stipulation: "And provided, further, that before the last payment is made all releases must be properly signed by the parties furnishing labor and materials on the building, that he (the architect) has carefully examined the records, and finds no liens or claims against said works or on account of the said contractor. Neither shall there be any legal or lawful claims against the contractor, in any manner, from any source whatever, for work or materials furnished on said works." Of course, there is nothing in this stipulation, nor anywhere else in the contract, that would prevent the plaintiff, in his mere capacity of subcontractor, from filing a lien against the defendant for work or materials furnished by him. But the question in controversy arises upon a bond of indemnity made directly by the plaintiff's testator, Francis Gannon, and one Gilbert F. Meyer, as sureties, and David M. White, the original contractor, as principal, the condition of which was "that, if the said David M. White shall duly perform said contract, then this obligation is to be void; but, if otherwise, the same shall be and remain in full force and virtue." The literal performance of the original contract by the contractor requires that there shall be no lawful claims against the contractor "in any manner, from any source whatever, for work or materials furnished on said works." If now the plaintiff's testator held a claim as a mechanic's lien creditor against the building for

work or materials furnished to the contractor, and a recovery is permitted on it, his obligation as surety is broken, and his estate must immediately make good the loss to the defendant. We held in *Benedict v. Hood*, 134 Pa. St. 289, 19 Atl. 635, confirmed in *Iron Works v. O'Brien*, 156 Pa. St. 172, 27 Atl. 131, that where the surety was himself a claimant to a lien on the building the lien could not be sustained, because his suretyship must be deemed a waiver of any right of lien in favor of the surety. We have reviewed this subject, and followed the same ruling in an opinion just filed in the case of *Rynd v. Pittsburg Natatorium* (No. 229, Oct. term, 1895) 33 Atl. 1041. While there is some difference in the precise terms of the plaintiff's contract of suretyship between this case and that, there is no substantial difference in the legal effect resulting from both. It is inconsistent that one who agrees to guaranty that there shall be no lawful claims for work or materials furnished to the original contractor shall himself be permitted to occupy such a position. He cannot be permitted to recover without violating his contract of suretyship, and he must therefore be held to have waived the right to file any lien in the face of his contract. The reasoning in the opinion just filed controls the decision of the present case, and therefore need not be repeated. Judgment affirmed.

KIEFFEL et al. v. KEPPLER et al.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

CONSTRUCTION OF WILL—LIFE ESTATE—FEE SIMPLE.

The act of 1833 provided that all devises of real estate shall pass the whole estate of the testator in the premises devised, unless it appear by the will that the testator intended to devise a less estate. *Held*, that a will giving the husband of testatrix the "whole income while he lives," and also granting him an unlimited power of sale of all her property, with no restriction on the appropriation of the proceeds, gave him, in effect, a fee simple.

Appeal from court of common pleas, Allegheny county; White, Judge.

Bill by Theresa Kieffel and others against Charles Keppler and others for the partition of land. From a decree for defendants, plaintiffs appeal. Affirmed.

Shiras & Dickey, for appellants. J. P. Hunter, for appellees.

MITCHELL, J. Notwithstanding the general presumption that one who makes a will does not intend to die intestate as to any part of his estate, reinforced as it is here by the words, "All such estate as it hath pleased God to intrust me with, I dispose of," etc., it is clear that, without the aid of the act of 1833, the will of Judith Pfeifer would have given her husband only a life estate; for the devise is only of the "whole income while he lives," and at common law

this express life estate would not be enlarged by the subsequent gift of a power of sale. *Hinkle's Appeal*, 116 Pa. St. 490, 9 Atl. 938. But the act of 1833 changes the rule of construction by its command that "all devises of real estate shall pass the whole estate of the testator in the premises devised, * * * unless it appear by a devise over, or by words of limitation, or otherwise in the will, that the testator intended to devise a less estate." Starting with this statutory presumption, the burden of proof is now upon those who claim that a less estate was intended by the testator. In the present case there is no devise over, and the limitation by the words "while he lives" is followed by an unlimited power of sale, with no restriction on the appropriation of the proceeds. Such an estate is very near a fee simple. The difference is purely technical, and is not one which would be obvious to the ordinary mind. For all practical purposes, the beneficial interest is the same; and, from the entire absence of any devise over after the husband's death, we must presume that it was solely his beneficial interest that the testatrix had in mind. We are not dealing with a deed granting an express life estate, with a power of sale which must be strictly construed, but with a will, having a statutory *prima facie* intent. The actual intent of the testatrix appears to be in practical harmony with the statutory presumption, and we can therefore best carry it out by giving her will the legal construction which accomplishes the practical result she desired, and holding that the estate passing to him was a fee simple. Judgment affirmed.

HARKINS v. PITTSBURGH, A. & M. TRACTION CO.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

STREET-RAILWAY COMPANY—INJURIES TO CHILD ON TRACK—CONTRIBUTORY NEGLIGENCE.

The mother of a child injured by a street car was not necessarily negligent because she intrusted the child to her brother, a boy 14 years of age, to take to a store on the other side of the street; the boy being a member of the family, and having frequently aided in taking care of the child.

Appeal from court of common pleas, Allegheny county; Kennedy, Judge.

Action by Clyde Harkins against the Pittsburgh, Allegheny & Manchester Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. M. Neeper, for appellant. Marshall & Sproul, for appellee.

FELL, J. This action was brought by a father to recover for expenses and loss of services resulting from an injury to his minor child. The only assignment of error to be considered relates to the refusal of the court

to direct a verdict for the defendant. The testimony in relation to the rate of speed at which the car was moving, to obstructions in the street, to the attention which the motorman gave to his duties, and to the question whether the child who was injured came so suddenly upon the track, from behind a wagon, as not to be seen in time to stop the car before he was struck, was conflicting and contradictory. If credit is given to the plaintiff's witnesses, the car was moving at an unusually high rate of speed; the view of the whole street in front was unobstructed; the child was seen, by passengers in the car, walking from the foot pavement to the track, and would have been seen by the motorman, if he had properly attended to his duty, long enough before the point of the accident was reached to have enabled him to stop the car. The motorman, instead of looking ahead, was looking at a house at the side of the street, where a number of persons had assembled; and he was negligent in not sooner stopping the car, and thus avoiding the more serious injuries which resulted from his clothing becoming entangled in the machinery. This testimony was sufficient to carry the case to the jury, unless it appeared that there was contributory negligence. The child injured was 2 years and 11 months old. His mother had asked her brother, the child's uncle, a boy 14 years old, to go to a store on the opposite side of the street for a loaf of bread. The child begged to go with him. For greater safety the mother carried the child across the street, and left him on the pavement, in the care of his uncle. The two children walked down the street together, a short distance, when the younger asked the older to get him a piece of ice from a wagon standing on the other side of the street. Cautioning him to remain where he was, the older boy ran across the street, got the ice, and started to return. As he stepped down from the wagon he noticed that the child had started to follow him, and was then on the car tracks. The car was at the distance of the width of two or three stores, and moved so rapidly that the child was struck before he could reach him.

The only question raised at the trial, which has been argued here, is whether the parents of the child who was injured negligently permitted him to go upon the street without a suitable protector. The defense was confined to this ground, and the question of imputable negligence was not considered, and is not now raised. The older boy was 14 years of age. He was a member of his sister's family, and had frequently aided in taking care of the child. The presumption is in favor of his capacity as a care taker, and there was no evidence of his incapacity, unless it be found in the particular occurrence under investigation. The question was for the jury, and the case should not have been withdrawn. The judgment is affirmed.

HARKINS v. PITTSBURGH, A. & M. TRACTION CO.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

STREET-RAILWAY COMPANY—INJURIES TO CHILD ON TRACK.

In an action for injuries to a child, caused by a street car, where there is testimony that the motorman, at the time of the accident, failed to see plaintiff because he was looking in another direction, at persons assembled at the side of the street, and there is no question of contributory negligence, the case cannot be withdrawn from the jury.

Appeal from court of common pleas, Allegheny county; Stowe, Judge.

Action by George Harkins, by his next friend, Clyde Harkins, against the Pittsburgh, Allegheny & Manchester Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. M. Neeper, for appellant. Marshall & Sproul, for appellee.

FELL, J. This action was brought by a minor child, to recover for injuries sustained by being struck by one of the defendant's cars. The facts appearing in evidence are substantially the same as those in *Harkins v. Same Defendant* (in which the opinion of the court has been filed) 33 Atl. 1044. The errors alleged are in not withdrawing the case from the jury on the ground that there was no evidence which would sustain a verdict for the plaintiff, and in not specifically instructing the jury that the evidence in relation to the speed of the car was insufficient to sustain a finding that the defendant was negligent in that regard. As there was testimony that the motorman, at the time of the accident, was looking at persons assembled at the side of the street, and for that reason failed to see the plaintiff in time to stop the car, and as no question of contributory negligence arose, the case could not have been withdrawn from the jury. It was not error to refuse the instruction asked as to the speed of the car. There was testimony that the car was running very rapidly through a crowded thoroughfare. The instruction on the subject in the general charge was highly favorable to the defendant. In *Yingst v. Railway Co.*, 167 Pa. St. 438, 31 Atl. 687, relied on by the appellant, the injury resulted from the frightening of the plaintiff's horse; and one of the questions raised was whether the railway company was negligent in running its cars at excessive speed, and it was held that there was no evidence of excessive speed. The circumstances of the two cases are not alike, and the degree of care required was not the same. In one case the speed of the car was wholly unimportant, except as it contributed to causes which produced an unexpected result,—the fright of the horse; in the other the rate of speed was of primary importance, as indicating the degree of control which the motorman exer-

cised over the movements of the car in a crowded street, and when in a position demanding a high degree of care. The judgment is affirmed.

COSGRAVE v. HAMMIL.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

AFFIDAVIT OF DEFENSE—SET-OFF—STIPULATION IN LEASE—PURCHASE OF IMPROVEMENTS.

1. When the grounds set up in the affidavit of defense are in reduction or set-off to the payment sued for, the averments must be specific as to the amounts claimed in reduction, so that plaintiff may, if he choose, elect to admit them and take judgment for the balance.

2. In an action by a lessee on a contract by the lessor to purchase the improvements at the end of the term, an affidavit of defense alleging plaintiffs' failure to comply with covenants in the lease requiring him to pay water rents, and prohibiting subletting, is insufficient, if there is no averment as to damages resulting from such breach.

3. In an action by a lessee on a contract by the lessor to purchase the improvements made by the former at the end of the term, an allegation in the affidavit of defense that plaintiff failed to comply with a stipulation in the lease that he should remove a certain building on the premises to an adjoining lot is insufficient, in the absence of an averment that such stipulation was an essential part of the contract, without which the lease would not have been signed.

4. An averment in the affidavit of defense that the premises were to be yielded up in good repair by plaintiff lessee, and that, on the contrary, they were in a very dilapidated condition, is insufficient, when it appears from the pleadings that the premises, when leased, were a vacant lot.

Appeal from court of common pleas, Allegheny county.

Action by Rev. James A. Cosgrave, trustee for St. James' Roman Catholic Church, against Catharine Hammil, on a stipulation contained in a lease. From a judgment for plaintiff, defendant appeals. Affirmed.

George P. Hamilton, for appellant. A. V. D. Watterson and A. B. Reid, for appellee.

MITCHELL, J. The grounds set up in the affidavit of defense do not traverse the obligation declared upon in the statement, but are in the nature of confession and avoidance, in reduction or set-off to the payment sued for. In such cases the averments must be specific as to the amounts claimed in reduction, so that plaintiff may, if he choose, elect to admit them and take judgment for the balance. *Gould v. Bush*, 13 Wkly. Notes Cas. 20; *Watson v. Galloway*, 1 Wkly Notes Cas. 109. In this respect the affidavit is entirely wanting. The first ground is a general averment of failure to comply with the terms of the lease, with no specification of the particulars, and no averment of damages. The second is also a denial of compliance with the covenants of the lease, with the specification of two particulars: (a) Failure to pay water rents, to the extent of \$25; and (b) subletting without consent. The first was

allowed by the court in reduction of the amount of judgment given, although the affidavit was only that the rent was unpaid "at the time of the notices and demands," and not at the time of suit brought. The averment as to subletting without consent does not allege any damages. The third ground, that at the time of making the lease there was a collateral agreement to remove a stable on the demised premises to the adjoining lot, is subject to the same objection, besides lacking the necessary averment that the agreement set up was an essential part of the contract, without which the lease would not have been signed. The last ground of defense is that the premises were to be yielded up in as good repair as when received, and that, on the contrary, the same were in a very dilapidated condition, had been allowed to become so with intent to defraud the defendant, and that to put them in good and sufficient repair will require the expenditure of \$620. This, in spite of its vagueness and generality, would have some plausibility, were it not for the fact that appears in the pleadings, that the premises, when leased, were a vacant lot, and that the only building on it was to be thereafter erected by the lessee, of a size, style, cost, and subsequent use entirely in his own discretion. In view of this fact, the affidavit is simply impudent. Judgment affirmed.

COLENBURG et al. v. VENTER.
(Supreme Court of Pennsylvania. Jan. 6, 1896.)

LIEN OF JUDGMENT—SCIRE FACIAS.

The lien of a judgment existing against a decedent at the time of his death need not be revived every five years as against his heirs and devisees.

Appeal from court of common pleas, Allegheny county; E. H. Stowe, Judge.

Case stated on articles of agreement for the sale of a lot of ground between Robert J. Colenburg and others and Catherine S. Venter. From a decree for plaintiffs, defendant appeals. Reversed.

Joseph Crown, for appellant. George D. Riddle and Edmund B. Patterson, for appellees.

STERRETT, C. J. The facts agreed upon in this case stated bring it within the provisions of the act of February 24, 1834 (section 25) which declares: "All judgments, which at the time of the death of a decedent shall be a lien on his real estate, shall continue to bind such real estate during the term of five years from his death, although such judgments be not revived by scire facias or otherwise after his death; and such judgments shall, during such term, rank according to their priority at the time of such death; and after the expiration of such term, such judgments shall not continue a lien on

the real estate of such decedent, as against a bona fide purchaser, mortgagee or other judgment creditor of such decedent, unless revived by scire facias or otherwise according to the laws regulating the revival of judgments." *Purd. Dig.* p. 593, pl. 118. The judgment in favor of John R. Large, Esq., against Mrs. Drusadow, the then owner of the lot in question, was entered in her lifetime, February 24, 1871, and on June 2d following she died intestate, seised of said lot, leaving to survive her a husband, since deceased, and heirs at law, plaintiffs in this action, who have ever since been in possession of the premises. More than 10 years after Mrs. Drusadow's death a scire facias to revive and continue the lien of the Large judgment was issued against her administratrix, and judgment by default was entered *sec. reg.* September 9, 1881. Under a fieri facias issued on this revived judgment the lot in question was levied on, condemned, and afterwards sold on a venditioni exponas, and in June, 1882, conveyed by the sheriff to John F. Large, whose deed was duly recorded. There is no question as to any other intervening purchaser, mortgagee, or creditor of said decedent, or any of her heirs. It does not appear that there are or were any. In *Shearer v. Brinley*, 76 Pa. St. 300, Mr. Justice Sharswood, after reviewing the statutes and decisions bearing on the subject, concludes thus: "It is accordingly well established that the lien of a judgment against a decedent at the time of his death, as against his heirs and devisees, is without limit, and needs not to be revived every five years in order to be executed at any time on lands still held by them;" and he cites in support thereof, *Fetterman v. Murphy*, 4 Watts, 424; *Brobst v. Bright*, 8 Watts, 124; *Wells v. Baird*, 3 Pa. St. 351; *Konigsmaker v. Brown*, 14 Pa. St. 269; *Aurand's Appeal*, 34 Pa. St. 151; *Bindley's Appeal*, 69 Pa. St. 295. In *Aurand's Appeal*, supra, it was held that the lien of a judgment, though not revived by scire facias within five years, continues against the lands of the debtor in the hands of his heirs or devisees, and is entitled to priority of payment over the general creditors of the debtor who had not obtained judgments against him in his lifetime; that the act of April 4, 1798, restrained the lien of a judgment to a period of seven (now two) years only in favor of purchasers from the debtor and judgment creditors in his lifetime, but left it without limit against every one else. Again, in *Baxter v. Allen*, 77 Pa. St. 468, it was held that a judgment of record at the time of the defendant's death, though not then a lien on his land, is not a debt whose lien is limited to five years from his decease, unless suit be brought according to the twenty-fourth section of the act of February 24, 1834. In such cases suit is unnecessary, because the debt is already in judgment. As to all volunteers it remains unaffected by the lapse of

time, until the presumption of payment arises. Heirs and devisees are regarded as mere volunteers. *Shannon v. Newton*, 132 Pa. St. 381, 19 Atl. 138. To the same effect are *Middleton v. Middleton*, 106 Pa. St. 252, and other cases; but enough has been said to show that the judgment originally obtained against plaintiffs' ancestor, Mrs. Drusadow, in her lifetime, had not lost its lien on the lot in question, and that it was unnecessary to bring in her heirs by scire facias, as it would have been had there been no judgment against Mrs. Drusadow in her lifetime. Upon the facts as presented, the defendant should not be required to accept the title that plaintiffs offer to give her. To say the least it is not marketable. Judgment reversed, and judgment is now entered here on the case stated in favor of the defendant.

BOROUGH OF BELTZHOOVER v. HEIRS OF BELTZHOOVER.

(Supreme Court of Pennsylvania. Jan. 13, 1896.)

ASSESSMENTS FOR IMPROVEMENTS—EXEMPTIONS—APPEARANCE BY DEFENDANT.

1. A graveyard is not exempt from special assessments for local improvements.

2. An assessment may be made under Act May 16, 1891, for an improvement made under an ordinance passed under Act April 23, 1889.

3. Want of legal service of a scire facias issued on a lien for street assessments is cured by the entry of a general appearance for the defendants.

Appeal from court of common pleas, Allegheny county.

Scire facias by the borough of Beltzhoover against the heirs of Jacob Beltzhoover to enforce a lien for grading and paving. From a judgment for plaintiff, defendants appeal. Affirmed.

Davis & Magee, for appellants. Frank M. McKelvey, for appellee.

GREEN, J. In the case of *Sewickley M. E. Church's Appeal*, 165 Pa. St. 475, 30 Atl. 1007, we decided that church property was not exempted from liability to pay assessments for local improvements. We held that such special assessments were not general taxation, and therefore did not come within the operation of the constitutional exemptions from taxation of churches and other properties designated. Again, in the case of *City of New Castle v. Stone Church Graveyard* (recently decided, but not yet officially reported) 33 Atl. 236, we held that a graveyard was not exempt from such assessments, for the same reasons expressed in the decision of the former case. The present is the case of a graveyard, and, of course, comes within both the foregoing decisions.

There is no force in the objection that the ordinance under which the improvement was made was passed under the act of 1889, and therefore no assessment could have been

made under the act of 1891. This question was settled by our decision in the case of *Hand v. Fellows*, 148 Pa. St. 456, 23 Atl. 1126, and in *Frederick Street and Hanover Borough's Appeal*, 150 Pa. St. 202, 24 Atl. 669.

The fourth and fifth assignments are not sustained, because there was a general appearance for all the defendants, and a general affidavit of defense for all. The objection that there could be no proceeding against the heirs of Jacob Beltzhoover without naming them is answered by the decision of this court in *Wistar v. City of Philadelphia*, 86 Pa. St. 215, and *Northern Liberties v. Coates' Heirs*, 15 Pa. St. 245. The assignments of error are not sustained. Judgment affirmed.

KRAEMER v. GUARANTEE TRUST & SAFE-DEPOSIT CO.

(Supreme Court of Pennsylvania. Feb. 3, 1896.)

APPEAL FROM SUPERIOR COURT.

A justice of the supreme court should not allow an appeal from a judgment of the superior court, under the act creating the latter court, when the question involved is merely the construction of words in a will, which is of interest only to the parties to the suit.

Action by Josephine M. Kraemer against the Guarantee Trust & Safe-Deposit Company. On petition by Elizabeth Kitchenman, intervener, for the allowance of an appeal from the judgment of the superior court. Refused.

MITCHELL, J. By section 7 of the act establishing the superior court, it is provided that that court "shall have exclusive and final appellate jurisdiction" in the classes of cases named. In a subsequent clause of the same section, it is provided that, "nevertheless in any action or proceeding whatever above committed to the final and exclusive decision of the same court, there may still be an appeal from its judgment to the supreme court" in certain cases, one class of which is where the appeal is "specially allowed by the superior court itself, or by any one justice of the supreme court." The conditions under which the appeal may be allowed by the superior court itself are prescribed in section 10. The authority of the justices of the supreme court to allow special appeals is not limited, but it is apparent, from the general scheme of the act, that it is intended to be exceptional, and based on considerations other than the mere desire or interest of the particular parties. The most obvious of such considerations are the bearing of the question on public interests or rights, the importance of the decision as a precedent in frequently occurring litigation, diversity of opinions in other courts, and consequent desirability of a final determination, and, generally, the preservation of uniformity in the application of legal principles.

Unless these or similar considerations suggest a review by this court, the final and conclusive character of the judgments of the superior court ought not to be questioned, or in any way trenching upon. The principles upon which the supreme court of the United States exercises an almost identical authority to order special certification of cases from the circuit courts of appeals are thus expressed in *American Const. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 383, 13 Sup. Ct. 758: "It has been held to be a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." Following these principles, this court, in considering applications for special allowance of appeals from the judgments of the superior court, will look only to the character of the question involved, and the allowance or refusal of the appeal must not be taken as an indication of any opinion on the merits of the decision, or the correctness of the application of legal principles in the particular case. The case before us does not present any of the features necessary to justify special review. It depends entirely on the construction of the will of Charles W. Kraemer. As we have frequently said, such cases are usually of little weight as precedents, because different testators may use the same expressions under different circumstances and in different connection, with entirely different meaning. The present case is no exception to this general rule. It raises no question which is of importance to any but the parties immediately interested. A special appeal is refused.

NEW YORK & C. GAS COAL CO. v. UNITED MINE WORKERS' ASS'N OF AMERICA et al.

(Supreme Court of Pennsylvania. Nov. 4, 1895.)

PRELIMINARY INJUNCTION — REVIEW ON APPEAL.

On appeal from a decree dissolving a preliminary injunction, it appeared that the decree was made after a full hearing, but that no findings of fact were made from the evidence, and no legal conclusions or other reasons in support of the decree were placed on the record by the court below. *Held*, that the decree should be set aside, and the injunction reinstated.

Appeal from court of common pleas, Allegheny county; J. F. Slagle, Judge.

Bill by the New York & Cleveland Gas Coal Company against the United Mine Workers' Association of America and others. From a decree dissolving a preliminary injunction, plaintiff appeals. Reversed.

S. Schoyer, Jr., S. B. Schoyer, and William Kaufman, for appellant.

PER CURIAM. And now, to wit, November 5, 1895, the above appeal from a decree dissolving a preliminary injunction came on

to be heard in this court; and, upon examination of the record, and hearing the argument of counsel, it was made to appear that the decree appealed from was made after a full hearing of the parties and their witnesses, but that no findings of fact have been made from the evidence, and no legal conclusions or other reasons in support of the decree have been placed on the record by the court below. It is now, in consideration of the premises, ordered, adjudged, and decreed that the decree so appealed from be set aside, and the injunction reinstated, with same force and effect as if the said decree had not been made. It is further ordered, adjudged, and decreed that the record be remitted to the court below, that the said court may proceed with the hearing of the said motion to dissolve said injunction, and place the findings of fact and law, on which any further order in regard thereto may be made, on the record.

CHALFANT v. EDWARDS et al.
(Supreme Court of Pennsylvania. Jan. 17, 1896.)

SPECIAL ACT—REGULATION OF SCHOOLS.

1. Since the common schools are not a part of the municipal machinery, the act of 1895, entitled "An act to establish and regulate the affairs of school districts and sub-school districts in cities of the second class," is a local and a special law, in violation of Const. art. 3, § 7.

2. The constitution requiring notice of the intention to apply for the passage of a local law to be published in the locality where the matter or thing to be affected is situated, the act of 1895, repealing the local acts of 1855 and 1869 relating to the schools in the city of Pittsburg is invalid.

Appeal from court of common pleas, Allegheny county; Ewing, Judge.

Bill by George N. Chalfant against A. H. Edwards and others, directors of Lincoln sub-school district in the city of Pittsburg, to restrain the sale of certain bonds. From a decree for plaintiff, defendants appeal. Reversed.

J. McF. Carpenter, for appellants. Shiras & Dickey and G. N. Chalfant, for appellee.

WILLIAMS, J. The common school system of this state is the creature of the school law of 1854. It was intended to cover the state, to be administered under general laws, and to be fostered and sustained, in part at least, by public moneys paid out of the state treasury. The scheme contemplated the division of the state into school districts upon the line of existing civil divisions. Each township, borough, and city was made a separate school district, with the right to elect its own board of school directors. In cities divided into wards, each ward was made a subdistrict, with power to elect a board of directors, to the care of which the schools and school property therein were committed, subject to a supervisory control by a central or

city board, composed of one member from each of the ward boards within the city. In the city of Pittsburgh, this general system was somewhat modified by a local law passed in 1855. It was again modified by another local law in 1869. From the last date, 1869, down to the present time, the schools in the several districts or subdistricts in the city of Pittsburgh have been regulated and conducted in accordance with the law as it then stood. The system was well understood, was easy of management, and secured to the people of each district that measure of local control over the schools which it was the purpose of the general law of 1854 to give. In 1895 the legislature undertook to overturn this system, and substitute another in its stead. For this purpose, an act was passed, entitled "An act to establish and regulate the affairs of school districts and sub-school districts in cities of the second class, and to repeal all local and special laws inconsistent therewith." The draftsman of this act seems to have been apprehensive that it might not be held effective for the repeal of the local acts of 1855 and 1869, which were applicable, not to cities of the second class, but to the city of Pittsburgh by name; and for this reason, no doubt, another act was drawn, and introduced into the legislature, simultaneously with the one just referred to, providing only for the repeal of the two obnoxious local laws, those of 1855 and 1869. These bills made their journey through both houses *pari passu*, and reached the executive, and received his approval upon the same day. What is their effect upon the common school system of Pittsburgh? The court below held that the first of these acts was unconstitutional and void, but that the second or repealing act was valid. This led to the conclusion that the old system was effectually overturned and that no new one had been provided to take its place, and it left the boards of school directors and the schools under their care in a state of perplexity and confusion, calculated to impair, if not practically to destroy, their usefulness. This appeal brings the conclusions of the learned judge before us for consideration.

It is contended that he was in error in holding the act that provides a new system for cities of the second class to be local, and therefore unconstitutional, as its provisions include all the members of the class of cities to which it relates. It is true that the classification of cities was upheld in *Wheeler v. City of Philadelphia*, 77 Pa. St. 338, but the object of classification is very clearly stated in the act of 1874 that provides for it. It is to facilitate municipal government. The common school system of this state rests on the general law of 1854. It is largely supported by state appropriations, and is under the general supervision of a state superintendent. School directors are by no means municipal officers. They are not invested with any of the municipal powers, nor are

they charged with the performance of municipal functions. An attempt to regulate the affairs of school districts by local or special laws is expressly forbidden by the constitution, in article 3, § 7; and, until the common schools can be regarded as a part of the municipal machinery, necessary for the government of cities, this act, which relates to cities of the second class, must be treated as local in its character. Many efforts have been made to make the classification of cities for municipal purposes serve as a warrant for local legislation on subjects having no possible relation to municipal government, but this court has uniformly refused to sanction them. In *Davis v. Clark*, 106 Pa. St. 377, the act under consideration attempted to regulate mechanics' liens with reference to the class of cities in which the building against which the lien was filed might be located. In *Scowden's Appeal*, 96 Pa. St. 422, the effort was to fix the place at which sessions of the several courts should be held for the trial of causes in counties having a certain number of cities of a given class, and at a given distance from the county seat. In *Weinman v. Railway Co.*, 118 Pa. St. 192, 12 Atl. 288, an attempt had been made to regulate street railways according to the classification of the city in which they might happen to be located. In *Re Ruan St.*, 132 Pa. St. 257, 19 Atl. 219, and in *Re Wyoming St.*, 137 Pa. St. 494, 21 Atl. 74, the manner in which the right of eminent domain should be exercised, and the power of the legislature to establish a different system for fixing the value of property taken, in different classes of cities, was considered. The right of the legislature to provide different modes for the collection of school and county taxes in different cities has been under examination in many cases. In every instance, we have asserted the same rule, saying that the effect of classification must not be carried beyond its purpose, as declared in the original classification law, and that a law relating to any other subject, though embracing all the cities of any given class, or of all the classes into which cities are divided, is local and unconstitutional, if the subject be one upon which local and special legislation is forbidden. The regulation of the affairs of school districts is such a subject. It is distinctly named in the list of subjects enumerated in the seventh section of article 3, upon which "the general assembly shall not pass any local or special law." The precise point was under consideration in *Appeal of City of Scranton School Dist.*, 113 Pa. St. 176, 6 Atl. 158, and we there held that, "if an act regulating the affairs * * * of school districts either produces, or may produce, local results, it offends against article 3 of the constitution, and is therefore void." The act now before us was passed to establish a local system. Its results were intended to be local, and only local. They can by no possibility be anything but local. It is therefore squarely within the rule laid

down in Appeal of City of Scranton School Dist., as well as squarely within the words of the constitutional prohibition. It is beyond the power of the legislature to enact, and absolutely void. The learned judge of the court below was right in his conclusion upon this subject, and the assignments of error relating to this question are overruled.

We come now to consider the other or repealing act. This is a local law, passed to effect the repeal of the local acts of 1855 and 1869. Such a law is not necessarily within the constitutional prohibition. To hold that it was would make the road to uniformity much more difficult than was intended. The repeal of local laws is ordinarily made to open the way for the operation of general laws within the territory from which the local law had previously excluded them. Still it is true that such a law is local, within the meaning of section 7 of article 3. Particularly is this true when the object of the repealing act is, not to make way for a general law, but for another local one. In such case, it is such a local law as the constitution declares shall not "be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected shall be situated." It is conceded that no notice of an intention to apply for the passage of a law repealing the local acts of 1855 and 1869 was ever published in the city of Pittsburg. If this fact was not admitted, our question might not be as free from difficulty as it now is. It is admitted. It was so treated in the court below. We have, then, a local law passed to repeal one local law in order to make way for another. It affects the people of the city of Pittsburg. They have a right to notice of the intention to apply for it. It now appears that, without notice, the parties interested procured the passage of this local law, in plain violation of the constitution. If it appeared that this question had been considered by the legislature, and that body had decided that sufficient notice had been given or if the committee to which the bill was referred had reported that the constitutional requirement as to notice had been complied with, we might feel ourselves concluded by such action. But there is not the faintest suggestion to be found anywhere that the subject of notice was ever before the mind of the legislature, or attracted the attention of the promoters of the bill. If we should hold that, as a general rule, in the absence of any recital or proof upon the subject, notice should be presumed, yet the presumption cannot prevail when it is a conceded fact in the case that no notice was given. The only question, then, presented, is over the validity of an act passed in the face of a clear and positive constitutional prohibition. The learned judge of the court below was of opinion that, as the form and manner of publishing notice was prescribed by the act of 1874, the legislature of 1895, having equal power in the premises, was not bound

by the directions of its predecessor, but might disregard them at its pleasure. The power of the legislature to repeal the act of 1874 cannot be doubted, but it had not been exercised. When this act was introduced into the legislature, and when it came up on its final passage, the act of 1874 was in full force, and the citizens of Pittsburg had a right to rely upon the observance of its provisions. The point made, however, does not relate to a compliance with the forms of the act of 1874, but with the substance of the constitutional provision that makes notice in the locality, and by publication, an indispensable pre-requisite to the passage of a local law. The legislature of 1895, though not bound by the directions of its predecessor, was bound by the fundamental law, and its power to pass the repealing act depended on compliance with its mandate. We cannot agree, therefore, with the learned judge in regard to the validity of the repealing act. It is invalid. The acts of 1855 and 1869 are in full force, and the system of schools, school districts, and school directors built upon them in the city of Pittsburg has undergone no change whatever. The decree of the court below must therefore be reversed, and the record remitted, in order that the court below may proceed to determine the questions before it as though the legislation of 1895 relating to this subject had never been passed. The costs of this appeal should be paid by Lincoln school district.

WOOSTER v. COOPER et al.

(Court of Errors and Appeals of New Jersey.
March 9, 1896.)

WILL—DEVISE OF LIFE ESTATE.

Where a testator gives an estate for life only, by express words, and annexes to it an absolute power of disposal, the devise takes a life estate only, and not a fee; and this rule is applicable to bequests of personalty as well as to devises of realty.

(Syllabus by the Court.)

Appeal from court of chancery.

Suit by Charles I. Wooster against William T. Cooper and others. Decree for defendants, and plaintiff appeals. Affirmed.

John W. Wescott and John J. Crandall, for appellant. William Moore and James Buchanan, for respondents.

GUMMERE, J. Benjamin D. Cooper died in the month of March, 1893, having made his last will on December 31, 1881, by which, among other things, he provided as follows: "I order and direct that all my estate, real, personal, and mixed, shall during the life of my beloved wife, Tacy Cooper, should she survive me, pass into her hands, and be subject to her sole management and control, to keep and use or sell and dispose of the same as she shall see fit; and my executors hereinafter named shall not, during said time, be responsible therefor. From and after the death of my wife, should she survive me,

otherwise from and after my death, all my estate, real, personal, and mixed, which shall then remain, I order and direct my executors hereinafter named, or the survivor of them, to dispose of, as soon as conveniently may be thereafter, as follows." The will then directs a conversion of the estate into cash, and the distribution thereof among the respondents in this case. Testator's wife, Tacy, survived him, and, under the terms of his will, took possession and control of his entire estate, real and personal, and continued to possess and enjoy the same until her death, which occurred February 24, 1894. Testator's wife made no disposition of any portion of her husband's estate during her lifetime, but she left a will in and by which, after directing the payment of her debts and funeral expenses, she gave, bequeathed, and devised all her property, both real and personal, wherever situate and whatever the same might be, to her nephew Charles I. Wooster, the appellant in this case, to him and his heirs, forever. Under this last-mentioned will, the appellant claims to be entitled to the whole of the estate of Benjamin D. Cooper which was in the possession of his wife, Tacy, at her death; his insistence being that she was the absolute owner thereof by the terms of her husband's will, because there was coupled with the devise to her an absolute and unqualified power to dispose of the estate. The vice chancellor, by the decree appealed from, overruled this claim, and held that, by the will of her husband, Tacy Cooper took only a life interest in his estate, and that at her death so much of it as had not been disposed of by her in her lifetime went to her husband's legatees.

I agree with the learned vice chancellor in this construction of the will of Benjamin D. Cooper. It gives to his wife, by express words, a life estate in his property, and then annexes to it a power to dispose of the same without qualification or limitation. The rule that a devise of an estate generally, with a power to dispose of the same absolutely and without limitation, imports such dominion over the property that an estate in fee is created, and that a devise over is consequently void, has one exception, which is this: that where the testator gives an estate for life only, by certain and express words, and annexes to it a power of disposal, the devisee for life will not take an estate in fee. This exception was recognized and enforced by this court in the case of *Downey v. Borden*, 36 N. J. Law, 460, and again in the case of *Pratt v. Douglas*, 38 N. J. Eq. 533; and in the latter case it was declared to apply to bequests of personal estate as well as to devises of realty. These cases have definitely settled the law on this subject in New Jersey, and the propriety of the rule laid down in them is no longer open to discussion. The decree of the court of chancery should be affirmed.

TRAINER v. WOLFF.

(Court of Errors and Appeals of New Jersey.
March 9, 1896.)

TRESPASS—EXEMPLARY DAMAGES.

In an action of trespass, where the injury is inflicted with a reckless and wanton disregard of the rights of the party injured, exemplary damages may be recovered.

(Syllabus by the Court.)

Error to circuit court, Hudson county; before Justice Lippincott.

Action by Mary Trainer against Ernest Wolff. From the judgment, plaintiff brings error. Reversed.

James F. Minturn, for plaintiff in error.
Collins & Corbin, for defendant in error.

GUMMERE, J. The plaintiff in error was plaintiff in the court below, and brought suit to recover damages for a trespass *quare clausum fregit*. Plaintiff and defendant were the owners of adjoining houses in the city of Hoboken, the plaintiff's house being one story higher than that of the defendant. In 1893 the defendant raised his house an additional story, and, for the purpose of doing so, removed the weather boards from that portion of the plaintiff's house which was higher than his; and this action was brought to recover damages for this tortious act of the defendant. It was a disputed question at the trial whether the defendant, before removing these weather boards from the plaintiff's house, had obtained her permission to do so, or whether he did it without her permission and against her protest. It was left to the jury to decide this question, and they determined it in favor of the plaintiff. Another question, however, which the plaintiff insisted should be left to the jury, was her right to exemplary damages in case the jury should conclude that the defendant's act was not only unauthorized by her, but was done in the face of her protest. The trial judge, however, refused to leave that question to the jury, and charged them that the circumstances of the case would not warrant them in awarding punitive or exemplary damages to the plaintiff. This, in my opinion, was erroneous. If the jury found that the act of the defendant was a willful trespass, it was their province to say whether or not the plaintiff should have exemplary damages. The finding of the jury established the fact that the act was done with a wanton and reckless disregard of her rights, and it is well settled that in such a case the jury are not confined, in assessing damages, to compensation, but may give damages as a punishment to the defendant. The cases upon this subject will be found collated in 5 Am. & Eng. Enc. Law, p. 22. By the action of the trial judge, the plaintiff was deprived of her right to have this question passed upon by the jury, and for this reason the judgment of the court should be reversed, and a venire de novo issue.

**STATE (MATTHEWS, Prosecutor) v.
RANKIN.**

(Supreme Court of New Jersey. March 5,
1896.)

**PRACTICE IN CIVIL CASES—TRIAL DOCKET—WAIVER
BY APPEARANCE.**

1. Under Supp. Revision, p. 404, art. 4, § 15, when an appeal to the court of common pleas is taken from a judgment of the court for the trial of small causes within five days prior to the beginning of the next term, and the papers are not filed with the clerk of the court three days prior to the beginning of such term, the appeal cannot be placed on the list for trial at such term, but must go over, and be put on the list for trial at the next term thereafter.

2. The party against whom the judgment is rendered before the justice of the peace does not waive his right to have the cause go over to the next term under the statute by appearing at the term to which the appeal is taken, and objecting to the trial at that time. While his motive may be only that of delay, yet he only insists upon the rights accorded him by statute, and his appearance for that purpose is no waiver of them.

(Syllabus by the Court.)

Certiorari to court of common pleas, Essex county; Judges Kirkpatrick, Schalk, and Ledwith.

Certiorari by the state on the prosecution of Charles R. Matthews against Joseph Rankin. Reversed.

Argued November term, 1895, before GARRISON and LIPPINCOTT, JJ.

Ernest F. Kerr, for prosecutor. Charles F. Lighthipe, for defendant.

LIPPINCOTT, J. This writ brings up for review a judgment of the court of common pleas of the county of Essex upon appeal from a judgment against the prosecutor in the court for the trial of small causes, in which the defendant was the plaintiff below. The summons before the justice was made returnable on Saturday, March 16, 1895, at 12 o'clock in the afternoon. The prosecutor appeared at the time and place mentioned in the summons, and objected to the trial of the cause because it was a legal holiday, and that, therefore, the prosecutor could not be compelled to appear on the trial of a cause on such a day. The justice overruled the objection, and the prosecutor filed a set-off to the demand of the defendant. The cause was adjourned for one week, or to Saturday, March 23, 1895, at 12 o'clock. On this adjourned day judgment was rendered against the prosecutor in his absence. On March 30, 1895, he took an appeal to the next term of the court of common pleas of the county of Essex, which commenced on April 2, 1895. The papers on appeal were not filed with the clerk of the court until the 2d day of April, or the first day of the term. These facts appear by the return to the writ of certiorari upon which this review is sought. On the first day of the term of the court of common pleas the prosecutor objected to the trial of the cause at that term because the papers

on appeal had not been filed within three days prior to the term. The court overruled this objection, and fixed the 11th day of April for the trial, proceeded with the cause on that day, and rendered judgment in favor of the defendant against the prosecutor. Laying aside all other questions, it is clear that the action of the court of common pleas in proceeding to try the cause and render judgment at the April term was erroneous. By Supp. Revision, p. 404, art. 4, § 15, it is provided that: "All appeals from justice courts to the court of common pleas of any county in this state shall be put on the list for trial at the first term to which the same shall be appealed; provided, however, that if said appeal is taken within five days prior to the beginning of such term, and if the papers are not filed with the clerk of said court, three days prior to the beginning of such term, then, in that case, said appeal to be put on the list for trial at the next term thereafter." The prosecutor had the right to rely upon this statute, that this cause on appeal would not be placed on the list for trial at the April term. It went over, by force of the statute, until the September term. The language of the statute is clear and explicit on this subject. Besides, this practice has been judicially established. *State v. Foster*, 44 N. J. Law, 378-380; *Johnson v. O'Neill*, 46 N. J. Law, 510, 511. The trial of appeals is a purely statutory proceeding, and the statute relating to them must be followed, and the prosecutor was entitled to the advantage of the procedure established by the statute in taking his appeal and in the trial thereof, and he waived none of his rights by appearing and objecting to the trial at any other time, or in any other mode, than that provided by law, although his motive may have been solely to delay the trial until the next term. The judgment of the court of common pleas must be reversed, with costs.

GIBBS et al. v. CRAIG.

(Court of Errors and Appeals of New Jersey.
March 4, 1896.)

ESTOPPEL IN PAIS—ACTION ON CONTRACT—MEASURE OF DAMAGES—EVIDENCE.

1. Plaintiff sold defendant two lots, and delivered to him a deed which he had received for one of them, with a blank for the name of the grantee, and a deed of the other, in which there was also a blank for the name of the grantee. Plaintiff received in exchange a bond of a corporation, which defendant guaranteed. Defendant afterwards sold the lots to plaintiff's grantor, delivering to him the deed which plaintiff had received from such grantor, with the blank for the name of the grantee; and he and his wife executing a deed to such grantor for the other lot after his wife's name had been filled in the deed executed to him by plaintiff. *Held*, that defendant was estopped from claiming that there was no consideration for his guaranty of such bond, whether the deeds received by him from plaintiff were valid as legal conveyances or not.

2. In an action for breach of guaranty of a

bond purchased by plaintiff from defendant, plaintiff claimed that the bond was worthless, and there was evidence that defendant knew the condition of the corporation at the time of the transfer of the bond to plaintiff, but there was no evidence of the value of the bond either intrinsically or in the market at such time. *Held*, that a nonsuit was proper, in the absence of any claim by plaintiff in the trial court that she was entitled to nominal damages.

Error to circuit court, Mercer county, before Justice Gummere.

Action by Harrie B. Gibbs and Isabella Gibbs against Thomas Craig for breach of a contract of guaranty of a bond received by plaintiff Isabella in exchange for land sold defendant. There was a judgment of nonsuit, and plaintiffs bring error. *Affirmed*.

Barton & Dawes, for plaintiffs in error.
William M. Lanning, for defendant in error.

DEPUE, J. The plaintiff Isabella Gibbs bought two lots of land, designated in the case as Nos. 12 and 14, of Frank M. Lanning, and received from him two deeds of conveyance. The deed for No. 12 was complete in all its parts. The deed for No. 14 was executed and delivered by Lanning with a blank for the name of the grantee. Mrs. Gibbs subsequently sold the two lots to Craig, the defendant, and took as payment a bond of the Postal Telegraph Company for \$1,000. For lot No. 12 the plaintiff gave defendant a deed executed by her, with a blank for the name of the grantee. For No. 14 she delivered to him the deed she got of Lanning, the blank for the grantee not having been filled in. These deeds were delivered to the defendant with blanks for the grantees' names, at the defendant's request, in order to save him the cost of having the deeds executed, and the trouble of having new deeds made out in case he sold the property. Afterwards Craig sold the two lots to Lanning, the grantor of the plaintiff. For lot No. 14, Craig delivered to Lanning the same deed that Lanning had given to the plaintiff; for No. 12 he gave Lanning a deed executed by himself and wife, the blank in the deed for that lot having been filled in with the name of Mrs. Craig. In this way the title for the two lots, such as it is, got back to Lanning. This suit was brought by the plaintiff to recover damages upon an allegation that, at the time the conveyance to him was made, Craig, in consideration thereof, promised and agreed that the Postal Telegraph Company was a good and solvent corporation, and that the said bond was worth \$1,000, and was selling in the market for that sum. At the trial a motion to nonsuit was made, at the close of the plaintiffs' case, on two grounds: (1) That the deeds of conveyance given by the plaintiffs to the defendant were void, for the reason that no grantee was named in them, and, therefore, that the consideration had failed; and (2) that there was not sufficient proof of damages to allow the case to go to the jury. The

nonsuit was granted, and this writ of error was brought to review that judicial action.

By the common law, it was essential to the validity of a deed of conveyance that the grantee be named in it either in personam, or be designated therein so as to identify the grantee by distinguishing such grantee from all other persons. Consequently, a deed executed and delivered with a blank for the name of the grantee was void. *Shep. Touch. 53*. A deed with a blank for the grantee was incomplete and imperfect. Whether authority to fill such a blank may be implied, or, if expressly authorized, authority to that end may be conferred by parol, are questions on which the English and American cases are not agreed. *4 Cruise, Dig. 25* (Greenleaf's note 2); *Elph. Interp. Deeds, 28*; *5 Eng. Ruling Cas. 140-183*. The English courts apply this doctrine to transfers of shares of stock, and hold that, when the articles of association of the company require transfers by deed, a transfer under seal with a blank for the name of the transferee is invalid. *Hibblewhite v. McMorine, 6 Mees. & W. 200*; *Societè Generale, etc., v. Tramways Union Co., 14 Q. B. Div. 424*. In this state it has been held that a bond intended to be negotiable, executed, and delivered with a blank for the name of the payee, and a transfer of stock with a blank for the name of the transferee, were good. *Boyd v. Kennedy, 38 N. J. Law, 146*; *Bank v. McElrath, 13 N. J. Eq. 24*. It is not necessary in this case to discuss the validity of the deeds in question as legal conveyances of the lands. The English judges hold that a deed executed and delivered with a blank for the name of the grantee creates an equitable estate, or rather confers upon the purchaser a right to go into equity for a decree to perfect the conveyance. In the present case the office of the deeds was simply as the consideration for the defendant's promise. They were delivered to him in their imperfect condition, at his request. He subsequently sold both lots to Lanning. He filled in the blank in one deed with the name of his wife as grantee, and united with her in the conveyance of that lot to Lanning, and for the other lot delivered back to Lanning the imperfect deed Lanning had given to Mrs. Gibbs. The defendant obtained in the deal exactly what he bargained for. There was no failure of consideration. If, by mistake, the deeds were imperfect, the defendant had a remedy by requiring the plaintiff to perfect the conveyance; and, having disposed of the lots, he is now estopped from setting up a failure of the consideration on which his promise was made.

The other ground on which the nonsuit was applied for was that there was not sufficient evidence to enable the jury to assess damages for a breach of the contract of guaranty. As already mentioned, the suit is in form an action *ex contractu* for a breach of contract. The breach assigned was that

the Postal Telegraph Company was insolvent, whereby the said bond was worthless and valueless, and the damages claimed were the \$1,000, the consideration agreed on as the value of the lots. The testimony in behalf of the plaintiff was that, at the time of the exchange, the defendant said that the company at that time was in bad straits; that its wires were all down, and that, in consequence of the great expense required to repair them, the company was unable to meet its dividends; but that the bond was worth \$1,000 in the market, and that he would guaranty it to be good; that in the succeeding August, when an interest coupon became due, the plaintiff's husband applied to the defendant to get the address of the company, so as to collect the interest; that the defendant said that was useless, and it had been a defunct company for years. The testimony was that nothing had been collected or received on account of the bond or the coupons; and there was also testimony tending to show that the defendant, before this deal between the parties, had knowledge that the bonds of the company were not merchantable in the market. It also appeared in the case that the bond in question was one of a number of bonds secured by a mortgage made by the company to the Farmers' Loan & Trust Company of New York City. To furnish the evidence necessary to enable the jury to estimate the plaintiffs' damages for the breach of the contract of guaranty, the plaintiffs offered in evidence a decree for the foreclosure of the mortgage, obtained in the supreme court of New York. In this condition of the evidence, the motion to nonsuit was made and granted. The damages recoverable for the breach of warranty are compensation, and the legal measure of damages, where consequential damages are not recoverable, as applicable to this case, consists in the difference between the value of the bond and the sum named as its value in the defendant's contract of guaranty. *Sedg. Dam.* 287-291; *Rutan v. Hinchman*, 29 N. J. Law, 113; *Perrine v. Serrell*, 30 N. J. Law, 455; *Hinchman v. Rutan*, 31 N. J. Law, 496, 497. Even in an action in tort to recover damages on an allegation of fraud in false representations concerning the value of property disposed of by means of such fraud, the value of the interest which the plaintiff obtained in the transaction and retained must be deducted from the damages otherwise recoverable. *Crater v. Binninger*, 33 N. J. Law, 513. Of the value of the bond in question at the time of the exchange, either intrinsically or in the market, there was no evidence whatever. Consequently, in the condition of the case when the nonsuit was granted, the jury could not have applied the legal rule of damages to the facts before them. If, upon this record, merely nominal damages might have been recovered, the attention of the trial court was not called to that aspect of the

case by the plaintiffs' counsel, if, indeed, he would have been satisfied with that result.

The remaining assignment of error was upon an exception excluding testimony of a conversation with respect to property the plaintiff's mother had for sale. This conversation took place in the course of the negotiation between the parties in question. It was offered as part of the *res gestæ*. It is now insisted that this testimony was competent, as evidence of a fraudulent intent on the part of the defendant. It is sufficient to say that, as the offer was made, the testimony was properly excluded as irrelevant.

The judgment should be affirmed.

MAGOWAN v. BAIRD.

(Court of Errors and Appeals of New Jersey.
March 6, 1896.)

CHATTEL MORTGAGE—VALIDITY OF AFFIDAVIT.

A chattel mortgage had annexed thereto an affidavit made in Pennsylvania before a notary public of that state, but the jurat did not contain a recital that the officer taking the affidavit was a notary public, as provided for in section 5 of the Jaths act (Revision, p. 740). *Held*, that the mortgage had annexed thereto an affidavit, within the meaning of section 4 of the chattel mortgage act (Supp. Revision, p. 491), and was not void, as to the creditors of the mortgagor, for lack of such recital in the jurat. (Syllabus by the Court.)

Appeal from court of chancery.

Bill by Frank A. Magowan, receiver, against Anna W. Baird. Decree for defendant, and complainant appeals. Affirmed.

G. D. W. Vroom and James Buchanan, for appellant. Edwin R. Walker, for respondent.

MAGIE, J. The result reached in this case in the court of chancery is satisfactory, but cannot, in my judgment, be supported upon the ground on which it was there rested. The contest between the parties related to the validity of a chattel mortgage. Respondent is the holder of the mortgage, which was made to her by a corporation. The corporation afterwards becoming insolvent, appellant was appointed receiver. His contention is that the mortgage is void as to the creditors of the corporation, under the provisions of section 4 of the chattel mortgage act of 1885 (Supp. Revision, p. 491), which expressly pronounce any such mortgage (not accompanied by immediate delivery, and followed by actual and continued possession of the things mortgaged) to be absolutely void against creditors of the mortgagor, unless the mortgage, having annexed thereto an affidavit or affirmation made and subscribed by the holder, and stating the consideration and the amount due and to grow due thereon, be recorded as required in the following section of the act. As the chattels of the corporation covered by the mortgage did not pass into the possession of the mortgagee, the va-

lidity of the mortgage depends upon the compliance of the mortgagee with the provisions of section 4, above set forth. The only lack of compliance with those provisions claimed by appellant is that the affidavit annexed to the mortgage, and which was taken in the state of Pennsylvania before a notary public, does not contain in its jurat a recital that the officer taking it was a notary public of that state. Upon that sole ground it is contended that respondent's mortgage had not an "affidavit annexed," within the meaning of the act, and is therefore void as to the creditors represented by appellant.

The learned vice chancellor who tried the cause concluded that the affidavit was defective in the respect complained of, but maintained the right of the court to supply its deficiency by proof of the official character of the officer before whom it had been made. Such proof was received. In this conclusion I think there was error; for, if respondent's mortgage did not have annexed to it an affidavit complying with the provisions of section 4, it was, by express enactment, absolutely void, as against creditors, and no court could supply its defects, or give it a validity which it did not originally possess. But, in my judgment, respondent's mortgage did have annexed to it an affidavit, within the meaning of those provisions, and complying therewith. To comply with those provisions, there must be annexed to the mortgage an affidavit,—i. e. a written statement made under oath before some person legally empowered to administer an oath and take an affidavit,—and such statement must contain the particulars required by section 4, and be made and subscribed by the holder. An examination of the affidavit in dispute discloses that it is in exact compliance with the requirements of that section, unless it was made before a person not legally competent to take it, or, if made before such a person, his taking it was ineffective because, being made in a foreign state, he failed to recite his official character in the jurat. The chattel mortgage act does not declare before whom such affidavits may be taken. To ascertain that, resort must be had to the provisions of the "Act relative to oaths and affidavits" (Revision, p. 740). It has been strenuously argued that a notary public is an officer of international authority, and that, in addition to the functions which he may admittedly exercise under the law merchant, he is possessed of power to take affidavits to be used in foreign countries and in other states. There are authorities justifying such contention, which, however, does not commend itself to my judgment. But no decisive opinion need be expressed thereon. For if the oaths act, before cited, does not confer power upon notaries public of other countries and states to take affidavits to be used in this state, it at least regulates the manner of taking and certifying such affidavits. By section 5 of the oaths act, it is enacted that any

affidavit required to be taken for any lawful purpose, when taken out of this state, may be taken before any notary public of the state in which it shall be taken. Obviously, the notary public who took respondent's affidavit was endowed with power to do so; and unless other clauses of that section, hereafter to be considered, forbid, his jurat, subscribed by him with his official designation and seal, would, prima facie, establish his right. The conflict in this case occurs over the following clause of section 5, viz.: "And a recital that he is such notary * * * in the jurat or certificate of such * * * affidavit and his official designation annexed to his signature and attested under his official seal shall be sufficient proof that the person before whom the same is taken is such notary," etc. The question which arises upon this clause is whether it was intended to limit or restrict the power to take affidavits, previously given in the same section, and to render it of no value unless the affidavit taken is accompanied with a certain jurat or certificate. I am aware that the clause has been so construed. *Sutherland v. Railroad Co.*, 22 Fed. 356; *Minford v. Taylor*, 1 J. Law J. 282. But I am unable to see such an intent in the clause. It was the legislative design, the design would singularly ill chosen, by a prohibition of naturally be expressed in a foreign country the use of affidavits authenticated by such a jurat or certificate. But, instead of a prohibition of this sort, the clause in question simply declares that such a jurat will afford sufficient proof of official character. It does not prohibit other proof, or deny to the ordinary jurat and certificate its prima facie effect. From these considerations, in my judgment, the better construction of the clause is that it does not make the recital of official character in the jurat or certificate essential to the validity of the affidavit, but permits such recital, so certified, to afford proof of official character, if challenged, without the expense and delay of proving such character by the official commission issued to the officer. For this reason, I think that the chattel mortgage in this case had annexed to it an affidavit, within the meaning of the chattel mortgage act, and was not void as to creditors. I shall therefore vote to affirm the decree below.

KERON v. CASHMAN et al.
(Court of Chancery of New Jersey. Jan. 11, 1896.)

LOST PROPERTY—JOINT FINDERS—INTENT.

One of several boys playing along a railroad track picked up an old stocking in which something was tied, and, after he had swung it about in play for a time, a second one of the boys snatched it or, it having been thrown by the finder, the second boy picked it up, and began striking the other boys with it. In this way it

passed from one to another, and, finally, while the second boy was swinging it, it broke open, and money was found therein, all then examining it together. Held that, efforts to find the true owner having been unavailing, the money belonged to all the boys in common.

Bill of Interpleader by John Keron against William Cashman and others. Decree advised.

Fred C. Marsh, for complainant. Walter L. Hetfield, for defendants.

EMERY, V. C. The bill in this case is filed by the stakeholder or custodian of lost money, and the sum in his hands, amounting to nearly \$800, has been paid into court, to abide the decision of the controversy between the defendants as to their respective rights in the fund. The money was found under the following circumstances: A party of boys, five in number, were going on their way home along a railroad track in the city of Elizabeth. The youngest boy, Crawford, about nine years of age, being ahead of the others on the railroad embankment, picked up an old stocking, tied at both ends, and in which something was found up. Crawford says that, after picking the stocking, he began swinging it, and ed it away, the oldest of the boys, snatched three boys from him. Cashman and the other stocking down that Crawford threw the then Cashman got it, and bankment, and that the boys with it. The stocking commenced beating one boy to another in this play, passed from broke open while Cashman was beating it other boy with it, and it was then first found, or suspected that the stocking contained money. All of the boys then examined the contents of the stocking together. The stocking contained \$775 in bills, besides some rags, cloths, ribbons, etc. A division of the money among the boys was proposed, and partially carried out; but, being interrupted, the boys went home, and all of the money was on that evening given to the father of two of the boys, named Fox, who, on the next day, put it into the possession of the complainant, the chief of police of Elizabeth, to discover the owner. This effort, though made with all diligence, has failed; and Crawford having demanded the whole sum, while the other boys demanded an equal division of the money, it has been paid into court on this bill of interpleader, upon which decree of interpleader has been made. The several claims are set up by the answers to the bill, Crawford claiming all, and the other boys claiming an equal division.

Upon consideration of the evidence in this case, I reach the conclusion that the lost money which is the subject of the present controversy must be treated as legally found while in the common possession of all the defendants. This common possession arises from the fact that the old stocking which contained the money and other articles was, at

the time the stocking burst open, in actual use by all the defendants as a plaything, and for the purpose of play only. The stocking itself, in the condition in which it was found, was not, in my view of the evidence, treated either by the boy who first picked it up or by any of the others as an article over which any ownership or possession was intended to be asserted for the purpose of examining or appropriating its contents. The evidence is conflicting as to whether the boy who first picked up the stocking threw it away again, or whether it was snatched from him by one of the older boys. The weight of evidence is that it was thrown away by him, and was then picked up again by Cashman. There is no sufficient evidence to establish that Crawford retained or desired to retain the stocking for the purpose of examining, or that it was taken from him for that purpose by the older, Cashman. When Cashman first got the stocking, whether by picking it up or by snatching, he did not proceed to examine it, but commenced the play with it; and the only intention or state of mind in any of the boys in relation to the stocking and its contents, as found, established by the evidence, in my view, is that the stocking was treated by all of them only as a plaything, to be used as such, in the condition it was when found. In the course of the play with it, after it had passed from one hand to another, and while one boy was beating another with it, the stocking burst open, and it was then disclosed to all of the boys that the stocking contained money. This money within the stocking was therefore the lost property, and as to this money the first intention, idea, or "state of mind," as it is called in some of the authorities, arose on this discovery. As a plaything, the stocking with its contents was in the common possession of all the boys; and inasmuch as the discovery of the money resulted from the use of the stocking as a plaything, and in the course of the play, the money must be considered as being found by all of them in common. Had the stocking been like a pocketbook, an article generally used for containing money, or had the evidence established that Crawford, the boy who first picked up the stocking, retained it, or tried to retain it, for the purpose of examining its contents, or that it had been snatched from him by Cashman, another boy, for the purpose of opening or appropriating the contents himself, and preventing Crawford's examining it, I think the original possession or retention of the stocking by Crawford, its original finder, for such purpose of examination, might perhaps be considered as the legal "finding" of the money inclosed, with other articles, in the stocking. But, inasmuch as none of the boys treated the stocking when it was found as a plaything but a plaything or abandoned article, I am of the opinion that the money within the stocking must be treated as lost property, which was not "found," in a legal sense, until the stocking was broken open during the play. At

that time, and when so found, it was in the possession of all, and all the boys are therefore equally finders of the money, and it must be equally divided between them. The case is most peculiar in its circumstances, and differs from any of the cases cited by counsel, but the general principles to be applied are stated in the cases cited in 7 Am. & Eng. Enc. Law, p. 977, and notes. In *Durfee v. Jones*, 11 R. I. 588, the bailee for sale of a safe, while examining it, found a sum of lost money inside the casing, and was held entitled to retain it against the owner of the safe, because the owner never had any conscious possession of the money. All of the cases agree that some intention or state of mind with reference to the lost property is an essential element to constitute a legal "finder" of such property, and the peculiarity of the present case is that the intention or state of mind necessary to constitute the finder must relate to the lost money inclosed within a lost stocking, and not to the lost stocking itself, in the condition when first found; and, under the circumstances established by the evidence in this case, the finder of the lost stocking was not, by reason of such finding, the legal finder of the lost money within the stocking. A decree will therefore be advised dividing the money equally between the defendants.

KIDD et al. v. HURLEY et al.

(Court of Chancery of New Jersey. Feb. 27, 1896.)

PRINCIPAL AND SURETY — RIGHT TO SECURITIES — STAT.

1. A surety is entitled to the benefit of all securities which the creditor holds against the principal, as indemnity against loss by reason of his suretyship. The surety's right in this respect may be modified or controlled by contract between him and his principal, but does not require any contract for its support. It is a right which results from the relation of surety and principal, independent of contract, and is founded on the principle of natural justice, of placing the charge where, in equity, it belongs.

2. In equity, relief will be afforded to a surety, for his indemnity, out of the property of the principal, where the equitable rights of the surety may be protected without prejudicing the substantial rights of the creditor.

3. In such a case, in a suit for the foreclosure of a mortgage given by the surety, all parties being duly before the court, the progress of the cause may, upon equitable terms, be stayed until the securities of the principal shall be first exhausted.

(Syllabus by the Court.)

Bill by George W. Kidd and the American Distributing Company against John R. Hurley and wife, and another, to foreclose a mortgage. Defendants Hurley file exceptions to the master's report. Sustained in part, and in part overruled, with directions.

On the 13th of May, 1892, Catharine V. Furey, a dealer in liquors, trading under the name of John Furey & Co., was largely indebted to the complainants, and, desiring them to give her credit in excess of \$25,000, in

pursuance of an arrangement with them, procured John R. Hurley, with his wife, to mortgage property in the city of Paterson, which belonged to Hurley, to the complainant George W. Kidd, "for the purpose" (using the language of the mortgage) "of securing unto the said George W. Kidd, his heirs, executors, administrators, and assigns, the payment of any sum of money, not exceeding five thousand dollars, which is now, or may hereafter be or become, due or owing from the said Catharine V. Furey or said firm to the said George W. Kidd, and after the payment in full of such sum, not exceeding five thousand dollars, to said Kidd, to hold the said property as security for the payment to said corporation of such part of the sum not exceeding the amount which may remain after deducting from said five thousand dollars the amount paid to said George W. Kidd as aforesaid: provided, always, that these presents are upon the express condition that if the said parties of the first part, or the said Catharine V. Furey, their or either of their heirs, executors, or administrators, shall pay or cause to be paid at any time within thirty days after demand made upon the said Catharine V. Furey, her heirs or legal representatives, five thousand dollars of the moneys due to the said Kidd and to said corporation, with interest, or if the aggregate indebtedness of said Catharine V. Furey, or of the firm of John Furey & Co., to the said Kidd and the said corporation, shall at any time be reduced to the sum of twenty-five thousand dollars or less, then these presents shall be void, otherwise of full force and virtue." The complainants' bill seeks the foreclosure of this mortgage, and makes the Hurleys and Mrs. Furey parties defendant. It alleges that the indebtedness of Catharine V. Furey to the complainants aggregates, and that since the giving of the mortgage it has always aggregated, more than \$25,000. Hurley and wife have answered, admitting the allegations of the bill, save as to the amounts due to the complainants since the giving of the mortgage, and, as to those allegations, submitting to the proofs, when produced. Mrs. Furey has not answered. The matter thus put in issue being a proper subject of reference to a master, it was referred to one. The proofs and admissions before the master show that, prior to the giving of the Hurley mortgage, Mrs. Furey, to secure the complainants the first \$25,000 of her indebtedness to them, gave them a mortgage upon her dwelling, in the city of New York, and as a further security for her entire indebtedness to them, at any time, assigned to them warehouse certificates for 75 barrels of whisky, worth, after the complainants paid some \$2,910 for tax upon it and expenses incidental to its safe preservation, from \$5,000 to \$5,500, and that the aggregate indebtedness to the complainants at the date of the master's report, including the amount expended to preserve

the whisky, was upwards of \$32,700. Upon these facts appearing, the defendants Hurley insisted before the master that their property should not be sold before the exhaustion of the mortgage of Mrs. Furey upon her dwelling, and the whisky pledged for the whole indebtedness. The master reported adversely to this claim, and because of such report the exceptions are filed. Upon the hearing of the exceptions the complainants and answering defendants agreed that the question so raised before the master should be heard and disposed of as though properly presented by the pleadings, and that the pleadings be hereafter amended, if need be, that the question may be presented by the record.

William B. Gourley, for exceptants. James P. Northrop, for complainants.

MCGILL, Ch. (after stating the facts). The equity insisted upon by the answering defendants arises from the circumstance that the debtor has given the complainants security for her debt to them. That fact does not appear by the bill, and hence the equity was not presented when Mrs. Furey was called upon to answer. To bind her now, it should be alleged by cross bill, or answer by way of cross bill, so that she may have her day in court.

The indebtedness consists of three parts: \$25,000 secured by the mortgage on the dwelling in New York, \$5,000 secured by the mortgage in question, and a surplus of some \$2,700. The whisky is pledged as security for the whole indebtedness. The right of the creditors is, to be fully paid from these three sources. At the same time the answering defendants, as sureties, in absence of a special agreement to the contrary with their principal, are entitled to the benefit of her securities held by the complainants—after the payment of the complainants—as indemnity against loss by reason of their suretyship. This right in a surety is one which, in the language of Mr. Justice Depue in the opinion of the court of errors and appeals in *Railroad Co. v. Little*, 41 N. J. Eq. 519, 7 Atl. 356, "results from the relation of surety and principal, independent of contract, and is founded upon principle of natural justice of placing the charge where, in equity, it belongs." When, then, the debt is paid by the surety, he will be entitled to be subrogated to all the properties belonging to his principal which the creditor holds as security for the debt, in order that he may indemnify himself against loss under his suretyship. At law he will be compelled to pay the debt, and after that may look to the collaterals of his principal for indemnity; but in equity, which does more exact justice under the circumstances of the given case, if there be circumstances from which it appears, directly or by reasonable inference, that substantial injury or prejudice will not result to the creditor by the enforcement in the first in-

stance of the surety's right to have the debt paid from his principal's property, the surety may, in a case of hardship to himself, compel the creditor to resort to the securities in the creditor's hands or under his control, the property of the principal, in satisfaction of the debt, before coming upon him. *Irick v. Black*, 17 N. J. Eq. 189, 195; *Railroad Co. v. Little*, supra. In the present case the testimony before the master was taken between the complainants and the answering defendants to develop whether the answering defendants shall have the relief indicated; and it has disclosed a situation in which it does not appear, and is not to be inferred, that the enforcement of resort to the principal's securities in the first instance will result in substantial prejudice to the complainants, and in which it does appear that it will be a hardship to the answering defendants to raise and pay \$5,000, a large portion of which may not be ultimately required of them. But it does appear that in any event part of the \$5,000 must, by reason of the insufficiency of the other securities, come from the answering defendants' mortgage. The debt, adding to it, for the purposes of the following calculation, the amount paid for the preservation of the whisky, is upwards of \$32,700; and it is a simple mathematical proposition (assuming, as I justly may, in absence of all proof to the contrary, most strongly for the sureties, that the \$25,000 mortgage will fully pay \$25,000 of the indebtedness) that upwards of \$7,700 will remain to be satisfied out of the whisky and the mortgage of the answering defendants, and, if the whisky be worth \$5,000, that upwards of \$2,700, necessary to the satisfaction of the debt, must come from the Hurley mortgage. This being so it will be but equitable to require that such sum shall be paid to the complainants, as a condition precedent to any stay of this suit until the securities of the debtor shall be exhausted. But even this relief should not be afforded until Mrs. Furey shall be brought into court upon this issue. The court should proceed upon sure premises. It may be that, by some agreement with the sureties, Mrs. Furey has the right to have their liability exhausted before resort is had to her securities. In short, it may be that the right claimed does not in fact exist.

The order of reference to the master required him simply to report the amount due upon the mortgage of the answering defendants, and whether the mortgaged premises should be sold in parcels or together. The insistence of those defendants upon a right to resort to their principal's securities in the first instance does not show that \$5,000 is not due upon their mortgage, and such equity cannot be urged upon exception to the master's ruling, that by reporting against it he has failed to find the correct amount due. It was not referred to him to ascertain and report upon the merits of the question argued under the exceptions. I find, however,

that, in the master's calculation of the amount due upon the mortgage in the suit, he debited the complainants' account with their expenditure of \$2,910 in preservation of the whisky. It is obvious that the answering defendants cannot be charged with that expenditure. That charge must be against the security it protects, and is only to be taken into the general account if the whisky is to be made presently available to the answering defendants, in reduction of that which they are to be called upon to pay. I have so regarded it in stating the equity to which they are entitled. Upon the basis of disallowing that charge against the general account, the amount due upon the mortgage here in foreclosure, at the date of the master's report, was \$4,825.34, instead of \$5,000. To secure this small reduction the exceptions are well taken.

I will dispose of this matter in this way: If the answering defendants desire to amend their answer so that, by way of cross bill, it will claim the equity above discussed, and bring Mrs. Furey, with the complainants, before the court upon it, they may apply to do so within a reasonable time, to be fixed by the order hereon; or, if Mrs. Furey will consent to an order staying the suit until her securities shall be resorted to, I will so stay the suit, upon the answering defendants paying to the complainants, on account of their claim against the mortgage herein, the amount which will remain after subtracting from the sum of \$32,700 and upwards, found by the master, \$25,000 (amount of Furey mortgage), and \$5,000 (estimated value of the whisky). If neither of these courses shall be pursued I will make the usual foreclosure decree, and direct the sale of the mortgaged premises to raise and pay \$4,825.34, with interest from the date of the master's report.

TALLMAN v. WALLACK et al.

(Court of Errors and Appeals of New Jersey.
March 2, 1896.)

FORECLOSURE—CROSS BILL.

On a bill for foreclosure, a defendant cannot be granted affirmative relief in the absence of a cross bill.

Appeal from court of chancery.

Bill by Irene C. Tallman against Mary D. Wallack and others to foreclose a mortgage. From a decree dismissing the bill, complainant appeals. Affirmed.

John T. Rosell and Frank P. McDermott, for appellant. Frederick Parker, for respondents.

BEASLEY, C. J. The bill in this case was exhibited by an assignee of a mortgage, and it was dismissed in the court of chancery on the ground that the complainant had no title to the instrument. My examination of the testimony has inclined me to think that

this mortgage, in equity, should be held to belong to the defendant Wallack, as the sum secured by it was, in all probability, deducted from the purchase money when the mortgaged premises were sold. But, as a cross bill has not been put in, this matter is not before us. It is enough to say that this court concurs in the conclusion of the chancellor that the complainant has no standing entitling him to call for a foreclosure in this case. Let the decree be affirmed.

POST v. KIRKPATRICK.

(Court of Errors and Appeals of New Jersey.
March 2, 1896.)

WRITS—SERVICE BY PUBLICATION.

1. On a bill calling for a personal decree, an order for publication of the usual notice to non-resident defendants is not objectionable, even though a decree cannot be taken against such defendants if they fail to appear.

2. What decree, if any, can be made against such absent defendants, is not considered.

(Syllabus by the Court.)

Appeal from court of chancery.

Action by Andrew Kirkpatrick, receiver, against Henry A. V. Post. Motion to discharge order of publication denied (32 Atl. 267), and defendant appeals. Affirmed.

R. V. Lindabury, for appellant. Coult & Howell, for respondent.

BEASLEY, C. J. The purpose of the receiver in filing this bill was to call to account, under the statute of this state, certain of the directors of the insolvent corporation represented by him, for the unlawful payment of dividends out of the capital of the company. The appellant is one of the directors thus arraigned, and, as he is a non-resident, the usual order of publication was taken, directing "that the said absent defendants do appear, plead, demur, or answer to the complainant's bill, on or before, etc., or that, in default thereof, such decree be made against them as the chancellor shall think equitable and just." On petition filed, the appellant was permitted to come in and move to discharge this order of publication.

On the motion thus authorized coming on to be heard before his honor, the vice chancellor, it was urged in behalf of the appellant that as the bill sought a personal decree against him, and as he was a non-resident, he could not by publication, or by a notice served upon him out of the state, be subjected to the jurisdiction in which the suit was pending. It was insisted with great force and much learning that such a course of law was inconsistent with fundamental principles, and, as it was not "due process of law," was prohibited by the fourteenth amendment of the constitution of the United States. With respect to this argument, this court agrees with the vice chancellor that it is not relevant to the motion in question. It does not touch the question

whether a notice of a pending suit is proper or not. Indeed, if we concede the principles propounded by counsel, all objections to the notice seem to be exploded. Why should the appellant object to a notice that cannot be followed by a decree against him? Plainly, it is not to be assumed that the court of chancery will pronounce a decree founded on this process that would be illegal and contrary to the federal constitution. As a mere notice to the appellant of the pending litigation, thus affording him an opportunity of coming in and taking part in it if he sees fit, it cannot be a subject of complaint, as it can do him no harm. The court, therefore, does not feel called upon to speculate with respect to the force, if any, that would be inherent in a personal decree against the appellant founded on this proceeding in question. To do so would be—in the language of an old report—"to jump before we came to the stile." All that is at present decided is that the publication of this notice is unobjectionable, and that the vice chancellor rightly refused to suppress it. Let the decree be affirmed.

**HOBOKEN PRINTING & PUBLISHING
CO. v. KAHN.**

(Court of Errors and Appeals of New Jersey.
March 5, 1896.)

For majority opinion, see 33 Atl. 382.

GARRISON, J. (dissenting). If Cook v. Barkley, 2 N. J. Law, 156, be assumed to stand for the proposition that the defendant in a libel suit may, in mitigation of damages, show that, in making the false defamatory statement, he was engaged in the circulation of a current rumor, and if it be admitted that this court would feel bound to adopt this exposition of the law of libel where the publication was not stated to be as of rumor, the ancient decision would still be devoid of any possible application to the case in hand. No question of the existence of rumors or of their repetition is in any aspect before this court, nor was any such matter asked of any witness in the court below; nor was any ruling made or charge given that in the remotest degree tended to raise or even to suggest any question concerning the currency of rumors, or the admissibility or effect of testimony with respect thereto.

On the contrary, the case was this: The defendant was the proprietor and publisher of a newspaper whose editorial agent, McCauley, accepted the story about the plaintiff from Collins, a local reporter. Collins had gotten the story from one Woods. At the trial the defendant was permitted to put McCauley on the stand, to testify to what Collins told him. Then Collins was allowed to tell what he said to McCauley, and that

his informant was one Woods. Woods was then sworn, and asked to give the conversation between Collins and himself about the plaintiff. This was objected to, and the ruling of the court sustaining the objection to this line of proof constitutes the sole bill of exceptions upon which the reversal of this judgment can rest.

It will be perceived that no question of common rumor arose or was at all involved, but that the contention of the defendant was that if Woods, in the course of a conversation with Collins, communicated to him the falsehood against the plaintiff, that circumstance would be relevant testimony in mitigation of the amount of damages the plaintiff should recover. I think it is safe to say that no theory can be suggested upon which this proof could be relevant evidence, and that no authority for its admission for any purpose by any court can anywhere be found.

The course pursued by the trial court was, in my opinion, entirely free from legal error, and the resulting judgment free from any reversible imperfection.

I am instructed by Justices VAN SYCKEL and MAGIE and by Judges TALMAN and SMITH to say that they concur in the views expressed in this memorandum.

**TRAVELERS' INS. CO. OF HARTFORD,
CONN., v. GRANT et al.**

(Court of Chancery of New Jersey. March 2,
1896.)

LIFE INSURANCE—GIFT—CONFLICT OF LAWS.

1. A policy of life insurance payable to "the legal representatives of the assured" may be made the subject of a gift, in the same manner as a bond or other moneyed obligation, with the same results.

2. Such gift may be effected by the mere delivery, without assignment, of the instrument, accompanied by such verbal or written words as indicate a clear intention to give, and its subsequent retention by the donee.

3. In such case the donee, if he or she have an interest in the continuance of the life of the assured, will be entitled, in equity, to the money due upon the policy at its maturity, notwithstanding it contains a clause forbidding any assignment except with the consent of the insurer. Such prohibitory clause cannot prevent the vesting of an equitable interest in the proceeds of the policy.

4. A person whose domicile was originally in New Jersey, and who had a wife and family residing there, acquired a domicile in Ohio, and died there insolvent. Letters of administration were taken out, first in Ohio, by a resident there, and later by his widow, in New Jersey. He had given his wife a policy of insurance upon his life payable to his legal representative, the annual premium upon which was less than the amount allowed by the laws of Ohio to be set apart annually in life insurance by a husband for the benefit of his family. Both administrators brought separate suits at law against the insurance company upon the policy so given to the wife and in her possession,—one in Ohio, the other in New Jersey. The insurance company filed a bill of interpleader in the chancery court of New Jersey, and paid the money into court.

The Ohio administrator appeared, and claimed the fund for the purpose of paying the Ohio creditors. The New Jersey administratrix claimed it as her own money, after paying the New Jersey creditors to the extent of premiums paid after the accrual of their debts. *Held*, that the Ohio administrator was not entitled to the fund, but that it should be paid to the New Jersey claimant, subject to the rights of the creditors.

(Syllabus by the Court.)

Bill of Interpleader by the Travelers' Insurance Company of Hartford, Connecticut, against James J. Grant, administrator of Frank E. McNichols, deceased, and another. Decree withheld, with directions.

This is a bill of interpleader. The contesting defendants are, on the one part, James J. Grant, administrator c. t. a. of Frank E. McNichols, deceased, appointed by the probate court of Stark county, Ohio, January 17, 1894, and, on the other part, Martha E. McNichols, individually and as administratrix of said deceased, who was her husband, by letters issued to her at a date subsequent to January 17, 1894, by the orphans' court of Camden county, in this state. The subject of the contest is the sum of \$3,181.50, paid into court by complainant as the amount due upon two policies of insurance issued by it upon the life of the decedent, and to recover which a suit was brought in an Ohio court by the defendant Grant, as administrator, and, later, another in the supreme court of New Jersey by the defendant Martha McNichols, as administratrix. The decedent died on the 10th of January, 1894, testate of a will which dealt solely with the proceeds of a third policy of insurance, issued upon his life by another company, and wholly intestate as to all other property, including, of course, the policies which produced the fund here in controversy. The latter were, from shortly after the time of their issuance, in the possession of Mrs. McNichols, the defendant, who had her residence in this state. She sued the complainant as administratrix, but claims here both as administratrix and in her individual right, as donee of her husband, the deceased. The domicile of birth and residence, for many years, of the deceased, was in New Jersey. He married and kept house here for many years, with his wife and their children,—four daughters, still living. His business was that of a contractor for public works, and he followed it at a distance from his home, and finally located at Canton, Ohio, and acquired a residence and voted there for two or three years before his death, which occurred there. All the time, however, he maintained his wife and daughters in this state, in a house which he provided for them, and visited them frequently. The first policy in the complainant company was issued July 18, 1885, for \$1,000, subject to an annual payment of \$32.40, and declared to be payable "to the legal representatives of the assured," and containing a provision "that no assignment of this policy shall be valid

unless made in writing, indorsed hereon, and unless a copy of such assignment shall be given to this company within thirty days after its execution; and any claim against this company arising under this policy shall be subject to proof of interest. It is also agreed that the company shall not be held responsible for the validity of any assignment." The second policy was issued June 29, 1891, for \$2,000, subject to an annual premium of \$79.30, and is declared to be payable to "his [McNichols'] legal representatives or assigns," and contains a proviso that "no assignment hereof will be noticed by this company unless made in writing, the original or a copy attached hereto, and a copy furnished this company immediately on its execution; but this company will not be held responsible for its validity." These policies were, shortly after issuance, sent through the mail by McNichols to his wife, with a letter stating, in substance, that he gave them to her for her own benefit. The letter which accompanied the first policy has been lost, but its contents are satisfactorily proven by both Mrs. McNichols and one of her daughters. That accompanying the second policy has been preserved, and reads as follows: "Canton, Aug. 21st 91. Dear Old Woman. Enclosed you will find Policy of Travelers Ins. Co. on my Life for \$2000.00 (two thousand Dollars) & Receipt for first year's Premium. Also Copy of letter acknowledging Receipt of Payment of Premium on the Policy you now have the Receipt was Lost in Transit by Mail. So they Send me copy of letter in Duplicate and will Send me Duplicate Receipt Soon as they can get it from Home Officers. Preserve this letter. & in the Event of anything Happening to me you would have no Trouble in Proving your Claim. This Policy is Extended for you alone. Love to all. H. & P. [meaning "Husband and Papa"]." Creditors' claims to a small amount for debts incurred in this state have been presented to the administratrix here, and claims for debts incurred in Ohio, amounting to about \$18,000, have been presented to the Ohio administrator, and allowed by him. The assets of the estate in Ohio, including the policy of life insurance disposed of by the will, amount to from \$12,000 to \$15,000; showing a deficiency sufficient to absorb the whole of the fund in court, if awarded to the defendant Grant. There are no assets in this state other than the fund here in question. No proof was given as to when any of the Ohio debts originated. A part of them are secured by a mortgage upon lands owned by deceased, and which form a part of the assets above mentioned. A statute of Ohio was put in evidence authorizing a debtor to invest a sum not exceeding \$150 per year in insurance on his life for the benefit of his family.

B. F. Haywood Shreve, for Grant. John F. Harned and S. C. Woodhull, for Mrs. McNichols.

PITNEY. V. C. (after stating the facts). A consideration of the facts shows that the controlling question in the case is whether there was an effectual gift by the husband to the wife of the policies in question, which entitles her, as against the next of kin and creditors, to the fund in court. For conceding, as I think I must upon the evidence, that the domicile of the decedent was in Ohio, yet it was not contended that the letters of administration granted in this state to the widow were void for want of power, but their validity was conceded. The argument was that the Ohio administration must be taken as the principal, and the letters granted here as ancillary merely. But, granting this subordinate position to Mrs. McNichols, it does not follow that the fund must be awarded, without question, to the principal administrator. The policies were found in this state at the decedent's demise, and the foreign administrator did not bring suit here to recover their possession. The fund is in this state. The foreign administrator has submitted to the jurisdiction of this court. The next of kin (assuming that the laws of Ohio designating who shall be considered the next of kin of a decedent correspond with our own) are all residents of this state, and the fund is claimed, as against the next of kin and creditors, by a resident of this state, who is a party to the suit, and has submitted her claim for adjudication in this court. Under these circumstances, I think this court ought not to send this claimant and the next of kin to a foreign tribunal to litigate over the fund. The facts of the case are similar, in the main, to those under consideration in *Merrill v. Insurance Co.*, 103 Mass. 245, except that the questions arose there upon the trial of the suit at law brought by the ancillary administrator against the insurance company pending the suit first brought by the principal administrator in the court of his domicile, and the transfer of the policy was in pledge to secure a debt of the assured of less amount, with written directions by the assured to the pledgee to pay the surplus to the heirs of the insured, who lived in Massachusetts. It was held, after full consideration of the rights of the principal administrator, that the ancillary administrator was entitled to recover. And see *Story, Conf. Laws*, § 514 et seq.

This brings us to the consideration of the question of the validity of the gift. It seems to be well settled that bonds and other non-negotiable obligations for payment of money may be the subject of a valid gift, and that a delivery of the obligation to the donee, without written assignment, but with a clearly-manifested intention to make a gift, is sufficient to satisfy the rule requiring delivery of the thing given. The sensible rule is that the delivery must be such a tradition as the nature of the subject admits of. And surely the delivery of the formal writing which evidences the debt and forms the foundation of the right of action is the best and only deliv-

ery of which the subject is capable. *Snellgrove v. Baily*, 3 Atk. 214; *Duffield v. Hicks*, 1 Dow. & C. 1, 1 Bligh (N. S.) 497, on appeal from *Duffield v. Elwes*, 1 Sim. & S. 239; *Veal v. Veal*, 27 Beav. 303, 6 Jur. (N. S.) 527, 29 Law J. Ch. 321; *Grover v. Grover*, 24 Pick. 261. The same has been decided as to savings bank pass books. *Tillinghast v. Wheaton*, 8 R. I. 536; *Camp's Appeal*, 36 Conn. 88; *Sheedy v. Roach*, 124 Mass. 472; *Bond v. Bunting*, 78 Pa. St. 210. The law is settled in this state, as to promissory notes, in *Corle v. Monkhouse*, 50 N. J. Eq. 537, 25 Atl. 157, at pages 543, 544, 50 N. J. Eq., and page 157, 25 Atl., by the late Vice Chancellor Van Fleet. The cases cited refer to bonds and notes not payable to bearer, and not assigned or indorsed by the donor. In such cases it is held that, where the strict rules of the common law prevent the donee from suing in his own name upon the unassigned instrument, he is entitled to sue in the name of the donor, or his personal representative, to the donee's use. See *Thornt. Gifts*, § 267 et seq. I am unable to perceive any distinction between a bond or promissory note and a policy of life insurance. Each is a contractual obligation to pay money at a certain time. If the mere delivery of a common money bond, or of a promissory note not payable to bearer, without assignment of the one or the indorsement of the other, but accompanied with words of gift, is sufficient to entitle the donee, as against the donor and his representatives, to demand and receive the money from the obligor or promisor, then I am unable to see any reason why, under like circumstances, the donee of a life insurance policy should not be vested with like rights. The authorities so hold. *Witt v. Amis*, 1 Best & S. 109, 7 Jur. (N. S.) 499, was an action of trover by the personal representative of a decedent whose life had been insured, to recover possession of the policy from the defendant, to whom she had given it by simple tradition, without written assignment, but accompanied by words of gift. The court of queen's bench, after consideration by Cockburn, C. J., held that there was no distinction between a bond and a policy of insurance. In this respect, and gave judgment for defendant. About the same time (but whether before or afterwards does not clearly appear) a bill was filed in equity to perfect the gift, and to get actual possession of the fund, and Lord Romilly held that the donee of the policy was entitled to the money due upon it. *Amis v. Witt*, 33 Beav. 619. And this is the settled law, although Lord Cairns afterwards, in *Rummens v. Hare* (1876) 1 Exch. Div. 169, in delivering judgment of the court of appeal in a case like *Witt v. Amis*, said that the right to the possession of the policy did not fully determine the right to the moneys due upon it. Such remark was thrown out merely to guard against prejudicing any equitable rights in the fund which might exist in other persons, the only question submitted to the jury

in that case being as to the right to the possession of the document. The distinction between the ownership of a policy of life insurance, and the ownership of the money to be paid thereon upon its maturity, arose out of the administration of the English bankrupt laws, applied to a policy upon the life of a bankrupt yet living, the question being as to what chattels were "within the disposition of the bankrupt." *Gibson v. Overbury*, 7 Mees. & W. 555; *Green v. Ingham* (1867) L. R. 2 C. P. 525. In *Phippard v. Phippard*, 55 Hun, 473, 8 N. Y. Supp. 728, an executrix collected the money due on a policy of life insurance found among the testator's papers, to which was attached a paper in his handwriting declaring that it was for the benefit of his children, and it was held that the children were entitled to recover the amount from the executrix. In *Appeal of Madeira*, 4 Atl. 908, in the supreme court of Pennsylvania, the question was elaborately argued and fully considered; and it was held that a husband could effectually give to his wife, by parol, without assignment, but with the delivery of the writing, a policy on his own life, payable to his legal representatives. In *Janes v. Falk*, 50 N. J. Eq. 408, 26 Atl. 138, our own court of errors and appeals held that a person holding a policy of life insurance on his own life could pledge it as security for a debt which he owed to an estate of which he was an executor, by simply placing it among the papers of the estate in his own possession, with a note or memorandum that it was held for the benefit of the estate. The contest was between a judgment creditor of the deceased, who had procured a vesting order under supplemental proceedings during his lifetime, and the representatives of the estate to which the deceased was a debtor. There was in that case a formal assignment of the policy executed by the decedent after the vesting order took effect, and dated back to precede it; but the court relied only upon the original deposit and memorandum, and not upon the assignment. The point of the case, for present purposes, is that the policy of insurance was treated as any other obligation. Finally, in the recent case of *Logan v. Logan* (decided without opinion) in the prerogative court of this state, upon appeal from the Camden orphans' court, the present chancellor has substantially decided the very question. There the widow, who was administratrix, had already collected the money, and the question was whether she should be charged with it. There being satisfactory proof that testator had given and delivered the policy to his wife in his lifetime, the learned chancellor held that she should not be charged with it as administratrix.

The counsel for Mr. Grant, however, rested his elaborate and able argument mainly upon the ground that by the terms of these policies no interest could vest in the donee unless a formal assignment, indorsed thereon, was executed, and notice given to the in-

surer. The clauses regulating assignments are not the same in both policies. That in the first policy is much more rigorous than that in the other. But I think neither can have any effect upon the present issue. The contest, so far as the complainant is concerned, was not between assignor and assignee, but between the two several personal representatives, deriving authority from separate jurisdictions, and each claiming the money, not as assignee, but as personal representative. The only defense complainant could have to either was that judgment had been recovered by one, and the money paid. The complainant, being thus subject to two suits, came voluntarily into this court, and asked to be discharged from all liability, upon terms of paying the money here. This has been done. The foreign administrator has submitted to our jurisdiction, and the question to be determined is, which of these personal representatives shall have the money? The one appointed by the court of this state claims it because she will hold it, when received, in trust for herself, after paying certain creditors domiciled here. The question was raised in *Merrill v. Insurance Co.*, supra; and it was held that such a clause could not be set up in that case, which, we have seen, is similar to this. To the same effect is *Marcus v. Insurance Co.*, 68 N. Y. 625, reversing the same case as reported in 7 Hun, 5. There the action was brought by the donee without assignment against the insurance company, and recovery was had notwithstanding a restrictive clause against assignments. Counsel, however, relies upon the case of *Stevens v. Warren*, 101 Mass. 564. That was an interpleader in equity, brought by the administrator, who had collected the money, to compel the next of kin and an assignee of the policy to litigate as to the right to the fund. The policy contained a clause like that in the first policy herein, and the assignee had no interest in the life of the assured. The court based its decision against the assignee mainly on the ground of public policy, it being the rule in Massachusetts "that no one can have an insurance upon the life of another unless he has an interest in the continuance of that life." The court said that the purpose of the clause found in the policy there under consideration was to guard against the "increased risk of speculating life insurance." The case has no application here, because—First, the wife had an undoubted interest in the continuance and prolongation of her husband's life; and, second, the complainant voluntarily paid the money into the court of a state whose courts have not adopted the policy in question, viz. that against life insurance in favor of parties who have no interest in the prolongation of the life of the assured. The authorities are *Insurance Co. v. Johnson*, 24 N. J. Law, 576; *Martin v. Insurance Co.*, 38 N. J. Law, 140, 141; *De Ronge v. Elliott*, 23 N. J. Eq. 491; *Vivar v. Supreme Lodge*, 52 N. J. Law,

455, 20 Atl. 36, at page 469, 52 N. J. Law, and page 36, 20 Atl. And see, upon the general subject, Am. Law Reg. & Rev., Feb. No. 1896, and cases cited. Counsel further relied upon the case of Legion of Honor v. Smith, 45 N. J. Eq. 466, 17 Atl. 770, also an interpleader. That case has no application here. The wife was originally named as the beneficiary in the policy or certificate which was issued by a company whose charter required that the benefits of membership should go to a certain class of relatives. The donor had attempted to change the beneficiary without the consent of the person originally named, and without surrendering the original certificate, or otherwise conforming to the rules of the society governing such change. Clearly, the donor, having once named the beneficiary, and delivered the certificate to her, could not revoke it and give it to another without the consent of the first beneficiary, unless he did it in strict accordance with the terms of the right of revocation and change prescribed by the charter, constitution, and by-laws of the association, which in that class of cases form a part of the contract between the parties. To hold otherwise would be to sanction an unlawful interference with vested rights. Several other cases were cited by counsel for Mr. Grant, which, upon examination, turn upon substantially the same questions as did the case last referred to. None of them go so far as *Stevens v. Warren*, supra; and I find no well-considered authority for the position that the beneficiary named in an ordinary policy of life insurance may not create an equitable interest therein, in his wife or other person interested in the prolongation of his life, which shall bind his legal representatives, without the sanction of the company which writes the policy, notwithstanding it contains a clause like that here in question. I conclude, therefore, that the clauses in question do not stand in the way of the vesting in equity of this gift. Nor do I find any ground for holding it void as a testamentary disposition. It was a gift in praesenti of the policy, and all the donor's interest in it. The donor could not recall the gift, and the donee might have herself paid the premiums, and kept the policy alive, if the donor had failed therein. Every payment of premium made by the husband was an additional present irrevocable gift to his wife. Every such payment made was, under the circumstances, a ratification of the original gift of the policy. I am satisfied that the case in hand makes a valid gift to the wife, and that she is entitled to the fund, except as against creditors in this state whose debts arose prior to any of the payments. As to those the gift is void, on the ground that it is a fraud upon creditors. *Transportation Co. v. Borland*, 53 N. J. Eq. 282, 31 Atl. 272.

A statute in Ohio authorizes a husband to set aside a sum, not exceeding \$150 a year, to create a life insurance in favor of his wife

or family. The result is that, so far as the creditors in Ohio are concerned, they can have no claim. They are properly represented by the foreign administrator.

With regard to the next of kin, who are the only parties, besides creditors, who are interested adversely to Mrs. McNichols, they must be ascertained, also, by the statutes of Ohio, and for the purpose of proving those statutes the case may be opened. As one of the children is an infant, Mrs. McNichols' cross bill may be amended by making the children parties; and, if it shall turn out that Mrs. McNichols and her daughters are the only next of kin then a decree can be made which shall bind them, and the fund may be awarded finally to Mrs. McNichols, in her individual capacity. But such decree cannot bind the creditors in New Jersey, who are not here properly represented by Mrs. McNichols, because their interests are adverse. Hence no decree can here be conveniently made which will bind them, but Mrs. McNichols, as administratrix, will be liable to be called to account by them in the orphans' court of Camden county.

FITZGERALD et al. v. MAXIM POWDER MANUF'G CO. et al.

(Court of Chancery of New Jersey. Feb. 26, 1896.)

EQUITY—PARTIES—INSOLVENT CORPORATIONS—LABORER'S LIEN—PRIORITY.

1. Act April 8, 1892, §§ 1, 2, provide that, in case of the insolvency of a corporation, its employes shall have a prior lien on the "assets" for the amount of wages due them, respectively, for services rendered within two months next preceding the institution of insolvency proceedings; and that such lien shall be prior to all other liens except as against chattel mortgages recorded more than two months next preceding such date, and those given for money actually loaned or for goods actually purchased within that time, and also except as against mortgages of land. *Held*, that "assets" does not mean simply the property remaining after exhausting liens thereon accruing prior to insolvency, but the property which comes to the receiver to be administered, without reference to whether it is incumbered by liens; and consequently a laborer's lien is prior to the lien of a judgment entered against the corporation before its insolvency.

2. On a bill by laborers claiming liens under Act April 8, 1892 (P. L. 426, c. 273), against the assets of a corporation, to have the corporation declared insolvent and its assets administered as such through a receiver under the statute, and to enforce their liens, a judgment creditor of the corporation, the lien of whose judgment is claimed to be inferior to complainants' liens, and under whose judgment property of the corporation was levied upon prior to the filing of the bill, may be made a party defendant and enjoined from selling, pending the proceedings, the property levied upon.

Bill by George Fitzgerald and others against the Maxim Powder Manufacturing Company and others to establish and enforce laborers' liens. A demurrer was interposed by defendant Arthur H. Smith. Overruled.

Frank P. McDermott, for complainants.
Warren Dixon, for demurrant.

EMERY, V. C. This case is heard upon the demurrer of Arthur H. Smith, one of the defendants; and the facts stated in the bill material to the decision of the question argued on demurrer are as follows: The complainants are employes of the defendant corporation, the Maxim Powder Manufacturing Company, to whom the company is indebted for services as its laborers. The primary object of the bill is to have the company, which is a foreign corporation, declared insolvent, and to have its assets administered as such, through a receiver, under the statutes relating to corporations, which in this respect are applicable to foreign corporations (Revision 196, § 103). The debts due to the complainants appear by the bill to be for wages due to them, respectively, from the company, for labor performed within two months next preceding the date of filing the bill (September 10, 1894); and they therefore claim that they are within the protection of the act of April 8, 1892 (P. L. 426, c. 273), providing that all such debts are prior liens upon the assets of the company. Part of the property of the company, at the time of filing the bill, consisted of real estate situated in the county of Monmouth; and the defendant Arthur H. Smith, on August 7, 1894, recovered a judgment in the supreme court against the company for \$2,088.63, upon which execution was issued and levy made upon these lands, before the filing of the bill. The bill alleges that the complainants' claims for wages are, under the above act, prior to the judgment of Smith; that the company is insolvent; and that Smith threatens to proceed to sell on his judgment and execution. He is therefore made a party defendant, and an injunction is prayed against the sale by him.

The records in this cause subsequent to the filing of the bill show that an ad interim restraining order was issued against sale by the defendant Smith, pending the hearing of the application for decree of insolvency; that, on this hearing, the company was declared insolvent and a receiver appointed; and that the receiver, by consent of the parties, including Smith, sold the property in question, and paid the proceeds of sale into court, where it now remains, subject to the final order of the court. This payment into court is made for the benefit of the persons ultimately entitled to the fund, either as parties to this suit or in the other suits also pending against the company, and referred to in the bill. The present demurrer was filed after the decree in insolvency and order for sale, and presents two objections: First, want of equity (without further specification); and, secondly, multifariousness. The decision upon both points depends upon the complainants' prior lien on the fund in court, under the act of 1892; and as the fund is now in court, and not in the hands of the receiver, the dispute between the complainants and demurrant upon this point may be

properly settled in this bill, without requiring other formal proceedings, to which all the persons interested in the fund are to be made parties. But, so far as the rights of any persons to the fund in court is concerned, this decision upon the demurrer is not intended to reach further than to dispose of this single question.

The act of 1892, under which the dispute arises, is as follows:

"An act to secure to laborers and workmen in the employ of corporations a prior lien in cases of insolvency.

"Section 1. Be it enacted by the senate and general assembly of the state of New Jersey, that in case of the insolvency of any corporation the laborers and workmen and all persons doing labor or service of whatever character in the regular employ of such corporation shall have a first and prior lien upon the assets thereof for the amount of wages due to them respectively for all such labor, work and services as may have been done, performed or rendered within two months next preceding the date when proceedings in insolvency shall be actually instituted and begun against such insolvent corporation.

"Sec. 2. Be it enacted, that such lien shall be prior to any and all other liens that can or may be acquired upon or against such assets, except the lien and incumbrance of a chattel mortgage or chattel mortgages thereon, and which mortgage or mortgages shall have been actually given and recorded (or filed for record) more than two months next preceding the date when proceedings in insolvency shall have been actually instituted against such insolvent corporations, and except the lien and incumbrance of such chattel mortgage or chattel mortgages thereon as shall have been actually given within two months next preceding the date when proceedings in insolvency shall have been actually instituted against such insolvent corporation for money loaned or for goods purchased within said period of two months; and also except as against the lien and incumbrance of any and all mortgages given upon the lands and real estate of such insolvent corporation.

"Sec. 3. And be it enacted, that this act shall take effect immediately.

"Approved April 8, 1892."

As to the objections both of want of equity and multifariousness, I think it is clear that if, upon an adjudication of insolvency, the complainants would acquire a lien prior to the defendant's judgment, and relating back to the filing of the bill, then the judgment creditor is a proper party to the bill, and, pending the adjudication, may be enjoined from selling or disposing of the assets. This results from the fact that the complainants' equity, if it exists against the defendant, can be worked out only through the medium of a decree in insolvency and a receiver. On similar equitable grounds, mortgagees or other lien creditors of a company

claimed to be insolvent, and whose liens are contested upon grounds which, under the insolvent corporation law, would make their liens invalid as against the receiver, and who threaten to proceed to realize upon their liens pending the hearing on the question of insolvency, have regularly been made parties to the bill for insolvency, and enjoined, pending the hearing of that question. Whether, after the decree in insolvency, the jurisdiction of the court, for the settlement of other questions raised in the bill, generally continues, is not now involved or decided. Upon such decree the actual possession of the property usually passes to and remains in the receiver, and the validity of the lien is usually contested by subsequent direct proceedings for that purpose. But in this case, by the orders for sale of the property and the payment of the fund into court, the present bill is to be considered as pending, for the purpose of deciding the question now raised, and, by request of counsel, I so treat it.

This act of 1892, it will be noticed, was not a supplement to the act concerning corporations; and, in considering its interpretation, this must be borne in mind, because the question which arises on its interpretation is whether the words "assets of the corporation" were used in this act in the same sense in which they had been used in the sixty-third section of the corporation act, as amended March 31, 1887 (P. L. 99). This act of 1887, which is a supplement to the corporation act, amends section 63 of the corporation act so as to read as follows: "In case of the insolvency of any corporation, the laborers in the employ thereof, shall have a lien upon the assets thereof, for the amount due to them respectively, which shall be paid prior to any other debt or debts of said company; and the word 'laborers' shall be construed to include all persons doing labor or service of whatever character for or as workmen or employees in the regular employ of such corporations. * * *"

Under this sixty-third section, it had always been held that the receiver in insolvency took the property of the company subject to the liens of mortgages and judgments obtained before the adjudication of insolvency. *Hinkle v. Trust Co.*, 47 N. J. Eq. 333, 21 Atl. 861 (Vice Chancellor Pitney affirmed on appeal, 1890); *Wright v. Iron Co.*, 48 N. J. Eq. 20, 21 Atl. 862 (Chancellor McGill, 1891). These decisions were based upon the ground that, under the sixty-third section of the corporation act, the "assets" of the corporation, upon which the laborers had a prior lien, must be held to be the property of the corporation subject to prior legal liens; and my view of this case at the hearing was that the same construction of the word should be adopted under the act of 1892. But, on further reflection, I am satisfied that the same rule cannot be applied without, in effect, declaring that the second section of the act of 1892 has no legal or substantial operation

whatever. Such a construction of the act should not be adopted unless no other fair or reasonable construction is possible.

The act of 1892, it will be observed, was passed after the decisions above referred to concerning the sixty-third section of the corporation act, in view of the state of the law, as established by those decisions, and, so far as any presumption of purpose can be made, for the purpose of changing the existing law in reference to the lien of the laborers. The act, moreover, was, as was held by Vice Chancellor Van Fleet in *Mersereau v. Mersereau Co.*, 51 N. J. Eq. 382, 385, 26 Atl. 682, intended to supersede and repeal all prior provisions of law on this subject of priority of laborers of insolvent corporations. And, inasmuch as the act was not a supplement to the corporation act, but an independent act, the precise construction of the word "assets," as used in the corporation act, should not be considered as adopted in the act of 1892, if, on the fair construction of the whole of the act, the word appears clearly to have been used in a different sense. As both acts, however, relate to the same subject-matter, a different construction of the same word used in the two acts should not be adopted, unless such construction is clearly necessary, in order to give effect to the later act. In the first section of the act of 1892, considered by itself, there is nothing to indicate that the assets of the corporation therein referred to as subjected to a first and prior lien are not the same as the assets referred to in the sixty-third section of the corporation act, i. e. the property of the corporation remaining after exhausting liens thereon accruing prior to the insolvency. This construction of the word would thus leave the property of the corporation which came to the possession of the receiver subject to all prior mortgages, whether real or chattel, and subject also to other prior liens thereon, by judgment or otherwise. In the second section, however, the legislature specially and expressly declare that this lien intended to be given by the first section for two months' wages shall be prior to any and all other liens that can or may be acquired against the assets of the corporation, except as against real-estate mortgages and against chattel mortgages recorded before said period of two months, or for money actually advanced or goods actually purchased within said two months. These mortgages thus specially validated were already, under the section 63, as construed by the courts before the passage of the act of 1892, valid liens on the assets of the corporation, and prior to the laborers' liens, equally with all other bona fide mortgages and judgments obtained at any time prior to insolvency. This priority of all prior mortgages resulted from the construction of the word "assets" in the sixty-third section as meaning the property of the corporation applicable to its debts, and subject to existing liens. If the word is held to be used in this same sense in the act of

1892, the exception in the second section of this act, validating certain prior existing liens, has no legislative force whatever, as applying to the existing law. With this construction, the whole second section also fails of legislative effect, and the whole act has no further force on existing legislation than to lessen the amount for which the laborer previously had a lien and preference, without giving any compensatory advantage by way of preferring his claim. If, however, by the assets of the corporation the legislature, in this act of 1892, intended to describe and refer to the property of the corporation in the sense of the actual property which came to the receiver to be administered, and without reference to whether it was or was not incumbered by liens, then, construed as meaning the "property" or "assets" of the corporation in this sense, the whole act has a clear meaning and application. By the first section, the lien of laborers' wages, which had previously been preferred without limit as to the time of creation, was cut down to the wages due for the two months preceding insolvency; and, by the second section, the entire assets or property of the corporation which came to the receiver for administration, whether incumbered by previous liens or not, was, with certain exceptions, charged with the prior payment of these debts due to laborers. This construction of the word gives a clear and intelligible legislative result and effect to the whole act, and should be adopted. Stating the result in another form, I may say that the word "assets" as used in the act of 1892, seems to have been used in the ordinary or usual business sense of the word, as intended to include all the property which would come to the receiver's possession, whether subject to liens or not, rather than in the technical or legal sense applied to the word under the sixty-third section of the corporation act, where it was held to mean only the company's ultimate rights in the property. There was in the corporation act nothing to indicate that the legislature intended to affect prior liens, but such intention is manifest in the act of 1892; and, as this latter act is an independent act, I do not, in construing it, consider myself bound to apply the word in the technical or legal sense in which it is used in the corporation act, where it fairly and reasonably appears that the other and ordinary use of the word is intended, and such use is the only one which will give the act the practical operation and effect intended. The act construed in this sense is valid as against all debts contracted after its passage, and no point was made, either in the specifications of demurrer or on the argument, of any failure of the bill to allege that Smith's debt was contracted after 1892. As the company appears to have been incorporated after this date, the fact that it was subsequently contracted, perhaps, sufficiently appears by inference.

I conclude, therefore, that the complain-

ants' liens in case of insolvency would be prior to Smith's judgment, and that, therefore, their bill discloses an equity to have a sale stayed pending hearing on the bill against the company for insolvency, in order that the receiver taking possession of the property may protect and complete the preferred lien given by the statute to the complainants. The demurrer is therefore overruled.

FOLLETT v. SHUMWAY.

(Supreme Court of Vermont. Windham. Feb. 15, 1896.)

SHERIFFS AND CONSTABLES—TAKING INSUFFICIENT BOND.

The obligee in an insufficient replevin bond, after recovering judgment thereon against the surety therein (the principal being insolvent), discharged the surety on partial payment of such judgment, and thereby deprived the officer of the power to proceed for his indemnity against the surety on such judgment. *Held*, that the officer was thereby released from liability to the obligee for having accepted such insufficient bond, on showing that the continued liability of the surety on such judgment would have been of some value to such officer.

Exceptions from Windham county court; Rowell, Judge.

Action by James O. Follett against John Q. Shumway, for damages for default as an officer in taking an insufficient replevin bond. There was a judgment for defendant on the facts found by the court, and plaintiff excepts. Affirmed.

Haskins & Stoddard, for plaintiff. Waterman, Martin & Hitt, for defendant.

TAFT, J. The defendant, an officer, served a replevin writ in favor of one French against the plaintiff, and took a bond signed by said French and one Earl as surety, conditioned as provided by the statute. R. L. § 1219. French was cast in the suit. The bond was never good and sufficient. The plaintiff seeks in this suit to recover damages for the defendant's default in not taking a good and sufficient bond. The defendant was entitled to the benefit of the bond to secure him for any liability he might be under to the plaintiff in respect to it. *Evarts v. Hyde*, 51 Vt. 183, and cases therein cited. The defendant, indemnifying the plaintiff for costs, had the right to maintain an action in the plaintiff's name to recover upon the bond. The plaintiff brought suit upon the bond against Earl, the surety, recovered judgment, and, upon partial payment thereof, discharged the defendant therein from any further liability upon it. The continued liability of Earl upon the judgment, had he not been discharged therefrom, the court below found would have been of some value to the defendant. French was insolvent, and by discharging Earl the plaintiff put it out of the defendant's power to proceed against him upon the judgment which he had recovered upon the bond. The plain-

tiff cannot thus intermeddle with the rights of the defendant except at the loss of his rights against the latter. The result of his so doing in this cause is that he cannot recover. Judgment affirmed.

MASON et al. v. TOWN AND VILLAGE OF ST. ALBANS.

(Supreme Court of Vermont. Franklin. Feb. 15, 1896.)

HIGHWAYS—PROCEEDINGS TO OPEN.

Where a village has refused an application for the laying out of a highway within its limits, proceedings in the county court to compel the construction of said highway can only be maintained against the town in which such village is located, and not against the village itself. *Landon v. Village of Rutland*, 41 Vt. 681, followed.

Exceptions from Franklin county court; Munson, Judge.

Petition by M. Mason and others against the town and village of St. Albans for the laying out of a highway. An order was made, on report of commissioners, directing the town to law out such highway, and said town excepts. Affirmed.

The commissioners found that the public necessity required the highway, and that the same was within the limits of the village, and submitted to the court whether it was incumbent upon the town or village to construct it. The court held as matter of law that it had no power to compel the village to lay out, work, and open said highways, and made an order upon the town to that effect. It appeared that application was made to the village trustees to lay the highway before the bringing of this petition, but that no such application had been made to the selectmen; also that all proceedings before the commissioners were objected to by the town for want of jurisdiction.

Farrington & Post, for the town. Hogan & Royce, for the village.

TAFT, J. This case involves the same question decided in *Landon v. Village of Rutland*, 41 Vt. 681. We have no disposition to overrule that case. Judgment affirmed.

DREW v. DREW.

(Supreme Court of Vermont. Orleans. Feb. 15, 1896.)

TROVER—WHO MAY MAINTAIN.

1. Vt. St. § 2205, giving a mortgagee of chattels a remedy by a sale at public auction by an officer, does not prevent him, after breach of the condition, from maintaining trover against the mortgagor for selling the mortgaged property.

2. Vt. St. § 2262, providing that, where a mortgagor of chattels is convicted of selling the property without the mortgagee's consent, the mortgagee is entitled to one-half of the penalty of double the value of the property, but gets nothing if the respondent is acquitted, does not pre-

vent the mortgagee under a statutory chattel mortgage, after breach of the condition, from maintaining trover against the mortgagor for selling the mortgaged property.

Exceptions from Orleans county court; Start, Judge.

Action of trover by Joseph Drew against J. Olin Drew, in which defendant pleaded the general issue and three special pleas in bar. There was a judgment sustaining a demurrer to the third plea, and defendant excepts. Affirmed.

F. W. Baldwin, for plaintiff. Cook & Redmond, for defendant.

TAFT, J. The only question in this case is, can the mortgagee under a statutory chattel mortgage, after a breach of the condition, maintain trover against the mortgagor for selling the mortgaged property? After breach of the condition, a mortgagee is entitled to possession, and can maintain trover for its conversion by one to whom the mortgagor sells it. *Longey v. Leach*, 57 Vt. 377. The defendant insists that the plaintiff cannot recover, for that Vt. St. § 2265, provides an exclusive remedy by a sale at public auction by an officer. It may be conceded that a sale under the statute is the only sale that can be made by the mortgagee, but it does not by any means follow that the mortgagor, if he converts the property by selling it, is not liable for the conversion. What remedy has the mortgagee, unless he can maintain an action of trespass or trover, if, by converting it, the mortgagor puts it out of the power of the mortgagee to take it for the purpose of selling it? It is also claimed that the mortgagee has a remedy under Vt. St. § 2262, by a prosecution of the mortgagor for selling the property without the mortgagee's consent, in which case, if the respondent is convicted, the mortgagee receives one-half of the penalty of double the value of the property, but gets nothing if the respondent is acquitted. The action under section 2262 is a penal one (*Adams v. Railroad Co.*, 67 Vt. 76, 30 Atl. 687), and was not intended to take away the common-law rights of the mortgagee, nor to compensate him for his damages, but as a just punishment of the mortgagor for his wrongful act of selling the property, which is prohibited by the statute. Judgment affirmed, and cause remanded.

BEAN v. BUNKER.

(Supreme Court of Vermont. Franklin. Dec. 24, 1895.)

CONTRACT—WAIVER OF CONDITIONS—INSTRUCTIONS.

1. In an action on a contract for cutting, skidding, and drawing logs, where it appeared that plaintiff had not completed the drawing, it was error to instruct that defendant's default in payment excused the plaintiff from further performance, where there was evidence that plaintiff had waived the contract conditions for pay-

ment by continuing performance after default was made, and accepting part payment of sums due under the contract.

2. Where plaintiff's contract to cut, skid, and draw logs provided compensation and times of payment thereof for the cutting and skidding separate from those for the drawing, payment for the cutting and skidding by defendant before the drawing was completed was not evidence that defendant released plaintiff from completing the drawing.

Exceptions from Franklin county court; Tyler, Judge.

Action of assumpsit by Frank Bean against J. F. Bunker. From a judgment for plaintiff, defendant brings exceptions. Reversed.

Rustedt & Locklin and Wilson & Hall, for plaintiff. Adams & Mott and F. W. McGettrick, for defendant.

START, J. By the terms of the written contract relied upon by both parties in the court below, the plaintiff was to cut, skid, and deliver at the defendant's mill 600,000 feet, or more, of logs. Acting under this contract, the plaintiff cut and skidded 813,000 feet, and drew 640,000 feet, and then abandoned the contract, leaving, of the logs so cut and skidded, 173,000 feet undrawn. The defendant did not pay for the drawing as required by the terms of the contract. The court instructed the jury that, if the defendant's failure to make payment according to the terms of the contract prevented the plaintiff from drawing the balance of the logs, the plaintiff was excused from further performance of the contract, and that he was entitled to recover the contract price for the work done under the contract. If the plaintiff did not waive his right to insist on payment being made as is provided in the contract, the charge upon this branch of the case was correct. *Frost v. Knight*, L. R. 7 Exch. 111; *Fletcher v. Cole*, 23 Vt. 114; *Chamberlain v. Neale*, 9 Allen, 410; *White v. Atkins*, 8 Cush. 369; *Stephenson v. Cady*, 117 Mass. 6. If the evidence tended to show such a waiver, the failure of the defendant to make payment in strict compliance with the terms of the contract did not excuse the plaintiff from further performing his contract; and the omission of the court to submit this question to the jury was error. *Tripp v. Insurance Co.*, 55 Vt. 100; *Walsh's Adm'x v. Insurance Co.*, 54 Vt. 351; *Ring v. Insurance Co.*, Id. 434; *Patnote v. Sanders*, 41 Vt. 66; *Boyle v. Parker*, 46 Vt. 343; *Seaver v. Morse*, 20 Vt. 620; *Cahill v. Patterson*, 30 Vt. 592. We think that the evidence tended to show that the plaintiff waived his right to insist on a strict compliance with the terms of the contract in respect to payment, and that he treated the contract as binding and subsisting during all the time he was cutting, skidding, and delivering logs. He continued the performance of the contract, when he knew that the defendant was in default, until he supposed he had fully performed the contract on his part. When he stopped work, he did not claim that he was excused from further performing the contract by reason of a

breach of its conditions by the defendant, but he insisted that he had cut, skidded, and drawn more than 600,000 feet, and that the contract did not require him to do more. He acquiesced in payments of less than the sum then due, and continued to work under the contract. When the defendant was nearly \$1,000 in arrears in his payments, he consented to go on (a payment of \$200 being made) until the defendant could get more money. He was paid in full for cutting and skidding the logs and from time to time received payments towards the drawing, and continued in the performance of the contract; and, when he stopped work, he understood that he had fully performed on his part. From this and other evidence referred to in the exceptions, the jury might properly have found that the plaintiff gave the defendant to understand that he would not insist on payment being made in exact compliance with the terms of the contract; that the defendant acted upon this understanding; and that the plaintiff knew he was so acting. If the essentiality of the time of payment was waived, it could not be revived without notice to the defendant, and fixing a certain and reasonable time within which payment would be required. *Battell v. Matot*, 58 Vt. 271, 5 Atl. 479.

In considering the exception to the instruction of the court as to the effect to be given to the settlement as evidence, it becomes important to refer to the contract and the issue that was under consideration. The written contract, so far as it relates to the compensation, settlement, and payment for the cutting and skidding, is distinct from the contract for drawing the logs, and is in no way dependent upon it. By the terms of the written contract, the plaintiff was to have two dollars for every 1,000 feet of logs that he cut and skidded. They were to be counted every 30 days, and payment was to be made in 6 days thereafter. On the 9th day of January, 1894, the parties settled, and the defendant paid the plaintiff in full for the cutting and skidding; and there was no controversy in respect to the cutting and skidding. The issue was in respect to the failure of the plaintiff to draw the logs that he cut and skidded in excess of 643,000 feet. The plaintiff's evidence tended to show that, subsequent to the making of the written contract, the defendant agreed to attend to drawing all logs in excess of 600,000 feet. The defendant's evidence tended to show that he did not so agree, and that the plaintiff had not performed his contract, in that he had not drawn all the logs that he cut and skidded. Upon this branch of the case the court instructed the jury as follows: "It is claimed that the settlement between the parties in January, 1894, in respect to what logs had been cut and skidded, tends to show that the defendant was willing to pay for the cutting and skidding and take care of the drawing himself. You will say what importance you attach to this settlement. It is a circumstance in the case, and the circum-

stance of the defendant's giving credit on his books for the cutting and skidding at one time." By this instruction, the court, in effect, conceded the claim of the plaintiff; and the jury must have understood that the fact that the defendant settled and paid for cutting and skidding the logs was evidence tending to show that he released the plaintiff from his contract to draw all the logs that he cut and skidded. We think the evidence has no such tendency. The defendant, in settling and paying for the cutting and skidding, was doing what the contract required him to do. He could perform the contract in this respect without having the fact that he did so evidence to be weighed against him upon the question of whether he had released the plaintiff from drawing all logs in excess of 600,000 feet. The written contract provides for a separate compensation for cutting and skidding, and a distinct time for payment; and this duty to settle and pay for the cutting and skidding is imposed upon the defendant by an independent provision of the contract, and is in no way made to depend upon whether the logs were drawn. The charge in other respects was correct, and there was no error in the admission of evidence. Judgment reversed, and cause remanded.

TAFT, J., did not sit, being engaged in county court.

STATE v. MORRILL.

(Supreme Court of Vermont. Orleans. Jan. 25, 1896.)

CRIMINAL LAW—BRINGING STOLEN PROPERTY FROM A FOREIGN COUNTRY.

1. One who steals property in another country, and brings it into this country, is guilty of larceny here, on the principle that the legal possession of the property remains in the true owner, the taking having been felonious, and that every appropriation is a fresh taking.

2. The courts will presume the laws of the foreign country to be the same as our own, and that the original taking there was criminal, under proof of acts which would make it so here.

Exceptions from Orleans county court; Start, Judge.

Frank Morrill was convicted of larceny, and excepts. Exceptions overruled.

Cook & Redmond, for appellant. O. S. Annis, State's Atty., for the State.

ROWELL, J. Indictment for the larceny of a horse, a wagon, and a harness. The testimony on the part of the state tended to show that the prisoner hired the team of the owner in Canada, to drive from a certain place therein, to a certain other place therein, and return the next day; that he did not return at all, but drove through and beyond his destination, and into Orleans county, in this state, where he tried to sell the team; and that when he thus obtained possession of it in Canada he intended to steal it. There was no proof as to the law of Canada, and

the prisoner moved for a verdict of acquittal for that there was no such proof, and for that he could not be convicted of larceny in this state if all was true that the testimony tended to show. The motion was overruled, and the prisoner excepted. Verdict of guilty.

Although courts do not without proof take notice of foreign laws, yet they will assume that certain general principles, consonant to reason and natural justice, and of universal applicability, are recognized by all civilized nations; as, for instance, the right of self-preservation, the privileges and exceptions of necessity, the common duties of humanity, of more or less perfect obligation, and those obligations for the most part conventional, upon which is based the modern system of international law. Thus the right to immunity from personal restraint and personal violence is such a natural right, and so generally recognized, that he who sues for false imprisonment or assault and battery in another country need not, in the first instance, prove that the act complained of was unlawful where committed. It will be presumed to have been unlawful there, and to have imposed liability for damages; or, to speak more exactly, in the absence of such proof, the court will proceed according to the law of the forum. *Lloyd v. Guilbert*, L. R. 1 Q. B. 115, 129; *Carpenter v. Railway Co.*, 72 Me. 388. Wharton says that, with regard to what may be called "processual presumptions," of which the presumption that a foreign law is the same as the domestic is one, no doubt the *lex fori* decides. *Conf. Laws*, § 782. But whether you say that, in the absence of proof, the court will presume the foreign law to be like the domestic law, or say that the court will proceed according to the domestic law, makes no difference with the rule, for it is the same in effect either way. In *Langdon v. Young*, 33 Vt. 136, *Redfield, C. J.*, says it is proper to assume that flagrant violations of the fundamental principles of moral obligations, such as theft and murder, are regarded as crimes by all Christian nations, and that unjustly to accuse abroad one of such deeds as there committed is actionable. In *Woodrow v. O'Conner*, 28 Vt. 776, this court assumed, in the absence of proof, that there was no difference between our law and the law of Canada in respect of the validity of arbitration notes. So in the case at bar, the court might well assume, as it did, that there was no difference between our law and the law of Canada in respect of larceny in the circumstances disclosed, and proceed according to our law. For a hundred years our courts have held the common law to be that one who steals property in another country, and brings it into this state, is guilty of larceny here. The same is true of one who steals in another of the United States and brings the property here. The first reported case in respect of stealing in Canada is *State v. Bartlett*, 11 Vt. 650, decided in 1839. It was there said that the rule had been too

long settled, and recognized by too long and uniform a course of practice and decision, to be changed except by legislative action. That was 57 years ago. The rule has not been changed by legislative action, although the attention of the legislature was then specifically directed to the matter, and hence it is fair to infer that the legislature has been satisfied with the rule. If it was too late then for the court to change the rule, it is certainly too late now. Nor can it be changed except for reasons that would equally call for its abrogation in cases of property stolen in another state of the Union and brought here, for the states are as independent of one another in respect of their jurisdiction as they are of foreign countries. Two states—Massachusetts and Ohio—have attempted to distinguish between the thief who brings therein property stolen by him in another state and the thief who does the like with property stolen by him in another country; convicting the one and acquitting the other. *Com. v. Uprichard*, 3 Gray, 434; *Stanley v. State*, 24 Ohio St. 168. But we think that no such distinction can be made, and that both cases stand on precisely the same ground. We could not, therefore, abrogate the rule as to one without abrogating it as to both, which we are by no means prepared to do. We are satisfied with the rule as matter of policy, as was the court in *State v. Bartlett*; for our law should not be such as to induce thieves to come here with their plunder. We are satisfied with it on principle, for every asportation is a fresh trespass and a fresh taking, and so, as matter of law, you have a felonious taking and carrying away in this state, since the possession as well as the title of the property is deemed to continue in the owner, notwithstanding the original taking, as that was felonious. It is upon the precise ground that in England one who steals goods in one county and carries them into another may be indicted for larceny in the latter, though he can be indicted for robbery only in the county where the force or putting in fear was. It is true, they do not extend the rule to cases where the property was stolen abroad; and the principle of the rule is logically capable of such extension, and it, in effect, receives such extension in this country when a thief is convicted of larceny in one state for bringing in goods that he stole in another state, which the states very generally do, though some do not. On this ground it is that one who steals my goods from one who had stolen them may be indicted as having stolen them from me. Ohio denies the principle altogether, and says that a mere change of place by the thief while he continues in the uninterrupted and exclusive possession of the stolen property does not constitute a new taking, either in law or in fact, and yet she convicts of larceny the thief who brings goods into the state that he stole in another state, but upon what ground is not obvious. Larceny of the same goods

by the same person may be committed any number of times; and this offense, like every other, is punishable in the jurisdiction in which it is committed. We cannot punish for offenses against a foreign law, but only for offenses against our law. But a man cannot bar prosecution for a criminal act here on the ground that he committed a like act elsewhere. A man can neither be punished nor escape punishment here because he stole the same goods in another state or country. 1 Bish. Cr. Law (7th Ed.) § 137. This question is so fully discussed in the cases, and the reason for the different holdings so fully stated, that further discussion here is unnecessary. We may say, however, that Maine holds with us in the question here involved. *State v. Underwood*, 49 Me. 181. Judgment that there is no error in the proceedings of the county court, and that the respondent take nothing by his exceptions.

LANCEY v. FOSS et al.

(Supreme Judicial Court of Maine. Sept. 13, 1895.)

BANKRUPTCY—ASSIGNMENT—ACTIONS—LIMITATIONS—FRAUD.

1. In March, 1878, the plaintiff brought suit against his debtor, for the purpose of collection, upon numerous notes, and upon an account annexed, and also upon a special contract. Subsequently, in the same year, the plaintiff became bankrupt under the act of 1867, and received his discharge in 1879. His assignee, duly appointed, did not appear in the case, nor did the bankrupt's schedule of assets set forth any of the notes, accounts, or claims embraced in the suit, which stood on the docket without further disposition until March, 1892.

Held, that such items of estate, corporeal and incorporeal, as the assignee declines to appropriate or utilize, remain the property of the bankrupt, subject, always, to the superior right and title of the assignee. Notwithstanding the adjudication and assignment under the bankrupt act, there is left in the bankrupt a right which makes a title good against all the world except his assignee and creditors, who may appropriate the entire title and interest, and so divest the bankrupt completely; but what they decline to appropriate remains with the bankrupt, who can defend or enforce it against all others. Also, that if the defendants desire, they can have an order of notice of this action served upon the assignee, which will conclude him of record.

2. It appeared in the case that the assignee did not take over the title. He elected not to take it, and left it in the plaintiff. He neither took nor passed the title. The plaintiff thus retaining the title subject to the assignee's paramount right, but good against others until such paramount right is asserted, *held*, that the two-years limitation (Rev. St. U. S. § 5057) does not apply as a bar to this action. That statute bars only the assignee and those claiming under him.

3. *Held*, that the statement, in the facts agreed in this case, of the omission to include these claims in the bankrupt's schedule of assets, is not a statement of fraud. There may have been innocent reasons for it, and the court cannot assume that it was fraudulent. The fraud, if any, was against the assignee and creditors, and not against these defendants.

(Official.)

Assumpsit by William K. Lancey against Obed Foss and another, executors of Going

Hathorn, deceased. The action was commenced in 1878, and subsequently, in that year, the plaintiff was declared a bankrupt, upon his own petition, in the district court of the United States for the district of Maine. A schedule of his assets was filed in said court, which did not include the claims mentioned in the writ, and an assignee was chosen and appointed. Thereafter, by decree and assignment of the register in bankruptcy, all the estate of the bankrupt was assigned to the assignee under the United States bankrupt act of 1867. The assignee never appeared in the action, and subsequently the bankrupt was discharged by the district court. It is agreed that, if the action can be maintained, it shall stand for trial, and that otherwise a nonsuit shall be entered. Action to stand for trial.

S. S. Hackett, for plaintiff. D. D. Stewart, for defendants.

EMERY, J. The statement of the case shows that the plaintiff is entitled to a hearing in this court upon the merits of his claim against the defendants, unless he is prevented by some provision of the United States bankruptcy act of 1867, to which he had become subject by the bankruptcy proceedings. The defendants contend that he is thus prevented by several provisions of that act.

1. Rev. St. U. S. tit. "Bankruptcy," § 5046, provides that all of the property of the bankrupt, including all choses in action, all debts due him, all rights and causes of action (with certain exceptions not material here), "shall in virtue of the adjudication in bankruptcy and the appointment of his assignee, be at once vested in the assignee." Section 5047 provides that the assignee may be admitted to prosecute in his own name, or that of the bankrupt, any suit pending at the time of the adjudication. This suit and the subject-matter of it are clearly within these sections.

Upon these sections and the bankruptcy proceedings the defendants base a vigorous argument, that the plaintiff was completely shorn of all title and interest in this action and its subject-matter; that the entire title and interest, ipso facto, passed to the assignee, leaving nothing in the bankrupt plaintiff; that the latter became *civilitur mortuus*, and lost the power of maintaining actions upon then existing claims as completely as one physically deceased. There are various expressions and dicta of judges which seem to state the operation of the statute as broadly as do the defendants, but we are not referred to any express decision going so far upon the language of this particular act.

Undoubtedly, by the operation of the bankruptcy proceedings under this act, the assignee is vested with the full right to take all the estate of the bankrupt, whether scheduled or not, and is vested with sufficient power and title to fully administer it in his own name, or that of the bankrupt, as he may

elect. But all such property of a bankrupt is not cast upon the assignee *nolens volens*, like the personal property of a deceased intestate upon the administrator. In the latter case the title cannot remain with the deceased, but must fall on his successor. The assignee of a living bankrupt, however, may decline to take or interfere with such property as he deems onerous or worthless. The property so rejected by the assignee does not thereby become derelict, to vest in the first appropriator. The rights and obligations which the assignee declines to enforce or notice do not thereby vanish into nothingness.

Such items of estate, corporeal or incorporeal, as the assignee declines to appropriate or utilize, remain the property of the bankrupt, subject, always, to the superior right and title of the assignee. Notwithstanding the adjudication and assignment under the bankrupt act, there is left in the bankrupt a right which makes a title good against all the world except his assignee and creditors. These may appropriate the entire title and interest, and so divest the bankrupt completely; but what they decline to appropriate remains with the bankrupt. The title does not fall to the ground between the two. If the assignee or creditors will not take it, no one else can appropriate it. The bankrupt can defend or enforce it against all others.

The above statement of the law is supported, directly or incidentally, by many judicial decisions: *Evans v. Brown*, 1 Esp. 170; *Chippendale v. Tomlinson*, 7 East, 57; *Temple v. Railway Co.*, 2 Jur. 296; *In re Stafford*, 18 Wkly. Rep. 959; *Herbert v. Sayer*, 5 Q. B. 965; *Fyson v. Chambers*, 9 Mees. & W. 460-466; *Smith v. Gordon*, 6 Law Rep. 313, Fed. Cas. No. 13,052; *Amory v. Lawrence*, 3 Cliff. 523, Fed. Cas. No. 336; *Taylor v. Irwin*, 20 Fed. 615; *File Co. v. Garrett*, 110 U. S. 288, 4 Sup. Ct. 90; *Reynolds v. Bank*, 112 U. S. 405, 5 Sup. Ct. 213; *Laughlin v. Dock Co.*, 13 C. C. A. 1, 65 Fed. 447; *Eyster v. Gaff*, 91 U. S. 521; *U. S. v. Peck*, 102 U. S. 64; *Thatcher v. Rockwell*, 105 U. S. 467; *Sparhawk v. Yerkes*, 142 U. S. 1, 12 Sup. Ct. 104; *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. 799; *King v. Remington*, 36 Minn. 15, 29 N. W. 352; *Sawtelle v. Rollins*, 23 Me. 196; *Foster v. Wylie*, 60 Me. 109; *Nash v. Simpson*, 78 Me. 142, 3 Atl. 53.

In this case at bar, the action, with its various counts upon promissory notes, merchandise sold, etc., was pending in the supreme judicial court for Somerset county at the time of the adjudication and assignment in bankruptcy. The claims here in suit were not scheduled by the bankrupt, but their existence, and the existence of this action to enforce them, were matters of public record, upon the docket and files of a court of general jurisdiction. The assignee and creditors may be presumed to have known of them. The assignee, however, never appeared in the case, and does not now appear after a

lapse of 14 years. He never appropriated or took over these claims. It is an easy and natural inference that he elected not to take them, but to leave them with the bankrupt. *U. S. v. Peck, Sparhawk v. Yerkes, and Sessions v. Romadka, supra.*

The defendants cannot be heard to complain of this conduct of the assignee. As to them it is *res inter alios*. The judgment in this action will protect the defendants against the assignee as effectually as if he appeared in the case. Whatever he may hereafter do to appropriate the proceeds of the suit, if any, will not affect the defendants. *Eyster v. Gaff, Thatcher v. Rockwell, and Foster v. Wylie, supra.* If, however, the defendants desire, they can have an order of notice of this action served upon the assignee which will conclude him of record.

2. Rev. St. U. S. tit. "Bankruptcy," § 5057, provides that "no suit either at law or equity shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

The defendants contend that this section bars the further prosecution of this action. Their argument is that the assignee could not, after the two years, begin a suit in his own or the bankrupt's name, nor could he come into or prosecute a suit already begun by the bankrupt. Their further argument is that every person claiming, or who must claim, under the assignee, is equally barred from beginning or prosecuting suits after the two years, and that, as whatever title this plaintiff has necessarily came from the assignee, he is barred as the assignee is barred. Many cases are cited in support of these arguments. In every case cited, however, the title was held to have once passed to the assignee. It followed that the plaintiff either had no title or was barred by the two-years limitation upon the assignee. Thus, in *Parks v. Tirrell, 3 Allen, 15*, cited so confidently by the defendants, the court held that the title had passed to the assignee, and that the bankrupt plaintiff could only show title from the assignee, and hence was barred equally with the assignee.

In this case at bar, as already stated, the assignee did not take over the title. He elected not to take it, and left it in the plaintiff. He neither took nor passed the title. The plaintiff retained the title, subject to the assignee's paramount right, but good against others until that paramount right was asserted. Therefore the cases cited do not apply. The two-years limitation in the bankruptcy act does not apply. It bars only the assignee and those claiming under him. The plaintiff is not in either category. In *Amory v. Lawrence, 3 Cliff. 523, Fed. Cas. No. 336*, cited *supra*, the suit was by a bankrupt on

a claim existing before the bankruptcy; but the suit was begun long after the two-years limitation had expired. The defendants invoked the statute, but it was held not to apply. See, also, *Ludeling v. Chaffe, 143 U. S. 301, 12 Sup. Ct. 439.*

3. The defendants further contend that the act of the plaintiff in omitting these claims from his schedule was evidently intentional, and in fraud of the bankruptcy act, and that this fraud vitiates and extinguishes his right to recover them. But in the statement of the case there is no allegation of fraud. The statement of the omission to include the claims in the schedules is not a statement of a fraud. There may have been innocent reasons for it. The court cannot assume that it was fraudulent. Again, the fraud, if any, was against the assignee, the creditors, and the bankruptcy act, and not against these defendants.

We have not been shown anything in the statement of the case, or in the bankruptcy act, which, in our opinion, inhibits the plaintiff from proceeding with this suit.

Action to stand for trial.

WILLIAMS v. COOMBS.

(Supreme Judicial Court of Maine. June 21, 1895.)

PARTITION IN EQUITY—COTENANTS—REPAIRS.

1. Since full chancery powers were conferred upon it, this court has the power to decree a sale of the whole property, and a division of the proceeds between the tenants in common, whenever, in its judgment, a division of the property cannot be made without greatly impairing its value, and whenever a sale of the whole property would be much more beneficial or less injurious to the owners. But this power will not be exercised whenever an actual partition is practicable without such injury.

2. The parties are tenants in common, the complainant owning four undivided fifths and the defendant one undivided fifth of a lot of land 60 feet square, situated in the city of Rockland. The buildings on the lot consist of a story and a half house, with ell and shed. The main house is 4 feet and 9 inches from the west line of the lot, and 32 feet and 9 inches from the east line of the lot, while the ell extends to the western line, and the shed to within 19 feet and 6 inches from the eastern line. The buildings extend from within a few feet of the street to within 1 foot and 6 inches from the back line of the lot. The house is not susceptible of division and separate occupancy.

Held, that this property could not be divided without greatly impairing its value, that a sale of the whole property would be much more beneficial to both parties, and that the prayer of the bill asking that the court decree a sale of the property should be granted.

3. Although it has been held by the courts in many jurisdictions that a tenant in common, who makes necessary repairs upon the common property without the consent of his cotenant, cannot maintain an action at law to recover contribution for the same, it is a well-settled principle of equity jurisprudence that such contribution may be compelled in equity under certain circumstances.

4. Where a tenant in common, without the consent of his cotenant, or against his objections, has expended money in making necessary re-

pairs upon the common property, which, without such repairs, was unsuitable for occupancy, and has thereby made it rentable and income paying, and has collected rents from such property; and where the cotenant, in his answer to a bill in equity brought by the tenant who made the repairs, has asked for an accounting and payment to him of his proportional part of the rents and profits received,—the most equitable method is to charge the tenant who made the repairs and collected the rents with all the rents and profits received by him, and allow him to reimburse himself, out of the rents received by him, for the expenditures made for necessary repairs, but only to the extent of the amount of rents and profits in his hands.

5. The request of a defendant, in his answer, for an accounting and payment to him of his proportional part of the rents and profits received, is equivalent, for this purpose, to the commencement of proceedings asking for affirmative relief.

6. No distinction should be made, in regard to the right of a cotenant to recover contribution for sums expended in making necessary repairs upon the common property, under the above circumstances, between one who at the time of making such expenditures had the legal title, and one who at that time was in fact the owner of an undivided portion of the premises, having completed a contract of purchase, agreed upon all the terms, and gone into possession, everything having been done to give him the legal as well as the equitable title, except that the deed had not been passed, and who subsequently acquired the legal title.

(Official.)

Report from supreme judicial court, Knox county, in equity.

Bill in equity by Mary A. Williams against Ensign H. Coombs. Decree for complainant.

C. E. and A. S. Littlefield, for plaintiff. W. H. Fogler, for defendant.

WISWELL, J. The parties are tenants in common of a lot of land, with the buildings thereon, situated in Rockland; the complainant being selsed in fee of four undivided fifths, and the defendant of one undivided fifth.

In this bill in equity, the complainant seeks a partition of the property by a sale of the same, and a division of the proceeds between the tenants in common, in proportion to their respective ownerships, and also for a contribution by the defendant of his proportional part of sums expended by her for necessary repairs and taxes. She alleges, in substance, that, because of the size and situation of the lot, and the character and location of the buildings thereon, an actual partition of the property could not be made without greatly impairing its value.

That this court has jurisdiction of a bill of this nature, and the power to decree a sale and division of the proceeds, if the situation is such as to justify it, is not denied by the counsel for the defendant.

Since full chancery powers were conferred upon it, this court has the power to decree a sale of the whole property, and a division of the proceeds between the tenants in common, whenever, in its judgment, a division of the property cannot be made without greatly im-

pairing its value, and whenever a sale of the whole property would be much more beneficial or less injurious to the parties. But this power will not be exercised whenever an actual partition is practicable without such injury or impairment of value. *Davidson v. Thompson*, 22 N. J. Eq. 83.

In *Wilson v. Railroad Co.*, 62 Me. 112, a petition for partition, Mr. Justice Walton said: "By process in equity the whole may be sold for the most that can be obtained for it, and the proceeds divided among the owners. Such is the usual course in England, and in most of the states in this country. *Wood v. Little*, 35 Me. 111; 1 Story, Eq. Jur. c. 14. And this court now has equity jurisdiction in such cases."

In the unreported case of *Newhall v. Taylor*, a bill in equity between tenants in common, in which a sale and division of the proceeds was asked for, which case was entered at the June term, 1890, of the law court for the Eastern district, the court sent down the following rescript: "This court sitting in equity has jurisdiction in the case of partition between cotenants. Bill sustained. Receiver to be appointed at the next term of court, in Waldo county, to make sale of the property as may there be directed."

The only question, then, upon this branch of the case, is whether the size and situation of this lot, and the location and character of the buildings upon it, are such as to entitle the complainant to the decree asked for.

The lot is 60 feet square. It is situated on Oak street, very near to the principal business street of Rockland. The buildings on the lot consist of a story and a half house, with ell and shed. The main house is 4 feet and 9 inches from the west line of the lot and 32 feet and 9 inches from the east line of the lot, while the ell extends to the western line and the shed to within 19 feet and 6 inches from the eastern line. The buildings extend from within a few feet of the street to within 1 foot and 6 inches from the back line of the lot. The house is not susceptible of division and separate occupancy, and if the defendant's one-fifth of the whole property in value, taking into account the value of the buildings, should be set out to him from the land east of the dwelling house, it would take nearly all of the unoccupied portion of the lot. This would greatly impair the value of the house and the land upon which it stands, while that portion thus set off to the defendant would be of much less value than it is now, while used as a part of the house lot.

It is the opinion of the court, therefore, that this property could not be divided without greatly impairing its value, that a sale of the whole property would be much more beneficial to both parties, and that the prayer of the bill asking that the court decree a sale of the property should be granted.

The complainant also asks that the defendant may be compelled to contribute his proportional part of the sums expended by her

for necessary repairs and in the payment of taxes.

Although it has been held, by the courts in many jurisdictions, that a tenant in common, who makes necessary repairs upon the common property without the consent of his cotenant, cannot maintain an action at law against him to recover contribution for the same (see *Calvert v. Aldrich*, 99 Mass. 74), it is a well-settled principle of equity jurisprudence that such contribution may be compelled in equity under certain circumstances.

"Where two or more persons are joint purchasers or owners of real or other property, and one of them, acting in good faith and for the joint benefit, makes repairs or improvements upon the property which are permanent, and add a permanent value to the entire estate, equity may not only give him a claim for contribution against the other joint owners, with respect to their proportional shares of the amount thus expended, but may also create a lien as security for such demand upon the undivided shares of the other proprietors." Pom. Eq. Jur. § 1240. See, also, Story, Eq. Jur. §§ 1236, 1237.

Various objections are urged against the application of the principle to the facts of this case. The principal portion of the expenditure for repairs was made in October and November, 1892, while the complainant did not acquire the legal title to four undivided fifths of the premises until December 1, 1892. It is necessary to briefly state the history of the title.

Harriet Coombs, at the time of her death, owned the property, subject to a mortgage given by her to the defendant to secure the sum of \$350 and interest. She died intestate in April, 1890, and the equity of redemption descended to her heirs, viz. her five children, Ensign H. Coombs, Charles S. Coombs, Ada A. Coombs, Eva M. Williams, and Alfred R. Douglass. The mortgage to the defendant was paid by the heirs in August, 1891. April 17, 1890, two of the heirs, Charles S. Coombs and Alfred Douglass, conveyed their shares in the property to Eva M. Williams, in trust for Ada A. Coombs, who was a confirmed invalid, with power to mortgage, sell, and convey the same, whenever the trustee deemed it necessary for the maintenance and support of the said Ada. Eva M. Williams then owned one-fifth in her own right, two-fifths in trust for her sister, and the sister owned one-fifth in her own right. August 19, 1891, Ada A. Coombs and Eva M. Williams, the latter both as trustee and in her own right, mortgaged the four-fifths owned by them to Frederick H. Daniels, to secure the sum of \$875, and on August 16, 1892, this mortgage was assigned to Charles F. Williams, the husband of Eva M. Williams and the son of the complainant. December 1, 1892, Ada A. Coombs and Eva M. Williams conveyed their shares in the property to Charles F. Williams, who, on the same day, conveyed the same to his mother, the complainant. Thus she ac-

quired the legal title to four-fifths of the property.

It is claimed that the complainant, although she did not have the legal title, was the equitable owner of four-fifths of the property, and that, in equity, this should entitle her to the same right of contribution as if she had been the legal owner of an undivided portion of the premises. Upon this claim the master's finding is as follows: "The plaintiff claimed, and I find, that in August, 1892, it was arranged between the owners of four-fifths of the property and the plaintiff that she should advance the money for the Frederick H. Daniels mortgage, and in consideration of that, and of the support of the invalid sister, Ada A. Coombs, they would sell and convey their share in the property to her, the plaintiff; and that this arrangement was consummated, and their part sold to the plaintiff, August 16, 1892, when she paid the Daniels mortgage, which was assigned to said C. F. Williams, acting for her; that they intended to give her a deed of it at the same time, August 16, 1892; but the deed was not executed till December 1, 1892."

According to this finding, the complainant had become the owner in fact, although not in law, prior to the expenditures in October and November, 1892. The bargain had been completed, the terms agreed upon, she had gone into possession of the premises, and everything had been done to give her the legal as well as the equitable title, except that the deed had not been passed.

It is a fundamental rule in equity that what ought to be done is considered as done. *Ricker v. Moore*, 77 Me. 292.

It is the opinion of the court that no distinction should be made in this respect between one who has the legal title and one who is in fact a part owner, and in possession of the premises at the time of the expenditures, and subsequently acquires the legal title.

It is further urged by the counsel for the defendant that this prayer of the bill should not be granted, because such relief is only granted by chancery courts when the person of whom contribution is claimed has commenced the proceedings in equity, asking for partition or other affirmative relief; and also because of the fact, as found by the master, that "no notice was given the defendant that such repairs were to be made, nor was he consulted in reference to them while they were being made, and he had no knowledge that those or any other repairs were to be made till they were begun; and he then went to said C. F. Williams, the plaintiff's agent, in charge of the premises for her, and forbid his putting any repairs upon the premises, or doing anything to them."

But it appears that these premises have been rented at \$175 per year since August 16, 1892, and the rent collected, or that it could have been collected, by the complainant.

The defendant alleges, in his answer, that the complainant is now, and for a long time has been, in the exclusive possession of the premises, receiving all the rents and income thereof, and he asks that she should account for such rents and profits, and pay him his proportional part of the same.

She should be charged with all the rents received, but it would be inequitable to compel her to account for the rents received, and not to allow her to credit herself with the sums expended in making necessary repairs, which have made the house rentable and income paying. The master finds: "Plaintiff claimed, and I find, that the buildings were badly out of repair; that it was necessary to repair them in order to preserve them, and render them suitable for such tenants as would rent premises so situated."

Courts have sometimes refused to compel contribution for improvements made, but have allowed the person in possession to retain the rents received by reason of such improvements. We think the most equitable method in this case is to charge her with the full amount of rents received, and to credit her with such sums as have been expended in making necessary repairs. The request of the defendant, in his answer, for an accounting and payment to him of his proportional part of the rents and profits received, is equivalent, for this purpose, to the commencement of proceedings asking for affirmative relief.

But, inasmuch as these repairs were made without notice to the defendant, or consultation with him, we think that she should be limited to the amount of rents in her hands, and with which she is chargeable, that she may be allowed to reimburse herself out of rents collected for the necessary repairs, but that the defendant should not be compelled to contribute any further sum.

The item of taxes paid by her should stand upon the same ground. A tax of \$51.73 was assessed upon the whole property for the year 1892. She paid this tax October 7th of that year. At that time she was in exclusive possession of the premises, and had been for some months, receiving all the rents. We think she should be allowed to reimburse herself for this sum out of the rents collected, and to offset this item, with the sums expended for her repairs, against the sums received by her, but that no further contribution should be compelled. This is not creating a lien upon the property, as was asked and refused in *Preston v. Wright*, 81 Me. 306, 17 Atl. 128.

A receiver should be appointed at nisi prius, or upon a rule day, to make sale of the property under such directions as may be given at the time of the appointment. The complainant is to be charged with all rents and profits collected by her, or which should be collected, up to the time of the sale, and she is to be credited with all sums expended by her for necessary repairs and

taxes in accordance with the master's report. If the amount with which she is to be charged is not equal to the amount with which she is to be credited, the defendant is not to be required to contribute any further sum. If the amount with which she is to be charged exceeds the amount with which she is to be credited, she shall pay to the defendant his proportional part thereof, or the same may be adjusted by the receiver in the distribution of the proceeds of the sale. The account stated by the master, in his report, is up to March 8, 1894. If the parties cannot agree upon the items accruing subsequent to that date, it will be necessary for the master to have a further hearing, and make a supplemental report. We think that no costs should be allowed either party.

Decree accordingly.

In re OPINION OF THE JUSTICES.

(Supreme Court of New Hampshire. March 31, 1891.)

EMINENT DOMAIN—CONCORD RAILROAD—RIGHT OF STATE TO TAKE—COMPENSATION—REPEAL OF STATUTE.

1. The property of the Concord R. Co., chartered by Laws 1835 (Priv. Acts, c. 1), is no exception to the rule that private property may be taken for public use on payment of its value to its owners.

2. The fact that the New Hampshire constitution does not require compensation to be made for private property taken for public use, and that the state is not bound, by contract or otherwise, to refrain from partial confiscation, does not authorize the state to purchase or take the property of the Concord R. Co., for less than its value, without the owner's consent.

3. The provision in the charter of the Concord R. Co. (Laws 1835; Priv. Acts, c. 1, § 18) that the legislature may at any time hereafter alter, amend, or modify this act, or any of its provisions, does not authorize the state to take or purchase the property of such company, for less than its value, without the owner's consent.

4. The charter of the Concord R. Co. (Laws 1835; Priv. Acts, c. 1, § 17) provided that the state may purchase the road for a sum to be ascertained by a prescribed computation which sum might be more or less than its market value. *Held*, that such provision was repealed by Laws 1844, c. 128, intended to be a system of uniform law applicable to all railroads, and the repeal by Gen. St. 1867, p. 553, c. 273, § 14, of section 10 of such chapter, providing that the state may, at any time after 20 years, resume the right and privilege of the corporation in such railroad, on giving one year's notice, and paying to the corporation all it may not have received of its expenditures, and interest on such expenditures at the rate of 10 per cent. per annum.

Advisory opinion from the justices of the supreme court in response to a resolution of the house of representatives.

Wayne MacVeagh and H. G. Sargent, for Austin Corbin. D. Barnard, Atty. Gen., for the State. F. S. Streeter, for the Concord Railroad.

To the House of Representatives:

The undersigned have received a copy of a resolution passed by your honorable body

requiring our opinions on the right of the state to purchase the property described in the resolution as the "Concord Railroad." That property is no exception to the rule that private property may be taken for public use on payment of its value to its owners, and the property in question cannot be purchased or taken by the state, for less than its value, without the owner's consent. As this answer seems to be, for practical purposes, a compliance with the requisition of the house, it is deemed unnecessary, at the present time, to give a more specific and extended opinion. Understanding that the house desire an immediate answer, we submit the conclusion at which we have arrived, without stating reasons, which will be given at a future day. 45 N. H. 596.

Concord, March 31, 1891.

C. DOE.

W. H. H. ALLEN.

ISAAC W. SMITH.

LEWIS W. CLARK.

I. N. BLODGETT.

A. P. CARPENTER.

Notice of a public hearing having been given, the questions proposed by the house were argued by counsel March 30, 1891. This statement of the reasons of the opinion that was given the next day follows the course of the argument that was presented in support of the opposite opinion.

1. The first ground on which it was claimed that the state can take the Concord Railroad, on paying its owners less than its value, is that the constitution of New Hampshire does not require compensation to be made for private property taken for public use, and that the state is not bound, by contract or otherwise, to refrain from partial confiscation. By the first section of the Concord charter, Isaac Hill and others, and their associates, successors, and assigns, "are made a body politic and corporate under the name of the Concord Railroad Corporation." Laws 1835, Priv. Acts, c. 1. The stockholders are the corporation. 1 Kyd, Corp. 13-18; Mor. Priv. Corp. preface, and section 227; U. S. v. Trinidad Coal & Coking Co., 137 U. S. 160, 169, 11 Sup. Ct. 57; State v. Standard Oil Co., 49 Ohio St. 137, 177, 30 N. E. 279. They hold the entire equitable title and beneficial interest of the property by them put in the corporate trust, and they are the trustee in whom is vested the legal title. Their constitutional rights are not affected by mere incorporation, or by the division of their title into legal and equitable parts. Trustees v. Woodward, 1 N. H. 111, 115, 116, 120. "There can be no valid distinction between property held in trust and that owned by individuals, in respect to the protection afforded to it by the constitution." People v. O'Brien, 111 N. Y. 1, 57, 18 N. E. 692. "The corporation, like the individual, is guarded from a despotic exercise of power. Whatever is taken must

be paid for." Backus v. Lebanon, 11 N. H. 19, 23. The equal protection of the laws, secured by our bill of rights and by the federal constitution, is not an exclusive privilege of unincorporated persons. Santa Clara Co. v. Southern Pac. R. Co., 118 U. S. 394, 396, 6 Sup. Ct. 1132; Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181, 189, 8 Sur. Ct. 737; Railway Co. v. Mackey, 127 U. S. 205, 209, 8 Sup. Ct. 1161; Railway Co. v. Beckwith, 129 U. S. 26, 28, 9 Sup. Ct. 207; Railroad Co. v. Gibbes, 142 U. S. 386, 391, 12 Sup. Ct. 255. The law "places natural persons and corporations precisely upon the same ground" of "liability to legislative control." "It is the true ground, and the only one upon which equal rights and just liabilities and duties can be fairly based." Thorpe v. Railroad Co., 27 Vt. 140, 145; Stone v. Trust Co., 116 U. S. 307, 329, 6 Sup. Ct. 334, 388, 1191. The public power of taking private property is limited by the necessity from which it is held to be implied. Kohl v. U. S., 91 U. S. 367, 371, 373, 374. As it is not necessary to take land for a highway, or to make a public use of other property, without buying it or paying for the use of it, the state cannot forcibly dispossess the owner, without indemnifying him. Eminent domain is the power of compelling him to sell. Milldam Corp. v. Newman, 12 Pick. 467, 480. The sale includes compensation, which is the payment, not of a large or small portion of the value, but of the whole of it. Sinnickson v. Johnsons, 17 N. J. Law, 129, 145; Gardner v. Newburgh, 2 Johns. Ch. 162, 166-168; Bonaparte v. Railroad Co., Baldw. 205, 220, 221, 226, Fed. Cas. No. 1,617; Hooker v. New Haven & N. Co., 14 Conn. 146, 152, 153; Pumpelly v. Bay Co., 13 Wall. 166, 178, 179; Monongahela Nav. Co. v. U. S., 148 U. S. 312, 324, 325, 327-329, 337, 341-343, 13 Sup. Ct. 622; Bristol v. New Chester, 3 N. H. 524, 535; Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35, 66, 67, 69; Backus v. Lebanon, 11 N. H. 19, 25; Petition of Mt. Washington Road Co., 35 N. H. 134, 142; Manufacturing Co. v. Fernald, 47 N. H. 444, 455; Ash v. Cummings, 50 N. H. 591, 612; Eaton v. Railroad Co., 51 N. H. 504, 510, 511; Thompson v. Androscoggin Co., 54 N. H. 545, 557, 558; Orr v. Quimby, Id. 590, 594, 599; Adden v. Railroad Co., 55 N. H. 413-415, 418; Thompson v. Androscoggin Co., 58 N. H. 108, 111; Low v. Railroad Co., 63 N. H. 557, 562, 3 Atl. 739; 1 Bl. Comm. 138, 139; 1 Hare, Const. Law, 333, 347, 349, 415; Cooley, Const. Lim. 691, 697-700.

Compensation is not merely an element of the implied power of coercive purchase. It is parcel of the rights of property and equality which are secured by express guaranties. The bill of rights is a list of rights reserved by the people. By the reservation they limited their grant, and exempted themselves, to the stipulated extent, from the authority of the government they created. Wooster v. Plymouth, 62 N. H. 193, 196-203. The reser-

vation is therefore a controlling definition of "legislative power," in their grant of that power to the senate and house in the second article of the constitution. The right of acquiring property, and the rights of life and liberty, which the second article of the bill puts together in a class of rights there described as natural, essential, and inherent, are reserved for all men. *Greenville v. Mason*, 53 N. H. 515, 518. The first, tenth, twelfth, fourteenth, fifteenth, and twenty-third articles reinforce the second, and establish a general principle of equal right, which governs all by the same rule, and takes from no one more than his share of public expense. *State v. Pennoyer*, 65 N. H. 113, 114, 18 Atl. 878, and authorities there cited. Eminent domain would not be a legislative power, in the sense required by the bill, if it trench upon the right of acquiring and possessing property, or the right of equality. Both rights would be invaded, were land taken for a highway, from an unconsenting owner, without full indemnity. "To provide a mode by which he shall be recompensed for property justly or unjustly taken from him is to protect his property." *Railroad Co. v. Greely*, 17 N. H. 47, 53. His right is not infringed when he is compelled, by due process of law, to sell a way for public use. *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35, 71. His share of the public expense, including land damages, is taken by taxation when a common road is built by the public across his land, and when a turnpike or other way built by him and other stockholders is bought by the public. More than their shares of a public expense would be taken from them, if their road were taken by the public without payment of its value.

It is not necessary, in the present inquiry, to consider an equal distribution of public expense by the tax power, or an exercise of the police power imposing fines and forfeitures as punishment, or destroying property for the prevention of fire, pestilence, or crime. An order to take property from its incorporated or incorporated owners, without paying them its value, and without their consent, for the sole purpose of enriching the state at their expense, would not be legislation. Law "is a rule, not a transient, sudden order from a superior to or concerning a particular person, but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attain him of high treason, does not enter into the idea of a municipal law; for the operation of this act is spent upon Titius only, and has no relation to the community in general. It is rather a sentence than a law." 1 Bl. Comm. 44. The confiscation decree of November 28, 1778, entitled "An act to confiscate the estates of sundry persons therein named," was an exercise of the war power against persons who had, as the preamble alleged, "since the commencement of hostilities between Great Britain and the United

States of America, left this and the other United States, and gone over to and joined the enemies thereof." *Laws N. H.* (Ed. 1789) p. 85; *Thompson v. Carr*, 5 N. H. 510, 515; *Miller v. U. S.*, 11 Wall. 268, 305, 306, 315. It was a law in the sense of being a lawful order issued by men holding all power, legislative and nonlegislative, before the adoption of the constitution. *Atherton v. Johnson*, 2 N. H. 31, 34. It was not a law in the true legal sense explained by Blackstone, and by the reservations of the bill of rights which limit and define legislative power. Such retrospective acts are denounced in article 23 of the bill as highly injurious, oppressive, and unjust. And the understanding that they were repugnant to the rights and liberties reserved in 1784, and were prohibited by the bill, appears in the proviso qualifying the exception in article 90 of the constitution. An act of that kind, operating "on the rights or property of only a few individuals without their consent, is a violation of the equality of privileges guaranteed to every subject." *Merrill v. Sherburne*, 1 N. H. 199, 212.

No one can be "deprived of his property * * * but by the judgment of his peers or the law of the land." Bill of Rights, art. 15. "Law of the land," in this article, means due course and process of law. 2 Inst. 46; *Cooley, Const. Lim.* 430. "It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition [*Trustees v. Woodward*, 65 N. H. 613, 614], 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation." *Hurtado v. California*, 110 U. S. 516, 535, 536, 4 Sup. Ct. 111, 292; *Ex parte Wall*, 107 U. S. 265, 289, 2 Sup. Ct. 569. "It must be conceded that there are" private "rights in every free government beyond the control of the state. A government which recognized no such rights,—which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depositary of power,—is, after all, but a despotism. It is true, it is a despotism of the many,—of the majority, if you choose to call it so,—but it is none the less a despotism. It may well be doubted, if a man is to hold all that he is accustomed to call his own, all in which he has placed

his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many. The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers." *Association v. Topeka*, 20 Wall. 655, 662, 663. "Power, when delegated without restrictions, and for the abuse of which the delegate is not held accountable, has a strong tendency toward despotism. The temporary constitution, which we had adopted at the beginning of the war [of 1776], was found by experience to have many imperfections; and the necessity of checks and exclusions became every day more evident." Belk. Hist. N. H. c. 26.

The general assembly that issued the confiscation decree of 1778 "carried on the war against foreign and domestic enemies without a bill of rights, and without any constitutional division or limitation of power. It was a temporary sovereignty, set up 'to continue during the * * * contest with Great Britain.' 8 N. H. State Papers, 2. And its undefined and boundless authority, hastily assumed and arbitrarily exercised, for the transient purpose of the war, does not prove the bounds of the limited government afterwards instituted with deliberation, in a form designed to be permanent, * * * and designed by its limitations to change the provisional and preliminary form because the latter was unlimited. The absolute form, and its precedents, so far as they were of the same character, or in any respect repugnant to the new and constitutional system, were swept away together. * * * We had no inviolable rights, no rights constitutional in the American sense, before the 2d day of June, 1784. The constitution that went into operation on that day terminated the era of unlimited power, and introduced an era of liberty and equality. * * * The nonconstitutional system was intentionally abolished, and the system of reserved rights and limited government was intentionally adopted. The reservations could not be more clearly expressed. If the right of equality is not secured by them, it can never be secured by any written instrument. * * * The legal value of the reservations is in their ability, not to suggest or advocate a theory of human rights, but to carry a theory into practical effect, and insure the enjoyment of the rights reserved. * * * 'The bill of rights contains the essential principles of the constitution.'" *Gould v. Raymond*, 59 N. H. 260, 272, 275.

The "supreme executive magistrate" named in article 41 of the constitution is distinguished from other executive officers. In article 40 the supreme court is named as one of several judicial tribunals. In article 2 a distinction is made between the legislative power of towns, cities, and counties (*Corporation of*

the Brick Presbyterian Church v. Mayor, etc., of New York, 5 Cow. 538, 540, 541; *Kelley v. Kennard*, 60 N. H. 1, 6), and the legislative power vested in the senate and house, and designated as supreme, to signify that it is the highest of a lawmaking character. Confiscation, either total or partial, not being law in the constitutional sense, is not authorized by the supremacy of the senate and house in the field of legislation, or by the supremacy of other branches of government in the interpretation, administration, and execution of law.

Partial confiscation, disregarding the difference between right and wrong, rests on a distinction that cannot be maintained. The confiscation of a part of a farm or railroad, by taking the whole and paying less than it is worth, and the confiscation of the whole, by taking the whole and paying nothing, are acts of the same legal nature. *Eaton v. Railroad Co.*, 51 N. H. 504, 512. There is no constitutional ground on which an approval of one can be reconciled with the condemnation of the other. If the owner of property worth \$400 can be compelled to sell it to the state for a less sum, the state may elect to pay him \$399, or \$1. If it can be taken from him on payment of \$200, the property in which he invests the \$200 can be taken from him for half its value, and the depredation can be repeated, with a public profit, so long as he has anything worth taking. If he can be deprived of half of his house by a special statute, taking so much without compensation, he can be deprived of his liberty half of the time, or be entirely stripped of property, and imprisoned for life, by the same arbitrary method, without trial and without cause. The despotic principle, whether stated in an unlimited or a fractional form, is in conflict with fundamental rights that are now openly and directly attacked for the first time, in this state, since their safety was assured by the establishment of constitutional government at the close of the Revolutionary War. It is useless to inquire whether, in any other jurisdiction, American or foreign, these rights have never had organic security, or have been deprived of it directly or indirectly, wholly or partially. They would not be overthrown here by proof that there are governments under which they are defenseless. In forming themselves into a state, the people of New Hampshire acted on the belief that insecurity of property would be unfavorable to enterprise, and would tend to discourage industry and economy, which they considered essential to general prosperity. And it is not probable that this was the only reason of their protecting themselves by reservations which render confiscation impossible. There is no evidence that they overlooked the moral aspect of the subject. By the eighty-third article of the constitution, they made it a duty to countenance and inculcate the principles of industry, economy, and honesty.

2. The second ground on which partial confiscation was put, in argument, is the eighteenth section of the Concord charter, which provides that "the legislature may at any time hereafter alter, amend, or modify this act or any of its provisions." Short of sheer and absolute (that is, total) confiscation. It was claimed, there is no limit of the power of amendment. The act of taking the road from its owners was called a resumption. The word "resume" is used in this connection, in the books, as an allusion to one of the alleged sources of the public right to take private property, whether held in fee or otherwise, and not as a suggestion that the owner's title is exceptionally defeasible. "The complainant held the land in fee, and probably under a title derived from the crown, to the rights of which the people have succeeded. * * * It was no part of the contract between the crown and its grantees or their assigns that the property should not be taken for public use. * * * All separate interests of individuals in property are held of the government, under this tacit agreement or implied reservation. Notwithstanding the grant to individuals, the eminent domain, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity, and they have a right to resume the possession of the property. * * * This right of resumption may be exercised," etc. *Beekman v. Railroad Co.*, 3 Paige, 45, 72, 73; *Bloodgood v. Railroad Co.*, 18 Wend. 9, 13; *Smith v. Rochester*, 92 N. Y. 463, 477. "The true theory * * * is that the legislature resume dominion over the property." *Todd v. Austin*, 34 Conn. 78, 91. "The right of the public to resume private property for the public use, which has been called the 'right of eminent domain,' is said to be implied in the original social compact." *Manufacturing Co. v. Fernald*, 47 N. H. 444, 455. Eminent domain "is sometimes spoken of as being based upon an implied reservation by the government when its citizens acquire property from it, or under its protection." *Cooley, Const. Lim.* 643. "The private owner of lands acquires only a tenancy, of more or less limited duration, under the absolute and ultimate proprietorship of the state, * * * subject to certain conditions, one of which is that the state may at any time, on payment of its value, reclaim the tenancy." *Tied. Lim.* § 121. All owners of property may be called tenants holding under leases from the state, if this feudal description is understood to mean that they are the owners holding titles either derived originally from the government, or acquired by its permission and under its protection, and subject to be bought by the government without the owner's consent. The public having a power of coercive purchase, and the question being whether the state can confiscate a part of what it buys, by not paying for the whole, it is not material whether the true theory and

source of the power are indicated when the purchase is described as an appropriation (*Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 641, 642; *Boston & L. R. Co. v. Salem & L. R. Co.*, 2 Gray, 1, 35, 36), expropriation (1 *Rap. & L. Law Dict.* 489), assumption (2 *Kent, Comm.* 338, 340), resumption, or reclamation of tenancy.

"According to the feudal theory, all estates were derived from the king. He was called the 'lord paramount,' and in him was vested the absolute right of property. As a return or compensation for the possession and enjoyment of the land, the owners, or, as they were called, 'vassals,' were obligated to render the king certain services, the failure to perform which defeated the estate, and caused it to revert to the lord paramount." *Tied. Real Prop.* § 20. In the English law, title by escheat was one of the consequences of feudal tenure. When the title of the tenant in fee failed, the land reverted to the original grantor, or lord of the fee, from whom it proceeded. "As the feudal tenures do not exist in this country, there are no private persons who succeed to the inheritance by escheat; and the state steps in the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction. * * * When the title to land fails, from defect of the heirs or devisees, it necessarily reverts." 4 *Kent, Comm.* 423, 424. Under the influence of feudal ideas, it was said that the lands of dissolved corporations reverted. *Co. Litt.* 13b; *Gray, Perp.* §§ 44, 48, 51; 1 *Bl. Comm.* 484; 2 *Bl. Comm.* 256; *Dill. Mun. Corp.* (3d Ed.) § 169; *Field, Corp.* § 491; *Mayor, etc., v. Brooke*, 7 Q. B. 339, 384; *Bacon v. Robertson*, 18 How. 480, 483, 487. The charters of several New Hampshire turnpikes (*Fourth, Chester, Piermont, and Coös*) provide that, when the net income of the toll amounts to the sums expended and interest, the roads "shall revert to the state." In such phrases, and when the state is said to resume turnpikes, railroads, or sites for public buildings, which it compels the owners to sell, the words "revert" and "resume" are neither obscure nor misleading. Feudal terms have survived the feudal tenure.

If, by the Concord charter, the state had given the stockholders the right of way and other real estate, and the money and chattels, now belonging to them, and had reserved a right to revoke the gift, the question of re-taking that property under the charter could be raised and discussed. But the charter did not give them any of the state's realty, money, or chattels, and an amendment or repeal of the charter cannot revoke a gift that has not been made. Long before the date of the charter, the state, or its predecessor, had parted with the land on which the rails are laid. The stockholders bought the land, or a right of way in it, paid for what they bought, and built the road. This real estate is theirs. No property, private or pub

lic, is held, or can be held, by a better title. There is in the state no right of resuming or retaking it that is distinguishable from the right of taking it. *Kohl v. U. S.*, 91 U. S. 367, 371. If the state once owned the land, its extinguished title is of no more avail than that of any other former owner. If the right of way had been originally taken from the proprietors of the soil, or were now taken from the railroad company, without payment of value, the legality of the act would not depend upon its being called resumption, or trespass and disseisin.

The power of amending charters, and the power of repealing them, are reserved for a single purpose. "A short reference to the origin of this reservation of the right to repeal charters of corporations may be of service in enabling us to decide upon its office and effect. * * * In *Trustees v. Woodward*, 4 Wheat. 518, decided in 1819, this court announced principles on the subject of the protection that the charters of private corporations were entitled to claim under the clause of the federal constitution against impairing the obligation of contracts. * * * The opinion in that case * * * held * * * that the rights and franchises conferred upon private * * * corporations by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by the statute, were, when accepted by the corporation, contracts which the state could not impair. It became obvious at once that many acts of incorporation, which had been passed as laws of a public character, partaking in no general sense of a bargain between the states and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise no longer existed. It was, no doubt, with a view to suggest a method by which the state legislatures could retain, in a large measure, this important power, without violating the provision of the federal constitution, that Mr. Justice Story, in his concurring opinion in the *Dartmouth College Case*, suggested that, when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation. * * * It would seem that the states were not slow to avail themselves of this suggestion. * * * This history of the reservation clause in acts of incorporation supports our proposition that whatever right, franchise, or power in the corporation depends for its existence upon the granting clauses of the charter is lost by its repeal. * * *

Whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the state, is abrogated by the repeal of the law which granted these special rights. Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not, in their nature, depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation to their interest in its property are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights." *Greenwood v. Freight Co.*, 105 U. S. 13, 19-21; *Waterworks v. Schottler*, 110 U. S. 347, 352, 369, 370, 4 Sup. Ct. 48. "Where an act of incorporation is repealed, * * * equity takes charge of all the property and effects which survive the dissolution, and administers them as a trust fund, primarily for the benefit of the creditors. If anything is left, it goes to the stockholders." *Shields v. Ohio*, 95 U. S. 319, 324; *Farrington v. Tennessee*, Id. 679, 686, 687. "As a private corporation holds its property in trust for the benefit of its stockholders, so a municipality holds its property in trust for beneficiaries whose equitable rights in the trust estate are not created by the incorporation, nor lost by the dissolution, of the imaginary holder of the legal title. The common law transfers the legal title to a provisional trustee, if the employment of such an agent is necessary, settles the business of the defunct corporation, and so disposes of the trust property as to maintain the rights of the equitable owners." *School Dist. v. Greenfield*, 64 N. H. 84, 85, 6 Atl. 484; *School Dist. v. Concord*, 64 N. H. 235, 9 Atl. 630. The beneficial ownership of trust funds cannot fall for want of trustees. As vested rights of an equitable character cannot be divested by the death of administrators, or other natural persons who hold property in trust, so the equitable title of the stockholders of an incorporated business company cannot be lost by the termination of the trustee's corporate life. The dissolution of the corporate trustee, by the repeal, forfeiture, surrender, or expiration of the charter, does not convey the corporate property to the state, nor enlarge or diminish the constitutional power of the state to become the owner. 2 Kent, Comm. 307, note b; *Folger v. Insurance Co.*, 99 Mass. 267, 277; *Thornton v. Railway Co.*, 123 Mass. 32, 34; *Burrall v. Railroad Co.*, 75 N. Y. 211, 216; *State v. Bailey*, 16 Ind. 46, 52; *Mumma v. Potomac Co.*, 8 Pet. 281; *Curran v. Arkansas*, 15 How. 304, 310, 312; *Bacon v. Robertson*, 18 How. 480; *Lum v. Robertson*, 6 Wall. 277; *Broughton v. Pensacola*, 93 U. S. 266, 268; *Late Corporation of Church of Jesus Christ of*

Latter-Day Saints v. U. S., 136 U. S. 1, 47, 10 Sup. Ct. 792, 150 U. S. 145, 14 Sup. Ct. 44, and authorities cited in Bowles v. Landaff, 59 N. H. 171; Mor. Priv. Corp., §§ 1031-1033; Field, Corp. § 491; Dill. Mun. Corp. § 169; Pierce, R. R. 13; Cook, Stock, Stockh. & Corp. Law, 638; Wait, Insol. Corp. §§ 347-349. An amendment of the charter can have no more confiscating effect than a repeal.

The stockholders of a business corporation are partners, with rights and liabilities fixed by the general or special law, which is a part of their contract. When their corporate union is dissolved, by repeal or otherwise, there is a tenancy in common, as there is after the dissolution of an unincorporated partnership. *Mason v. Mining Co.*, 133 U. S. 59, 10 Sup. Ct. 244; *Id.*, 145 U. S. 356, 12 Sup. Ct. 887. After three years, allowed for winding up by the use of corporate powers limited to that purpose (Gen. Laws, c. 147, § 17), undivided capital is divisible by agreement of the owners, or by legal process without the exercise of corporate power. "The contention that the property of a dissolved corporation is forfeited rests wholly upon what is claimed to be the necessary consequence of the extinction of corporate life. We do not think the dissolution of a corporation works any such effect. It would not naturally seem to have any other operation upon its contracts or property rights than the death of a natural person upon his. * * * It would seem to be quite obvious that a power existing in the legislature by virtue of a reservation, only, could not be made the foundation of an authority to do that which is expressly inhibited by the constitution, or afford the basis of a claim to increase jurisdiction over the lives, liberty, or property of citizens beyond the scope of express constitutional power. * * * An express reservation by the legislature of power to take away or destroy property lawfully acquired or created, would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly would be equally ineffectual and void." *People v. O'Brien*, 111 N. Y. 1, 47, 48, 51, 18 N. E. 692. "A statute of incorporation is a legislative grant, held by the federal court to be a contract and a creation of private rights, protected, in the absence of the reservation, by the contract clause of the federal constitution. But calling it a charter, a grant, or a contract does not make it anything more than an exercise of legislative power. A reservation of the right to amend and repeal it is an exercise of the same power,—a legislative retention, not of judicial or executive, but of legislative, power, and not a creation of any power, legislative, judicial, executive, or extraconstitutional. It has the negative effect of preventing the statute of incorporation being exempted by the contract clause from the legislative power of amendment and repeal. * * * Making a charter amendable and repealable like other statutes that are not con-

tracts," it protects "public interests against a contractual abdication of legislative power. * * * The reserved power of amendment and repeal is not anything more than the legislature would have had without a reservation, if statutes of incorporation had been held to be possessed of the ordinary, amendable, and repealable quality of other statutes. With a reservation of that power, an act of incorporation, regarded as a grant, is an alterable and revocable grant,—a gift or conveyance of something, a part or the whole of which the grantor can * * * take back or destroy." By "an unlimited reservation of the legislative power of amending and repealing the legislative grant, the state" reserves, "and the corporation, by accepting the charter," consents "to the reservation of, the power of taking from the corporation by legislation nothing more than that which, by legislation, the state" has "granted to it. Its existence, derived from the state," can "be terminated by the state. But its" property "cannot be taken away by a revocation of the charter. * * * An amendment of the charter would not be an exercise of a higher constitutional power than would be employed in a repeal of the charter. * * * The law cannot suffer a trust to fail for want of a trustee; for the beneficiaries have a private right in the trust estate, which is as inviolable as property similarly invested without a trustee. If * * * the charter of a railroad corporation were repealed, * * * the corporate property remaining in existence could not be confiscated by a legislative decree, and the right of the stockholders to a distribution of the assets through the agency of a trustee or receiver, or other legal process, could not be denied without a repudiation of constitutional duty. * * * As neither of the branches of government can acquire, by its own act of reservation, any power exclusively vested by the constitution in either of the others, so neither can acquire, by its own act of reservation, that unlimited power which passed from the British parliament to the provisional government in 1776, and was abolished in 1784. * * * Whatever legislative power was reserved, no power was reserved that is not legislative." *Railroad Co. v. Elliot*, 58 N. H. 451, 454, 455, 457. "As congress can exercise legislative power only, all its reservations of power, connected with grants that are made, must necessarily be legislative in their character;" and, while the exercise of such power (reserved when its reservation is held to be necessary) may render private property less valuable, it cannot appropriate such property to public use without compensation. *Bridge Co. v. U. S.*, 105 U. S. 470, 480, 482. "Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit no one can doubt. All agree that it

cannot be used to take away property already acquired under the operation of the charter." *Sinking-Fund Cases*, 99 U. S. 700, 720. "Where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." *Com. v. Essex Co.*, 13 Gray, 239, 253.

As confiscation is a matter of substance and effect, and not of form or method, the mode of accomplishing it is as immaterial as any name that may be given it. Not being a legislative act, in a constitutional sense, it is equally ineffectual whether attempted by a repeal or amendment of general or special acts of incorporation (*Gen. Laws*, c. 152), or by the repeal or amendment of the common or statutory law authorizing the organization of voluntary associations, religious societies, and partnerships (*Gen. Laws*, cc. 117, 118, 151, 153), or by the repeal or amendment of the common law, or statutes regulating the business of any or all unincorporated persons, and the conveyance, inheritance, and use of their homesteads, tools, and stock in trade. All effective statutes are amendments. A statute amending the Concord charter can be nothing but an alteration of some law, either unwritten, or written in the charter or elsewhere. If a legislative power of amendment were a power of confiscation, it could be exercised as well by an alteration of some other law as by an alteration of a charter, and as well against unincorporated as against incorporated persons. The argument for confiscation by amendment assumes that, by the clause which the Dartmouth decision made necessary for the retention of the legislative power of altering the Concord charter, the senate and house altered the constitution, and created and acquired a power that is not legislative. The charter is a statute which the grant of legislative power in the second article of the state constitution authorizes them to amend. Reserving the power of amendment is merely not parting with it. The retention of power that can exist only within constitutional limits is not an expansion of those limits. The eighteenth section of the charter could have been written in this form: "The legislative power of amendment, vested by the constitution in the senate and house, is hereby retained by them, and is hereby extended beyond the constitutional province of legislation, and enlarged into a power of confiscation." Such an extension clause cannot be implied. If it were implied, it would be no stronger than if it were expressed. If it were expressed, it would be void. The act of keeping the amending power does not add a word to the constitution, nor take a word from it, nor change the meaning given to "legislative power" by the bill of rights. It neutralizes the federal decision that a charter is a contract protected

by the federal constitution against impairment by state law. The entire effect of the reservation is to leave this charter unaffected by that federal construction of the federal constitution. It releases the senate and house from the restraint which that construction put upon their lawmaking capacity. Thus liberated, they can amend the charter by legislation, as they could have amended it without the reservation if the federal constitution had not been adopted, or the federal court had held that an act of mere incorporation is not a contract.

The questions proposed by the house are to be answered as they would have been at an earlier day, when the reservation was not necessary for an exercise of the legislative power of altering the law written in the charter. The question of confiscation by amendment is simplified, and cleared of irrelevant matter, by considering it as of the period between 1784 (when the constitution of New Hampshire took effect) and the subsequent adoption of the constitution of the United States. In July, 1784, the legislature could pass an act of eminent domain, under which the owners of land in the Merrimack valley, between Concord and Massachusetts, could be compelled to sell to John Stark a right of way for a railroad, to be operated by him, as an unincorporated common carrier, using any kind of motive power. *Moor v. Veazie*, 32 Me. 343, 355; *Hall v. Railroad Co.*, 21 Month. Law Rep. 138, 141; *Ash v. Cummings*, 50 N. H. 591, 613, 614. He could institute legal proceedings for taking the right of way, and, when he paid the landowners the judicially ascertained amount of their damages, he could lawfully build and work the Concord road. The property which he bought and paid for would be his. The right to be carried by him on the road for a reasonable price would be public. If he had built the road in 1785, and the legislature had enacted in 1786 that his railroad and his farm should become the property of the state when the state paid him nine-tenths or one-tenth of their value, the confiscation of one-tenth or nine-tenths of either piece of property under that act in 1786 would have been a wrong against which he would have had no federal protection. *Owings v. Speed*, 5 Wheat. 420. There was no federal court in which he could resist it, and no federal ground on which it could be held illegal in this court. As it would have been an attempt to destroy rights of property and equality secured by the New Hampshire bill of rights, it would not have been an exercise of legislative power. If the supposed statute of 1784 had been a corporate charter, as well as an act of eminent domain, and Stark had accepted it and become a corporation, his right of property in his road would have been as inviolable as if he were not incorporated. Had the legislature reserved the power of amendment and repeal, his case would not have been altered. In 1786 the

reservation would have been inoperative and useless. Without the reservation, the senate and house could repeal his charter, or amend it to any extent within the bounds of legislation. Neither without the reservation, nor with it, would his road be more liable to total or partial confiscation than his farm. The subsequent adoption of the federal constitution, its prohibition of state laws impairing the obligation of contracts, the federal decision that a charter is a contract protected by that prohibition, and the avoidance of that decision by reservations of the power of charter amendment and charter repeal, did not add a power of confiscation to the legislative power of 1784.

3. The third ground of the claim, that the state can take the Concord road on payment of part of its value, is the seventeenth section of the charter (Laws 1835, Priv. Acts, c. 1), which provided that the state might purchase the road for a sum to be ascertained by a prescribed computation. This sum might be more, and might be less, than the market value of the road at the time of purchase. The state's right to take the property of corporations under such a provision of general or special law may be called a statutory power, to indicate its origin, and to distinguish it from the power of eminent domain vested in the senate and house by the constitution, which requires the payment of full value for property taken from its owners for public use. The price to be paid under an exercise of the statutory power (for convenience of designation called the "statutory price") is unknown. The method of ascertaining it is in controversy. On one side it is claimed that the statutory power to buy this road still exists, and argument is advanced in support of a computation that would make the price less than the value. On the other side this power is denied, and it is argued that, if the power existed, the statutory price in 1889 would have been more than \$4,500,000. In the present settled and well-known condition of the constitutional power of eminent domain, by which the state can take turnpikes, railroads, and other property for public use, on payment of value, a proposition to purchase roads by statutory power would not be made by one who admitted the statutory price to be more than the roads are worth. If that price were agreed to be equal to the value, and no more, it would not be material whether the purchase were made by statutory or by constitutional power. The only branch of the present inquiry of any practical importance is, not whether the state can take one kind of property from its owners, paying them what the property is worth, but whether the state can take a part of one kind without payment, by compelling the owners to sell the whole for less than its value. This question was settled by legislative action in 1867. In the revision of the statutes at that time, it was thought equitable that there should be no

discrimination between owners of railroads, and owners of other property that cannot be taken for public use without payment of its value. Railroads might rise, in market value, above the statutory price. If this should happen, not only residents of other states, but also citizens of this state, buying shares of New Hampshire railroads at the market price, might be in no fault for not knowing the property could be taken from them at a lower price. In 1867 such an alleged defect in railroad title was not a matter of common knowledge. There had been no such prospect of New Hampshire roads being worth more than the statutory price as would attract general attention, or raise an alarm, and give warning to danger to savings banks and other seekers of safe investments. But to the commissioners, and the legislators specially engaged in the work of revision, it was apparent that at some time an exercise of the statutory power might be a grievous wrong. It was not believed that the legislature would ever use or ever desire a power of despoiling those who could be entrapped by the operation of a law made for a different purpose. So long as it was doubtful whether the turnpikes and railroads of incorporated companies could be taken by eminent domain, some precautionary measure had been considered expedient. For this reason a right to take them had been made a part of the general law of such roads; their charters, on this point, being, in effect, a general law before the general form was adopted, in 1844. When, upon repeated decisions, sustained many years by a concurrence of legal opinion, and by uniform practice in taking turnpikes, it had become certain that no other power than eminent domain would be needed for this purpose, the reason for introducing and retaining the statutory power ceased to exist. There was a probability, amounting to a reasonable and moral certainty, that the taking of railroads for less than their value would operate upon some, if not all, of the owners as oppressively as partial confiscation. In this state of things, upon deliberate consideration they were put upon the legal ground of equal right, by striking out of the law the power which long experience had shown was not needed for purposes of justice and good government.

The time and circumstances in which a statute was made, and the history of legislation on the subject, are competent evidence of legislative intent. *Preston v. Browder*, 1 Wheat. 115, 121, 123; *Garland v. Montgomery Co.*, 87 Ala. 223, 225, 6 South. 402; *Parvin v. Wimberg*, 130 Ind. 561, 571, 30 N. E. 790; *Holbrook v. Holbrook*, 1 Pick. 254, 258; *Eaton v. Green*, 22 Pick. 531; *Boston & L. R. Co. v. Salem & L. R. Co.*, 2 Gray, 28; *Holbrook v. Bliss*, 9 Allen, 75; *Hamilton v. Boston*, 14 Allen, 478; *Com. v. Munson*, 127 Mass. 461. The state has been of opinion that more roads were needed than taxpayers could reasonably be compelled to build and keep in

repair. And the want has often been supplied by turnpikes built under charters allowing rights of way to be taken by stockholders who were to receive tolls from travelers in payment of the expense of repairs, and interest on the investment. The object of the charter of the first New Hampshire turnpike, passed in 1796 (Laws 1797, p. 325), is stated in the preamble, which recites that a petition has been presented to the legislature asking a charter for improving the communication between the seacoast and the interior by a direct road from Concord to Piscataqua bridge, and that "the expensiveness of an undertaking of this kind, however useful to the community, would burden the towns through which it may pass so heavily as to render it difficult to effect so important a purpose otherwise than by an incorporated company, who might be indemnified by a toll for the sums that should be expended by them." But the state might grow in population and property, and the time might come when the taxpayers would be able to buy and maintain the road for free use. The question whether eminent domain could compel the stockholders to sell it and their franchise had not been settled. *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35, 66-70; *Barber v. Andover*, 8 N. H. 398; *Peirce v. Somersworth*, 10 N. H. 369, 373; *Backus v. Lebanon*, 11 N. H. 19, 22-25; *Northern B. R. v. Concord & C. R. R.*, 27 N. H. 183, 193-196; *State v. Canterbury*, 28 N. H. 195, 221, 222; *Crosby v. Hanover*, 36 N. H. 404, 420; *Boston Water-Power Co. v. Boston & W. R. Corp.*, 23 Pick. 360, 389-394; *Armingtton v. Barnet*, 15 Vt. 745; *Bridge Co. v. Dix*, 16 Vt. 446; and cases cited in *Cooley*, Const. Lim. 647; *Lewis*, Em. Dom. § 274; and *Mills*, Em. Dom. §§ 41, 42. The grounds on which the power was contested appear in the argument of *Backus v. Lebanon*, 11 N. H. 19-21, and *Boston Water-Power Co. v. Boston & W. R. Corp.*, 23 Pick. 360, 367-370, 386, 387. On the federal question, whether an exercise of the power would impair the obligation of a contract, decided in 1848, the federal court were not unanimous. *Bridge Co. v. Dix*, 6 How. 507, 537, 549.

When the first turnpike was chartered, in 1796, it was not deemed advisable to leave it uncertain whether the public could ever take the road from its owners. To remove the doubt, the owners' consent was inserted in this proviso of the last section of the charter: "Provided, also, that the state of New Hampshire may, at any time after the expiration of forty years from the passing of this act, repay the proprietors of the said road the amount of the sum expended by them thereon, with twelve per cent. per annum in addition thereto, deducting the amount of toll actually received by the proprietors, and in that case the said road shall, to all intents and purposes, be a public highway, anything in this act to the contrary notwithstanding." The provision that the road shall be a pub-

lic highway when the state pays the agreed price is a contract made by the state on one side and the stockholders on the other. A stipulation for a price less than their constitutional right under eminent domain, imposed as a condition of a grant of corporate powers, would raise a question of legality that need not now be considered. Assuming the whole contract, in its literal terms, to be valid, both parties are bound by it. A statute impairing its obligation would be retrospective, and within the prohibition of article 23 of the bill of rights. The consequence of the state's paying a legal price is as obligatory as any other part of the bargain. When the stockholders are paid, "the said road shall, to all intents and purposes, be a public highway, anything in this act to the contrary notwithstanding." The same result was intended by chapter 379, Laws 1838 (Gen. Laws, c. 67, § 13), which authorizes the selectmen and courts of common pleas to take any real estate, easement, or franchise of any corporation, "when in their judgment the public good requires a public highway." Under that act, the effect of taking a turnpike is, not that the collection of tolls is continued by the public or its vendee, but that the road is free. "The easement, in which the turnpike corporation had a private interest, but which was devoted to the use of the public, subject to the payment of a toll to the corporation, is taken by the highway for the public use, discharged and exempted from the toll. * * * The easement of the turnpike corporation is purchased by the public in order that the use may be free, instead of being subjected to a burden. * * * It is a substitution of a public right for a right previously existing, partly public and partly private." *Peirce v. Somersworth*, 10 N. H. 369, 373. The legislature empowered the first turnpike company to take land for a toll road that would be public in a certain sense, and to some intents and purposes. *Railroad Co. v. Greely*, 17 N. H. 47, 57, 59, 60, 62; *Holt v. Antrim*, 64 N. H. 284, 286, 287, 9 Atl. 389. When it should become free, it would be public in a broader sense. Then, and not till then, in the meaning of the proviso, it would, "to all intents and purposes, be a public highway, anything in this act [requiring payment of toll] to the contrary notwithstanding."

The expense of land damages, construction, and repairs being considered too heavy to be laid upon taxpayers at the date of the charter, the stockholders were induced to incur that expense by the promise of tolls. When, in the opinion of the legislature, the cost of buying the road and keeping it in repair would not be too heavy a charge to be borne by taxation, after a certain time, the agreement was that the state might abolish the tolls by buying the road. If the parties had agreed that the state, instead of relieving travel and trade from the burden of tolls, might buy and sell a right to maintain the burden, there would have been unequivocal

evidence of such a design in the written contract. Neither by the contract nor by law could the road be taken from its owners for the purpose of speculation. A taking and sale of it by the state for the profit the state might make by the transaction would not be a public use of it, within the law of eminent domain, or a public purpose, within the law of taxation. In *re Albany St.*, 11 Wend. 149, 151, 152; In *re John and Cherry Sts.*, 19 Wend. 659, 677; *Embury v. Conner*, 3 N. Y. 511, 515, 516; *Varick v. Smith*, 5 Paige, 137, 146-148, 158, 159; In *re City of Rochester*, 137 N. Y. 243, 247, 33 N. E. 320; *Cooper v. Williams*, 4 Ohio, 253, 284, 285, 288, 290-293; *Id.*, 5 Ohio, 391, 393; *Buckingham v. Smith*, 10 Ohio, 288, 297; *Little Miami Elev. Co. v. City of Cincinnati*, 30 Ohio St. 629, 643; *Dunn v. Charleston*, Harp. 189, 199, 200; *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.*, 17 W. Va. 812, 856; *Kane v. Mayor, etc.*, 15 Md. 240, 250; *Gregg v. Mayor, etc.*, 56 Md. 256, 272; *French v. Quincy*, 3 Allen, 9, 12, 13; *Worden v. New Bedford*, 131 Mass. 23, 24; *Attorney General v. City of Eau Claire*, 37 Wis. 400, 435, 437; *State v. Eau Claire*, 40 Wis. 533, 541; *Kaukauna Water-Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 272-276, 12 Sup. Ct. 173; *Cooley, Const. Lim.* 648 (note 1), 654, 665; *Cooley, Tax'n*, 55, 103, 113; *Dill. Mun. Corp.* §§ 591, 592; *Lewis, Em. Dom.* § 204; *Mills, Em. Dom.* § 23; 1 *Hare, Const. Law*, 338, 339.

In one respect the power of purchase under the contract was more limited than the constitutional power. If the road were taken under the contract, the tolls would cease. If it were taken by eminent domain, provision could be made for continuing them. In another respect these powers were alike. Under the power reserved in the charter, the road could not be taken for a purpose for which it could not be taken by eminent domain. By the reservation the legislature intended to acquire, not a power of speculating in a public burden, but a contractual right to abolish the burden,—a right they might need if the burden could not be abolished by eminent domain. The absence of all schemes of trading on fluctuations in value, and the presence of an intention to remedy the defect that would exist in the law if it should be held that without the reserved right, and without the owners' consent, toll roads could not be taken for free use, are material facts in the present inquiry. From the beginning to the end of turnpike and railroad legislation on this point, there was a continuity of purpose and meaning. In the course of time the purpose may have gradually lost a degree of its original distinctness, as the power of eminent domain came to be less and less a matter of uncertainty. But this change was accompanied by an unchanged practice of using an old charter as a precedent in drafting a new one, without such an investigation of legal questions as would be made on a general revision of the statutes.

When the subject had been dealt with in the railroad law of 1844, the revision of 1867 called for a thorough examination. And the state's right to take railroads by eminent domain being no longer an open question, and the removal of all doubt on that point having accomplished the object of the reserved statutory right to take them, the supernumerary right came to its natural end.

The first railroads that were built in New Hampshire (one chartered in 1833 was not built) were chartered in 1835. In the 39 years next preceding that date, charters for not less than 50 turnpikes had been passed, containing provisos for purchase by the state. These provisos evinced no special desire on the part of the state to own a particular road, but a general policy, such as would appropriately take the form of a general law. There were variations in matters of detail, but, so far as a mere right of purchase was concerned, the provisos amounted to a general statute, designed, out of abundant caution, to remedy a certain constitutional defect, if that defect should be found in eminent domain. In a turnpike charter passed January 7, 1853, the legislature stipulate that "the road shall at any time become the property of the state, or may be laid out as a public highway whenever the public good shall require it, on compensation being made to said corporation for their interest therein." Laws 1852 (Nov. Sess.) c. 1360, § 6. The special significance of this superfluous and inoperative clause is in its date, which was 14 years after the passage of the act of 1838, and after the practical operation of that act, and the adjudged cases, had demonstrated the useless character of such an enactment of the settled construction of the state and federal constitutions. The clause was harmless, and it was safe to follow the precedents of a former generation.

In other states similar precaution appears in more recent years. Eighteen constitutions have declared that the power of eminent domain shall not be so construed as to prevent the taking of the property and franchises of corporations. By this declaration the judicial decisions which had settled the question of construction were adopted and affirmed in Illinois in 1870 (article 11, § 14); in West Virginia in 1872 (article 11, § 12); in Pennsylvania in 1873 (article 16, § 3); in Arkansas in 1874 (article 17, § 9); in Alabama (article 1, § 24), Missouri (article 12, § 4), and Nebraska (article 11, § 6) in 1875; in Colorado in 1876 (article 15, § 8); in Georgia in 1877 (article 4, § 2, par. 2); in California in 1879 (article 12, § 8); in North Dakota (section 134), South Dakota (article 17, § 4), Montana (article 15, § 9), Washington (article 12, § 10), Idaho (article 11, § 8), and Wyoming (article 10, § 9) in 1889; in Mississippi in 1890 (section 190); and in Kentucky in 1891 (section 195). In New Hampshire, the senate and house of 1867 having repealed section 10 of the act of 1844 (Gen. St. 553), on the ground that the

question, which had been a cause of precautionary legislation, had disappeared, this action was accepted as final. When the constitution was amended in 1877 and 1889, the right of the state to take the property and franchises of corporations by eminent domain was so well understood here that it was not made the subject of a confirmatory amendment.

The Boston & Lowell Railroad was chartered in 1830; "so early indeed, and with so little foresight of the actual accommodations as they were afterwards provided and found necessary, that it was rather regarded as an iron turnpike, upon which individuals and transportation companies were to enter and run with their own cars and carriages, paying a toll to the corporation for the use of the road." *Boston & L. R. Corp. v. Salem & L. R. Co.*, 2 Gray, 1, 28. The owners of the first New Hampshire railroads were turnpike companies as well as common carriers. *Smith v. Railroad Co.*, 27 N. H. 86, 96; *Burke v. Railroad Co.*, 61 N. H. 160, 234. Their charters, framed upon turnpike models, abounded in turnpike phrases and turnpike ideas. They contained grants of power to erect toll houses, establish toll gates, appoint toll gatherers, and collect toll, and a turnpike clause which provided that the transportation of persons and property, the construction of wheels, the form of cars and carriages, the weight of loads, and all other matters relating to the use of the roads, should be in conformity to rules and regulations prescribed by the directors. Some contained the further stipulation, "and said road may be used by any person or persons who shall comply with such rules and regulations." In others this redundant clause was omitted. In some instances, as late as June, 1844 (chapter 111, § 5; chapter 112, § 5), "the times and periods of starting and rates of travel" were unnecessarily added to the specification of matters to be governed by the rules of the company. "Such corporations, whenever thereto required by the legislature, shall permit all persons to run locomotives and cars on their road, or may be required by the legislature to draw the cars of such persons with the engines of the corporation on said road, subject to such tolls, rules and regulations as the legislature may from time to time prescribe, having due regard to the income of the said road, as heretofore specified, as well as the convenience, safety, and welfare of all concerned; and provided, that when cars and engines are placed by others on the road, such others shall be liable to pay all damages arising from their own default or neglect." Laws 1844 (Nov. Sess.) c. 128, § 15. This section was intended to be a material change of railroad law. Each of the three railroad charters passed at the June session, 1844 (section 5, cc. 111-113), had the usual turnpike clause, which took it for granted that the public easement would include the right, not only

of stage proprietors and other common carriers of persons and property, but also of all other persons, to place their own cars on the rails, for their own use, under rules prescribed by the directors. One of the three (the Great Falls & Conway) contained the surplusage, "and said road shall be used by any person or persons who shall comply with such rules and regulations." In the seven railroad charters passed at the November session in the same year—chapter 188 (approved December 24), chapters 189, 190, 191, 192, and 193 (approved December 27), and chapter 194 (approved December 28)—the turnpike clause was omitted. Section 15 of chapter 128 (approved December 25) being a general law applicable to all railroads, its reenactment in laws called "special and private" was unnecessary. If it had been repeated in charters subsequently passed, its repetition would have been as inoperative as section 9 of chapter 549, Laws 1847; section 8 of chapter 661, Laws 1848; and section 7 of chapter 4317, Laws 1866,—which were evidently copied from old forms in drafting bills, the futility of those sections being overlooked. Section 15 of the act of 1844 was a revision of the law of the whole subject to which it related, and took the place of charter provisions which had been, in effect, a general law on the same subject. By chapter 39, Laws 1843, the provision of the Concord charter, that "said road may be used by any person or persons who shall comply with such rules and regulations," had been repealed. Section 15 of the act of 1844 put all railroads on the footing of equal right and equal obligation, by suspending the public right (so far as it existed) of using them as turnpikes, and providing that "such corporations" should "permit all persons to run locomotives and cars on their road" "whenever thereto required by the legislature." Sections 10-20 were evidently intended to be a system of uniform law applicable to all railroads.

The effect of those sections, and the effect of the repeal of section 10, are determined by settled principles of construction. "In the case of all written laws, it is the intent of the lawgiver that is to be enforced." *Cooley*, Const. Lim. 69. "The intention of the legislature must govern, and in this intention a literal construction of any statute must yield." *Church v. Crocker*, 3 Mass. 17, 21; *Mendon v. Worcester Co.*, 10 Pick. 235, 243; *Com. v. Cambridge*, 20 Pick. 267, 271, 272; *Stone v. Hill*, 72 Tex. 540, 543, 10 S. W. 665; *Suth. St. Const.* § 246. "Every interpretation that leads to an absurdity ought to be rejected. * * * As it cannot be presumed that any one desires what is absurd, it cannot be supposed that he who speaks has intended that his words should be understood in a manner from which an absurdity follows. * * * The rule we have just mentioned is absolutely necessary, and ought to be followed even when there is neither obscurity nor anything

equivocal in the discourse, the text of the law, or the treaty itself. For it must be observed that the uncertainty of the sense that ought to be given to a law or a treaty does not merely proceed from the obscurity, or any other fault in the expression, but also from the narrow limits of the human mind, which cannot foresee all cases and circumstances, or include all the consequences of what is appointed or promised, and, in short, from the impossibility of entering into this immense detail. We can only make laws or treaties in a general manner, and the interpretation ought to apply them to particular cases conformably to the intention of the legislature, or of the contracting powers. Now, it cannot be presumed that in any case they would lead to anything absurd. Therefore, if their expressions, taken in their proper and ordinary sense, lead to it, it is necessary to turn them from that sense just so far as is sufficient to avoid absurdity." *Vatt. Law Nat. bk. 2, c. 17, § 282.* "With respect to the written contracts of parties and the wills of testators, we must endeavor to construe them as well as we can; and if one construction leads to manifest absurdity, and a different construction leads to a sensible result, we are at liberty to reject the construction which leads to the absurdity. * * * But I do not think we are at liberty to use the same freedom with the statutes of the realm." *Pollock, O. B., in Miller v. Salomons, 7 Exch. 475, 560.* The reason given for this distinction is that written contracts and wills cannot be explained by their makers, and that statutes can be amended by the legislature. The reason is irrelevant, and the distinction groundless. Contracts, wills, and statutes are the makers' intentions, proved by competent evidence. *Cole v. Lake Co., 54 N. H. 242, 287; Houghton v. Pattee, 58 N. H. 328; Morse v. Morse, Id. 391; Hurd v. Dunsmore, 63 N. H. 171; Crawford v. Parsons, 63 N. H. 438; Johnson v. Conant, 64 N. H. 109, 136, 7 Atl. 116; Railway Co. v. Jurey, 111 U. S. 584, 592, 4 Sup. Ct. 566; Edgerly v. Barker, 66 N. H. 434, 447, 31 Atl. 900; Com. v. Boston & M. R. Co., 3 Cush. 25, 43; Risley v. Bank, 83 N. Y. 318, 336; Boody v. Watson, 64 N. H. 162, 189, 9 Atl. 794.* Whether a writing is a contract or a law, or both (*Richmond, F. & P. R. Co. v. Louisa R. Co., 13 How. 71, 81, 86*), its meaning is ascertained by a due consideration of legal proof. Courts cannot reject such proof, or impute to legislators an improbable purpose, in the performance of their public duty of making laws, that would not be imputed to them in the exercise of their private right of making contracts and wills. If a statute is capable of two meanings, and one is more reasonable and therefore more probable than the other, this fact is necessarily considered, with all other competent evidence, on the question of intent. The evidence of intention may include various inherent probabilities, and the probative force of many circumstances, as well as the literal

sense of the words used. When the meaning is found by giving due weight to everything that legally tends to prove it, it is not a matter of discretion whether it shall be adopted or rejected. If the evidence establishes the fact that the literal sense is not the true sense, a literal construction would be an alteration of the law. "It is not the words of the law," says Plowden, "but the internal sense of it, that makes the law. * * * It often happens that when you know the letter you know not the sense; for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive. * * * When an act of parliament ordains that whoever does such an act shall be a felon, and shall suffer death, yet if a man of unsound mind, or an infant of tender age, who has no discretion, does the act, they shall not be felons, nor shall they be put to death. And if a statute be made that all persons who shall receive or give meat or drink or other aid to him that shall do such an act (knowing the same to be done) shall be accessaries to the offence, and shall be put to death, yet if a man commits the act, and comes to his own wife, who knowing the same receives him and gives him meat and drink, she shall not be accessary to his offence, nor a felon, for one that is of unsound mind, an infant, or a wife, were not intended to be included in the general words of the law. So that in these cases the general words of the law are corrected and abridged by equity. * * * When the words of a statute enact one thing, they enact all other things which are in the like degree. As the statute which ordains that, in an action of debt against executors, he who comes first by distress shall answer, is extended by equity to administrators, and such of them as comes first by distress shall answer by the equity of the said statute, quia sunt in equali genere. And the act of 4 Hen. IV. c. 8, gives a special assize to him who is disseised and ousted of his land by force against the disseisor, and enacts that he shall recover against him double damages; and in the book of entries (folio 406) it appears that the plaintiff recovered by judgment double damages in an assize of nuisance for turning a watercourse with force, to the nuisance of his mills, wherein it was found for the plaintiff, and yet there he was not ousted of his land, nor did he suffer any disseisin, but only a nuisance to the damage of his freehold, viz. of his mills, whereof he continued seised: so that by the equity of the said statute the plaintiff recovered his double damages for the nuisance, because it is in like degree with a disseisin of land. And the statute of Gloucester gives an action of waste * * * against him that holds for life or for years, and by the equity thereof a man shall have an action of waste against him who holds but for a year, or for twenty weeks, and yet this is out of the words of the act, for he that holds but for

one year does not hold for years, but it is within the intent of the act, and the words which enact the one do by equity enact the other. And so there are an infinite number of cases in our law which are in equal degree with others provided for by statutes, and are taken by equity within the meaning of those statutes. * * * The intent (which is the only thing regarded by equity * * *) ought to be followed and taken for law." *Eyston v. Studd*, Plow. 459, 465, 467, 468; *Stowel v. Lord Zouch*, Id. 353a, 366; *Arthur v. Bokenham*, 11 Mod. 148, 161. "Also there be divers other estates in tail, though they be not by express words specified in the said statute [Westm. II.], but they are taken by the equity of the same statute." Litt. Ten. § 21. "The cases of the statute are set down but for examples of estates tail, general and special, and not to exclude other estates tail. * * * 'Equity' is a construction made by the judges that cases out of the letter of the statute, yet being within the same mischief, or cause of the making of the same, shall be within the same remedy that the statute provideth; and the reason hereof is for that the lawmakers could not possibly set down all cases in express terms." Co. Litt. 24. "Equity rather followeth the intent of the law than the words of the law." Doct. & Stud. Dialogue 1, c. 16. "As for construing the statute by equity, equity is synonymous to the meaning of the legislator." *Rex v. Williams*, 1 W. Bl. 93, 95; End. Interp. St. §§ 320, 321.

"The judges of the law in all times past have so far pursued the intent of the makers of statutes that they have expounded acts which were general in words to be but particular where the intent was particular. * * * Those statutes which comprehend all things in the letter they have expounded to extend but to some things; * * * and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the legislature." *Stradling v. Morgan*, Plow. 199, 203-205. "The real intention, when accurately ascertained, will always prevail over the literal sense of terms. When the expression in a statute is special or particular, but the reason is general, the expression should be deemed general." 1 Kent, Comm. 462; *Beawfage's Case*, 10 Coke, 99b. It is "an old and unshaken rule in the construction of statutes" "that the intention of a remedial statute will always prevail over the literal sense of its terms; and therefore, when the expression is special or particular, but the reason is general, the expression should be deemed general." *Brown v. Pendergast*, 7 Allen,

427, 429. "It is by no means unusual in construing a statute to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischief, where the statute is remedial. It is a mode of construction as familiar to every legal person as expounding the statute by equity." *Dean of York v. Middleburgh*, 2 Younge & J. 196, 215; Com. Dig. "Parliament," (R. 13, 15, 16).

"The defendants have argued," says Camden, C. J., delivering the judgment of the court in *Entick v. Carrington*, 19 How. State Tr. 1029, 1044, 1060, 1061, "upon two rules of construction, which in truth are but one: First, where, in a general act, a particular is put as an example, all other persons of like description shall be comprized; secondly, where the words of a statute enact a thing, it enacts all other things in like degree. In Plowden (pages 37, 167, and 467) several cases are cited as authorities under these rules of construction; as, that the bishop of Norwich in one act shall mean all bishops; that the warden of the Fleet shall mean all gaolers; that justices of a division mean all justices of the county at large; that guardian in socage after the heir's attaining fourteen shall be a bailiff in account; that executors shall include administrators, and tenant for years a tenant for one year or any less time; with several other instances to the like purpose. * * * Though the general rule be true enough that, where it is clear the person or thing expressed is put by way of example, the judges must fill up the catalogue, yet we ought to be sure, from the words and meaning of the act itself, that the thing or person is really inserted as an example. This is a very inaccurate way of penning a law; and the instances of this sort are scarce ever to be found, except in some of the old acts of parliament. * * * In all cases that fall within this rule [that, where the words of a statute enact a thing, it enacts all other things in like degree] there must be a perfect resemblance between the persons or things expressed and those implied. Thus, for instance, administrators are the same thing with executors; tenant for half a year and tenant for years have both terms for a chattel interest, differing only in the duration of the term; and so of the rest, which I need not repeat one by one: and in all these cases the persons or things to be implied are in all respects the objects of the law as much as those expressed. * * * The law must not be bent by the construction, but that must be adapted to the spirit and sense of the law. The fundamental rule, then, by which all others are to be tried, is laid down in *Wimbish v. Tailbois*, Plowd. 57, 58, according to which the best guide is to follow the intent of the statutes. Again, according to Plowden (pages 205 and 231), the construction is to be collected out of the words according to the true intent and meaning of

the act; and the intent of the makers may be collected from the cause or necessity of making the act, or by foreign circumstances."

"There is an essential difference between the expounding modern and ancient acts of parliament. In early times, the legislature used (and I believe it was a wise course to take) to pass laws in general and in few terms; they were left to the courts of law to be construed, so as to reach all the cases within the mischief to be remedied. But, in modern times, great care has been taken to mention the particular cases in the contemplation of the legislature, and therefore the courts are not permitted to take the same liberty in construing them as they did in expounding the ancient statutes." Buller, J. in *Bradley v. Clarke*, 5 Term R. 197, 201, 202; *Wilson v. Knubley*, 7 East, 123, 134, 136; *Lord Brougham*, in *Gwynne v. Burnell*, 6 Bing. N. C. 453, 561; *Bac. Abr.*, "Statute," I, 6; *End. Interp. St.* §§ 322-325. The precision and skill, or the want of them, apparent in the draft of any laws, ancient or modern, and the brief and general or the elaborate and specific character of writings of any date, are facts to be considered on the question whether their meaning is fully and exactly given by a literal version. "The fundamental principles of government found in constitutions must necessarily be declared in terms very general, because they must be very comprehensive." *Miller, J.*, in *Woodson v. Murdock*, 22 Wall. 351, 381. As such an instrument does not go minutely into particulars, it would sometimes be easy to defeat a provision by a narrow reading or by the application of arbitrary rules. *Cooley*, *Const. Lim.* 73, 101. Now, as in former times, a statute concisely expressed may be ambiguous. The true method of ascertaining its meaning cannot become obsolete. What is within the legally proved intention of the legislature is within the statute, though not within the letter; and what is within the letter, but not within the intention, is not within the statute. This tenor of the ancient rule has not been abandoned. While some of the old cases on this and other subjects are, for various reasons, of little or no value at the present time, the general doctrine of construction is unchangeable.

An English statute (1 Wm. IV. c. 70. § 27) abolishing certain courts provided "that the court of common pleas shall have the like power and authority to amend the records of fines and recoveries passed heretofore in any of the courts abolished by this act, as if the same had been levied, suffered, or had in the court of common pleas." In *Evans v. Griffith*, 9 Bing. 311-313, 316, the defendant contended that "amend" did not mean "create," and that the act did not authorize the court to make a new and entire record. In the opinion, the court say: "The enactment * * * may be well understood as a power to enter up the whole record where the mate-

rials are found upon the files of the court; to make a good record altogether; and not to be confined to the amending of a faulty record, or the completing of a record where a formal incipitur only has been put upon the plea roll. Many instances occur in the books, of a similar construction of statutes. The 9 Rich. II. c. 3, gives a writ of error to him in reversion, if a tenant for life lose in a precipice; but it was resolved that, though the statute speaks only of reversions, yet remainders are also taken to be within the purview thereof. *Winchester's Case*, 3 Coke, 4. The action of debt for an escape, which lies against every sheriff and gaoler where the prisoner escapes out of execution, is grounded upon the statute 1 Rich. II. c. 12, which is altogether silent about sheriffs and gaolers, and mentions only the warden of the Fleet. So the statute of * * * 13 Edw. I., which mentions only the bishop of Norwich, has been always extended to include all other bishops. 2 Inst. 487. The statute of Westminster 1 gives a remedy where 'outrageous toll is taken.' By construction of law, that remedy applies either where a reasonable toll is due, and excessive toll is taken, or where no toll at all is due, and yet toll is unjustly usurped. 2 Inst. 220. In these and many other instances the particular expression used in the statute is looked upon only as an example of other cases lying within the same mischief, and therefore calling for the same remedy." In *Jones v. Harraden*, 9 Mass. 540, note 3, it was held that an action of account, given as a remedy by 4 Anne, c. 16, "ought to be considered as put by way of example, not of limitation." Of a statute literally applicable to no place but London, Coke says: "Here the city of London is named, but it appeareth by that which hath been said out of Fleta that this act extends to such cities and boroughs privileged; that is, such as have such privilege to hold plea as London hath." 2 Inst. 322. "The language of the statute [7 & 8 Vict. c. 101] applies in terms only to single women; so did the language of St. 6 Geo. II. c. 31; yet Lord Ellenborough and the whole court, in *Rex v. Luffe*, 8 East, 183, held that an order might be made on the putative father of the bastard child of a married woman, who was to be considered single under the existing circumstances and for that purpose. * * * The law, differently interpreted, would fail to reach a very large proportion of illegitimate children." *Reg. v. Collingwood*, 12 Q. B. 681, 686, 687. "It would be strange if one class of bastards, though small, were left entirely destitute, and there were no liability in the putative father." *Reg. v. Pilkington*, 2 El. & Bl. 546, 553.

In *Sliver v. Ladd*, 7 Wall. 219, an unmarried woman was held to be "a single man," within the meaning of an act of congress granting public land to settlers in Oregon. In *Ragland v. Justices*, 10 Ga. 65, 70, 71, "looking to the subject-matter of the law,"

and "the reason and object of the law," the court held that a statute relating to "any guardian, executor, or administrator, chargeable with the estate of any orphan," included minors whose parents were living. "The bond of a county treasurer, he being peculiarly an officer of the county as distinguishable from an officer of the state, payable to the county, and not to the state, * * * may not be within the words of" a statute concerning the "breach of any official bond or undertaking of any officer of this state," "if they are taken in a narrow or a strict sense." But it was held to be within the statute. *Morrow v. Wood*, 56 Ala. 1, 5. Under a statute exempting carts carrying manure from the payment of turnpike toll, it was held that empty carts going to fetch manure were exempt. This construction was opposed on the ground that "the exemption can go no further than the express letter, and it cannot be extended by equity." *Harrison v. James*, 2 Chit. 547. Floating lumber "across" the waters of a river may include floating it down the river. *Bennett's Branch Imp. Co.'s Appeal*, 65 Pa. St. 242, 251. "The second article of the by-laws [of a corporation], that any person chosen a director should cease to be one when he ceased to be a proprietor, if construed according to its precise language, would not prohibit the election of a person who was not a proprietor. * * * But this was not probably the construction intended. There is nothing in the proceedings of the company to show that we ought to give this clause such a strict interpretation, and it may well be construed to render any one who was not a proprietor ineligible." *Despatch Line of Packets v. Bellamy Manuf'g Co.*, 12 N. H. 205, 222. The duty of so constructing a railroad as not to obstruct the safe use of private ways requires the company to maintain as well as to construct safe crossings. *Keefe v. Railroad Co.*, 63 N. H. 271.

"Such construction ought to be put upon a statute as may best answer the intention which the makers had in view. * * * The intention * * * is sometimes to be collected from the cause or necessity of making a statute; at other times, from other circumstances. Whenever this can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter of the statute. * * * A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter. * * * A thing which is within the letter of a statute is not within the statute, unless it be within the intention of the makers." *Bac. Abr.*, "Statute," I, 5, and authorities there cited; *People v. Insurance Co.*, 15 Johns. 358, 380, 381; *Riggs v. Palmer*, 115 N. Y. 508, 509-511, 22 N. E. 188; *State v. Boyd*, 2 Gill & J. 365, 374; *Chesapeake & Ohio Canal Co. v. Baltimore*

& O. R. Co., 4 Gill & J. 1, 152; *City of Baltimore v. Root*, 8 Md. 95, 105; *New England Car-Spring Co. v. Baltimore & O. R. Co.*, 11 Md. 81, 90; *Oates v. Bank*, 100 U. S. 239, 244. "A rigid and literal reading would in many cases defeat the very object of the statute. * * * Every statute ought to be expounded, not according to the letter, but according to the meaning. * * * And the intention is to govern, although such construction may not in all respects agree with the letter of the statute. The reason and object of a statute are a clue to its meaning, and the spirit of the law and the intentions of its makers are diligently to be sought after, and the letter must bend to these." *Tracy v. Railroad Co.*, 38 N. Y. 423, 437; *Rutledge v. Crawford*, 91 Cal. 526, 533, 27 Pac. 779.

In *Ryegate v. Wardsboro*, 30 Vt. 746, the town of W. recovered a judgment against the town of R. for money expended by W. in the support of W.'s pauper. "This singular result," say the court, "inevitably follows from a literal construction of the statute. Hence the question arises: Are we at liberty, when the words of the statute are plain and unambiguous, but are directly repugnant to the whole spirit and intent of all our legislation on the same subject and in the same act, and seem to involve an absurdity, to disregard the letter of the law, and attach to it that meaning which the legislature really intended? * * * The letter of the law is found by experience not to be in all cases a correct guide to the true sense of the law-giver; hence have arisen those rules for the construction of statutes which look to the whole and every part of a statute, and the apparent intention derived from the whole, to the subject-matter, to the effects and consequences, and to the reason and spirit of the law, and thus ascertain the true meaning of the legislature, though the meaning so ascertained conflict with the literal sense of the words. * * * Illustrations and authorities are unnecessary to sustain a principle so well settled. We may, however, refer to one derived from an old book, which, in his treatise on this subject, Judge Story calls 'an excellent summary of the rules for construing statutes,' and which, for its sense and point, is worthy of attention. 'In some cases the letter of an act of parliament is restrained by an equitable construction; in others, it is enlarged; in others, the construction is contrary to the letter. In order to form a right judgment whether a case be within the equity of a statute, it is a good way to suppose the lawmaker present, and that you have asked him this question, did you intend to comprehend this case? Then you must give yourself such answer as you imagine he, being an upright and reasonable man, would have given. If this be that he did mean to comprehend it, you may safely hold the case to be within the equity of the statutes; for, while you do no more than he would have done, you do not act contrary to the statute,

but in conformity thereto.' [Flow. 467, 467a.] Applying this rule to the case at bar, we think all must agree that if the lawmaker were present, and so interrogated, he would answer that he did not intend to comprehend it within this statute. * * * It is clear to us that the true meaning of the statute cannot be reconciled with the literal meaning of the words. In such case the letter of the law must yield to its spirit and intent." The judgment recovered against R. by W. for money expended by W. in supporting W.'s pauper was reversed, upon legal evidence that the literal construction did not correctly express the legislative intent. The proposition that an interpreter of a statute is to imagine what answer would be given by upright and reasonable legislators to the question of their intent (*Baker v. Jacobs*, 64 Vt. 201, 23 Atl. 588; *Riggs v. Palmer*, 115 N. Y. 510, 22 N. E. 188) is one of several modes of stating the question of probability, and presenting the idea that the legal meaning is a fact to be found by a reasonable inference from the letter and all other competent evidence tending to prove the sense in which the legislature used the language of the act. "Statutes are to be construed with reference to the objects to be accomplished by them, and with reference to the circumstances existing at the time of their passage, and the necessity for their enactment. Where a statute would operate unjustly, or absurd consequences would result from a literal interpretation of terms and words used, the intention of the framers, if it can be fairly gathered from the whole act, will prevail." *Murray v. Hobson*, 10 Colo. 66, 73, 13 Pac. 921. "Where any particular construction which is given to an act leads to gross injustice or absurdity, it may generally be said that there is fault in the construction, and that such an end was never intended or suspected by the framers of the act." *Peckham, J., in People v. Board, etc., of Onondaga Co.*, 129 N. Y. 395, 445, 29 N. E. 327. "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." *Lau Ow Bew v. U. S.*, 144 U. S. 47, 50-52, 12 Sup. Ct. 517; *Pollock, C. B., in Hutchinson v. Railway Co.*, 15 Mees. & W. 314, 318; *End. Interp. St. c. 9*. "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always therefore be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf that the Bolognian law, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of

a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Flowden, that the statute of 1st Edward II., which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire, 'for he is not to be hanged because he would not stay to be burnt.' And we think that a like common sense will sanction the ruling we make that the act of congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder." *U. S. v. Kirby*, 7 Wall. 482, 486, 487. "Where any particular construction would lead to an absurd consequence, it will be presumed that some exception or qualification was intended by the legislature, to avoid such conclusion." *Com. v. Kimball*, 24 Pick. 366, 370; 1 Bl. Comm. 91; *Opinion of the Justices*, 41 N. H. 555.

"It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose all of its provisions must be examined in the light of attendant and surrounding circumstances. To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. The reports of adjudged cases and approved legal treatises are full of illustrations of the application of this rule. The inquiry in all such cases is as to what was intended in the law by the legislature, and in the treaty by the contracting parties. In *Geofroy v. Riggs*, 133 U. S. 258, 10 Sup. Ct. 295, * * * it was held that the District of Columbia * * * is one of 'the states of the Union,' within the meaning of that term as used in the consular convention of 1853 with France. * * * A statute of Henry VIII. enacted that if anybody should rob or take 'the goods of the king's subjects within this realm,' and be found guilty, the party robbed should have restitution of the goods. Of this statute Sir Matthew Hale said that, 'though it speaks of the king's subjects, it extends to aliens.' " *In re Ross*, 140 U. S. 453, 475, 476, 11 Sup. Ct. 897. In that case it was held (page 479, 140 U. S., and 897, 11 Sup. Ct.) that a British subject, being one of the crew of an American vessel, is a citizen of the United States, within the meaning of Rev. St. U. S. §§ 4083-4087, which authorize American consuls to arrest and try "citizens of the United States" charged with crime committed in certain foreign countries.

The first section of a federal statute (February 26, 1885, c. 164) makes it unlawful to assist or encourage the immigration of a foreigner "under contract * * * to perform labor or service of any kind" in this country. The fifth section provides that the act shall not apply to foreigners temporarily residing here; to the importation of skilled workmen for any new industry, when skilled labor can-

ot otherwise be obtained; "to professional ctors, artists, lecturers, or singers, nor to ersons employed strictly as personal or domestic servants"; or to a person assisting a member of his family, or any relative or personal friend, to migrate for the purpose of ettlement here. The corporation of Trinity hurch made a contract with a foreigner to ome from England to New York, and enter he service of the church as rector and pas-or. The contract was performed, and an ction was brought against the church to re-over the penalty prescribed by the statute. It must be conceded that the act of the orporation is within the letter of" the first section, for the relation of rector to his hurch is one of service, and implies labor on he one side, with compensation on the other. ot only are the general words 'labor' and 'service' both used, but also, as it were to ward against any narrow interpretation, nd emphasize a breadth of meaning, to them s added 'of any kind'; and, further, * * * he fifth section, which makes specific excep-tions, among them professional actors, artists, cturers, singers, and domestic servants, trengthens the idea that every other kind of labor and service was intended to be reached y the first section." But assisting and en-ouraging the immigration of foreigners un-der contract to perform, in this country, the labor and service of clergymen or teachers, lthough within the letter of the law, was ot within the evil which congress intended o remedy, and therefore was not prohibited y the true construction. Church of Holy rinity v. U. S., 143 U. S. 457, 12 Sup. Ct. 11. The evil at which the statute was aimed s evidence of its meaning (Co. Litt. 381b; 1 31. Comm. 87), and may be looked for in he public history of the time (Aldridge v. Williams, 3 How. 9, 24; U. S. v. Union Pac. r. Co., 91 U. S. 72, 79; Rich v. Flanders, 39 U. S. 304, 311, 312) Due weight being given o this evidence, one kind of labor and ser-vice is an exception, not included in the gen-eral expression "labor or service of any kind"; nd the special and particular expression 'professional actors, artists, lecturers, or sing-ers' is not a complete enumeration, but an example, of the class of persons covered by the exception. The general expression has a narrower meaning, and the particular expres-sion has a broader meaning, than would be found by literal construction.

"The language of a statute is not to be con-structed according to technical rules, unless such be the apparent meaning of the legis-lature. Therefore many cases, not express-ly named, may be comprehended within the equity of a statute, the letter of which may be enlarged or restrained, according to the true intent of the makers of the law." Whit-ney v. Whitney, 14 Mass. 88, 92, 93. "In some cases, the letter of the statute may be restrained by an equitable construction; in others, enlarged; and sometimes the con-struction may be even contrary to the letter."

Pierce v. Emery, 32 N. H. 484, 508; Bac. Abr. I, 6; People v. Lacombe, 99 N. Y. 49, 1 N. E. 599; Opinion of Justices, 8 N. H. 574; Davis v. School Dist., 44 N. H. 405; Opinion of Jus-tices, 7 Mass. 524-526; 'Walnut v. Wade, 103 U. S. 694; Inhabitants of Hallowell v. Inhabitants of Gardiner, 1 Me. 93; State v. Albee, 61 N. H. 423, 424, 429; Wooster v. Plymouth, 62 N. H. 193, 202; Sargent v. School Dist., 63 N. H. 528, 530, 2 Atl. 641; McDermut v. Lorillard, 1 Edw. Ch. 273, 277. "Instances without number exist where the meaning of words in a statute has been en-larged or restricted and qualified to carry out the intention of the legislature. The inquiry, where any uncertainty exists, always is as to what the legislature intended, and, when that is ascertained, it controls." Eureka Consol. Min. Co. v. Richmond Min. Co., 4 Sawy. 302, Fed. Cas. No. 4,548. "There is probably no jurisdiction in which a legislative purpose is carried into effect by a more liberal mode of construction than that which prevails in this state. But the most liberal construction is nothing more than the ascertainment of that purpose from competent evidence." Boston, C. & M. R. Co. v. Boston & L. R. Co., 65 N. H. 393, 399, 23 Atl. 529. "An intention to supersede local and special acts may * * * be gathered from the design of an act to reg-ulate, by one general system or provision, the entire subject-matter thereof, and to substi-tute for a number of detached and varying enactments, one universal and uniform rule applicable throughout the state." End. Interp. St § 231. "Special or local laws will be re-pealed by general laws when the intention to do so is manifest, as where the latter are in-tended to establish uniform rules for the whole state." Suth. St. Const. § 159. Earl of Derby v. Commissioners, L. R. 3 Exch. 121, L. R. 4 Exch. 222, was an action for constructing a sewer across the plaintiff's land in the town of Bury. A local act of 1846, relating to that town, authorized such work to be done by the defendants after notice and opportu-nity for a hearing. A general act of 1855 on the same subject contained no provision in relation to notice. No notice was given by the defendants. "A general act," says Mar-tin, B. (L. R. 3 Exch. 134), "relating to the sewage of towns, expressed to apply to the whole of England, and in no way referring to local acts, is to be construed according to the ordinary and natural meaning of the words used, and is not to be restricted or affected by local acts. If the contrary view be correct, the inevitable consequence will be that, in-stead of the general act operating uniformly and consistently throughout the kingdom, there will, as regards different towns, be so many different constructions as there are dif-ferent local acts varying in their provisions relating to sewers." The act of 1855 was "expressed to apply to the whole of Eng-land" by the use of ordinary terms of gen-eral legislation. In the exchequer chamber, the court say (L. R. 4 Exch. 226): "Many

cases were cited to show that special privileges conferred by statute upon individuals, or special constitutions imposed upon limited bodies, are not to be considered as repealed by subsequent general legislation not expressly or by necessary inference inconsistent with the former. Those authorities are only so many illustrations of the rule, '*Generalia specialibus non derogant.*' They are inapplicable to the present case, where the local act conferred upon the commissioners a power conditional upon giving notice, and the general act gives power to all such bodies to do the same thing without such notice."

A special act providing how prisoners of certain boroughs should be maintained in a jail of Essex county was held to have been repealed by a general law in which the special act was not mentioned. *Bramston v. Mayor, etc.*, 6 El. & Bl. 246. "In all cases," says Campbell, C. J. (page 251), "the statute must be construed according to what appears to be the intention of the legislature." The ground of the decision (page 253) is that "it appears to have been the intention of the legislature to sweep away all local peculiarities, though sanctioned by special acts, and to establish one uniform system, except in so far as there are express exceptions." In *Rex v. Trustees of Northleach & Witney Roads*, 5 Barn. & Adol. 978, the provisions of a local turnpike act concerning the inspection of books were held to be superseded by a general turnpike act which expressly declared the importance of a uniform system of turnpike law. "Otherwise," says Denman, C. J. (page 981), "the very evil would ensue which that act was intended to prevent, namely, the want of uniformity in the laws regulating turnpike roads throughout the kingdom." Without the express clause on the importance of a uniform system, and without a provision that special or local laws shall remain in force (Gen. Laws, c. 44, § 13), in the construction of such an act in this state there would be a presumption in favor of an intention to establish uniformity.

In 1855, a general law (chapter 1862, § 6) provided that "no policy issued by any insurance company * * * shall be void by reason of any error, mistake, or misrepresentation, unless it shall appear to have been intentionally and fraudulently made." In 1862 an amendment of the charter of an insurance company provided that any policy of insurance issued by that company shall be valid "in all cases where the assured has a title in fee simple, unincumbered, to the building, buildings, or property insured, and to the land covered by said buildings; but if the assured have a less estate therein, or if the property or premises are incumbered, policies shall be void, unless the true title of the assured and the incumbrances on the same be expressed therein." The claim of the company that, as to them, the general law of 1855 was modified and superseded by the special act of 1862, was not sustained. On the

ground of a presumed legislative intent to maintain equality and uniformity, the special act was held to operate in harmony with and subject to the general law. "The general drift of the constitution is distinctly hostile to the creation of discriminating and unreasonable privileges and immunities. * * * It is difficult to overestimate the weight of the natural presumption that the legislature did not intend either to pass an act that would be void, because evidently a breach of constitutional obligations, or to pass one that would so far indirectly defy the general spirit of the paramount law—though not in direct, open, and violent conflict with any of its specific provisions—as to be of doubtful validity. It is always to be presumed—and the presumption is to stand until the contrary is shown by an immense preponderance of evidence—that the legislature have not intended to disregard the doctrine of equal rights upon which our institutions are founded." *De Lancey v. Insurance Co.*, 52 N. H. 581, 592. "Corporate powers are conferred in subordination to the general laws of the land, and are so to be construed." *Tyng v. Warehouse Co.*, 58 N. Y. 308, 314. "The charter of a corporation is not presumed * * * to exempt it from subordination to general laws." *Pierce, R. R.* 494. "Presuming that all are equal before the law, we must administer it equally to all who do not clearly show their special exemption, shadowed by no doubts in its interpretation." *Kupfert v. Association*, 30 Pa. St. 465, 470. "Equality of rights, privileges, and capacities unquestionably should be the aim of the law; and if special privileges are granted, or special burdens or restrictions imposed in any case, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government. The state, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are always obnoxious, and discriminations against persons or classes are still more so; and, as a rule of construction, it is to be presumed they were probably not contemplated nor designed." *Cooley, Const. Lim.* 485. "It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances." *Holden v. James*, 11 Mass. 396, 406; *In re Dorsey*, 7 Port. (Ala.) 293, 360-362. In *Janesville v. Carpenter*, 77 Wis. 288, 46 N. Y. 128, the principle of equal and general laws was held to be essential to a free government. Of the special act of 1887 (chapter 423), the court say (page 302): "This statute is discriminating and class legislation, in violation of the spirit of our constitution. * * * It gives to a certain class of citizens privileges and advantages which are denied to all others in the state under like circumstances." "It * * * affords a safe rule of construction

for courts, in the interpretation of laws admitting of any doubtful construction, to presume that the legislature could not have intended an unequal and unjust operation of its statutes. Such a construction ought never to be given to legislative language if it be susceptible of any other more conformable to justice." *Cochran v. Van Surlay*, 20 Wend. 365, 382. "All statutes are to be construed as far as possible in favor of equality of rights." *In re Hall*, 50 Conn. 131, 137.

In some jurisdictions, inequality, resulting from an excess of special legislation, has been aggravated by construction. On this subject, as on others, the intention of the legislature, instead of being ascertained by a fair and reasonable consideration of all competent evidence, has sometimes been determined by an arbitrary rule. In practical effect, a rigid application of the rule amounts to a legal presumption of a legislative intent that special laws shall override general ones, both previous and subsequent. *End. Interp. St. § 223; Suth. St. Const. § 157; Sedg. St. Const. Law 361; Potter, Dwar. St. 273.* In some states the growing evil has been met by constitutional amendments, prohibiting special legislation in cases for which provision can be made by general law, and requiring that laws of a general character shall have a uniform operation throughout the state. *Cooley, Const. Lim. 152n.* In this state, more than elsewhere, legal effect has been given to the general declarations of the bill of rights, in which uniformity and equality are laid down as a rule of government. In 1827, the justices, answering a question proposed by the house of representatives, expressed the opinion that "the legislature cannot authorize a guardian of minors, by a special act or resolve, to make a valid conveyance of the real estate of his wards." "Under our institutions, all men are viewed as equal, entitled to enjoy equal privileges, and to be governed by equal laws. If it be fit and proper that license should be given to one guardian, under particular circumstances, to sell the estate of his ward, it is fit and proper that all other guardians should, under similar circumstances, have the same license. This is the very genius and spirit of our institutions. And we are of opinion that an act of the legislature to authorize the sale of the land of a particular minor by his guardian cannot be easily reconciled with the spirit of the article in the bill of rights which we have just cited." *Opinion of the Justices*, 4 N. H. 572-574. Notwithstanding the prevalence of a different view elsewhere (*Cooley, Const. Lim. 115-122, 479*), the opinion given in 1827 has been accepted in this state as sound, and the reasoning on which it was based has been applied to other classes of cases. *McDuffee v. Railroad Co.*, 52 N. H. 430, 454, 455; *Greenville v. Mason*, 53 N. H. 515, 518; *Bowles v. Landaff*, 59 N. H. 164, 194, 195; *Gould v. Raymond, Id.*, 260, 275, 278; *State v. United States & C. Exp. Co.*, 60 N. H. 219, 236, 238,

250, 251, 256; *Wooster v. Plymouth*, 62 N. H. 193, 217; *State v. Pennoyer*, 65 N. H. 113-115, 117, 18 Atl. 878. So far as equality of right depends upon the uniform and general character of legislation, the settled constitutional policy of the state is evidence of the meaning of many statutes, there being a presumption that they were not intended to conflict with that policy. The construction that favors and extends inequality by assuming the precedence and superiority of special laws having been rejected on the ground that it is not consistent with fundamental principles, the view held to be erroneous need not be further considered.

A lack of uniformity may result from the exercise of limited powers of local government granted to towns and cities. *Cooley, Const. Lim. 207, 223-231, 281, 282; State v. Hayes*, 61 N. H. 264. The legislature may be of opinion that the peculiar circumstances of a town, a business corporation, or an unincorporated person make a case in which there should be an exception to the general law of the land (*Cooley, Const. Lim. 479, 480; Brown v. Lowell*, 8 Metc. [Mass.] 172, 174); and the exception may be clearly enacted. When there have been special and general laws relating to the same subject, and it becomes necessary to determine which are in force, the first question is the competency of evidence. The effect of the act of 1844 and its repeal is a question of legislative intent; and the evidence includes the general and special character of various acts, and a presumed legislative regard for equal rights and for the convenience and justice of uniform law.

A special act is not to be declared void because it is opposed to a spirit supposed to pervade the constitution, but not made an operative part of it by express words or necessary implication; that is, by fair construction. *Cooley, Const. Lim. 87, 204.* But the principle of equality declared in the bill of rights cannot be classed with matters of conjecture and uncertainty. If it had not been held to be law, it would be a correct statement of the spirit of our institutions, and would be properly considered on many questions of statutory construction. The meaning of a written law is not found, beyond the fair scope of its terms, in a subsequent public policy, or a policy not sufficiently established at the date of the act to be presumably known to the legislature. *Story, Const. § 426; Suth. St. Const. § 407; End. Interp. St. § 5; Hadden v. Collector*, 5 Wall. 107, 111, 112. A part of the evidence tending to show the fair scope of the acts of 1844 and 1867 is a policy adverse to the unnecessary introduction or maintenance of unequal rights by special legislation,—a policy as old as the constitution, and distinctly stated in the *Opinion of the Justices* given to the house of representatives before 1844. Those acts could have been so written as to make it certain that the legislature of 1844 intended to introduce inequality among railroad companies by subjecting some

to the operation of sections 10, 11, 12, 13, 14, 15. and 16 of chapter 128, and leaving others under different regulations, and that the legislature of 1867 intended, by the repeal of that chapter, to relieve some from a supposed danger of being compelled to sell their property for less than its value, and to leave others exposed to that danger. No such purpose is expressed, and an imputation of it would not be a fair or reasonable construction. If such a purpose had been expressed in unmistakable terms, it would have been necessary to inquire on what ground it could be reconciled with the paramount law of equal right. *State v. Sheriff of Ramsey Co.*, 48 Mich. 236, 51 N. W. 112. "By the constitution of 1846, * * * corporations were authorized to be formed under general laws, and the creation of any, except for municipal purposes and in cases where the objects of the corporation could not * * * be attained under the general laws, was prohibited. One design was that all that desired to transact business in a corporate capacity might do so upon an equality, and with equal privileges and liabilities, with uniform powers, and under uniform restraints. Equality between corporations themselves, as well as equality between corporations and individual citizens, so far as the latter was practicable, was in the minds of the convention in framing this part of the constitution." *Johnson v. Railroad Co.*, 40 N. Y. 455, 458. To some extent a similar purpose is accomplished by the view taken of the bill of rights in Opinion of the Justices, 4 N. H. 572, and other cases before cited, and by the presumption of intended equality.

It may not be important whether, in form and name, laws are general or special, public or private. Their practical effect is the vital question. In character and operation, there is a wide difference between a general act making a universal rule, and a special act making a rule for a particular person or case; but, of the ancient distinction between public and private legislation, nothing is left of any significance in the present inquiry. Gen. St. c. 242, § 10. "In regard to private statutes, resolutions, etc., the only mode of proof known to the common law is either by means of a copy, proved on oath to have been examined by the roll itself, or by an exemplification under the great seal. * * * It is the invariable course of the legislatures of the several states * * * to have the laws and resolutions of each session printed by authority. * * * The very object of this provision is to furnish the people with authentic copies; and, from their nature, printed copies of this kind, either of public or private laws, are as much to be depended on as the exemplification, verified by an officer who is a keeper of the record." 1 Greenl. Ev. § 480; *Hall v. Brown*, 58 N. H. 93. By chapter 224, Laws 1835, it was made the duty of the secretary of state to cause to be printed, in pamphlet form, "all the public and private acts, and

resolutions of a public nature, passed at" each session of the legislature. In *Perry v. Keene*, 56 N. H. 514, 537, Judge Ladd examined the provisions of private acts, printed in pursuance of general law. In *Railroad Co. v. Greeley*, 17 N. H. 47, 62, and in *Manufacturing Co. v. Fernald*, 47 N. H. 444, 449, 450, 459, 460, judicial notice was taken of the public record of many private acts passed before 1835, and not printed. "Whether an act is public or private does not depend upon any technical considerations, * * * but upon the nature and substance of the case." *Dawson v. Paver*, 5 Hare, 415, 434. "Whether a statute be a law of a general nature or not depends * * * upon its subject-matter, and not upon its form." *State v. Ellet*, 47 Ohio St. 90, 94, 23 N. E. 981. "Acts may be local and special, immediately designed to affect only a part of the territory or people under the jurisdiction of the lawmaking power, * * * and yet be public, because being intended for a public object. Thus, acts * * * to organize corporations for canals, railroads, or turnpikes, when they contain provisions affecting the general public, * * * are, in this country, public acts." *Suth. St. Const.* § 193. "A statute, local or private in many of its provisions, may contain a section which is of a public or general character, and to be noticed as such." *End. Interp. St.* § 504. Several laws of a public and general character, both civil and criminal, were naturally inserted in railroad charters before a general system of railroad law was embodied in acts called "public." Being, in fact, general laws, they are to be regarded as such; and this view of them is material, the difference between general and special legislation being evidence to be considered in construing the act of 1844, and determining the effect of its repeal. When laws of a public and general character were transferred, with or without modification, from charters to statutes called "public," the transfer was made, generally, if not always, without express mention of the acts in which they were originally written. Upon the established rule of construction, the transfer, when made, as in 1844, for the purpose of revision and codification, would ordinarily be a repeal, so far as a repeal would be an exercise of legislative power.

The provisions of previous charters on the subjects covered by the act of 1844 were disposed of by section 21, which repealed "all acts and parts of acts inconsistent with the provisions of this act." If section 21 had been omitted, many sections of that act would have been a repeal. "A subsequent statute, revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of law, as well as in reason and common sense, operate to repeal the former." *Bartlet v. King*, 12 Mass. 538, 545. "When a statute directs something to be done in a certain event, and another law is made which appoints some-

else to be done, not contradictory, but comprehensive, and including the former. I cannot help thinking that the first act was." *Bramwell, B., in In re Baker, 2 & N. 219, 242.* "Even though two statutes relating to the same subject, be not in as repugnant or inconsistent, if the later statute is clearly intended to prescribe the rule which should govern the case provided for, it will be construed as repealing the former act. The rule does not rest strictly on the ground of repeal by implication, but on the principle that when the legislature makes a revision of a particular statute, and makes a new statute upon the subject-matter, from the framework of the act it is apparent that the legislature designed a complete scheme for this matter, it is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is discarded. It is decisive evidence of an intention to prescribe the provisions contained in the later act as the only ones that subject which shall be obligatory." *The v. Mayor, 40 N. J. Law, 257, 262; Cullen v. Smith, 39 N. J. Eq. 169, 172; Giddings v. Cox, 31 Vt. 607, 609; State v. Smith, Vt. 201, 203, 22 Atl. 604; Ellis v. Paige, 10 Vt. 43, 45; Leighton v. Walker, 9 N. H. 176, 182; Jewell v. Warner, 35 N. H. 176, 182; Keefe v. Phelps, 37 N. H. 295, 305; State v. Otis, 42 N. H. 71, 73; State v. Wilson, 43 N. H. 415, 419; Hillsborough Co. v. Manches, 49 N. H. 57, 60; Towle v. Marrett, 3 Me. 26; Heckman v. Pinkney, 81 N. Y. 211, 213; People v. Gold & Stock Tel. Co., 98 N. Y. 67, 78; Horton v. Cantwell, 108 N. Y. 255, 264, 15 N. E. 546; Anderson v. Anderson, 112 N. Y. 104, 110, 111, 19 N. E. 427; The New York Institution for Instruction of the Deaf and Dumb, 121 N. Y. 234, 239-241, 24 N. E. 378; Cromwell v. MacLean, 123 N. Y. 474, 475, 25 N. E. 932; Fayette Co. v. Fairles, 44 N. Y. 514, 517; Suth. St. Const. §§ 154-156.*

"Whether a subsequent statute repeals a former one in the absence of express words depends upon the intention of the legislature, and one of the tests frequently resorted to, to ascertain whether there is a repeal by implication, is to inquire whether the special and general acts may both be executed without involving repugnancy of rights or remedies. In some cases the question has been solved by holding that the general act was intended to declare a general rule governing cases not already provided for, and that a prior special statute on the same subject, operating upon a single person or class of persons, or within a limited territory, should be treated as if specially excepted from the operation of the general law. It will be found, I think, on examining the cases in which the courts have held that a special law was not repealed by a subsequent general law on the same subject, that they are, as a general rule, cases where the legislature was not dealing directly with the subject of the prior law, and it was not in the mind of the legislature when the gen-

eral law was enacted, or where the special law was part of a system of local administration, or where it was possible to assign a reasonable motive for retaining the special and peculiar provisions of the special act, notwithstanding the enactment of a subsequent general rule covering the same subject.

* * * The case is within the rule that a later statute, covering the same subject-matter, and embracing new provisions, operates to repeal the prior act, although the two acts are not in express terms repugnant." *People v. Jaehne, 103 N. Y. 182, 194, 195, 8 N. E. 374.* "Where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." *U. S. v. Tynen, 11 Wall. 88, 92; District of Columbia v. Hutton, 143 U. S. 18, 25, 26, 27, 12 Sup. Ct. 369.* In *Murdock v. Memphis, 20 Wall. 590*, one question was whether all or any part of section 25 of the judiciary act of 1789 was repealed by section 2 of an act of 1867. "The act of 1867," say the court (pages 616, 617), "has no repealing clause, nor any express words of repeal. If there is any repeal, therefore, it is one of implication.

* * * There is no repeal by positive new enactments inconsistent in terms with the old law. * * * A careful comparison of these two sections can leave no doubt that it was the intention of congress, by the latter statute, to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law, embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself, and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform." "While repeals by implication are not favored, it is well settled that where two acts are not in all respects repugnant, if the latter act covers the whole subject of the earlier, and embraces new provisions which plainly show that it was intended as a substitute for the first, it will operate as a repeal." *King v. Cornell, 106 U. S. 395, 399, 1 Sup. Ct. 312; Fisk v. Henarie, 142 U. S. 459, 468, 12 Sup. Ct. 207.* "If a particular statute is clearly designed to prescribe the only rules which should govern the subject to which it relates, it will repeal any former one as to that subject." *Cook County Nat. Bank v. U. S., 107 U. S. 445, 451, 2 Sup. Ct. 561; Tracy v. Tuffly, 134 U. S. 206, 223, 10 Sup. Ct. 527.*

If section 3, c. 230, Rev. St., had been omitted, the sections of railroad charters passed before 1842, making it a crime maliciously to obstruct the passage of cars, would

withhold from any company the notice to which others were entitled.

Section 10 of the act of 1844, repealed in the revision of 1867 (Gen. St. c. 273, § 14), was not re-enacted in that revision, as it would have been if the legislature had intended it should remain in force. If section 5 of the repealing chapter were applicable to the "right of resumption," so called, it would be, in effect, a re-enactment of section 10 of the act of 1844, as the law of all railroads in existence at the time of the repeal. Such a re-enactment would have made the repeal a mere exemption of other roads from the operation of the repealed section. A construction giving this effect to sections 5 and 14 of the repealing chapter would put an undesigned and novel inequality in the place of uniformity, in violation of elementary principles established by authorities that have been cited. The intention was to repeal a law that had been found useless for the purpose for which it was made, and, by the repeal, to recognize the equality of owners of railroads and owners of other property, and not to divide railroad companies into classes, in order to subject one class to, and exempt another class from, a risk of being compelled to sell their property for less than its value. The object of section 10 of the act of 1844 being neither to acquire a right of buying railway property for the purpose of selling it (86 N. H. 647, 33 Atl. 1036), nor to acquire a right of compelling the owners to sell it for less than its value, but to acquire a power of taking corporate railway property for public use if it could not be taken by eminent domain, this power of resumption was regarded in 1867 as a sovereign power of legislation, unnecessarily reserved in the act of 1844, and not as one of the vested rights of action or property necessarily excepted from the effect of repeal in every general revision of the statutes.

IN RE RICE'S ESTATE.

Appeal of FRAKE.

(Supreme Court of Pennsylvania. Jan. 20, 1896.)

EXECUTION OF WILL—EVIDENCE.

After a will has been duly proven by its two witnesses before the register, its execution cannot be disproved by the uncorroborated testimony of one of the witnesses directly contrary to that given by him under oath before the register.

Appeal from orphans' court, Philadelphia county; Hanna, Judge.

Petition by Carrie E. Frake for an issue as to the validity of a certain paper offered as the will of Elizabeth Rice, deceased. From a decree affirming a decision of the register of wills admitting said will to probate, and refusing an issue, said Carrie E. Frake appeals. Affirmed.

The opinion of the court below (Hanna, P. J.) was as follows: "The testimony in this

case presents a most remarkable state of facts. The contest is by a granddaughter of testatrix, to whom was given the income of the residuary estate for life, the effect of which, if successful, will be to set aside the will, defeat the pecuniary bequests, and entitle her to the entire estate, as sole heir at law. It is alleged in the petition that the testatrix, at the date of the execution of the will, was of unsound mind; that the will was procured by undue influence, exerted by certain of the legatees; and that it was not signed by her in the presence of the two attesting witnesses, nor was she present at the time they subscribed their names as witnesses. These are the reasons alleged for contesting the validity of the will. At the hearing the two former were abandoned by the contestant, and it was in fact conceded that testatrix was of testamentary capacity, and no undue influence had been used or employed by any one to procure the execution of the will; but the remaining alleged cause for the contest was insisted upon, and the testimony was confined solely to the formal execution of the will. From the facts shown, many of which are undisputed, it appeared: That testatrix, about two years prior to the execution of the present will, employed her counsel to prepare for her a will which was executed by her in the presence of her counsel and a very near neighbor, with whom she had been intimately acquainted many years. That a few weeks prior to January 26, 1892, she concluded to have another will prepared, and accordingly again gave instructions for its preparation to her counsel, the same gentleman who had been employed to prepare the prior will; and also informed her neighbor, the other subscribing witness thereto, of her intention, and expressed a wish to him that he would be a witness also to the new will she was having prepared. The new will was prepared, and sent to testatrix by her counsel for her examination, and an appointment was made by him with her to call at her residence, and witness its execution. In pursuance of this appointment, on the morning of January 26, 1892, on his way to his office, he called at the home of testatrix. She was within, and produced the will he previously sent to her. But the neighbor whom she desired as the other witness was not present. Testatrix immediately sent for him, and requested his attendance. While her messenger crossed the street, testatrix stood in the open doorway, and when the former returned left the door and retired to an inner room, where her counsel was in waiting. The sought-for witness immediately answered the summons, and also went into the inner room, and in perhaps less than five minutes, having apparently accomplished the purpose of his visit, he left the house of testatrix, and returned to his place of business. The counsel of testatrix also soon after departed, leaving the will with his client. This, as

ted, was on January 26, 1892, and testatrix survived until April 30, 1893. On May 1893, the will was produced before the register. The counsel for the late testatrix, a neighbor for whom she had sent to witness her signature to her will, the friend she named as executor, her granddaughter, the attestant, with her counsel, were all present. No caveat had been or was filed, and the slightest objection made to the admission of the will to probate. Both subscribing witnesses were sworn or affirmed, and testified and subscribed 'that they were present, and did see and hear Elizabeth Rice, deceased, the testatrix therein named, make her mark, seal, publish, and declare the same and for her last will and testament; and at the doing thereof she was of sound, disposing mind, memory, and understanding, to the best of their knowledge and belief.' Upon the faith of this testimony the register admitted the will to probate, and admitted letters testamentary. But, strange to say, after all these formalities were complied with, without demur or objection from any person, seven months afterwards, a most incredible story is told by one of the subscribing witnesses, the intimate friend and near neighbor of testatrix. After being duly sworn, and testifying he was present, and saw her make her mark on the will, and declare the same to be her last will and testament, by the same solemn sanction he swears that, while he signed the will as a subscribing witness, yet she was not present at the time, and he wrote his signature as a witness in her absence, and at the suggestion of the counsel for the testatrix. But he is not corroborated in a single particular, and his narrative of what took place is so repugnant and incredible that it must be rejected as wholly unfounded in fact. On the other hand, the account of the transaction given by the other subscribing witness, the counsel for the testatrix, is directly the opposite, and, moreover, so much in harmony with the probabilities of the case and of high character as a member of the bar, that it cannot for a moment be doubted. In addition, he is corroborated in every particular by his co-witness, except as to the very act of signing, and by the messenger of the testatrix who summoned the witness. His testimony is most direct and positive that the testatrix made her mark in the presence of both the subscribing witnesses. And the executor also testified that she placed the will now in contest in his safe-keeping, after its execution, declared it to be her will, and stated that the persons whose names are affixed as witnesses had witnessed it.

"It is requiring too much of the judges of this court, who have favorably known and highly esteemed the counsel for the administratrix, a reputable member of this bar, for more than a quarter of a century, a gentleman of high sense of honor and integrity, who is respected both in public and private

life, and has occupied and now holds positions of public trust and confidence, to believe that he would so far forget his fealty to the court and loyalty to his client as to be a party to such an act as is now attempted to be imputed to him, and, more than that, commit the infamous crime of perjury. And as to the other subscribing witness it need only be said that after his oath before the register, made, as he admits, voluntarily, and without suggestion or solicitation from any person whatever, when he attempts to discredit it it must be by far more reliable and credible testimony than his own uncorroborated denial. His testimony before the register must be taken as that which can be relied upon; not what he now says, which, in charity to him, must be the production of forgetfulness, or the result of illness from which he has recently suffered. And such a witness, attempting to impeach the validity of his own act, is always regarded with the greatest suspicion. His testimony is never received except with the most scrupulous jealousy and doubt of its truth. *Bootle v. Blundell*, 19 Ves. 504; *Cook's Estate*, 16 Phila. 322; *Greenough v. Greenough*, 11 Pa. St. 498. Here he admits his signature as a subscribing witness to the will, and believes the paper he subscribed to be the will of testatrix. This being the case, as was said by Thompson, J., in *McKee v. White*, 50 Pa. St. 360, 'proves the instrument in the first place, and it stands until like any other fact it is disproved,' and to which is to be added his oath before the register, in the absence of which the will could not have been admitted to probate. The execution of the will by testatrix is thus *prima facie* proved by two witnesses, as the statute requires, and should not be allowed to be overcome by the uncorroborated testimony of a single subscribing witness, who confesses himself a perjurer. It would be against public policy to permit it, and, instead of closing, open wide, the door to fraud the most dangerous and the most difficult to expose and circumvent. Indeed, no will could with safety be admitted to probate. And under such testimony as here presented, it would be a perversion of justice and a crime to send an issue to a jury. In the face of the positive and corroborated testimony of the other subscribing witness, and all the surrounding facts and circumstances, should a verdict be rendered against the validity of the will, no judge would be justified in sustaining the verdict, and in justice and equity his plain duty would be to set it aside. This, happily for the cause of justice and the best interests of the community, is now the well-settled law of the state, and is consistently and firmly adhered to. In the latest cases upon the subject it is recognized and followed. *Miller v. Oestrich*, 157 Pa. St. 277, 27 Atl. 742; *Pennsylvania's Estate*, 157 Pa. St. 465, 27 Atl. 669. In the latter it is said: 'Viewing the testimony in its most favorable light, there is

nothing in it that would warrant a jury in rendering a verdict against the validity of the will.' Our conclusion, therefore, in the present case, is that the presumptions of law arising from the facts, conceded and proved, that the will was properly executed by testatrix in the presence of two witnesses, is not overcome by credible and reliable testimony; and, as a verdict against the will will be against the weight of the evidence, and should not be allowed to stand, the issue is refused, petition dismissed, and the decision of the register affirmed."

Allen H. Gangewer and J. J. Crandall, for appellant. Arthur Moore and John G. Johnson, for appellees.

PER CURIAM. We have no doubt as to the correctness of the decree refusing an issue devisavit vel non and dismissing the petition. The court was fully warranted in concluding that the will in question was properly executed in the presence of two witnesses. There was no reliable testimony to the contrary. A verdict in favor of the contestant would be against the decided weight of the evidence, and could not be permitted to stand. We find nothing in the record that requires further notice. The controlling questions in the case have been fully considered and correctly disposed of by the learned court below, and on its opinion we affirm the decree. Decree affirmed, and appeal dismissed, with costs to be paid by the appellant.

DURST v. CARNEGIE STEEL CO., Limited.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

INJURY TO EMPLOYE—NEGLIGENCE—FALLING IN OF DITCH.

1. When the master intrusts to the superintendent in charge of an excavation the matter of notifying the employes of any latent danger, the foremen in charge of the gangs engaged in the work or excavation are not vice principals in the absence of said superintendent, so as to render the employer liable for their failure to notify the employé of such danger.

2. When the only possible danger to an employé engaged in making an excavation is such as may arise during the progress of the work, the employer is not bound to stand by during the work to see if a danger arises, it being sufficient if he provides against such dangers as may possibly arise, and gives the workmen the means of protecting themselves.

3. Injuries to a workman engaged in making an excavation through the falling of earth upon him are not shown to have resulted from the negligence of the employer, by the fact that he knew that a sewer ran through the place where the excavation was to be made, and failed to warn the employé.

Appeal from court of common pleas, Allegheny county.

Action by Henrietta Durst against the Carnegie Steel Company, Limited, for the death

of plaintiff's husband. From a judgment for defendant, plaintiff appeals. Affirmed.

The opinion of the court below, refusing to take off nonsuit, was as follows:

"This was an action to recover damages from the death of Andrew Durst, the husband of plaintiff, who was an employé of defendants, and lost his life by the fall of an embankment of earth into a ditch, which he was engaged with others in digging on the 18th of October, 1893. The defendants were engaged in making an excavation for new buildings at their works at Homestead. The excavation was to be about 50 feet square and 15 feet deep. The plan adopted was to dig a trench 8 feet wide around the outside of the full depth, and afterwards remove the core. The purpose of this was to provide means for bracing the sides in case of necessity. The work was laid out by the engineer, and its execution was under the direction of John Molampy, superintendent of labor. A considerable amount of work had been done on the southern and eastern sides, and perhaps some, but not much, on the northern and western. The work was being prosecuted at night as well as by day. The deceased was engaged on the night gang, and had been at work three or four nights. He was not an ordinary laborer, but was so employed in absence of work at his usual employment. A great many excavations had been made in this ground, which was the site of the city poor farm, which had been purchased from the city of Pittsburg, some of them to a greater depth than 15 feet. The ground was generally clay or shale, with a layer of sand at the depth of about 11 feet. It was generally found necessary to shore the sides of the cut, and brace them upon reaching the sand, and in some instances before doing so. An ample supply of plank and braces was provided and on the ground, ready for use when necessary. Carpenters were within call, charged with the duty of putting the braces in place. Each gang of men was in charge of a foreman, who superintended the work. They were instructed to call on Mr. Molampy or the carpenters whenever bracing was needed, in daytime or at night. When the day turn went off duty on the day of the accident, about 6 o'clock, the eastern trench was about 6 or 7 feet deep. About this time Mr. Molampy and the boss carpenter were there, and decided that it was not necessary to brace at that time. The night gang went to work, and about 11 o'clock they had reached a depth of 10 or 11 feet in the eastern trench, when a portion of the inner wall fell, resulting in the death of Durst and the serious injury of another workman. It did not clearly appear whether or not they had at that time reached the sand, though it is possible they had not. It was further shown that there was a considerable number of sewers and pipes in this ground, which had been used for the poor-

use. The engineer of the defendant company had procured a diagram showing the location of these pipes, but it did not appear whether he had shown it to any other official. They, however, knew that these pipes were there, having encountered them in other excavations, and Mr. Molamphy had given

instructions to the foreman that no pipe which might be discovered should be cut until it had been examined specially with reference to its use. During the afternoon

October 18, 1893, a pipe sewer was discovered crossing the southern trench, and running north and south through the core parallel with the eastern trench, and about 18 inches to 2 feet from the side of the cut, and about 6 or 7 feet below the surface. After the embankment had fallen away, this pipe was exposed. This was known to the remainder of the day gang, but he did not inform Mr. Molamphy of the fact. It further appeared that the ground in this trench was hard clay or shale. This, we think, is a full and fair statement of the case as shown by the testimony. There was no evidence as to any difficulty caused by sewers in other excavations, nor that by the nature of the ground there was any apparent danger from the proximity of this sewer to the cut, nor any indication of danger from any source which would have been discovered by proper

care, so that plaintiff's case depended solely on the fact that the sewer was close to the cut, that the defendants knew or could have known that it was there, and could have provided against it. Upon motion a compulsory nonsuit was granted. Upon motion to take off nonsuit counsel for plaintiff have furnished us with an admirable brief referring to all the important cases on this subject, but, after a full consideration of these cases and the able argument of counsel, we are of the opinion that the court did not err in entering the nonsuit.

"The principles of the law governing such cases are well established. The difficulty arises in their application to particular cases. An employé assumes all the ordinary risks of the business in which he may be employed. This includes accidents caused by the negligence of coemployés. But the master owes certain duties to the employé, and among these is to furnish a reasonably safe place to work, and to notify the employé of any latent danger of which the employer has knowledge, or with reasonable care would know. These duties cannot be avoided. If the master intrusts them to another, the latter becomes a vice principal, and the master is liable for any neglect by him in performance of the duties imposed by law upon the principal. It does not matter how many intermediates there may be, the person to whom the duty is committed is such vice principal. In this case the duty was intrusted to John Molamphy, superintendent of labor, who had charge of all excavations. The company was therefore re-

sponsible for any neglect by him to perform the duty imposed by law upon them. It is contended that Patterson and McMillan, who were foremen of the gangs engaged at this work, were charged with the duty of protecting it in absence of Molamphy, and were therefore vice principals for the time being. We do not so understand it. They were mere foremen in charge of the men, supervising and directing their labor. Under all the cases they were coemployés with the men under their charge. *Railroad Co. v. Bell*, 112 Pa. St. 400, 4 Atl. 50; *Reese v. Biddle*, 112 Pa. St. 72, 3 Atl. 813, and cases there cited. We do not understand that Molamphy turned over any of his duties to them, but merely instructed them, in cases of necessity, to call him or the carpenter to provide against danger. There was no evidence to show contributory negligence on part of deceased. The only question, therefore, is whether there was evidence of neglect on part of Molamphy to perform any of the duties imposed by law upon the defendants. The duty which it is alleged was neglected is that of furnishing a reasonably safe place to work. It will be observed that the place as it stood when the work commenced was perfectly safe. The danger could only arise as the work progressed, and be caused by the work done. In such a case we do not think it is the duty of the employer to stand by during the progress of the work to see when a danger arises. It is sufficient if he provides against such dangers as may possibly or probably arise, and gives the workmen the means of protecting themselves. They should look out for such dangers, and use the means provided: *McKinzle v. Philadelphia*, 46 Leg. Int. 506; *Coke Co. v. McEnery*, 91 Pa. St. 185; *Walton v. Hotel Co.*, 160 Pa. St. 5, 23 Atl. 438. In this case the defendants had furnished all the materials for shoring, and competent workmen to put it in place, and foremen who were instructed to call upon the superintendent or carpenters whenever any danger appeared. But it is said that the accident in this case occurred because of the proximity of a sewer to the place of working; that this was known to the company, or ought to have been known, before the deceased went to work that evening. That the location of the sewer and its relation to this trench might have been known by using the plot in the possession of the engineer, and making accurate surveys of the ground, is certain. It is possible that it might have been known from the course of sewers struck in other excavations, but it does not appear to have been actually known to Mr. Molamphy, the superintendent. It was known to McMillan, one of the foremen, but he did not tell Mr. Molamphy. But with all this plaintiff's case falls in proof that a failure to ascertain the exact location of this sewer, and to know that it had been struck that afternoon, was negligence of duty on part of the company.

There is no evidence that the existence of sewers in the ground was in itself an element of danger and rendered excavations unsafe. That would depend on the size and character of the sewer and nature of the ground. The evidence does not show that the accident was caused by the presence of the sewer. There was no evidence that there was any indication of weakness before the accident happened; presumably there was not, or the foreman would have ordered the shoring. There was no evidence of the condition of the ground afterwards,—whether it fell from the top only or from under the sewer as well. So that the fact that the accident was caused by the sewer would only be an inference from the fact that after the fall it was exposed; in other words, it would be to infer negligence from the happening of the accident merely. *Heating Co. v. Bohan*, 118 Pa. St. 223, 11 Atl. 789; *Railroad Co. v. Hughes*, 119 Pa. St. 301, 13 Atl. 286. But an employer is not an insurer. In such a case he is only bound to reasonable care. He is not bound to provide against danger that an ordinarily prudent man would not anticipate. To hold defendants responsible, the evidence should show that the sewers presented a dangerous obstruction to excavation, and that any ordinarily skilled and prudent man would have known it. As before said, this would depend on the size and character of the sewer, and the nature of the ground, and could only be ascertained in the progress of the work. There was no evidence in the case upon this subject, and the testimony as to the nature of the ground would tend to show that no such danger would be apprehended. So that, in order to convict defendants of negligence, it would be necessary to infer from the mere happening of the accident that it was caused by the sewer, and that the danger was apparent, and was known, or should have been known, to the defendants. Unless this last fact is found, then the duty of notification would not arise. Defendants, of course, could not be required to notify an employé of a danger they did not apprehend or have reason to apprehend. But, aside from this, we do not think it is incumbent on an employer to see every person employed. When men are employed in gangs, it ought to be sufficient to notify their foreman. The foreman knew as much of these sewers as the defendants, and McMillan knew of this one."

L. L. Davis and D. R. Jones, for appellant. Knox & Reed, Gibson D. Packer, and Edwin W. Smith, for appellee.

PER CURIAM. The opinion of the learned court below on the motion to take off the nonsuit is so full, clear, and convincing that for the reasons there stated, and upon the authorities cited, we affirm the judgment in this case.

SNODGRASS v. CARNEGIE STEEL CO.
(Supreme Court of Pennsylvania. Jan. 13, 1896.)

INJURIES TO EMPLOYE — BOILER EXPLOSION — INCOMPETENT SERVANT—EVIDENCE.

1. An employé injured by an explosion of a boiler cannot recover without showing by affirmative testimony that the explosion was one for which the defendant was liable.

2. Evidence that plaintiff told one of defendant's officers that the man in charge of the boiler was incompetent is insufficient to show that he was incompetent, and that he was retained in defendant's employ with knowledge of his incompetency.

3. Testimony by plaintiff that he told defendant's manager that the coemployé was incompetent, when contradicted by the testimony of the manager himself, will not sustain a verdict for plaintiff on the ground of defendant's knowledge of such incompetency.

Appeal from court of common pleas, Allegheny county; Magee, Judge.

Action by John Snodgrass against the Carnegie Steel Company. From a judgment for plaintiff, defendant appeals. Reversed.

Knox & Reed, Gibson D. Packer, and Edwin W. Smith, for appellant. Thomas M. Marshall and Rody P. Marshall, for appellee.

GREEN, J. The solitary ground upon which it is claimed that the defendant was liable in damages for the plaintiff's injury is that the defendant was guilty of negligence in employing a fellow servant by whose negligence the injury was occasioned. This makes it necessary to inquire, for a moment, what is the law in regard to this kind of liability. The rule of law on that subject is very clear, and altogether unquestioned. It is thus expressed in the case of *Frazier v. Railroad Co.*, 38 Pa. St. 104: "The fundamental averment here is that it was because of the carelessness of the conductor that the brakeman was injured, and, in order to show that the company was responsible for this, it is averred that they were in fault in knowingly or negligently employing a careless conductor."

* * * The question of character thus became an important one, and we are constrained to say that it was tried on improper evidence. Character for care, skill, and truth, of witnesses, parties, or others, must, all alike, be proved by evidence of general reputation, and not by special acts. The reasons for this have been so often given that we need not repeat them. 1 Greenl. Ev. §§ 461-469; *Elliott v. Boyles*, 31 Pa. St. 67. Character grows out of special acts, but is not proved by them. Indeed, special acts do very often indicate frailties or vices that are altogether contrary to the character actually established.

* * * Besides this, ordinary care implies occasional acts of carelessness, for all men are fallible in this respect, and the law demands only the ordinary." In *Oil Co. v. Gilson*, 63 Pa. St. 146, *Sharswood, J.*, delivering the opinion, says: "There is no difference between liability to a stranger and to a servant for a man's own negligence or want

of skill, though a master is not responsible for an injury to a servant by the negligence of a fellow servant, unless he has failed in ordinary care in the employment of the culpable party,"—citing a number of authorities. In *Coke Co. v. McEnery*, 91 Pa. St. 185, Mr. Justice Paxson, delivering the opinion, said: "The deceased having lost his life by the giving way of defendant's bridge, over which he was passing at the time with a mule team, it was a necessary part of the plaintiff's case to show that the bridge had not been properly constructed. The defense was that the defendant had not exercised ordinary skill and care in the selection of employés to construct it. The defense is ample, if made out. * * * The defendant showed, and it was not disputed, that it employed Henry Willard to construct this bridge, and that he was a carpenter and bridge builder of experience. It is not enough for the plaintiff to show that his work was unskillfully done, or that he was incompetent. It must appear that the defendant was guilty of negligence in selecting him,—that it either knew he was incompetent, or, with proper diligence, might or ought to have known it. The law presumes it exercised ordinary care and skill in making the selection. The defendant is as much entitled to this presumption as the plaintiff is to the presumption that the deceased exercised ordinary care in crossing the bridge. It will not do to have all the presumptions on one side. It follows that the burden of proof of showing that the defendant did not exercise ordinary care and skill in the employment of Mr. Willard rests upon those who assert it,"—citing many cases. It is unnecessary to extend the citations. The law as above stated is unquestioned.

It is only necessary, now, to recur to the testimony, in order to determine whether it conforms with the requirements established by the foregoing decisions. The writer has read the whole of the testimony delivered on the trial with the utmost care, and is obliged to say that it utterly fails to establish a single condition of liability in this class of cases. There is absolutely no evidence in the cause that the defendant employed an incompetent person, whose negligence caused the plaintiff's injury, either knowing, or having any reason to know, the fact of his incompetency. The theory of the plaintiff's case is that he was injured by escaping steam from a boiler in the defendant's works which exploded, and that the explosion was the result of the negligence of one Snyder, who was a fellow servant with the plaintiff in attending the boilers in the boiler house of the defendant. They were both engaged in the same service, 12 hours each out of the 24, and the particular service was keeping the boilers properly supplied with water at all times. The explosion took place about 1 o'clock in the day, while Snyder was on duty; Snodgrass, the plaintiff, having gone off at 12 o'clock, one

hour before. In order that the plaintiff might recover against this defendant, he was bound to show, by affirmative testimony, (1) that the explosion was the result of some negligent act or omission of the fellow servant, Snyder; (2) that Snyder was an incompetent servant for the duty he had to perform; and (3) that the fact of his incompetency was known to the defendant when he was employed, by means of his having a reputation for incompetency, or by acquiring a knowledge of it during his employment, and before the accident. The first difficulty with the plaintiff's case is that he entirely fails to prove that the explosion was the result of any negligent act or omission of the fellow servant Snyder. At the end of the plaintiff's testimony there was no evidence to prove what was the cause of the explosion. The plaintiff did not give, or attempt to give, any evidence on that subject. The fact of the explosion was proved, and the injury to the plaintiff; but no witness was examined, and no testimony was given, or offered, to show the cause of the explosion. Of course, boiler explosions may occur from different causes. Defective material, overburning weak parts of the boiler, so as to cause attenuation of the plates, overheating by the person in attendance before the fellow servant went on duty, an insufficient supply of water to the proper elevation indicated by the gauge cocks, and a sudden impouring of cold water on the heated plates,—all of these were testified to as causes which might produce explosions. But, out of them all, there was only one for which the fellow servant in charge at the time of the explosion would be responsible, and that is the omission to maintain a proper elevation in the boilers. On that subject there was not a particle of testimony in the cause. The only witness who was examined on the subject of the cause of the explosion, was W. F. Bailey, the man who had charge of this part of the work. He was asked, on cross-examination, what caused the boiler to explode, and replied that there were different causes that might have occurred, explaining them. He added: "Well, I am under the impression we were short of water in the boilers. Still, as I say, that sheet might have been heated on the turn before this man came on, and the great heat that was in there, and the pressure of steam still in that boiler, would draw that sheet until it would stand no longer, and get very thin, and then, if they got a little more pressure on the boiler than what there had been before that, it might have let go." He was asked: "Q. In your opinion, it was the want of water that caused that boiler to blow up? A. I won't say positively. There was at one time, but I wouldn't say it was at the time it let go. There was a great deal of water came out of it at the time it let go." After saying that the flues were not collapsed, and that not a rivet was put in them when the

boiler was repaired, he was asked: "Q. You don't know what caused that boiler to explode? A. No, sir; not positively." There was no other testimony than that of this witness on this subject, and the substance of his testimony was that there were different causes that might have produced the explosion, and he did not know how it was produced. When it is considered that there can be no recovery unless the plaintiff proves, by affirmative testimony, that the cause of the explosion was one for which the defendant was liable, and he simply proves that the cause was unknown, his proof is radically defective, and he cannot recover for that reason. The jury could only reach a verdict by conjecture, without proof; and this, as we have many times said, is insufficient.

But, in the next place, there was not a particle of proof in the cause that the defendant employed the fellow servant knowing that he was incompetent, and there was no proof that he had the reputation of being incompetent. Not a word of testimony was given or offered on this most vital subject. Not a witness testified that he had such a reputation. One witness, Bebout, said he had known him for several years before the accident, and that he knew him as being engaged in other pursuits at different times; but not a word did he say touching his reputation as a workman or as a boiler tender. There was a total failure of proof that the man had any reputation as an incompetent workman where he was employed. But there was affirmative proof by the defendant's witness Bailey that when Snyder came there he was recommended as an engineer; that he took him around the boilers, and explained to him what he was to do; that he was intelligent, and understood at once what he was to do, and took it up immediately; that he regarded him as an entirely competent workman, and never had any occasion to think otherwise. In the absence of any proof of bad reputation as a workman, the plaintiff undertook to prove his incompetency, and the defendant's knowledge of it, by testifying that, on two or three occasions, he told Bailey that Snyder was not a fit person to tend the boilers. His testimony was that, on August 23d, "I told him [Bailey] that that man was not capable of handling them boilers, and he said he knewed he wasn't; and he says, 'Do the best you can for a few days.'" He said he again complained on the following Saturday, the 27th, that Snyder "came in the boiler house and put a monkey wrench onto one of the feed valves, and gave it a twist, and broke it, and let the hot water run out. Q. What did you do? A. I ran after Bailey, and I couldn't find him, and so I got the pipe fitters, and put another valve in. Q. Did you say anything to Mr. Bailey at that time? A. After we got the steam started, I says, 'You didn't get a man in Snyder's place; now you can get one in mine.' And he says, 'No; you stay where you are, and I'll get you a man right away.' Q. What

else? A. He said Snyder was all right. There was no danger of burning or doing any harm to the boilers,—to just watch him." On one other occasion, soon after Snyder came, the plaintiff says, "I told him [Bailey] there was too many boilers for the man to handle,—that he was not competent."

There are three radical defects in this testimony to make out the essential requirement of the plaintiff's case: (1) It is the mere declaration of the plaintiff that he told Bailey that Snyder was incompetent, without any statement as to how or why he was incompetent. (2) It contains no proof of any actual incompetency. (3) The declarations are absolutely denied by Bailey, who is a disinterested witness. As to the first, it will be observed that the witness simply says he told Bailey that Snyder was incompetent, but gave no reason for saying so, and gave no particulars in support of his statement. He did not say, but implied, on the last occasion mentioned, that he was incompetent to handle so many boilers, which would be his opinion only as to Snyder's physical competency. On the occasion of Snyder's breaking one of the feed valves with a wrench, it did not follow that he was in the least degree incompetent, as the valve might have broken from inherent weakness, and there was no explanation. On the other occasion, he merely said Snyder was incapable of handling the boilers. Bearing in mind, now, that the undertaking of the plaintiff is to prove the knowledge by the defendant of Snyder's actual incompetency, and retaining him in its employment after such knowledge, it will be seen at a glance how entirely inadequate the foregoing proof is to that exigency. The plaintiff does not claim that he informed Bailey of any actual facts showing real incompetency, and therefore it could not have any knowledge on that subject. The plaintiff's declaration might be true, or it might not, but it did not impart the least information of any actual incompetency, and therefore it cannot be said that the defendant had any such knowledge. Nor is a jury in any better situation as to this essential fact. How can they find, upon such testimony, that the defendant had any knowledge of any actual incompetency of Snyder's? It is impossible, because the jury do not know, themselves, whether such was the fact. In the next place, not a particle of proof of actual incompetency was given in evidence. The plaintiff did not pretend to say that Snyder had done any acts which were careless or negligent; as, for instance, that he had allowed the water in the boilers to get too low. There is not a fragment of testimony in the whole cause showing that or any other act of incapacity or negligence. How, then, could the defendant have knowledge of any actual incapacity or negligence on the part of Snyder, and thereby become chargeable with the consequences of such knowledge? The liability of the defendant does not arise upon the mere declaration of some witness of the fact

of incompetency of its agent, but upon proof of the fact of actual incompetency imparted to it, and of that there is not a particle of proof in this case. But, in the third place, the declarations, such as they were, are denied absolutely, emphatically, and positively by Bailey; and the case stands upon the testimony of the plaintiff, a most deeply interested witness in his own favor, and the entirely disinterested testimony of Bailey in flat contradiction. It is not enough to reply that the jury is the judge of the credibility of witnesses. The case involves a peculiar phase of liability, depending upon the knowledge by the defendant of a certain fact. Considering that there is no proof of the fact in question, and that there is no evidence in support of the charge of knowledge by the defendant, except the interested declaration of the plaintiff himself, against the disinterested denial of the declaration by the person to whom it was alleged to be made, the case presents nothing more than a mere scintilla of proof entirely insufficient to sustain a verdict.

But, to cap the climax of the insufficiency of proof, it was not proved that the explosion of the boiler was the result of any negligent act or omission of the fellow servant; and nothing but a tissue of conjectures, without any proof of actual facts to support them, could enable a jury to find a verdict for the plaintiff. But lawful verdicts cannot be rendered upon such principles. We are clearly of opinion that the evidence is entirely insufficient to justify a verdict for the plaintiff, and therefore sustain the fourth, fifth, and sixth assignments of error. It is not necessary to consider the other assignments. Judgment reversed.

SCHWAN et al. v. KELLY et al.

(Supreme Court of Pennsylvania. Jan. 6, 1896.)

RES JUDICATA—IDENTITY OF SUBJECT-MATTER.

Where vendees of land, claiming the right to rescind for fraud, tender a deed of reconveyance, and demand the repayment of the part of the purchase money paid, and the vendors deny the right to rescind, and then foreclose a mortgage given them by the vendees for the balance of the price, the judgment in the proceeding on the mortgage is not a bar to a bill subsequently filed by the vendees to rescind the contract and to obtain the return of the purchase money.

Appeal from court of common pleas, Allegheny county.

Bill by Charles Schwan and others against Joseph M. Kelly and others. From a decree for defendants, plaintiffs appeal. Reversed.

James S. Young, S. U. Trent, A. Leo. Weil, and C. M. Thorp, for appellants. Knox & Reed and William F. & Charles S. Wise, for appellees.

FELL, J. The vendees in a contract for the purchase of land, claiming the right to

rescind on the ground of fraud, tendered a deed of reconveyance, and demanded the repayment of the part of the purchase money which they had paid. The right was denied by the vendors, who then caused a scire facias to issue on the mortgage which had been given them by the vendees for the unpaid balance of the purchase money. At the trial no defense was interposed, and under the judgment obtained the property was sold by the sheriff, and purchased by the plaintiffs in that action. A bill subsequently filed by the vendees to rescind the contract, and to require the return of the purchase money, was dismissed by the court of common pleas on the ground that the judgment on the scire facias was an adjudication of all matters set up by the bill, and a bar to the proceedings. The rule that what has been judicially determined shall not again be made the subject of controversy extends to every question in the proceedings which was legally cognizable, and applies where a party has neglected the opportunity of trial, or has failed to present his cause or defense, in whole or in part, under the mistaken belief that the matter would remain open, and could be made the subject of another proceeding. A verdict and judgment in a suit on a mortgage establish the fact that the debt is due, and preclude the defendant from setting up fraud as a defense in an action on the bond, and are conclusive on this ground in an action of ejectment for the land sold under the judgment (*Lewis v. Nenzel*, 38 Pa. St. 222), as are a former verdict and judgment for plaintiff in replevin on an issue of rent in arrears conclusive in a subsequent action in assumpsit for the same rent (*Cist v. Zeigler*, 16 Serg. & R. 282). So will the failure of an action to recover for the non-delivery of goods purchased estop the defendant in a suit for the price from denying the delivery. *White v. Reynolds*, 3 Pen. & W. 97. So, also, a judgment recovered against a physician for malpractice is a bar to a subsequent action by him for services in the course of which the malpractice occurred. *Edwards v. Stewart*, 15 Barb. 67. The same principle controlled the decisions in *Haneman v. Pile*, 161 Pa. St. 590, 29 Atl. 113; *Bierer v. Hurst*, 162 Pa. St. 1, 29 Atl. 98; and *Wilson v. Buchanan*, 170 Pa. St. 14, 32 Atl. 620,—where questions which had been decided on the merits at law were presented on the same grounds in equity. In these cases, and many others depending upon the same principle, the precise question had either been decided by a court of competent jurisdiction, or the judgment in the first suit had negatived by implication the foundation of the second. Generally the estoppel extends to any allegation which was at issue and determined in the course of the proceedings which went to establish or disprove either the plaintiff's case or that set up by the defendant. *Stevens v. Hughes*, 31 Pa. St. 381; *Beloit v. Morgan*, 7 Wall. 610. But

permitted to carry out a certain contract with defendant. From a judgment for plaintiff for a nominal sum, he appeals. Affirmed.

The charge of the court (Kennedy, Judge) was as follows:

"This action is brought for the purpose of recovering, by the plaintiff from the defendant, profits which, he alleges, would have accrued to him for certain work contracted to have been done by him for the defendant, and which he was prevented doing by the defendant. In other words, he made a contract for the doing of certain work for the defendant company in connection with its construction, namely, excavating along the line of its road, which, he claims, he was prevented from doing, and which, if he had been allowed to do, he would have realized profits from it, and for those profits he asks a verdict at your hands. It seems that, in the month of March, 1887, a contract was entered into between the plaintiff and the defendant company for the doing of certain work in connection with the construction of the defendant company's line over on the other side of the river, in Allegheny, and a part of that work was the excavation for places to locate their trestles which support the track of the defendant company. The contract bears date the 25th of March, 1887. In connection with that is a letter, or a proposition, from the plaintiff, Mr. Huckestein, dated in February preceding. This letter is important, in that it at least bears upon the construction of the contract. As it seems by the testimony, it was accepted by the defendant company at the time of the execution of the contract, and in reality becomes a part of the contract. On the same day, a third paper was executed,—at least it bears date the same date, namely, the 25th of March,—executed by the plaintiff and the defendant company. This contract provided, among other things, for excavating for the purpose of raising the trestles of the defendant company, on which was laid its track, and the proposition, to which I have referred, made by the plaintiff and the defendant company, and dated in February, seems to contemplate that the foundation or bottom sill of these trestles, shall be laid, either on a level, or the same grade as Henderson street adjoining, or at a rise of four or five feet to the hundred,—a foundation that would be even, I say, with the grade of four or five feet to the hundred, from Henderson street back to these foundations. Now, it is claimed by the plaintiff that, in order to get the foundation that is contemplated by these agreements, he would have been required to excavate a large amount of earth under the tracks, and between these trestles, on which he would have realized the profit for which he brings suit here. He says that, according to the terms of the contract, he was allowed 55 cents per cubic yard for all the excavation done by him under the contract, but that he was prevented by the defendant company from excavating in accordance with the con-

tract, and thus deprived of these profits. When he brought his suit he claimed that he was prevented from excavating some 18,000 yards, and that he would have realized a profit on each of those yards of 35 cents, which amounted to \$6,300. Subsequently, he amended his statement, and showed that the excavation would have amounted to a larger number of yards; and he claims to have shown here, by the testimony in the case, that it would have amounted to a much larger number of cubic yards than he claimed in his statement. But he does not claim any more damages, but he does claim that, if he had been allowed to excavate, as he contracted to do under the contract, he would have made the profits named here, some \$6,300.

"Now, the defense to this,—and, in referring to the defense as set up by the defendant company, we will have something to say, also, as to the claims of the plaintiff,—the defense to this is that, in the acceptance of this proposition of Mr. Huckestein, which is dated in February, and which is accepted, I believe, on March 29th, they modified his proposition. By that modification, which is with reference to the first mudsill, or the sill under the first piers of this incline, they say its location is changed in the acceptance. That is true, gentlemen. It was so modified in the acceptance of the proposition. And they say that, by that modification, to construct the plane, in accordance with the proposition made by Mr. Huckestein, and as he claims it should have been done, was impracticable; that they could not, starting with the first pier, as it was arranged to be placed, in accordance with the modification accepting Mr. Huckestein's proposition, that they could not reasonably have constructed it in accordance with his proposition; that that changed the whole character of the construction; and that, therefore, the whole thing was thrown open to the discretion of the company's engineer, Mr. Diecher. And hence they insist that, in accordance with the terms of this third paper, Mr. Huckestein was bound to construct the whole incline in accordance with the directions of the company's engineer, and that it has been so done. Mr. Huckestein has constructed it as directed by the company's engineer, and they say that that is an end of the case. But the plaintiff claims—and this, I take it, gentlemen, is a question for your determination under the evidence—that that modification only applied as to the one pier, and that it was, in point of fact, not on the Swan property, and that, although it did modify the location of the sill of the first trestle, yet they could have constructed the balance of the incline through the Swan property, in accordance, strictly, with this proposition of Mr. Huckestein, and hence, I say, this is for you to determine. If you find that this modification, made in accepting Mr. Huckestein's proposition, so changed the character of the whole construction that it could not reasonably be constructed in accordance with the proposition as originally

made, then Mr. Huckestein cannot recover here, because he is remitted, then, to the direction of the company's engineer. But if you find that, although the location of the first sill or trestle was changed by that acceptance, they could still have constructed the balance under the original proposition, then they should have done so, and you will then consider further the questions that will be submitted to you. The defendant company says, not only did this modification change the whole construction of the line, but that, as tending to show Mr. Huckestein's acceptance of the modification for the construction of the whole line, this property belonged to him, that he knew its lay, and knew that it would be impracticable to construct the incline in any other way than it was constructed. They further say that the stakes that were placed there by the engineer, he saw, and did his work of excavating in accordance with them. They further say that the plans which showed the excavation that was necessary for the plane, as it is constructed, were seen by Mr. Huckestein, and that he accepted the doing of the work under those plans, and knew what they were, and that he is concluded thereby. Now, if you should find that to be the case, and that Mr. Huckestein accepted the modification, and did the work in accordance with the direction of the company's engineer, knowing where the stakes were placed by him, and knowing the plans,—in other words, accepted the modification of the contract,—then he is concluded thereby, and your verdict should be for the defendant company.

"As I have told you, the plaintiff denies that there was any modification, denies that there was any acceptance of any such modification by him; and, while he merely did the work in accordance with the instructions of the company's engineer, yet he did not, in doing so, remit his claim for which he now brings suit. As evidence of that, he shows you letters which were written by him in May and in July of 1887, in which he gives them notice that the work was not being done in accordance with the contract, and that he will hold them liable for a strict performance of the contract. The answer of the defendant company to those letters is that they referred to the damages that he was to receive for the right of way for the defendant company's line passing through his property. You have learned, in the course of the trial, that Mr. Huckestein had another action, which was tried over in the other court, for damages to his land by reason of the passing through it, and appropriating a portion of it by the defendant company. The defendant says that these notices which he served upon them were with reference to his claim for damages for their right of way. These notices, however, gentlemen, have been read in your hearing, and it is for you to say whether they do not also contemplate his action for damages in being prevented from

making the excavation for which he brings this action. That action, which was tried in the other court, as I have said to you, was for damages for the right of way; and the testimony that was offered in that case is only to be considered by you here with reference to the statements that Mr. Huckestein made in that case as bearing upon the claim here. So far as the record in that case shows, I have to say to you that it was not brought for the damages for which he brings suit here, or any part of it. The charge of the court in that case limited the recovery to the damages for the right of way, and not for the profits which he alleged would have accrued to him for the making of the excavation, if he had been allowed to do so, as he claims, under the contract. But the statements of Mr. Huckestein, made when on the witness stand in that case, are for your consideration, and are important in the consideration of his claim here, and all of those statements are before you.

"Now, the defendant company further claims that, on the 2d of July, 1888, there was submitted to Mr. Huckestein a final estimate of the work done under this contract, and that he was paid the amount shown to be due by that final estimate. At that time he made no claim for profits which he now alleges would have accrued to him from this excavation, but, subsequently to that, he set up another claim for extras, and was paid,—or that bill which amounted to upward of a thousand dollars was paid or settled by the payment of \$900, and they say that neither in the final estimate nor in this claim for extras did he make any mention of any claim for the profits from this excavation for which he brings suit in this case. And they argue to you that his failure to mention those at that time, and for some five or six years thereafter, tends to show that he did not consider he had any claim for the profits from this excavation. Claims of this kind are not barred by the statute until six years after the right of action has accrued. In this case the suit was brought between five and six years after the right of action had accrued, and hence the claim was not barred by the statute. But the defendant company, while admitting that, say that the circumstance of this long delay tends to show that he did not consider he had any such claim as he now sets up. After the amount shown to be due by the final estimate was paid, and the amount of these extras, a certain receipt was given by Mr. Huckestein, which purports, by its terms, to be in full for all work done or furnished by him under this contract. But the plaintiff claims that that is only a receipt for the work actually done, and in no way affects his claim for profits arising from work which he was prevented from doing, and for which this suit is brought. Of course, as you have been told, a receipt only covers what it was intended to cover; and if that receipt, which has been read

four hearing, was intended only to cover work done (not that which he was precluded from doing), then he is not barred in bringing this action. I have said to you that the statements of Mr. Huckestein, made in the other trial, were for your consideration. I referred to the statements wherein he denied having received anything on the side of the engineer's estimate. He is contradicted by the testimony here, and it is shown that he did receive this \$900 for the extra work. Mr. Huckestein admits that, and explains it to you. You have heard the explanation of the statements made in the other trial, and they are for you.

Now, then, notwithstanding all these transactions that have occurred since the doing of this work in 1887 and 1888, notwithstanding all these circumstances, which the defendant sets up here as a defense to the action, and claims that they prevent any recovery, if you should be of opinion that Mr. Huckestein is entitled to recover, if he was prevented by the defendant company from doing the excavating which he was entitled to do under the contract, and that profits could have accrued to him therefrom, then, gentlemen, it is for you to say what is the amount of the profits. We have here the testimony to show in what manner the plane could have been constructed. The plaintiff claims it could only be done in a proper and workmanlike manner by making a through cut through the length of the property, that it is the only way it could be done with a view to the safety and propriety and workmanlike manner of doing the work. The defendant claims it might have been done by excavating for each pier. It is for you to say, under all the circumstances, which could be the proper and workmanlike manner of doing the excavating, provided you find that Mr. Huckestein was authorized to do it under the contract. If this plane could have been constructed by digging the pits, and shoring up and cribbing the dirt, to prevent its falling in while so doing,—if that is the proper and workmanlike manner of doing it,—then he is only to be allowed for the excavating necessary for those pits. If, however, you find it should have to be done by a through cut, that that was the proper way, or that he could excavate in any other way, in a reasonable and proper workmanlike manner, so as to get the foundations, as he claims they should have been, under the contract, then you will adopt that mode of construction, and allow Mr. Huckestein

for his profits on the excavation that would have been necessary to build a plane in that way, or to get the foundation for the piers in that way. But that, gentlemen, is only for you to consider in case you should find that the foundations are to be built, or the mudsills are to be laid in accordance with the proposition made by Mr. Huckestein in his letter of February, which was accepted in March."

W. B. Rodgers and J. H. Beal, for appellant. John S. Ferguson and George P. Hamilton, for appellee.

PER CURIAM. The learned court below gave to the plaintiff every possible opportunity to recover before the jury that can be conceived. There was no provision in any of the correspondence, or in the contract as signed, or in the annexed specifications, that gave an absolute right to the plaintiff to have any earth excavation whatever. But there was positive provision that all the work, including excavation, should be done "according to the directions, and under the supervision, of the engineer in charge of the construction of said incline." As no excavation, for the loss of which the present action is brought, was directed by the engineer, it is difficult to conceive upon what rational basis the claim can be sustained. Then, too, the receipt in full for every item of claim made, after the work was all completed, and which was "in full settlement for all stone work and excavation, labor, material, etc., furnished in connection with the construction, etc., of the Nunnery Hill Incline Plane," may well have convinced the jury that all demands under the contract were fully adjusted, settled, and paid. Nevertheless, notwithstanding this receipt in full, the court left it to the jury to say whether this extraordinary claim for loss of profits was intended to be included within it. This suit was not commenced until nearly six years had elapsed after the work was all done, and in all that time this claim for alleged loss of profits had never been heard of. The only wonder is that the verdict was not absolutely in favor of the defendant, instead of for 6¼ cents in the plaintiff's favor. The claim is very stale, it is unsupported by any reasonable view of the testimony, and, in our opinion, it is entirely devoid of merit. The verdict was a condemnation of it on its merits. We discover no error in the several assignments, and they are all dismissed. Judgment affirmed.

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An award will not be set aside merely because one of the arbitrators failed to set his name upon the agreement for arbitration, in token of his acceptance of the position of arbitrator, as provided by such agreement.—*Witz v. Tregallas* (Md.) 718.

To avoid an award on the ground of a mistake of law by the arbitrators, the mistake must appear on the face of the award.—*Witz v. Tregallas* (Md.) 718.

Evidence examined, and *held* insufficient to show that an arbitration was fraudulently devised and carried out.—*In re Leslie* (N. J. Sup.) 954.

Conclusiveness of award as warranted by the evidence.—*Huckestein v. Kaufman* (Pa.) 1028; *Appeal of Frazier*, Id.

Estoppel of party who presented an item to the arbitrators to deny their jurisdiction to consider it.—*Huckestein v. Kaufman* (Pa.) 1028; *Appeal of Frazier*, Id.

Argument.

Of counsel, see "Trial."

Army and Navy.

Rights of discharged soldiers, see "Office and Officer."

Assessment.

For public improvements, see "Municipal Corporations."
Of taxes, see "Taxation."

ASSIGNMENT.

See "Assignment for Benefit of Creditors."

The assignment as security of a contingent interest in a bank deposit will be enforced when the assignor becomes owner of the deposit.—Peterborough Sav. Bank v. Hartshorn (N. H.) 729.

In equity the assignment of future improvements on a patented process, in connection with an assignment of the patent, is valid.—McFarland v. Stanton Manuf'g Co. (N. J. Err. & App.) 962.

The interest of a residuary legatee *held* assignable.—Hamlin v. Mansfield (Me.) 788.

Right to assign a contract for drilling an oil well.—Galey v. Mellon (Pa.) 560.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

A trustee under an assignment for the benefit of creditors made by a foreign corporation need not file a bond in Maryland in order to obtain title by the assignment to personalty in Maryland.—Moore v. Land Title & Trust Co. (Md.) 641.

An assignee takes no greater rights or interests than his assignor possessed.—Peterborough Sav. Bank v. Hartshorn (N. H.) 729.

Provision in will directing payment of income to husband of testatrix, to be disposed of by him for the advantage of the children, *held* not to vest in him such an interest as would pass under an assignment by him for his creditors.—Appeal of Hartman (Pa.) 1025.

Associations.

See "Benevolent Societies"; "Corporations"; "Religious Societies."

ASSUMPSIT.

A statement of a claim for work done and materials supplied must aver the amount or sum that each item is reasonably worth.—Murphy v. Taylor (Pa.) 1041.

Where one of several tenants in common in a vein of coal has taken coal therefrom, and received the proceeds, another of such tenants may sue in assumpsit.—Winton Coal Co. v. Pan-coast Coal Co. (Pa.) 110.

Where the declaration has an account annexed for balance due on a contract, and the contract price is not stated, nor any items given constituting the balance, a demurrer will lie.—Turgeon v. Cote (Me.) 787.

In an action for goods sold, plaintiff may show delivery to defendant's agent, and that defendant ratified his acts, without an allegation to such effect in the complaint.—Plumb v. Curtis (Conn.) 998.

In assumpsit on a nonnegotiable duebill, defendant may prove under the general issue that the payee had no title when he transferred it to plaintiff.—Emley v. Perrine (N. J. Sup.) 951.

Right of jury to consider on question of damages, in assumpsit for machinery sold, the con-

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1071.

Property which the assignee in bankruptcy declines to appropriate remains in the bankrupt.—*Lancey v. Foss* (Me.) 1071.

BANKS AND BANKING.

Necessity of demand before bringing suit against a bank to recover funds sent to it for deposit.—*Miller v. Western Nat. Bank* (Pa.) 684.

BASTARDY.

Proceedings cannot be taken in the court for the trial of small causes.—*Lynch v. Pott* (N. J. Sup.) 798.

If the jury disagree the justice may issue a venire de novo.—*Lynch v. Pott* (N. J. Sup.) 798.

BENEVOLENT SOCIETIES.

Construction of constitutional requirements as to the suspension of a subordinate lodge from right to share in the endowment fund.—*Young v. Grand Lodge of Sons of Progress* (Pa.) 1038.

Bequest.

See "Wills."

BIGAMY.

An indictment under Pub. St. R. I. c. 244, § 1, for bigamous cohabitation, held insufficient.—*In re Watson* (R. I.) 873.

Bills and Notes.

See "Negotiable Instruments."

Bonds.

Necessity of, see "Assignment for Benefit of Creditors."

Of railroad companies, see "Railroad Companies."

Of school district, see "Schools and School Districts."

Of state, see "States and State Officers."

BOUNDARIES.

The term "high-water mark," when applied to a nontidal river, means the highest limit reached when the river is in its natural flow.—*Morrison v. First Nat. Bank* (Me.) 782.

Admissibility of evidence in locating a boundary line, where the surveys are conflicting.—*Fisher v. Kaufman* (Pa.) 137.

Defendant may show that a line claimed by plaintiff to indicate the north line of a survey was not that line, but a line run as the result of a compromise between the owner of a subsequent interfering survey on the north.—*Fisher v. Kaufman* (Pa.) 137.

Where the location of a boundary is disputed, and there is some evidence of surveyors' marks and a recognition of the lines set up by defendant, the location of the boundary is for the jury.—*Wilson v. Marvin* (Pa.) 275.

BRIDGES.

Liability of township for injuries received through the absence of railing on a highway bridge.—*Yoders v. Township of Amwell* (Pa.) 1017.

Brokers.

See "Factors and Brokers."

BUILDING AND LOAN ASSOCIATIONS.

Construction of charter and by-laws in determining the amount to be paid by a borrowing stockholder in order to redeem his mortgage before maturity of the stock.—*Middle States Loan, Bldg. & Const. Co. v. Hagerstown Mattress & Upholstery Co.* (Md.) 886.

Cancellation.

Of contract, see "Equity."

CARRIERS.

See, also, "Horse and Street Railroads"; "Railroad Companies."

A carrier is not liable to a firm for injuries to a firm article carried as personal baggage of a passenger who is a member of the firm.—*Pennsylvania R. Co. v. Knight* (N. J. Sup.) 845.

Complaint in a suit to recover the penalty for traveling without payment of fare, under Revision, p. 912, held defective.—*Harris v. New Jersey Cent. R. Co.* (N. J. Sup.) 799.

Right of passenger on street car to recover damages on account of his ejection from the car on his refusal to comply with a rule forbidding passengers to stand on the platform.—*McMillan v. Federal St. & P. V. Pass. Ry. Co.* (Pa.) 560.

One getting on the wrong train through the company's negligence cannot hold it liable because he is injured in getting off it while in motion.—*Rothstein v. Pennsylvania R. Co.* (Pa.) 379.

One injured by jumping from a train cannot hold the company liable because he was told by an official that it was going so slowly that he could jump from it.—*Rothstein v. Pennsylvania R. Co.* (Pa.) 379.

Contributory negligence of one jumping from a train in motion.—*Rothstein v. Pennsylvania R. Co.* (Pa.) 379.

In an action for the death of a person pushed by an employé from a train, evidence that he had a ticket entitling him to ride is admissible.—*Sharer v. Paxson* (Pa.) 120.

A person getting on a moving train is not guilty of contributory negligence when pushed therefrom by an employé of the company.—*Sharer v. Paxson* (Pa.) 120.

A carrier is as liable to a person with a ticket boarding its moving train as to any other passenger.—*Sharer v. Paxson* (Pa.) 120.

CARRYING WEAPONS.

Where one takes a pistol for a few minutes, to return to the owner, he is not guilty of carrying weapons.—*State v. Chippey* (Del. Gen. Sess.) 438.

CERTIORARI.

Certiorari to review a judgment granted after verdict, but before judgment entered, will be ineffectual, where the judgment was not entered until jurisdiction of the supreme court was transferred to the superior court.—*Ruffner v. Hooks* (Pa.) 108.

A taxpayer in a borough formed under Act April 2, 1891, may prosecute certiorari to review an ordinance providing for the issuance of bonds for the purchase or construction of an electric light plant.—*Biddle v. Borough of Riverton* (N. J. Sup.) 279.

Certiorari will not lie to review the proceedings of the board of chosen freeholders in elect-

constitutional, when its object is to determine the title of the incumbent.—*Stites v. Board of Chosen Freeholders of Cumberland County* (N. J. Sup.) 737.

Certiorari lies to review the proceedings for removal of a janitor of a county court house.—*Daily v. Board of Chosen Freeholders of County of Essex* (N. J. Sup.) 739.

The review by certiorari of an election for a public office would have no effect on a subsequent information in the nature of a quo warranto.—*Roberson v. City of Bayonne* (N. J. Sup.) 734.

The judgment of the county commissioners on application for abatement of a tax may be reviewed by certiorari.—*Wheeler v. Board of Com'rs of Waldo County* (Me.) 983.

One having no interest in the laying of street-railway tracks cannot object thereto on certiorari.—*West Jersey Traction Co. v. Board of Public Works of City of Camden* (N. J. Err. & App.) 906.

The power of the legislature to pass a special act creating a township will not be considered on certiorari to review an assessment by a borough for taxation on the lands which were formerly within such borough, but were included within the new township.—*Riverton & P. Water Co. v. Haig* (N. J. Sup.) 215.

When the purpose of the writ is to test the right to a public office, and the proceeding brought up by the writ consists only of the resolution or other action of a municipal body electing a person to such office, the writ will be dismissed.—*Roberson v. City of Bayonne* (N. J. Sup.) 734.

On review of proceedings under the road act the official return to the writ may be explained only by testimony taken under a rule of court.—*Fowler v. Larrabee* (N. J. Sup.) 216.

Chancery.

See "Equity."

CHARITIES.

A hospital incorporated under special act to furnish treatment for the sick, without capital stock, and from which its members derive no profit, is a charitable corporation.—*Hearns v. Waterbury Hospital* (Conn.) 595.

A charitable corporation is not liable for injuries to a patient through the negligence of physicians employed by it, where they were selected with due care.—*Hearns v. Waterbury Hospital* (Conn.) 595.

Charter.

Of city, see "Municipal Corporations."

CHATTEL MORTGAGES.

Where a horse is sold with an option in the vendor to repurchase within a certain time, it is not a mortgage, entitling the vendor to equitable relief on failure to exercise the option.—*Roberts v. Norton* (Conn.) 532.

A chattel mortgage with an affidavit made in Pennsylvania before a notary public, not containing a recital that the officer was a notary public, is sufficient under Supp. Revision, p. 491.—*Magowan v. Baird* (N. J. Err. & App.) 1054.

Act May 2, 1885 (Supp. Revision, p. 491), making chattel mortgages void as to creditors unless there is immediate possession by the mortgagee, or the mortgage is recorded, applies to all creditors of the mortgagor as well as judg-

Where a chattel mortgage is unrecorded, the mortgagor may sell the goods and pay the proceeds to the mortgagee, as against a judgment creditor of the mortgagor who has made no levy.—*National Shoe & Leather Bank v. August* (N. J. Ch.) 803.

Under Act May 2, 1885, § 9 (Supp. Revision, p. 492), when a chattel mortgage is once recorded, it is valid until canceled, without being refiled.—*Roe v. Meding* (N. J. Err. & App.) 394.

CLERK OF COURT.

Liability of prothonotary for loss arising from his failure to insert in a writ of fieri facias a waiver of exemption.—*Wilson v. Arnold* (Pa.) 552.

The clerk of the orphans court is entitled, under Act Feb. 22, 1821, to a fee of three dollars for each of a number of sales of the real estate of one deceased.—*In re Griel's Estate* (Pa.) 375; Appeal of Will, Id.

Common Carrier.

See "Carriers."

Competency.

Of witness, see "Witness."

Complaint.

See "Pleading."

COMPROMISE.

Where plaintiff received money paid to a third person, knowing it was in settlement, before bringing the action, she cannot recover if she has not returned it.—*Arthurs v. Bridgewater Gas Co.* (Pa.) 88.

Condition.

Of policy, see "Insurance."

CONFLICT OF LAWS.

A chattel mortgage made in New York by a New York corporation on personality in Connecticut is not governed by the laws of New York.—*Chillingworth v. Eastern Tinware Co.* (Conn.) 1009.

The validity of the transfer of a note payable in another state must be governed by the laws of the state where transferred.—*Brook v. Van Nest* (N. J. Err. & App.) 382.

The administrator of one dying in Ohio, but whose family resided in New Jersey, held not entitled to proceeds of a life policy given the wife.—*Travelers' Ins. Co. v. Grant* (N. J. Ch.) 1090.

CONSPIRACY.

A conspiracy may be proven without proof of attempts towards its execution.—*State v. Clark* (Del. Gen. Sess.) 310.

A husband and wife, being one in law, cannot alone be guilty of conspiracy.—*State v. Clark* (Del. Gen. Sess.) 310.

CONSTITUTIONAL LAW.

See "Intoxicating Liquors."

Titles of acts, see "Statutes."

Act April 17, 1876, providing that landowners within certain districts may agree not to

apply for any deduction of taxes by reason of any mortgages, is not unconstitutional.—*Case v. Beunett* (N. J. Ch.) 248.

The legislature has no power to dictate to the courts what construction shall be placed upon a particular act.—*Commonwealth v. Warwick* (Pa.) 373.

Act 1888 (P. L. p. 366), providing for contracts for water supplies by municipal corporations, is constitutional.—*Van Reipen v. City of Jersey City* (N. J. Sup.) 740; *Morris Canal & Banking Co. v. Same, Id.*; *Moutclair Water Co. v. Same, Id.*; *Whelihan v. Same, Id.*; *Favier v. Same, Id.*; *Rockaway & Hudson Co. v. Same, Id.*

The question of the removal of a county seat is one of local concern, which the legislature may refer to the voters of the county.—*Hamilton v. Carroll* (Md.) 648.

Laws 1893, c. 310, prohibiting any state court other than the supreme judicial and superior courts from exercising jurisdiction over the naturalization of aliens, is constitutional.—*In re Gilroy* (Me.) 979.

P. L. c. 447, authorizing the registry voters to vote on the question of the abolition of school districts, is constitutional.—*In re School Committee of Town of Johnston* (R. I.) 369.

Act 1891 (P. L. p. 176), requiring owners to employ a mine foreman, is unconstitutional so far as it makes the owner liable for injuries to his employes from the negligence of such foreman.—*Durkin v. Kingston Coal Co.* (Pa.) 237.

Pub. St. c. 208, § 15, authorizing a garnishee to satisfy a final judgment to the amount of the attached property in his hands is constitutional, though it affects nonresidents.—*Cross v. Brown* (R. I.) 147.

Packages of oleomargarine, put up out of the state, intended for sale to the consumer, are not original packages, within the interstate commerce clause.—*Commonwealth v. Paul* (Pa.) 82.

Rev. St. c. 27, § 56, providing that no action shall be maintained for the price of intoxicating liquors sold in violation of law, is not void, as a regulation of interstate commerce.—*Knowlton v. Doherty* (Me.) 18.

Act March 22, 1895, for the incorporation of cities, does not delegate legislative power to the township committee in authorizing it to determine what territory shall be included.—*Borough of Glen Ridge v. Stout* (N. J. Sup.) 858.

Pub. Acts 1893, p. 271, c. 121, providing for licenses of persons engaged in transient business, is unconstitutional, as granting exclusive privileges.—*State v. Conlon* (Conn.) 519.

Local and special acts.

Act 1891 (P. L. p. 176), providing for employment in coal mines of foremen certified to by state officers, is not a local act.—*Durkin v. Kingston Coal Co.* (Pa.) 237.

Act of 1895, establishing and regulating school districts in cities of the second class, held to be unconstitutional as a local law.—*Chalfant v. Edwards* (Pa.) 1048.

The legislature may pass a special law providing for the removal of a county seat.—*Hamilton v. Carroll* (Md.) 648.

Act March 22, 1895, for the incorporation of cities, is not unconstitutional in excepting certain territory from its operation in cities or towns, and not excepting it in boroughs.—*Borough of Glen Ridge v. Stout* (N. J. Sup.) 858.

Supplements to the borough act of 1878 are not unconstitutional in not applying to boroughs incorporated by special charters before the constitutional amendments prohibiting special legislation were adopted.—*Benson v. Inhabitants of Township of Bloomfield* (N. J. Sup.) 855.

Supplements to the borough act of 1878 are not unconstitutional because they do not apply to local governments organized under Act March 7, 1882, Act 1890, or Act 1891.—*Benson v. Inhabitants of Township of Bloomfield* (N. J. Sup.) 855.

Taxation.

Pub. St. c. 43, §§ 6-8, relating to statements of taxable property, is constitutional.—*McTwiggan v. Hunter* (R. I.) 5.

Act 1881, relative to collection of taxes, is unconstitutional.—*Van Loon v. Engle* (Pa.) 77.

Const. art. 4, § 7, subd. 12, relating to uniform taxation, does not refer to license fees.—*Johnson v. Borough of Asbury Park* (N. J. Sup.) 850.

P. L. 1895, p. 490, relating to licenses in boroughs, is constitutional.—*Johnson v. Borough of Asbury Park* (N. J. Sup.) 850.

Code, art. 81, § 88, taxing corporate bonds secured by mortgage, held constitutional.—*Simpson v. Hopkins* (Md.) 714.

Jury trial.

Const. U. S. Amend. 7, relating to the right of jury trial, does not apply to state legislation.—*In re Condemnation of Certain Land for New State House* (R. I.) 448.

The legislature can give the state a right to a jury trial in condemnation of land for state purposes.—*In re Condemnation of Certain Land for New State House* (R. I.) 448.

The state cannot claim a jury trial as a constitutional right in proceedings under Pub. Laws, c. 1201, to condemn land for a state house.—*In re Condemnation of Certain Land for New State House* (R. I.) 448.

Construction.

Of will, see "Wills."

CONTEMPT.

A party is not in contempt by refusing to obey an order of the chancery court not served in the regular way, unless so served under an order of the chancellor.—*Perrine v. Broadway Bank* (N. J. Err. & App.) 404.

CONTINUANCE.

The refusal of a continuance asked by a stranger to an action is in the discretion of the trial court.—*McMahon v. O'Brien* (N. J. Sup.) 848.

CONTRACTS.

See, also, "Arbitration and Award"; "Assignment for Benefit of Creditors"; "Conflict of Laws"; "Carriers"; "Chattel Mortgages"; "Covenants"; "Deed"; "Factors and Brokers"; "Frauds, Statute of"; "Fraudulent Conveyances"; "Gifts"; "Insurance"; "Interest"; "Landlord and Tenant"; "Master and Servant"; "Negotiable Instruments"; "Partnership"; "Principal and Agent"; "Principal and Surety"; "Specific Performance"; "Subrogation"; "Trusts"; "Usury"; "Vendor and Purchaser."

Cancellation of, see "Equity."
Gambling contracts, see "Gaming."
Of corporation, see "Corporations."
Reformation of, see "Equity."

An agreement by master plumbers, withdrawing their patronage from certain dealers, held not unlawful.—*Macauley v. Tierney* (R. I.) 1.

A contract by a railroad company with an iron company by which the former furnishes funds to develop the latter and give it facili-

es for transportation in consideration of the on company's contract to give it all its traffic, not against public policy.—*Bald Eagle Val. Co. v. Nittany Val. R. Co.* (Pa.) 239.

A provision in a deed that grantee is to have grantor's personal property after his death, after paying debts, is valid.—*Peterborough Sav. Bank v. Hartshorn* (N. H.) 729.

Where property is left to a wife, with remainder to the children surviving her, an agreement among them that their shares should vest to the death of the testator is valid.—*In re Talston's Estate* (Pa.) 273.

An agreement by members of a benevolent association to submit any grievance to tribunals of their order before bringing suit is valid.—*Ocean Castle, No. 11, Knights of the Golden Eagle, v. Smith* (N. J. Sup.) 849.

The purchase by plaintiff railroad of bonds secured by mortgage to enable the mortgagor to develop his ore lands and the construction of a railroad to the land is a sufficient consideration for the covenant of the landowner to give traffic to and from the land and furnaces on plaintiff's line.—*Bald Eagle Val. R. Co. v. Nittany Val. R. Co.* (Pa.) 239.

Equity will not relieve from liability on an instrument under seal merely for want of consideration, when no consideration was contemplated.—*Meek v. Frantz* (Pa.) 413.

Contract for lumber cannot be rescinded for defects in the lumber known to exist when the contract was made.—*Scales v. Wiley* (Vt.) 771.

Provision in a building contract, referring to the architect all disputes, construed.—*Barclay v. Deckerhoof* (Pa.) 71.

Construction of contract for royalties on certain steel as not applying to other steel made by a somewhat similar process.—*Todd v. Wheeler* (Pa.) 1020.

Construction of contract for excavation, as to whether contractor had right to recover on account of loss of profits caused by a change in the plans.—*Huckestein v. Nunnery Hill Incline Plane Co.* (Pa.) 1108.

Rights of parties to a fund deposited in trust by complainant under a contract whereby, in certain contingencies it was to be paid to defendants, otherwise to revert to complainants, determined.—*Lehigh Val. Terminal Ry. Co. v. Currie* (N. J. Ch.) 824.

Right of railway company, after having obtained right of way, water supply, and certain land, under agreement to pay the landowner for the use of a depot on the land, and for his services as station master, to retain the way, water, and land, and avoid payment by condemning the depot.—*Semple v. Cleveland & P. R. Co.* (Pa.) 564.

Where a contract provides that the president of the company for which the work was done may revise the engineer's estimates, and he fails to do so, his approval of an estimate did not affect its character as to final award.—*Gonder v. Berlin Branch R. Co.* (Pa.) 61.

An architect is not disqualified as a referee in a building contract because he had been a witness in an action between the parties.—*Barclay v. Deckerhoof* (Pa.) 71.

Character of estimate of engineer under a construction contract determined.—*Gonder v. Berlin Branch R. Co.* (Pa.) 61.

Estimates of an engineer are not binding, where, at the instance of the contractor, they were increased by him above the amounts justly due.—*Gonder v. Berlin Branch R. Co.* (Pa.) 61.

One who willfully defaults in the performance of an entire contract cannot recover for a part performance.—*Hartman v. Meighan* (Pa.) 123.

Evidence examined, and held insufficient to show that plaintiff was released from performance of his contract.—*Bean v. Bunker* (Vt.) 1068.

Evidence examined, and held, that plaintiff had waived the conditions as to payment by continuing performance after default.—*Bean v. Bunker* (Vt.) 1068.

Partial payment on a contract was not conclusive evidence of a waiver of defects in work done thereunder.—*Hattin v. Chase* (Me.) 989.

Action on.

In a suit on a contract providing that in certain contingencies a fund should be paid to defendants, otherwise to revert to complainant, a written proposition to defendants to pay the fund for other purposes is not evidence of liability under the contract.—*Lehigh Val. Terminal Ry. Co. v. Currie* (N. J. Ch.) 824.

Propriety of charge, in action on parol agreement, that a written receipt would represent the contract of the parties unless it is shown that a part of the contract was omitted by fraud, accident, or mistake.—*Jessop v. Ivory* (Pa.) 352.

Contributory Negligence.

See "Master and Servant"; "Negligence."

Conversion.

See "Trove and Conversion."

Conveyances.

See "Chattel Mortgages"; "Covenants"; "Deed"; "Fraudulent Conveyances"; "Mortgages"; "Sale"; "Vendor and Purchaser."

CORPORATIONS.

See, also, "Carriers"; "Horse and Street Railroads"; "Municipal Corporations"; "Railroad Companies."

Whether an association constitutes a corporation depends on its powers.—*Edgeworth v. Wood* (N. J. Sup.) 940.

A corporation suable in the state of its organization in the name of its treasurer may be so sued in New Jersey.—*Edgeworth v. Wood* (N. J. Sup.) 940.

Construction of act providing that no certificate of stock shall be transferred so long as the holder is indebted to the company.—*National Bank of the Republic v. Rochester Tumbler Co.* (Pa. Sup.) 748.

A statement in a stock certificate that the shares are transferable on the books of the company held not to estop the corporation from claiming a lien on the stock for debts due it by the holder.—*National Bank of the Republic v. Rochester Tumbler Co.* (Pa. Sup.) 748.

Sufficiency of affidavit of defense in action on contract of subscription for stock in a corporation.—*Columbus Land Co. v. McNally* (Pa.) 329.

Officers.

Sufficiency of showing of fraud and unlawful acts on the part of officers of a corporation to justify the appointment of a receiver on the application of a stockholder.—*Du Puy v. Transportation & Terminal Co.* (Md.) 889.

The fact that after directors acquired bonds on a paid-up stock basis, they became charged with knowledge that later issues were not on such basis, did not authorize the taking of their bonds either as a penalty or as a contribution to the general dividend fund for the holders of the subsequent issues.—*Physick v. Baker* (N. J. Err. & App.) 815.

Sufficiency of notice of managers' meeting "to hear the treasurer's report and transact any other business," to justify the making by the meeting of a perpetual lease of the corporate property.—*Mercantile Library Hall Co. v. Pittsburgh Library Ass'n* (Pa. Sup.) 744.

In the absence of any by-law or fixed practice in that regard, a notice of a meeting of a board of managers is insufficient if not received by the members of the board before the morning of the day on which the meeting is to be.—*Mercantile Library Hall Co. v. Pittsburgh Library Ass'n* (Pa. Sup.) 744.

The directors of a corporation formed by the consolidation of two other corporations under P. L. 1893, p. 121, c. 67, need not be stockholders either in the new or in the old corporations.—*Camden Safe-Deposit & Trust Co. v. Burlington Carpet Co.* (N. J. Ch.) 479.

Where the president of a corporation, after bringing suit as a creditor, resigned his office, and an attorney was authorized to confess judgment at once, *held*, that the judgment could not have preference over other creditors.—*Mallory v. Kirkpatrick* (N. J. Ch.) 205.

Contracts.

The fact that an officer of a corporation procuring notes to be discounted by a bank, and the proceeds applied to the corporation's debt to a partnership, was a member of that partnership, did not affect the bank's right to recover the amount of the discounts on the corporation becoming insolvent.—*Bank of America v. Poultney Slate Works' Assignee* (Vt.) 895.

Board of managers *held* not to have authority to make perpetual lease of corporate property at a rent of 4 per cent. on its cost when the act of incorporation directed a lease for a rent of 6 per cent. on the cost.—*Mercantile Library Hall Co. v. Pittsburgh Library Ass'n* (Pa. Sup.) 744.

An affidavit attached to a mortgage of a consolidated corporation, stating its consideration, and the amount due, *held* sufficient, under Supp. Revision, p. 491, par. 11.—*Camden Safe-Deposit & Trust Co. v. Burlington Carpet Co.* (N. J. Ch.) 479.

Where two corporations are consolidated under P. L. 1893, p. 121, c. 67, *held*, that the new corporation could give a mortgage to secure bonds to pay off mortgage liens and debts of the old corporation.—*Camden Safe-Deposit & Trust Co. v. Burlington Carpet Co.* (N. J. Ch.) 479.

Stockholders.

Where an arbitrator decided that certain certificates of stock should be delivered to one of the parties, and they were so delivered and transferred on the company's books, such party was a stockholder while the stock stood in his name, though the award was subsequently set aside.—*In re Leslie* (N. J. Sup.) 954.

Where the complaint in an action to enforce the liability of stockholders alleged a joint and several liability, a defense that the liability was limited by statute could not be raised by demurrer.—*Warren v. Providence Tool Co.* (R. I.) 876.

Under a bill filed by a creditor and stockholder of a company for himself and all others joining against the directors for fraud, a decree cannot be made for the sole benefit of complainant.—*Landis v. Sea Isle City Hotel Co.* (N. J. Err. & App.) 964; *Class v. Landis*, *Id.*

Where, under Gen. St. §§ 1942, 1965, a decree dissolving a corporation, and appointing a receiver, has been made, creditors, on refusal of the receiver to sue stockholders, should apply for his removal or an order to compel suit.—*Links v. Connecticut River Banking Co.* (Conn.) 1003.

Insolvency.

Under Act April 8, 1892, §§ 1, 2, a laborer's lien against the property of an insolvent corporation is prior to the lien of a judgment entered against the corporation before its insolvency.—*Fitzgerald v. Maxim Powder Manufg Co.* (N. J. Ch.) 1004.

Corporations are not liable to be proceeded against by creditors' bill under Chancery Act. § 88 et seq.—*Mallory v. Kirkpatrick* (N. J. Ch.) 205.

An insolvent corporation cannot prefer as a creditor one of its officers.—*Mallory v. Kirkpatrick* (N. J. Ch.) 205.

Creditors dealing with a corporation after publication of a certificate that 20 per cent. of the subscribed stock has been paid in will be presumed to have relied on such certificate.—*Canfield v. Gregory* (Conn.) 536.

COSTS.

Judgment on appeal from a justice's court *held* not to have been "more favorable" (Gen. St. 1121) to plaintiff, so as to entitle him to costs.—*Anderson v. Town of New Canaan* (Conn.) 593.

Where costs are awarded as incident to the final decree, their payment can be enforced only by the methods designated for the enforcement of the decree itself.—*Aspinwall v. Aspinwall* (N. J. Err. & App.) 470.

Discretion of court as to imposition of costs in church litigation conducted by both parties in good faith.—*Bliem v. Schultz* (Pa.) 337.

Counterclaim.

See "Set-Off and Counterclaim."

COUNTIES.

A court of equity has no jurisdiction either in a direct or collateral proceeding to hear and determine the validity of a county-seat election.—*Hamilton v. Carroll* (Md.) 648.

Under the supplement of March 7, 1895, to the borough act of April 5, 1878, the borough of Vineland is entitled to one member of the board of chosen freeholders, to be elected in the spring of 1896.—*Miller v. Board of Chosen Freeholders of Cumberland County* (N. J. Sup.) 948.

Under Code, art. 81, § 23, and article 25, § 1, county commissioners can employ a person to compile abstracts of title of unassessed lands.—*Tasker v. Commissioners of Garrett County* (Md.) 407.

On an investigation of county finances under Supp. Revision, p. 723, the board of chosen freeholders cannot order compensation paid to associate counsel.—*Baldwin v. Board of Freeholders of Middlesex County* (N. J. Sup.) 197.

Act Feb. 13, 1884, authorizing the burial of soldiers, sailors, etc., does not authorize the board of chosen freeholders to employ a "superintendent of soldiers' burials."—*Boice v. Board of Chosen Freeholders of Essex County* (N. J. Sup.) 54.

Conclusiveness of decision of county auditors upon an investigation of the accounts of a county officer under Act April 15, 1834.—*County of Westmoreland v. Fisher* (Pa.) 571.

Time within which a county officer may appeal from a settlement of his accounts with the county.—*Armstrong County v. McKee* (Pa.) 192.

As the board of freeholders cannot create a debt in excess of a certain limit, the members of such board cannot be convicted of attempting to create such debt.—*Marley v. State* (N. J. Sup.) 208.

County Commissioners.

See "Counties."

COURTS.

See "Justices of the Peace."

A case of which the supreme court, under Act 1895, establishing the superior court, has no jurisdiction unless acquired before such establishment, will be remitted to such court, where, prior to such establishment, the only steps taken for appeal were in the trial court.—*Christner v. John* (Pa.) 107.

A justice of the supreme court should not allow an appeal from a judgment of the superior court under the act creating the latter court when the question involved is merely the construction of words in a will, which is of interest only to the parties to the suit.—*Kraemer v. Guarantee Trust & Safe-Deposit Co.* (Pa.) 1047.

Under P. L. 1894, p. 491, the court of errors and appeals has no jurisdiction of an appeal from a judgment of the supreme court on appeal from the judgment of the circuit court in contested election cases.—*O'Brien v. Benny* (N. J. Err. & App.) 380.

The district court of Newark has jurisdiction of a suit to the extent of \$300 under the landlord and tenant act, § 27 (Revision, p. 575).—*Tims v. Spragg* (N. J. Sup.) 213.

Under the judiciary act of August 22, 1893, (chapter 8, § 23), the district court has exclusive jurisdiction of an action for possession of land against a tenant by sufferance.—*Cosgrove v. Merz* (R. I.) 370.

The orphans' court has no jurisdiction of a contest by an heir as to the validity of a transfer of personality by deceased during his lifetime to other heirs.—*Daugherty v. Daugherty* (Md.) 541.

The orphans' court may, under Act March 26, 1893, order investment of a fund to produce an annuity given a widow in lieu of dower, and order preference of the annuity over the claims of the creditors.—*Green v. Saulsbury* (Del. Ch.) 623.

Power of orphans' court to remove an executor for neglect of duties.—*Carey v. Reed* (Md.) 633.

COVENANTS.

Where the owners of the equity of redemption in ore land covenanted with a railroad company that had made improvements thereon to give such company all their traffic, one obtaining title to the land through foreclosure of mortgage antedating the agreement, and having accepted the benefits of the contract, is bound thereby.—*Bald Eagle Val. R. Co. v. Nittany Val. R. Co.* (Pa.) 239.

CREDITORS' BILL.

A bill by an attaching creditor to set aside conveyances as fraudulent and impress the property with a trust, and for the appointment of a receiver, examined, and held sufficient on demurrer.—*Couse v. Columbia Powder Manuf'g Co.* (N. J. Ch.) 297.

CRIMINAL LAW.

See, also, "Bail"; "Indictment and Information"; "Witness."

Fraudulent attempt to create debt, see "Counties."

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Particular crimes, see "Bastardy"; "Bigamy"; "Carrying Weapons"; "False Pretenses"; "Gaming"; "Homicide"; "Intoxicating Liquors"; "Prostitution"; "Rape." Violation of election law, see "Elections and Voters."

Evidence held to sustain a plea in bar of a previous conviction for maintaining a common nuisance.—*State v. Brownrigg* (Me.) 11.

Before proving an oral confession, it is not necessary to show it was not reduced to writing.—*State v. Smith* (Del. Gen. Sess.) 441.

Where a conspiracy is proven the admissions of the conspirators are admissible against the others.—*State v. Clark* (Del. Gen. Sess.) 310.

Evidence of past character is inadmissible where defendant has not put his character in issue.—*State v. Lodge* (Del. O. & T.) 312.

Harmless error of court in stating that five witnesses testified to a certain fact when but two had done so.—*Commonwealth v. Bowman* (Pa.) 342.

Where the evidence of guilt is clear, proof of good character is of little weight.—*State v. Smith* (Del. Gen. Sess.) 441.

Where the jury is instructed that on the evidence defendant cannot be convicted of a crime charged, but may, if the facts warrant, be convicted of an attempt to commit such crime, failure to instruct that they must acquit of a crime charged is error.—*Marley v. State* (N. J. Sup.) 208.

The fact that a juror expressed an opinion is not ground for new trial, where he was not examined on voir dire, and testified that he merely expressed the opinion to escape jury duty, but had not in fact formed one.—*State v. Robinson* (Del. O. & T.) 57.

DAMAGES.

See, also, "Libel and Slander"; "Trespass."

In condemnation proceedings, see "Eminent Domain."

Right of passenger to recover punitive damages for being put off a car by force in compliance with a rule of the company.—*McMillan v. Federal St. & P. V. Pass. Ry. Co.* (Pa.) 500.

Sufficiency of instruction as to measure of damages in action by boy 16 years old on account of permanent injuries.—*Baker v. Irish* (Pa.) 558.

An unemancipated minor cannot recover for both the damages sustained by personal injuries and the loss of earning power during minority.—*Clark Mile-End Spool Co. v. Shaffery* (N. J. Sup.) 284.

In an action for injuries not resulting in death, mortality tables are admissible under proper instructions.—*Campbell v. City of York* (Pa.) 879.

Right of plaintiff, under Act May 2, 1876, to recover damages up to the date of trial, on account of the pollution of a stream.—*Hileman v. Hileman Distilling Co.* (Pa.) 575.

DEATH BY WRONGFUL ACT.

Recovery can be had under St. 1891, c. 124, for death by wrongful act, only when the person injured dies immediately.—*Sawyer v. Perry* (Me.) 660.

No action will lie for the wrongful death of a person except that provided by Revision, p. 294, by the personal representative of decedent for the benefit of the widow and next of kin.—*Myers v. Holborn* (N. J. Err. & App.) 389.

A declaration for death by wrongful act in form a common-law action based on defend-

ant's negligence could not be amended by an allegation that the action was brought for the benefit of the widow.—*Sawyer v. Perry* (Me.) 660.

Decedents.

See "Executors and Administrators"; "Wills."

DECEIT.

In an action against one who induced plaintiff to marry him by false representations that he was single, and to live with him for over 30 years, evidence of defendant's wealth, which plaintiff helped to accumulate, was admissible on the question of damages.—*Morrill v. Palmer* (Vt.) 829.

Declarations.

See "Pleading."

Of agent, see "Principal and Agent."

Declarations and Admissions.

See "Evidence."

DEDICATION.

Of highways, see "Highways."

Evidence *held* not to show a dedication of a street made by one through his property.—*City of Baltimore v. Fear* (Md.) 637.

A conveyance of lots as bounding on a street laid out over the grantor's land is a dedication of only so much of the land occupied by the street as will enable the grantee to reach another public way.—*City of Baltimore v. Frick* (Md.) 435.

Where the state, on platting a town, marks certain squares as public squares, and sells lots thereby, the squares are dedicated to public use.—*Commonwealth v. Borough of Beaver* (Pa.) 112.

The fact that land dedicated for a street was not accepted as such by the public for 23 years, during which time it was frequently obstructed, did not constitute an abandonment of the dedication.—*City of Baltimore v. Frick* (Md.) 435.

DEED.

See, also, "Boundaries"; "Covenants"; "Fraudulent Conveyances"; "Mortgages"; "Vendor and Purchaser."

Sufficiency of evidence to show that deed from mother to one of her children was obtained by undue influence.—*Bauer v. Bauer* (Md.) 643.

Where a deed is delivered to a third person, to be delivered to the grantee on the grantor's death, such a delivery relates back to the date of execution.—*Gish v. Brown* (Pa.) 60.

Delivery of a deed considered, and *held* to pass title.—*Gish v. Brown* (Pa.) 60.

Question whether deed running in names of several grantors was delivered as to those of the grantors who executed it.—*Donnelly v. Rafferty* (Pa. Sup.) 754.

The fact that a deed was never delivered *held* not to revive a previous deed originally made for the same purpose and then abandoned.—*Donnelly v. Rafferty* (Pa. Sup.) 754.

Where, to avoid a family quarrel, each of the remainder-men under a devise agrees to join in a conveyance to the life tenants, provided it is joined in by all the remainder-men, the consideration for the deed fails if any of the remainder-men fail to join therein.—*Donnelly v. Rafferty* (Pa. Sup.) 754.

The words, "give, grant, bargain, sell, convey, and confirm," in a deed, *held* to convey a fee.—*Breckinridge v. Delaware, L. & W. R. Co.* (N. J. Ch.) 800.

Deed construed, and *held* to convey a fee subject to an easement.—*First Nat. Bank v. Morrison* (Me.) 784.

Two calls in a deed, one to the "high-water mark" of a river, and the other "thence westerly by the bank of the river," mean the same thing.—*Morrison v. First Nat. Bank* (Me.) 782.

Deed construed, and *held* to convey a fee subject to an easement.—*Morrison v. First Nat. Bank* (Me.) 782.

The punctuation of an instrument may be considered in order to solve an ambiguity which was not created by the punctuation.—*Olivet v. Whitworth* (Md.) 723.

A deed of two tracts of land as that received under a certain waiver "particularly described in a deed from P." *held* not to include a tract received by will, but not included in the deed from P.—*Jay v. Michael* (M.I.) 322.

A second deed between the same parties may be used to show the construction given to the first deed by the parties thereto.—*Ringrose v. Ringrose* (Pa.) 129.

Deed construed, and *held* to charge the land in the hands of the grantee and his successor with a provision in favor of the grantors.—*Ringrose v. Ringrose* (Pa.) 129.

A deed construed in connection with the evidence in the case, and *held*, that the alleged reservation therein without words of inheritance constituted a personal right or easement in the grantor which he could convey.—*Ring v. Walker* (Me.) 174.

Defective Streets.

See "Municipal Corporations."

Demurrer.

See "Pleading."

DEPOSITION.

Deposition, in whole or in part, may be read in evidence by either party to the action.—*Town of Ansonia v. Cooper* (Conn.) 905.

DESCENT AND DISTRIBUTION.

See, also, "Dower"; "Executors and Administrators"; "Wills."

A bill will not lie against a devisee to recover loss by an estate of which his testator was executor, through his negligence, without making the personal representative of the testator a party.—*Dodd v. Lindsley* (N. J. Err. & App.) 963.

Effect of special act of March 14, 1873 (P. L. 290), as exempting one M. H. from the payment of the collateral inheritance tax on property devised to him by one R. H.—*Commonwealth v. Henderson* (Pa.) 368.

DISTRICT AND PROSECUTING ATTORNEYS.

When prisoner properly discharged by direction of state's attorney.—*Kent v. Miles* (Vt.) 768.

District Court.

See "Courts."

DIVORCE.

Where a wife deserts her husband for three consecutive years, and refuses to return, the fact that he visited her on one occasion and occupied the same bed does not show condonation.—*Danforth v. Danforth* (Me.) 781.

Utter desertion for three consecutive years is ground for divorce.—*Danforth v. Danforth* (Me.) 781.

Character of evidence admissible on issue as to cruel and barbarous treatment of husband by wife.—*Barnsdall v. Barnsdall* (Pa.) 343.

The cruel and barbarous treatment of a husband by his wife, which justifies a divorce, need not be such as to endanger the husband's life.—*Barnsdall v. Barnsdall* (Pa.) 343.

Held, that defendant did not allege facts sufficient to entitle him to a new trial of a petition for a divorce.—*Roberts v. Roberts* (R. I.) 872.

A woman who has been granted a divorce and the custody of her minor children, without any provision for their maintenance, cannot, on the death of the husband, recover from his estate for the support of the children.—*Brown v. Smith* (R. I.) 466.

A dismissal by complainant *held* properly granted on condition that he pay the costs and defendant's attorney's fees.—*Chappell v. Chappell* (Md.) 650.

Documentary Evidence.

See "Evidence."

DOWER.

A widow who takes an annuity in lieu of dower not exceeding her dower interest is preferred to creditors of the estate.—*Green v. Saulsbury* (Del. Ch.) 623.

Dying Declarations.

See "Homicide."

EASEMENTS.

Where land held in common was severed, light and air were appurtenant to a building on one of the separate parcels thereby created.—*Greer v. Van Meter* (N. J. Ch.) 794.

An easement is not lost by cesser of use for two years.—*Manning v. Port Reading R. Co.* (N. J. Ch.) 802.

The owner of land subject to easement cannot change location of the easement without the consent of the person entitled thereto.—*Manning v. Port Reading R. Co.* (N. J. Ch.) 802.

The fact that there is a change of a few feet in the way which is the subject of user does not affect the right thereto by prescription.—*Kurtz v. Hoke* (Pa.) 549.

Act April 25, 1850, providing that no right of way through uninclosed woodland shall be acquired by user, the use of a part of the way passing through arable land does not draw with it a prescriptive right to the part passing through uninclosed woodland.—*Kurtz v. Hoke* (Pa.) 549.

Evidence examined, and *held*, that the building of a fence across a street did not show an abandonment of the easement in the street.—*White v. Tide Water Oil Co.* (N. J. Ch.) 47; *Same v. Tide Water Pipe Co.*, *Id.*

Evidence examined, and *held* insufficient to show an abandonment of an alley.—*Ermentrout v. Stitzel* (Pa.) 109.

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Grantor's report and findings on premises.—*Riment.*—*Riment.*

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v. Same, Id.; Montclair Water Co. v. Same, Id.; Whelihan v. Same, Id.; Favier v. Same, Id.; Rockaway & Hudson Co. v. Same, Id.

Right of plank-road company which condemns a right of way to appropriate a spring opened in cutting its roadway, and to use the waters thereof.—Upper Ten Mile Plank-Road Co. v. Braden (Pa.) 562.

Under general power to take lands for streets, land on which a dwelling house is situated may be taken by a city.—Barr v. City of New Brunswick (N. J. Sup.) 477.

Where directors of a corporation adopted a plan requiring the acquisition of certain lands and paid for some of them, they sufficiently determined the necessity of the taking.—State v. Proprietors of Morris Aqueduct (N. J. Sup.) 252.

The Morris Aqueduct has power to condemn lands and rights in them to furnish water and to collect and preserve the water.—Kountze v. Proprietors of Morris Aqueduct (N. J. Sup.) 252.

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An application to condemn land by a corporation authorized to condemn lands necessary for its purpose need not show how it determined the necessity.—Kountze v. Proprietors of Morris Aqueduct (N. J. Sup.) 252.

A tenant whose name does not appear in the report of condemnation proceedings because he failed to make his interest known, is not entitled to personal notice under Pub. St. c. 64, § 35.—Wahlen v. Bates (R. I.) 224.

An election of the city to make an improvement, made after the filing of a first, but before the filing of an amended, report, vests title in lands included in the amended report.—In re Washington Street (R. I.) 516.

Where parties interested allowed a recommitment of a commissioners' report without objection, they waived any irregularity.—In re Washington Street (R. I.) 516.

Where a report was recommitment for correction, the amended report, when filed, related back to the filing of the original report.—In re Washington Street (R. I.) 516.

A recital in the order of recommitment of a report to the commissioners as to who made the motion for recommitment is conclusive.—In re Washington Street (R. I.) 516.

Effect of approval of bond on application for condemnation of property by a railroad company, as passing the title thereto.—Semple v. Cleveland & P. R. Co. (Pa.) 564.

The approval by directors of a corporation of eminent domain proceedings by its president are sufficient to sustain an order made.—Kountze v. Proprietors of Morris Aqueduct (N. J. Sup.) 252.

The right to jury trials given by Pub. Laws, c. 1201, § 2, on condemnation of land for a statehouse, refers to awards from the board of appraisal commissioners.—In re Condemnation of Certain Land for New State House (R. I.) 448.

Under Pub. Laws, c. 1201, there is no right on the part of the state to a jury trial.—In re Condemnation of Certain Land for New State House (R. I.) 448.

Compensation.

In condemning land for a state house, the commissioners in awarding damages should not add to the area of the lots abutting on streets condemned one-half the width of the streets.—In re Condemnation of Certain Land for New State House (R. I.) 523.

The payment into court, after a party's refusal to accept the amount awarded for land taken by condemnation, stops interest thereon.—National Docks & N. J. J. C. Ry. Co. v. Pennsylvania R. R. (N. J. Ch.) 860.

The attorney for parties having a divided interest in condemnation proceedings is authorized to receive the amount awarded for taking the land.—National Docks & N. J. J. C. Ry. Co. v. Pennsylvania R. R. (N. J. Ch.) 860.

Measure of damages on the taking of a toll bridge by a county for public use under Act May 8, 1876.—Clarion Turnpike & Bridge Co. v. Clarion County (Pa.) 580.

Construction of charter to a turnpike company as making its right to erect a toll bridge over a river distinct from the right to maintain a turnpike, so that the latter was not to be considered in determining the value of the former when appropriated by the county.—Clarion Turnpike & Bridge Co. v. Clarion County (Pa.) 580.

In proceedings to condemn land for a statehouse, the commissioners should consider the enhancement in value of the land taken due to the purchase of an adjacent tract for the statehouse.—In re Condemnation of Certain Land for New Statehouse (R. I.) 523.

Under Pub. Laws, c. 1201, the statehouse board of commissioners must regard the time when the court adjudicates a public necessity for taking land for such statehouse in determining the value of the land taken.—In re Condemnation of Certain Land for New Statehouse (R. I.) 523.

Error of commissioners, in proceedings under Act Feb. 22, 1854, as amended, in not apportioning to parties having distinct interests their separate damages, held a mere irregularity not affecting the jurisdiction.—In re Washington Street (R. I.) 516.

Sufficiency of evidence on issue as to damages sustained by plaintiff through the widening of a street through his property to justify the court in telling the jury that the plaintiff is the owner of the land.—Royer v. Borough of Ephrata (Pa.) 361.

Harmless error, on issue as to damage caused by widening a street through one's land, in submitting to the jury plaintiff's testimony that he made a parol sale of the lot for \$4,000 before the taking of part of it by the borough.—Reinhold v. Borough of Ephrata (Pa.) 362.

A statement by the court, on an issue as to damage caused by widening a street, of the time before the widening which was to be considered in determining the market value, held not to be ground for reversal.—Royer v. Borough of Ephrata (Pa.) 361.

Rights of landowners.

One suing to restrain the laying of railroad tracks over his land need allege only ownership and occupancy, without introducing the chain of his title.—Lewis v. Pennsylvania R. Co. (N. J. Ch.) 932.

It is presumed that an abutting owner owns to the center of the street, and he is hence entitled to a preliminary injunction against the laying of tracks on that half of the street adjoining his lot.—Lewis v. Pennsylvania R. Co. (N. J. Ch.) 932.

Where land is subject to the servitude of a highway the construction of an electric road will not be restrained at the suit of the landowner, because without legal authority, where it does not impose an additional servitude or cause complainant any special damage.—Borden v. Atlantic Highlands, R. B. & L. B. Electric Ry. Co. (N. J. Ch.) 276.

EQUITY—

See, also, "Charities"; "Fraudulent Conveyances"; "Injunction"; "Marshaling Assets"; "Mortgages"; "Partnership"; "Receivers"; "Specific Performance"; "Subrogation"; "Trusts."

Where equity assumes jurisdiction of cause also triable at law, it will retain it.—*Meyer v. Saul* (Md.) 539.

Where a court of equity entertains jurisdiction for the purpose of granting any relief it will determine all the matters in controversy so as to put an end to the litigation.—*Middle States Loan, Bldg. & Const. Co. v. Hagerstown Mattress & Upholstery Co.* (Md.) 886.

Where equity is invoked to effect the crossing of one railroad by another, and the right to cross has been duly condemned, the court will determine the legality of the proposed manner of crossing.—*National Docks & N. J. J. C. Ry. Co. v. Pennsylvania R. Co.* (N. J. Ch.) 219.

Equity has no jurisdiction to protect a person from being watched by detectives.—*Chappell v. Stewart* (Md.) 542.

The rights of all parties before a court of equity will be determined, regardless of informalities in their joinder.—*Peterborough Sav. Bank v. Hartshorn* (N. H.) 729.

A proceeding to enforce a surety's liability will be stayed until securities which the creditor holds are first exhausted.—*Kidd v. Hurley* (N. J. Ch.) 1057.

Question as to equitable jurisdiction conferred by bill reciting defendant's duty to pay mortgages assumed by him, and a threat by the mortgagees to proceed against plaintiff mortgagor on account of such debt.—*Blood v. Crew Levick Co.* (Pa.) 348.

Where there is no trust relationship, and there is no complexity of accounts, complainant will be remitted to his remedy at law.—*Bellingham v. Palmer* (N. J. Ch.) 199.

A bill for injunction and to correct a deed and for legal relief will be dismissed where the application for equitable relief is unfounded.—*Collier v. Collier* (N. J. Ch.) 193.

Where plaintiff claims the right to build over defendant's lot, which defendant denies, the remedy is not in equity, but at law.—*Saunders v. Racquet Club* (Pa.) 79.

Where a creditor failed to present his claim to the executors of his debtor, a court of equity has no jurisdiction to declare certain bequests subject to his claim, it appearing that on a final settlement a large residue remained in the executors.—*Dodson v. Severs* (N. J. Err. & App.) 388.

Reformation of contract.

Equity will not reform an executed contract on the ground of mistake unless it was mutual.—*Dougherty v. Greenwich Ins. Co. of City of New York* (N. J. Ch.) 295.

Cancellation of contract.

Fraud relied on as ground for equitable relief must be proven like any other fact.—*Burton v. Willen* (Del. Ch.) 675.

Failure of an executor to disclose to the daughter of his decedent the condition of decedent's estate held a suppressio veri vitiating an agreement by the daughter that the claim by the executor for advances made her while a minor shall be allowed on a claim of the daughter against the executor, disconnected with the estate.—*Burton v. Willen* (Del. Ch.) 675.

A deed will not be set aside where the party executing it can read, on the claim that he supposed the conditions different from what they really were.—*Eldridge v. Dexter & P. R. Co.* (Me.) 974.

A higher degree of mental capacity is required on the exchange of lands than to attend to ordinary business or to make a will.—*Turner v. Hought* (N. J. Ch.) 28.

Evidence in an action to set aside an exchange of properties on the ground of fraud considered,

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management of milling property determined.—Kennedy v. McCloskey (Pa.) 117.

A judgment creditor *held* a proper party to an action by lien claimants against a corporation for the appointment of a receiver.—Fitzgerald v. Maxim Powder Manufg Co. (N. J. Ch.) 1064.

Right to have master's report stricken out because testimony was not taken within the time fixed by rule of court, when the delay was caused by the one making the motion.—Hoofstittler v. Hostetter (Pa. Sup.) 753.

When defendants voluntarily appear, and without objection participate in all the proceedings, it is error to dismiss the suit because an erroneous form of notice to appear and answer was used.—Brinton v. Hogue (Pa.) 554.

A decree for the payment of money due on a contract can be enforced by sequestration, by fieri facias, and, in cases of fraud, by capias against his person.—Aspinwall v. Aspinwall (N. J. Err. & App.) 470.

ESTATES.

Right of life tenant to profits arising from the sale of property bought in by the trustees on foreclosure.—In re Park's Estate (Pa.) 884; Appeal of Leech, Id.

ESTOPPEL.

By judgment, see "Judgment."

A corporate officer who signed a sworn statement that 20 per cent. of the capital stock had been paid in is estopped, in an action on his own subscription, from denying corporate existence because such stock was not paid in.—Canfield v. Gregory (Conn.) 536.

An abutting owner is not estopped to allege the invalidity of an ordinance because he opposed the paving of a street with stone, expressing the preference for brick, which the ordinance, when passed, provided for.—City of Bradford v. Fox (Pa.) 85.

Defendant, having objected to the jurisdiction because of a provision in a contract for reference to an architect, cannot thereafter object to a reference to the architect.—Barclay v. Deckerhoof (Pa.) 71.

The fact that a city accepted the benefits of a contract by the council will not estop it from avoiding the contract on the ground that the council had no authority to make it.—McTwiggan v. Hunter (R. I.) 5.

A plaintiff, in an action to set aside a conveyance on the ground of fraud, *held* not estopped by statements made by his wife to inquiries made by a proposed purchaser.—Turner v. Houpt (N. J. Ch.) 28.

Evidence examined, and *held*, that one building a fence across a street was not estopped to claim an easement therein.—White v. Tide Water Oil Co. (N. J. Ch.) 47; Same v. Tide Water Pipe Co., Id.

One receiving benefits *held* estopped thereby.—Gibbs v. Craig (N. J. Err. & App.) 1062.

A borrower or his creditor cannot object that a loan by a national bank was in excess of the legal limit.—McCartney v. Kipp (Pa.) 233.

Estoppel of one to allege that suit is brought prematurely after having asserted to plaintiff before suit an absolute title to the property in suit.—Collins v. Bellefonte Cent. R. Co. (Pa.) 331.

Effect of declarations by plaintiffs as to boundary line between their land and defendants' as estopping them from recovering for timber cut by defendants on a disputed strip.—Elfert v. Lytle (Pa.) 573.

A county officer is not, by attending a meeting of the county auditors at which his accounts are examined, estopped to deny the jurisdiction of the auditors to review a former decision as to his indebtedness to the county.—County of Westmoreland v. Fisher (Pa.) 571.

Defendant, who had induced plaintiff to marry him by false representations that he was single, could not assert that plaintiff was not deceived by his denial that he was previously married.—Morrill v. Palmer (Vt.) 829.

One who permitted a railway company to erect an expensive embankment over land in which he had an easement was not entitled to a decree for the abatement of the obstruction until the company had opportunity to condemn a right of way.—Manning v. Port Reading R. Co. (N. J. Ch.) 802.

Facts considered, and *held* to constitute a ratification by a remainder-man of a conveyance in fee by the life tenant.—Town of Ansonia v. Cooper (Conn.) 905.

A contract for the sale of a right to mine coal owned by tenants in common, and the recognition of such contract by one of such tenants as made by others, *held* not to estop him from claiming a larger interest in the proceeds than provided for in the contract.—Winton Coal Co. v. Pancoast Coal Co. (Pa.) 110.

EVIDENCE.

See, also, "Deposition"; "Witness."

In criminal cases, see "Criminal Law"; "Homicide."

In particular actions, see "Assumpsit"; "Libel and Slander"; "Negligence"; "Trespass."

Newly-discovered evidence as ground for new trial, see "New Trial."

Objections to, see "Trial."

Reception of, see "Trial."

Evidence in a personal injury suit that the wagon which ran over plaintiff was marked like wagons of defendant established prima facie that defendant was in control of the wagon by its servant.—Edgeworth v. Wood (N. J. Sup.) 940.

The presumption from the giving by a corporation of a mortgage on personalty of ownership is overcome by evidence that another was in possession.—Chillingworth v. Eastern Tinware Co. (Conn.) 1009.

Admissibility of evidence of purchases at various times to show a general scheme to defraud.—White v. Rosenthal (Pa.) 1027.

A lawyer of a foreign state is competent to testify as to the laws of that state.—Jackson v. Jackson (Md.) 317.

It is error to exclude oral evidence that certain rules were not distributed by defendant to its employes at the date of the accident on the ground that the receipts signed by the employes on receiving the rules are the best evidence as to the date of such receipt.—Dougherty v. Philadelphia & R. R. Co. (Pa.) 340.

Secondary evidence of a bill not produced is properly refused.—Martin v. McCray (Pa.) 108.

The courts will take judicial notice of a statute vesting the control of the construction of city waterworks in a commission independent of the city.—Gross v. City of Portsmouth (N. H.) 256.

In an action for property claimed as a gift from decedent, plaintiff's evidence that she was threatened with imprisonment if she did not give it up is admissible to explain her surrender of it to the administrator.—Pryor v. Morgan (Pa.) 98.

Proof of the handwriting of one making entries on an open account is admissible where he is out of the state.—Heiskell v. Rollins (Md.) 263.

Burden of proof.

On a reference to ascertain what complainant had expended for a certain purpose, the burden was on him to show the expenditures and their object.—*New York Bay Cemetery Co. v. Buckmaster* (N. J. Ch.) 819.

Burden on the defendant in a writ for the delivery of possession of land of showing that a restoration by the plaintiff of possession involved a reinstatement of the defendant's equitable title divested by the previous proceedings.—*Berwind v. Williams* (Pa.) 353.

Declarations and admissions.

In an action for negligence, evidence of statements by defendant's foreman is admissible against defendant.—*Rowe v. Baltimore & O. R. Co.* (Md.) 761.

Statements made by the agent soon after the execution of a contract *held* inadmissible against the other party to the contract, to prove its terms.—*C. & C. Electric Motor Co. v. D. Frisbie & Co.* (Conn.) 604.

Admissibility, in action against railroad company for certain railroad stock, of admissions by the president, in a sworn report, that the stock belonged to plaintiff.—*Collins v. Bellefonte Cent. R. Co.* (Pa.) 331.

Documentary.

A copy of the record of the adjutant general, duly certified, is not sufficient to show a discharge of a volunteer soldier.—*Francis v. City of Newark* (N. J. Sup.) 853.

Admissibility of book accounts in an action for goods sold.—*Lumb v. Curtis* (Conn.) 998.

Opinion.

Opinions of county commissioners as to the dangerous condition of a highway *held* inadmissible.—*Rowe v. Baltimore & O. R. Co.* (Md.) 761.

A family physician can express an opinion on the actual condition of his patient's mind.—*Hall v. Perry* (Me.) 160.

A witness, after describing a highway, can give his opinion that it was dangerous.—*Kitchen v. Union Tp.* (Pa.) 76.

Parol.

Where an original contract is verbal and entire, and a part only is reduced to writing, it is competent to show such fact.—*Neal v. Flint* (Me.) 669.

An accommodation maker of a note cannot alter its terms by evidence of a verbal agreement that the indorser should be liable jointly with him.—*Kling v. Kehoe* (N. J. Sup.) 946.

Parol evidence is inadmissible to explain the provisions of a lease.—*Smith v. Blake* (Me.) 992.

Receipts given for rent are open to explanation.—*Smith v. Blake* (Me.) 992.

A defense based on the breach of parol promises by plaintiff's agent *held* to be unavailable as involving the alteration of a written instrument by parol.—*Hallowell v. Lierz* (Pa.) 344.

A receipt signed by one party is not a written agreement incapable of modification by parol evidence.—*Jessop v. Ivory* (Pa.) 352.

Admissibility of parol evidence to ascertain the land referred to in a levy of execution.—*Wildasin v. Bare* (Pa.) 365.

Examination.

Of witness, see "Witness."

EXECUTION.

See, also, "Attachment"; "Garnishment."

Conditions precedent to the issuance of a special fieri facias under Act April 7, 1870.—

Mausel v. New York, C. & St. L. Ry. Co. (Pa.) 377.

Sufficiency of levy in terms on a "tract of land situated in W. township, containing 98 acres, and adjoining lands of" certain named persons, as describing two tracts aggregating 98 acres, and used together as one farm, neither of them lying in W. township.—*Wildasin v. Bare* (Pa.) 365.

The fact that, by an arrangement with the sheriff and a first execution creditor of his assignor, an assignee for creditors takes possession and makes sales of the goods levied on, does not necessarily postpone the levy of such creditor to a junior levy.—*Broadhead v. Cornman* (Pa.) 360.

Question whether the lien of a mortgage was divested by an execution sale so as to entitle it to share in the proceeds thereof.—*Hilliard v. Tustin* (Pa.) 574; *Appeal of Wilson, Id.*

A statutory provision that execution sale should be made at the end of 21 days from posting notice of sale *held* mandatory, and a sale thereafter conveyed no title.—*Morey v. Hoyt* (Conn.) 496.

Notice of an execution sale *held* not given for sufficient length of time.—*Goldsworthy v. Coyle* (R. I.) 466.

Holders of wage earners' claims have no right to object to the stay of a writ of execution issued on a judgment obtained by another person against their debtor.—*Mettfett v. Mohn* (Pa.) 367.

EXECUTORS AND ADMINISTRATORS.

See, also, "Descent and Distribution"; "Wills."

The appointment of a wife as executrix does not make the husband a coexecutor, so that his disqualification to act as such will disqualify her to act alone.—*Lippincott v. Wikoff* (N. J. Ch.) 305.

The orphans' court could not appoint an administrator c. t. a. in the absence of evidence that the executor was present at the probate and failed to qualify, or, if not present, was summoned and did not appear, or was out of the state, or had become disqualified.—*Wheeler v. Stiffer* (Md.) 434.

Misconduct on the part of an executor justifying his removal.—*Carey v. Reed* (Md.) 633.

The fact that on the death of an administrator a bank account on which he occasionally deposited is standing on the bank's books in the name of the original decedent, is *prima facie* evidence that it belonged to the latter's estate.—*Getty v. Long* (Md.) 639.

Right of administrator of deceased administrator to recover a balance in bank, standing in the name of the original decedent, which is an undistributed part of the assets of the latter's estate.—*Getty v. Long* (Md.) 639.

Where a widow, prior to the assignment of her dower, uses for herself and children a tenement owned by the children, she cannot be required to pay rent, though such tenement is no part of the mansion house.—*Flynn v. O'Malley* (N. J. Ch.) 402.

Where a widow leases a part of the mansion house, she is entitled to the rents until assignment of her dower.—*Flynn v. O'Malley* (N. J. Ch.) 402.

Where property which was a gift by decedent was wrongfully obtained by the administrator, the owner may sue the administrator either as an individual, or in his representative capacity.—*Pryor v. Morgan* (Pa.) 98.

One of two executors to whom property is left in trust to carry on a partnership business

cannot, without the consent of his coexecutor, mortgage the trust property.—*Carr v. Hertz* (N. J. Ch.) 194.

Where the ends sought by a bill against an executor named as an individual show ground against him in his representative capacity, he will be regarded as defendant in that capacity.—*Harlem Co-operative Building & Loan Ass'n v. Freeburn* (N. J. Ch.) 514.

An administrator who, in good faith, pays a creditor's claim in full, believing the estate to be solvent, may, on the estate proving insolvent, recover the difference between the amount so paid and that pro rata share which the creditor would have been entitled to, in common with all other creditors.—*Morris v. Porter* (Me.) 15.

After a decree of the probate court settling the account of a testamentary trustee is confirmed on appeal, the probate judge, in the settlement of a subsequent account, cannot allow costs incurred in the settlement of such prior account.—*Peabody v. Mattocks* (Me.) 900.

An order confirming the auditing of an executor's accounts is conclusive, in the absence of fraud or mistake.—*In re Heath's Estate* (N. J. Prerog.) 46.

The transfer of a balance from an executor's account to a subsequent account is not an auditing and reporting, within Laws 1890, p. 250, allowing the register of the prerogative court a fee thereon.—*In re Heath's Estate* (N. J. Prerog.) 46.

Claims against estate.

The law implies a promise on the part of an executor to pay the funeral expenses out of the estate.—*Fogg v. Holbrook* (Me.) 792.

The estate of a decedent is liable for reasonable expenses incurred in providing a decent burial.—*Fogg v. Holbrook* (Me.) 792.

Debts of deceased and expenses of administration must be paid before devises and legacies.—*Hamlin v. Mansfield* (Me.) 788.

Propriety of instruction as to amount of recovery in action on decedent's contract to pay for plaintiff's services.—*Kauss v. Rohner* (Pa.) 1016.

Construction and effect of Act Feb. 24, 1834, § 24, declaring that no debts of a decedent not secured by mortgage or judgment shall remain a lien on his lands after his death more than five years unless an action is commenced or a statement of the debt filed.—*In re Emerick's Estate* (Pa.) 550.

Where plaintiff pays an accommodation note given by her to decedent out of moneys given her by decedent, she may recover against his estate on a note given as security.—*In re Kern's Estate* (Pa.) 129; Appeal of Gilpin, Id.

Right of parties interested in decedent's estate to furnish the money for the payment of the debt and take deeds for the land in severalty.—*Sager v. Mead* (Pa.) 355.

Sale of decedent's land.

An executor's sale will not be set aside because of a bona fide bid by an executor.—*Rigg v. Schweitzer* (Pa.) 116.

An orphans' court sale for payment of debts is not complete, nor is the interest of the heirs at law divested, until confirmation by the court and delivery of deed to the purchaser.—*In re Emerick's Estate* (Pa.) 550.

On the sale of decedent's land more than five years after his death, creditors whose claims are not liens under Act Feb. 24, 1834, do not share in the distribution of proceeds.—*In re Emerick's Estate* (Pa.) 550.

EXEMPTIONS.

From taxation, see "Taxation."

Right of creditor to transfer his claim to his wife so that she may issue an attachment exe-

cution against a judgment recovered by the debtor under Act May 23, 1887, for an amount recovered by the creditor in another state in violation of the exemption law.—*Steele v. McKerrihan* (Pa.) 570.

FACTORS AND BROKERS.

See, also, "Principal and Agent."

Right of owner of oil property to withdraw it from the hands of an agent after the latter's failure to obtain the desired price, and to thereafter sell it to one from whom the agent had obtained an offer.—*Kelly v. Marshall* (Pa.) 690.

FALSE IMPRISONMENT.

When pleas to a declaration for false imprisonment not objectionable for insufficiency.—*Kent v. Miles* (Vt.) 768.

When arrest and commitment lawful.—*Kent v. Miles* (Vt.) 768.

FALSE PRETENSES.

The indictment must exhibit a pretense having an apparent tendency to induce the person defrauded to part with his money.—*Roper v. State* (N. J. Sup.) 969.

Where the indictment charges fraud by the offer of an existing mortgage, and the proof shows that the money was obtained on a promise to make a mortgage, the variance is fatal.—*Harris v. State* (N. J. Sup.) 844.

Fees.

Of clerk of court, see "Clerk of Court."

FINDING LOST GOODS.

Several boys, who, while playing together, found money, were entitled to the same in common.—*Kerou v. Cashman* (N. J. Ch.) 1055.

FISHERIES.

The title of a claimant to a designated oyster bed may be questioned by defendant, in an action in trespass for entering on such ground.—*Cook v. Raymond* (Conn.) 1006.

Pub. Acts 1893, c. 110, relating to the marking of established oyster beds with buoys, does not amend Gen. St. § 2328.—*Cook v. Raymond* (Conn.) 1006.

In trespass for unlawfully carrying away oysters from plaintiff's oyster beds, where the ground is a natural oyster bed, plaintiff cannot recover the value of such oysters, though he had planted in good faith.—*Cook v. Raymond* (Conn.) 1006.

Act April 14, 1881, and Act April 23, 1885, do not prevent proving by parol evidence that the ground designated for the cultivation of shellfish was a natural oyster bed.—*Cook v. Raymond* (Conn.) 1006.

Rev. St. c. 40, § 49, prohibiting the sale of trout between certain days, means a fresh-water fish.—*State v. Lewis* (Me.) 10.

FIXTURES.

Certain machinery placed on land held to be fixtures, and subject to mortgage on the land.—*Peeder v. Van Winkle* (N. J. Err. & App.) 399.

A heater and range, though but slightly attached to the building, held fixtures if put in with

intent to make them such.—*Erdman v. Moore* (N. J. Sup.) 958.

Casings in an oil well are trade fixtures, and the property of the landowner if not removed during or within a reasonable time after the expiration of the lease.—*Shellar v. Shivers* (Pa.) 95.

FORCIBLE ENTRY AND DETAINER.

One having the fee is entitled to judgment for possession, though the tenant has an easement over a portion of the demanded premises.—*First Nat. Bank v. Morrison* (Me.) 784.

Foreclosure.

Of mortgage, see "Mortgages."

FRAUDS, STATUTE OF.

Agreement to take down, transfer, and erect a barn is not a sale of goods, nor a sale of interest in lands.—*Scales v. Wiley* (Vt.) 771.

Insufficiency of parol contract for sale of lands.—*Reed v. Adams* (Pa.) 700.

A contract of employment for one year, to commence when the employe secures a release from a former employment, *held* not within the statute.—*Baltimore Breweries Co. v. Callahan* (Md.) 460.

A judgment creditor of a fraudulent grantee is not a purchaser within the statute of frauds excepting bona fide purchasers of property fraudulently conveyed from the operation of such statute.—*Couse v. Columbia Powder Manuf'g Co.* (N. J. Ch.) 297.

FRAUDULENT CONVEYANCES.

Question whether fraud as to creditors was shown by the fact that a creditor preferred by the debtor made large profits from the property conveyed to him by the investment of capital.—*Davis v. Yoder* (Pa.) 882.

An agreement made by a debtor with a creditor whom he had preferred, by which he was to have a commission for selling the property, *held* not to show fraud.—*Davis v. Yoder* (Pa.) 882.

Actual insolvency of a donor is not an indispensable element in the proof of a fraudulent intent as to creditors.—*Weeks v. Hill* (Me.) 778.

A conveyance by a single woman pending an engagement, without consideration, *held* in fraud of the marital rights of the husband, and void as to him.—*Leary v. King* (Del. Ch.) 621.

A conveyance of property in trust to pay debts, to be sold on consent in writing of the grantor, *held* fraudulent, as hindering creditors.—*Richey v. Carpenter* (N. J. Ch.) 472; *Hulsizer's Adm'rs v. Same, Id.*

A conveyance by a corporation of all its property to another corporation in consideration of the assumption by the latter of the former's debts, which allowed the stockholders of the grantee to divide the proceeds among themselves instead of applying it to the payment of debts, is prima facie fraudulent as to the creditors of the grantor.—*Couse v. Columbia Powder Manuf'g Co.* (N. J. Ch.) 297.

Testimony by a husband that the consideration for a conveyance by him to his wife was that he had sold certain stock for her and received value therefor *held* not to be ground for sustaining the conveyance as against creditors.—

In re Sweeting (Pa.) 543; Appeal of Billington, Id.

Whether a conveyance was made in fraud of creditors is a question of fact for the jury.—*Weeks v. Hill* (Me.) 778.

In an action under Laws 1887, c. 137, § 12, to recover double the amount of the execution, declaration *held* defective, in not averring the specific act of the defendant whereby the debtor was fraudulently aided in concealing his property.—*Wing v. Weeks* (Me.) 779.

GAMING.

Indictment for violation of act preventing pool selling *held* not to charge two offenses.—*State v. Falk* (Conn.) 913.

An indictment, under Pub. Acts 1893, c. 68, for keeping a place for the purpose of transmitting money to be bet on races, must charge knowledge of the purpose for which the money was transmitted.—*State v. Falk* (Conn.) 913.

It is no defense for keeping a place from which to transmit money to be bet on races out of the state that defendant was the agent of the corporation of another state authorized to do such business.—*State v. Falk* (Conn.) 913.

An indictment under Rev. Code 1874, p. 786, charging defendant with unlawfully exhibiting a sweat cloth on which dice were played for money is sufficient.—*State v. Norton* (Del. Gen. Sess.) 438.

Numerous dealings in stock on margins, where the broker always keeps sufficient actual stock to make delivery, and where, at the end of the last deal, he transfers the remaining stock to his customer's order, are not a wagering contract.—*Dillaway v. Alden* (Me.) 981.

GARNISHMENT.

See, also, "Attachment."

Where jurisdiction is obtained of a nonresident defendant, a debt due him by a resident under a foreign contract, and payable in another state, is subject to garnishment.—*Cross v. Brown* (R. I.) 147.

A debt payable at a future date is subject to garnishment before maturity.—*Cross v. Brown* (R. I.) 147.

An insurance company which sends on surrender of a policy a cashier's check to its agent, payable to defendant's order, *held* could not be garnished subsequently.—*Campbell v. Hanney* (R. I.) 444.

The refusal to issue garnishment process against one is proper where it appears that he is already liable as garnishee in other suits for amounts exceeding the value of the property held by him.—*Cross v. Brown* (R. I.) 147.

It is within the discretion of the court to allow a claimant of attached property to amend his claim, though it appears to have been amended at the instance of the garnishee.—*Cross v. Brown* (R. I.) 147.

GIFTS.

The deposit of money by a mother in the name of her children, coupled with her declarations, *held* not to show a complete gift of the deposit or to create a voluntary trust.—*Norway Sav. Bank v. Merriam* (Me.) 840.

Where a deposit in a savings bank in the names of a father and child is for the convenience of the parent, the mere permitting the account to so remain and declarations indicating a gift are insufficient to show such gift.—*Skillman v. Wiegand* (N. J. Ch.) 929.

A note not under seal, and without consideration, is not enforceable against a decedent's estate.—*In re Kern's Estate* (Pa.) 129; *Appeal of Gilpin, Id.*

Heirs.

See "Descent and Distribution."

HIGHWAYS.

Question whether lands reserved in a deed as lying within the lines of a street which had not been opened constituted a highway, or remained the property of the grantor.—*Patterson v. People's Natural Gas Co.* (Pa.) 575.

Where land is conveyed as bounded by a street, the presumption of dedication is conclusive.—*White v. Tide Water Oil Co.* (N. J. Ch.) 47; *Same v. Tide Water Pipe Co., Id.*

Where a village refuses to lay out a highway, proceedings to compel its construction can be maintained only against the town in which the village is located.—*Mason v. Town and Village of St. Albans* (Vt.) 1068.

The record of county commissioners' proceedings in laying out a highway examined, and held a sufficient basis for their procedure as against collateral attack.—*Higgins v. Hamor* (Me.) 655.

Where the courses and distances of the return of the surveyors lay a road through dwelling houses, it will be set aside, though the map shows the road to be on one side of the dwellings.—*Mowbray v. Allen* (N. J. Sup.) 199.

Railroad commissioners may alter or discontinue streets on either side of a railroad crossing as the necessity or convenience of the public may demand.—*Cullen v. New York, N. H. & H. R. Co.* (Conn.) 910; *Tallmadge v. Same, Id.*

Under Act June 13, 1836, an order shutting up an old road before the new one is open is void.—*In re Bridgeport Turnpike* (Pa.) 145.

Owners of lots abutting on streets, near railroad crossings, which are closed by order of railroad commissioners, are entitled to resulting damages, and such damages are part of the "expense" of the alteration, to be paid by the parties named in the order.—*Cullen v. New York, N. H. & H. R. Co.* (Conn.) 910; *Tallmadge v. Same, Id.*

Right of abutting owner to recover damages for an elevation of the highway above his lots in the course of the widening of the street by the township after a proper view.—*Winner v. Graner* (Pa.) 698.

Defective highways.

Where the contributory negligence of plaintiff is the cause of an injury on a highway, a verdict for plaintiff will be set aside.—*Tasker v. Inhabitants of Farmingdale* (Me.) 785.

A question whether a highway is defective so as to render a town liable is for the jury.—*McCloskey v. Moies* (R. I.) 225.

A town is liable, under Pub. St. c. 65, § 1, where rain collects in a depression in a sidewalk, forming ice, by which plaintiff is injured.—*McCloskey v. Moies* (R. I.) 225.

Ice formed in a depression in a sidewalk is not an obstruction caused solely by ice, as contemplated by Pub. St. c. 65, § 15.—*McCloskey v. Moies* (R. I.) 225.

Where the danger in a highway had existed for a long time, a township was liable for injuries caused thereby.—*Kitchen v. Union Tp.* (Pa.) 76.

HOMICIDE.

A homicide with a deadly weapon provided beforehand constitutes murder.—*State v. Peo* (Del. O. & T.) 257.

The burden is on defendant to rebut the presumption of malice arising from the use of a deadly weapon.—*State v. Peo* (Del. O. & T.) 257.

Malice is implied from a killing with a deadly weapon.—*State v. Davis* (Del. O. & T.) 55.

Malice exists if the fatal shot was the result of a purpose, though conceived but a moment before the killing.—*State v. Davis* (Del. O. & T.) 55.

Proof of malice is necessary to a conviction for murder.—*State v. Walker* (Del. O. & T.) 227.

Where the killing is admitted, if a deadly weapon is used malice is presumed.—*State v. Walker* (Del. O. & T.) 227.

A killing is malicious if defendant's act is reckless or wicked.—*State v. Becker* (Del. O. & T.) 178.

A killing with a deadly weapon raises the presumption of malice.—*State v. Becker* (Del. O. & T.) 178.

Medical operation not necessary to preserve life constitutes murder in the second degree.—*State v. Lodge* (Del. O. & T.) 312.

Indictment examined, and held to allege an assault with a dangerous weapon with intent to kill, under Rev. St. c. 118, § 25.—*State v. Lynch* (Me.) 978.

A provocation to reduce a killing to manslaughter must bear a reasonable proportion to the act, and there must not have been time for passion to cool.—*State v. Becker* (Del. O. & T.) 178.

Insulting words or gestures will not reduce a homicide from murder to manslaughter.—*State v. Walker* (Del. O. & T.) 227.

Intoxication is no defense unless the murder was committed under influence of alcoholic insanity.—*State v. Davis* (Del. O. & T.) 55.

The burden is on defendant, after the killing is proven, to reduce the grade below murder in the second degree, and on the state to raise it to murder in the first degree.—*Commonwealth v. Mika* (Pa.) 65.

Statements by one fatally wounded, after he had been informed that he would not recover, and had given it as his opinion that he would die, are admissible.—*Commonwealth v. Mika* (Pa.) 65.

Dying declarations may be contradicted by proof of contradictory statements of deceased.—*State v. Lodge* (Del. O. & T.) 312.

On an indictment for manslaughter under Act Jan., 1881, for intentionally pointing firearms, it must be shown that the pointing was intentional.—*State v. Goodley* (Del. Gen. Sess.) 226.

Killing in self-defense is justifiable only where every means of escape is exhausted.—*State v. Walker* (Del. O. & T.) 227.

To justify a killing in defense of possession of land, the trespass must be to a dwelling house.—*State v. Becker* (Del. O. & T.) 178.

One attacked cannot kill his adversary without an attempt to escape, unless he cannot escape without imminent peril.—*State v. Talley* (Del. O. & T.) 181.

Where one endeavors to withdraw, but cannot by reason of the attacks of his adversary, he may kill his adversary in self-defense.—*State v. Peo* (Del. O. & T.) 257.

Where deceased was entitled to pass over defendant's land, and defendant armed himself to resist such passage, he cannot justify killing deceased on the ground of self-defense.—*State v. Talley* (Del. O. & T.) 181.

To justify an acquittal on the ground of death by accident, the act resulting in death must have been lawful in itself.—*State v. Becker* (Del. O. & T.) 178.

HORSE AND STREET RAILROADS.

See, also, "Carriers."

Duties of a street-railway company to make certain repairs in the streets occupied by it.—*City of Philadelphia v. Thirteenth & Fifteenth Sts. Pass. Ry. Co. (Pa.)* 126.

The fact that the consideration to the state for the passage of an act confirming the merger of certain street railway companies was a surrender of certain franchises did not vary the nature of such act as a legislative grant of new franchises.—*City of Philadelphia v. Thirteenth & Fifteenth Sts. Pass. Ry. Co. (Pa.)* 126.

Where the charter of a street-car company and city ordinance require it to repair and repave streets occupied by it, such duty extends to the replacement of an old pavement by a new one of a different kind ordered by the city.—*City of Philadelphia v. Thirteenth & Fifteenth Sts. Pass. Ry. Co. (Pa.)* 126.

Under the Camden city charter (P. L. 1871, p. 210), the right to construct a street railway in such city can only be granted by ordinance, and not by resolution of the board of public works.—*West Jersey Traction Co. v. Shivers (N. J. Sup.)* 55.

Evidence in an action to recover for injuries considered and *held* not to show plaintiff guilty of contributory negligence.—*Central Ry. Co. of Baltimore v. State (Md.)* 265.

Evidence in an action to recover for injuries considered and *held* sufficient to warrant a verdict for plaintiff.—*Central Ry. Co. of Baltimore v. State (Md.)* 265.

Right to withdraw case from jury, there being testimony that the accident happened because defendant's motorman was looking in the wrong direction.—*Harkins v. Pittsburgh, A. & M. Traction Co. (Pa.)* 1045.

Question whether parents of a child injured by a street car were negligent in intrusting him to a boy 14 years old to take across the street.—*Harkins v. Pittsburgh, A. & M. Traction Co. (Pa.)* 1044.

Whether or not the accident in which plaintiff's intestate was injured was due to defendant's negligently maintaining tracks at an improper elevation over the street level, is for the jury.—*Central Ry. Co. of Baltimore v. State (Md.)* 265.

HUSBAND AND WIFE.

See, also, "Dower"; "Marriage."

Propriety of charge in action against a married woman for goods sold for use in a store carried on in her husband's name.—*Voskamp v. Connor (Pa.)* 553.

Where a married woman dies leaving an insolvent husband, a third person, who has paid her funeral expenses, may recover from her estate.—*Gould v. Moulahan (N. J. Prerog.)* 483.

An antenuptial agreement to pay the wife a certain sum in lieu of dower and other claims construed.—*Appeal of Staub (Conn.)* 615.

An agreement in contemplation of marriage not to claim a statutory allowance in case the husband dies first, is valid.—*Appeal of Staub (Conn.)* 615.

A wife may be convicted of crime without proof that she was not acting under the influence of her husband.—*State v. Clark (Del. Gen. Sess.)* 310.

Impeachment.

Of witness, see "Witness."

INDICTMENT AND INFORMATION.

See "Bigamy"; "False Pretenses"; "Gaming."

The day of the finding of an indictment by the grand jury is the day when the indictment is returned and presented to the court.—*State v. Brownrigg (Me.)* 11.

An indictment alleging that defendant kept a disorderly house, and one where lewd persons resorted, *held* not to state two offenses.—*State v. De Ladson (Conn.)* 531.

INJUNCTION.

Where the facts on which a preliminary injunction is asked are explicitly denied, it will not issue, except in cases of peculiar hardship.—*Kountze v. Proprietors of Morris Aqueduct (N. J. Ch.)* 817.

The obstruction of an easement in light and air will be enjoined.—*Greer v. Van Meter (N. J. Ch.)* 794.

Propriety of injunction to restrain a water company from collecting rents for water unfit for use.—*Brymer v. Butler Water Co. (Pa.)* 707.

Equity will not enjoin an action on a recognition bond by an assignee on the ground of payment.—*Burton v. Willen (Del. Ch.)* 675.

Reversal of decree dissolving preliminary injunction, no findings of fact or legal conclusions having been placed on the record.—*New York & C. Gas Coal Co. v. United Mine Workers' Ass'n of America (Pa.)* 1048.

A preliminary injunction will not issue where the right of the complainant is in doubt.—*National Docks & N. J. J. C. Ry. Co. v. Pennsylvania R. Co. (N. J. Ch.)* 219.

Right to injunction to restrain proceedings for the condemnation of certain property by a railroad, when this involves a violation of a contract between the railroad and the owner.—*Simple v. Cleveland & P. R. Co. (Pa.)* 564.

A preliminary injunction will not issue where complainant's right rests upon an unsettled question of law.—*Newark & H. R. Co. v. New Jersey Traction Co. (N. J. Ch.)* 475.

Where a bill for an injunction is dismissed without hearing by a pro forma decree, *held*, that attorney's fees incurred on appeal cannot be included in the damages.—*Barre Water Co. v. Carnes (Vt.)* 898.

INSOLVENCY.

See, also, "Assignment for Benefit of Creditors." Of corporation, see "Corporations."

That a person is under execution process, and is threatened with suits by creditors, does not conclusively prove his insolvency.—*Burton v. Willen (Del. Ch.)* 675.

Instructions.

See "Trial."

INSURANCE.

A life policy payable to legal representatives may be the subject of a gift, though assignments without the company's consent are prohibited.—*Travelers' Ins. Co. v. Grant (N. J. Ch.)* 1060.

Where application is made to agents, who deliver a policy and collect the premium, the contract is made at the time and place of the delivery and acceptance of the policy.—*Perry v. Dwelling House Ins. Co. (N. H.)* 731.

A policy payable to a third party in case of loss becomes functus officio when the interest of the insured ceases.—*Richmond v. Phoenix Assur. Co. (Me.) 786*; *Same v. Liberty Ins. Co., Id.*

One induced to become a member of a mutual insurance company through fraud of an agent cannot, in an action against him on his premium note, set up the fraud in defense, where, after he discovered the fraud, he paid assessments and other parties became members of the company.—*Eichman v. Hersker (Pa.) 229*.

An agreement between all the parties in a life policy that the amount should be scaled down two-fifths is an extinguishment pro tanto of such amount.—*Leonard v. Charter Oak Life Ins. Co. (Conn.) 511*.

An agreement between a life insurance company and persons interested in the policy for scaling down the amount named is binding on an assignee of the policy.—*Leonard v. Charter Oak Life Ins. Co. (Conn.) 511*.

Application.

There is no presumption that the agent of an insurance company, having knowledge of false representations in an application, communicated them to the company.—*Ward v. Metropolitan Life Ins. Co. (Conn.) 902*.

Knowledge of an agent of material misstatements in the application held not knowledge of the insurer.—*Ward v. Metropolitan Life Ins. Co. (Conn.) 902*.

Under Gen. Laws, c. 172, an insurance company is affected by statements of incumbrances on insured property made to agent when making application, whether shown therein or not.—*Perry v. Dwelling House Ins. Co. (N. H.) 731*.

When false statements are inserted in the application for insurance by the agent of the company without the knowledge of insured, the company cannot rescind the policy on account thereof.—*Smith v. People's Mut. Live-Stock Ins. Co. of Pennsylvania (Pa.) 567*.

Conditions.

Where a policy provides that if the property shall be sold it shall be void, a sale terminates the policy.—*Richmond v. Phoenix Assur. Co. (Me.) 786*; *Same v. Liberty Ins. Co., Id.*

Gen. Laws, c. 172, having been by statute made a part of every contract of insurance, provisions of applications or policies contravening its terms are void.—*Perry v. Dwelling House Ins. Co. (N. H.) 731*.

Whether the use of an engine was an increase of risk of which no reasonable notice was given, held a question for the jury.—*Farmers' Mut. Fire Ins. Co. of Dug Hill v. Schaeffer (Md.) 728*.

Under a policy providing for notice of an increase of risk, held, that the location of an engine on the premises the day before the loss will not prevent recovery, where insured, 10 days prior thereto, notified the company of the proposed use.—*Farmers' Mut. Fire Ins. Co. of Dug Hill v. Schaeffer (Md.) 728*.

A provision that insured shall be the sole owner is not broken, though insured has not paid all the price, and has bought under a contract providing for forfeiture on default.—*Carey v. Allemania Fire Ins. Co. of Pittsburg (Pa.) 185*.

A provision in a life policy that all deferred premiums and unpaid premium notes should be deducted from the amount named in the policy extinguishes it pro tanto.—*Leonard v. Charter Oak Life Ins. Co. (Conn.) 511*.

The fact that the surgeon, sent by a live-stock insurance company on its notification of the sickness of a horse insured, did not complain, when he saw it, that he had not been called in time to treat it, was evidence that notice of the

disease was given promptly, as required by the policy.—*Smith v. People's Mut. Live-Stock Ins. Co. of Pennsylvania (Pa.) 567*.

Waiver by live-stock insurance company of right to forfeit the policy for want of a written notice of the animal's disease as required by the policy.—*Smith v. People's Mut. Live-Stock Ins. Co. of Pennsylvania (Pa.) 567*.

An insurance company held to have waived its right to avoid policy for nonpayment of premium within the time required by the policy.—*Estes v. Home Manufacturers' & Traders' Mut. Ins. Co. (N. H.) 515*; *Same v. American Manufacturers' Mut. Ins. Co., Id.*; *Same v. Aetna Mut. Fire Ins. Co., Id.*

Facts held to show that a house became "vacant and unoccupied," within a condition in an insurance policy.—*Agricultural Ins. Co. of Watertown, N. Y., v. Hamilton (Md.) 429*.

Proofs of loss.

Acts of adjuster may waive presentment of proofs of loss, though contrary to terms of policy.—*Perry v. Dwelling House Ins. Co. (N. H.) 731*.

A condition for furnishing proofs of loss within a certain time held waived.—*Carey v. Allemania Fire Ins. Co. of Pittsburg (Pa.) 185*.

A delay of a month to object that proofs were not furnished in time is not a waiver of such objection.—*Carey v. Allemania Fire Ins. Co. of Pittsburg (Pa.) 185*.

Agents.

Where the broker who procures the policy is not the agent of the company, he cannot receive notice, and consent to the transfer of the policy.—*Richmond v. Phoenix Assur. Co. (Me.) 786*; *Same v. Liberty Ins. Co., Id.*

Evidence in action to recover amount of the loss from agents, because the company issuing the policy had not complied with the state law as to foreign companies.—*McBride v. Rinard (Pa. Sup.) 750*.

An insurance broker held the duly-authorized agent of an insurance company, within a provision in the policy allowing payments of premiums to its duly-authorized agent.—*Estes v. Home Manufacturers' & Traders' Mut. Ins. Co. (N. H.) 515*; *Same v. American Manufacturers' Mut. Ins. Co., Id.*; *Same v. Aetna Mut. Fire Ins. Co., Id.*

Actions on policy.

The insured, and owner of the property, may properly bring an action on an insurance policy, though it has been assigned to a mortgagee to the extent of her interest.—*Perry v. Dwelling House Ins. Co. (N. H.) 731*.

Where a policy payable to a mortgagee was issued in the name of one as owner, who had no interest in the property, an action cannot be brought thereon without reformation.—*Sun Ins. Co. v. Greenville Building & Loan Ass'n No. 2 (N. J. Err. & App.) 962*.

In an action by the holder of a life policy to establish a claim against receivers of the company an agreement for scaling down the amount of the policy construed.—*Leonard v. Charter Oak Life Ins. Co. (Conn.) 511*.

Action on policy on the life of a horse, in which an instruction which assumed that a cancellation of the policy shortly before the horse's death was due to a misrepresentation by plaintiff in his application as to the value of the horse, was rightly refused.—*Smith v. People's Mut. Live-Stock Ins. Co. of Pennsylvania (Pa.) 567*.

Mutual insurance.

Where a mutual insurance company borrowed money to pay losses, afterwards again borrowed money to pay such loan, and confessed judgment in favor of the second lender, the members are liable for the debt represented by the judg-

ment as for an original loss.—*Eichman v. Hersker* (Pa.) 229.

Sufficiency of affidavit of defense in an action for money due on an assessment levied by the receiver of a mutual insurance company.—*Capital City Mut. Fire Ins. Co. v. Boggs* (Pa.) 349.

INTEREST.

A garnishee who, after service of process on him, continues to use the money due defendant, is liable for interest on the amount of the debt from the date of service.—*Cross v. Brown* (R. I.) 147.

INTOXICATING LIQUORS.

Act preventing the sale of intoxicating liquors within one mile of Asbury Park is unconstitutional.—*Ryno v. State* (N. J. Sup.) 219.

Act March 20, 1889, § 4, regulating the amount of licenses, is unconstitutional.—*Berry v. Cramer* (N. J. Sup.) 201.

Act Feb. 5, 1892, relating to licenses for inns and taverns, is a special law, and unconstitutional.—*Johnson v. Hoover* (N. J. Sup.) 217.

Act 1889, p. 112, prohibiting agents from procuring and delivering intoxicating liquors to any person not legally authorized to sell the same, without a written order, applies only to persons acting as agents of the buyer.—*State v. Hoju* (Conn.) 917.

Under Rev. St. c. 27, § 56, where intoxicating liquors are bought in another state, and brought into this state for sale, in violation of law, the vendor cannot recover the purchase price.—*Knowlton v. Doherty* (Me.) 18.

To convict of sale without a license under the crimes act (P. L. 1893, p. 193), it must be shown that the sales were habitual.—*Rogers v. State* (N. J. Sup.) 283.

An indictment charging sales without a license, without showing either the place or that they were habitual, discloses no offense.—*Rogers v. State* (N. J. Sup.) 283.

JOINT TENANCY.

The rule of the common law by which a devise to husband and wife made them tenants by the entirety is abolished.—*Appeal of Robinson* (Me.) 652.

JUDGMENT.

It is error to strike out a final judgment on an ex parte affidavit of fraud.—*Register v. Woodward Iron Co.* (Md.) 320.

In entering judgment by confession on a warrant of attorney, the prothonotary is not confined to the names appearing in full on the face of the warrant.—*Miller v. Royal Flint Glass Works* (Pa.) 350.

Where a conservator's account has been settled in the probate court, it may be attacked by the town sued for the support of the conservator's ward, the town not being a party to the settlement.—*Cook v. Town of Morris* (Conn.) 594.

In an action by a conservator against a town for the support of his ward as a pauper, the probate record settling his account may be attacked for fraud.—*Cook v. Town of Morris* (Conn.) 594.

An order disposing of all matters involved will not be made until final hearing.—*National Docks & N. J. C. Ry. Co. v. Pennsylvania R. Co.* (N. J. Ch.) 219.

A satisfaction of judgment entered pursuant to a warrant from plaintiff's attorney of record

will be vacated if the attorney was without authority to satisfy the judgment.—*Faughnan v. City of Elizabeth* (N. J. Sup.) 212.

An order authorizing the receiver of an insurance company to make a specific assessment on a policy cannot be collaterally attacked.—*Capital City Mut. Fire Ins. Co. v. Boggs* (Pa.) 349.

A decree authorizing the receiver of an insolvent mutual insurance company to levy an assessment on members cannot be attacked by a member in an action against him for the assessment.—*Eichman v. Hersker* (Pa.) 229.

Res judicata.

Extrinsic evidence is admissible to prove that a matter within the issue raised in a prior action was decided in such action, where the fact does not appear by record.—*Perkins v. Brazos* (Conn.) 908.

A judgment in an action by the maker of a note to enjoin its transfer *held* res judicata in an action by the holder of the note.—*Perkins v. Brazos* (Conn.) 908.

A recovery in an action to remove an obstruction of an easement *held* to establish plaintiff's right to the easement, and to show prima facie the continuance of that right.—*Manning v. Port Reading R. Co.* (N. J. Ch.) 802.

Where an assignee for benefit of creditors claimed credit for a payment on a claim of a creditor, and it was excepted to, an adjudication of the auditor therein, though the exceptions were withdrawn, established the validity and amount of the claim.—*In re Ahl's Estate* (Pa.) 66; *Appeal of Hepburn*, Id.

A judgment on certiorari in favor of the legality of an appropriation by a board of chosen freeholders *held* binding on the parties in a subsequent application for mandamus.—*Shields v. City of Paterson* (N. J. Sup.) 947.

Finding by jury on feigned issue, that at the date of a note defendant was indebted on the account sued on, *held* not to conclude the parties as to charges in the account after the date of the note.—*Maloney v. Bartlett* (Pa.) 553.

A judgment in a proceeding on a mortgage given for purchase money *held* not a bar to a bill subsequently filed by the vendee to rescind the contract and to obtain the return of the price.—*Schwan v. Kelly* (Pa.) 1107.

Lien.

A lien of a judgment against a husband *held* superior to a mortgage by the wife on land standing in her name but bought with money furnished by the husband.—*Sayre v. Coyne* (N. J. Ch.) 300.

The lien of a judgment on a farm which defendant owned when judgment was entered is continued by a revival of an amicable scire facias signed by defendant alone.—*Lyon v. Cleveland* (Pa.) 143.

The lien of a judgment existing against a decedent at the time of his death need not be revived by scire facias every five years, as against his heirs and devisees.—*Colenburg v. Venter* (Pa.) 1046.

Vacating judgment.

The opening of a judgment on a second application and permitting defendant to take further testimony *held* not an erroneous practice.—*Silberman v. Shuklansky* (Pa.) 272.

Judgment by confession on a note *held* properly opened and case sent to the jury, where there was evidence that defendant's signature was forged.—*Darragh v. Bigger* (Pa.) 273.

Evidence on a rule to vacate a judgment for plaintiff, and to set aside supplemental proceedings, considered, and *held*, that defendant is not entitled to such relief because of laches.—*Walton v. Rorke* (N. J. Sup.) 52.

Judgment entered on a judgment note *held* properly opened to allow the maker to defend on the ground that it was not given as evidence of indebtedness.—*Wilson v. Cox* (Pa.) 79.

Foreign judgment.

A foreign judgment against several defendants in a joint action in which one was not served cannot be enforced against one served with process.—*Watson v. Steinau* (R. I.) 4.

JUDICIAL SALES.

A party to proceedings for the sale of land cannot attack the sale as fraudulent if she continues to keep the benefits derived by her therefrom.—*Sager v. Mead* (Pa.) 355.

Judicial sale set aside for failure of the trustee to advertise the sale as required by the decree, coupled with the fact that the land was sold for less than its value.—*Conroy v. Carroll* (Md.) 423.

Evidence of inadequacy of price brought by land on judicial sale *held* not to justify the vacation of the sale 16 years thereafter, possession having been taken and the price paid.—*Sager v. Mead* (Pa.) 355.

Admissibility, on issue as to title obtained on judicial sale, of evidence that the adverse claimant notified the bidders of his claim.—*Collins v. Bellefonte Cent. R. Co.* (Pa.) 331.

Jurisdiction.

See "Courts."

On appeal, see "Appeal."

Jury.

Right to jury trial, see "Constitutional Law."

JUSTICES OF THE PEACE.

A justice of the peace has no authority to depute a private citizen to execute and return a writ of attachment.—*Orenstine v. Schaffer* (N. J. Sup.) 285.

A trial justice in Knox county has no jurisdiction of a complaint for violation of the game law committed in Kennebec county, the offender not being found in Knox county.—*Stilphen v. Ulmer* (Me.) 980.

Laches.

See "Equity."

LANDLORD AND TENANT.

See, also, "Use and Occupation."

Covenant of the lessor to "keep" the premises in repair construed.—*Miller v. McCardell* (R. I.) 445.

An oil lease, to continue for three years unless oil or gas is found in paying quantities, construed.—*Shellar v. Shivers* (Pa.) 95.

Lease construed, and *held* to show that an erroneous subdivision of the rental into quarters was a mathematical mistake, not affecting the total rent to be paid.—*Smith v. Blake* (Me.) 992.

Question for jury as to whether a lessor obtained the signature of one as surety on the lease by false representations as to the lessee's wishes.—*Meek v. Frantz* (Pa.) 413.

Sufficiency of affidavit of defense, in action on lessee's contract, which failed to allege that the stipulation set up by defendant was an essential part of the contract.—*Cosgrave v. Hammil* (Pa.) 1045.

Question whether liability for rent under a lease of a gas well terminated upon the cessation of the use of gas from the well by the purchaser of the lease.—*Double v. Union Heat & Light Co.* (Pa.) 694.

Question for jury as to whether lessor of oil property did not by his conduct waive the prompt payment of the rent.—*Steiner v. Marks* (Pa.) 686.

Effect of averment by defendant lessor that the premises were to be yielded up in good repair by plaintiff lessee, it appearing that the premises when leased were vacant.—*Cosgrave v. Hammil* (Pa.) 1045.

Tenants holding over after determination of a lease for a term of years are strictly tenants at sufferance, though the lessors may treat them as trespassers or tenants from year to year.—*Williams v. Ladew* (Pa.) 329.

Trespass will lie where a tenant holding over is ejected by force.—*Thiel v. Bulls Ferry Land Co.* (N. J. Sup.) 281.

LARCENY.

One who steals property in another country and brings it into this country is guilty of larceny here.—*State v. Morrill* (Vt.) 1070.

Levy.

Of execution, see "Execution."

LIBEL AND SLANDER.

A corporation may sue for libel concerning it in its business.—*Morrison-Jewell Filtration Co. v. Lingane* (R. I.) 452.

To prefer written charges against a policeman to the effect that he has committed perjury is actionable.—*Dennehy v. O'Connell* (Conn.) 920; *Roche v. Same*, *Id.*

A publication made while plaintiff was trying to contract with a city for the introduction of its water system, stating that plaintiff offered a bribe to a councilman if he would cause the resolution introducing plaintiff's system to be passed, was actionable.—*Morrison-Jewell Filtration Co. v. Lingane* (R. I.) 452.

A publication made when plaintiff was trying to introduce a water system, falsely stating that it was doubtful whether water having passed through plaintiff's process was healthful, was actionable.—*Morrison-Jewell Filtration Co. v. Lingane* (R. I.) 452.

In an action for libel, based only on certain charges preferred against plaintiffs before the police commissioners, it was not error to refuse to permit defendant to show that certain other charges were true.—*Dennehy v. O'Connell* (Conn.) 920; *Roche v. Same*, *Id.*

In mitigation of damages, defendant in an action for libel may show that he did not originate the libelous article.—*Hoboken Printing & Publishing Co. v. Kahn* (N. J. Err. & App.) 382, 1060.

Certain evidence *held* properly excluded in an action for libel.—*Dennehy v. O'Connell* (Conn.) 920; *Roche v. Same*, *Id.*

Defendant in an action of libel may, in mitigation of damages, show that plaintiff's reputation as a moral man is bad, and that his reputation with respect to matters involved is bad.—*Sickra v. Small* (Me.) 9.

An instruction, in an action of libel, that, if plaintiff's conduct was such as to excite defendant's suspicion, it should be considered in mitigation of damages, is erroneous.—*Sickra v. Small* (Me.) 9.

License.

See "Constitutional Law."

LIENS.

See "Landlord and Tenant"; "Mechanics' Liens."
Of judgment, see "Judgment."
Of vendor, see "Vendor and Purchaser."

A bill by a husband against the heirs of his deceased wife, to establish an equitable lien on lands of which she died seised, *held* to state a cause of action.—*Bennett v. Finnegan* (N. J. Ch.) 401.

LIMITATION OF ACTIONS.

See "Adverse Possession."

The fact that the husband could sue to enforce an equitable lien on his wife's land only in equity does not prevent the running of the statute of limitations against his cause of action.—*Bennett v. Finnegan* (N. J. Ch.) 401.

Limitations begin to run against a mortgage, to be void if certain remainder-men gave a required deed on becoming of age, from the date the youngest remainder-man attained majority.—*Subers v. Hurlock* (Md.) 409.

Limitations do not run as between partners until an account has been settled and a balance ascertained.—*Matthews v. Adams* (Md.) 645.

Complaint in an action to enforce liability of stockholders examined, and *held*, that it was not demurrable on the ground that it showed that the claim had been barred by limitations.—*Warren v. Providence Tool Co.* (R. I.) 876.

Limitations begin to run against an action for deceit by one who was induced by defendant's fraudulent representations that he was single to marry him, from the discovery of the fraud.—*Morrill v. Palmer* (Vt.) 829.

Where the correct name of a defendant was substituted in the declaration, *held* not to bring in a new party, so as to entitle it to plead limitations computed from the filing of the amendment.—*Western Union Tel. Co. v. State* (Md.) 763.

The right to recover on a contract by which plaintiff was to have decedent's estate upon the plaintiff's death, in consideration of her services, did not accrue until the latter's death.—*Kauss v. Rohner* (Pa.) 1016.

The statute of limitations does not commence to run against a cause of action on a premium note given by a member of a mutual insurance company until an assessment is levied.—*Eichman v. Hersker* (Pa.) 229.

Where the principal in a bond concealed a breach thereof from the obligee, limitations do not run in favor of the surety until discovery of the breach.—*Eising v. Andrews* (Conn.) 585.

Sufficiency of acknowledgment to remove the bar of the statute.—*Ward v. Jack* (Pa.) 577.

The two-years limitation of Rev. St. U. S. § 5057, applies only to the assignee in bankruptcy and those claiming under him, and not to the bankrupt.—*Lancey v. Foss* (Me.) 1071.

LIS PENDENS.

A lis pendens on the filing of a bill to cancel a deed on the ground of fraud *held* to be constructive notice of matters alleged in an amended bill.—*Turner v. Houtt* (N. J. Ch.) 28.

Local and Special Laws.

See "Constitutional Law."

LOGS AND LOGGING.

Duties of a booming company to raft logs according to their marks and ownership, and deliver them to their owner.—*Proprietors of Machias Boom v. Sullivan* (Me.) 13.

Priv. Laws 1891, c. 174, amending the charter of the Machias Boom, *held* not to impose any additional duty on the boom company by the use of the words "sorting and rafting" instead of the word "rafting," as in the original charter.—*Proprietors of Machias Boom v. Sullivan* (Me.) 13.

MALICIOUS PROSECUTION.

An allegation in the declaration that plaintiff was bound over and indicted is prima facie evidence of probable cause.—*Giusti v. Del Papa* (R. I.) 525.

Evidence showing probable cause for the prosecution of plaintiff for having taken defendant's satchel from a railway car.—*Mitchell v. Logan* (Pa.) 554.

The question of reasonable cause, the facts not being in dispute, is for the court.—*Bell v. Atlantic City R. Co.* (N. J. Sup.) 211.

A verdict for \$20,000 is excessive where everything in the nature of punitive damages is excluded.—*Bell v. Atlantic City R. Co.* (N. J. Sup.) 211.

It is no defense that defendant submitted affidavits to a supreme court commissioner, who, being satisfied, made an order for bail.—*Truax v. Pennsylvania R. Co.* (N. J. Sup.) 278.

MANDAMUS.

Mandamus will not lie to compel the payment by a town officer of a disputed claim.—*Foster v. Angell* (R. I.) 406.

Mandamus will not lie to compel a town treasurer to pay claims not audited as required by law.—*Foster v. Angell* (R. I.) 406.

A petition to compel supervisors to appoint certain persons as ballot clerks must allege that they have the statutory qualifications.—*Sudler v. Lankford* (Md.) 455.

P. L. 1895, p. 339, supplementary to proceedings by mandamus, do not affect the doctrine of res judicata.—*Shields v. City of Paterson* (N. J. Sup.) 947.

Where a petition for mandamus is heard on demurrer, the court cannot grant the writ without proof by petitioner of his right thereto.—*Sudler v. Lankford* (Md.) 455.

Petition by sheriff to compel a treasurer to place unpaid tax bills in his hands for collection *held* insufficient.—*Sterling v. McMaster* (Md.) 461.

Manslaughter.

See "Homicide."

MARRIAGE.

A marriage by a divorced person, in contravention of R. L. § 2391, is absolutely void.—*Ovitt v. Smith* (Vt.) 769.

A common-law marriage is invalid in Vermont.—*Morrill v. Palmer* (Vt.) 829.

Under R. L. § 2346 et seq., the court has jurisdiction to decree as void a marriage solemnized where one of the parties had a former husband or wife living.—*Barney v. Cunyes* (Vt.) 897.

A marriage solemnized by a magistrate is valid without a certificate of intention.—*City of Gardiner v. Inhabitants of Manchester* (Me.) 990.

A witness cannot testify that parties alleged to be married had a divided reputation on the subject.—*Jackson v. Jackson* (Md.) 317.

Evidence of a woman's reputation after she left her husband, for chastity during the time she lived with him, is not competent to disprove marriage.—*Jackson v. Jackson* (Md.) 317.

A foreign marriage, valid where performed, is valid in Maryland, in the absence of a statute prohibiting it.—*Jackson v. Jackson* (Md.) 317.

Marriage Settlements.

See "Husband and Wife."

MARSHALING ASSETS.

Rule to determine the marshaling of assets, where two tracts of land are alike subject to a charge by will.—*In re Fessenden's Estate* (Pa.) 135; Appeal of Tyler, Id.

MASTER AND SERVANT.

An agreement by a workman to take part pay in merchandise is a violation of Supp. Revision, p. 771, § 1, requiring payment in lawful money.—*Cumberland Glass Manufg Co. v. State* (N. J. Sup.) 210.

Where a workman agrees to take pay in part in merchandise, the merchandise so furnished constitutes payment.—*Cumberland Glass Manufg Co. v. State* (N. J. Sup.) 210.

Negligence of master.

An employer is liable for injuries occasioned to his servant through some latent danger of which he should have warned him.—*Western Union Tel. Co. v. McMullen* (N. J. Err. & App.) 384.

A master must use reasonable care in the adoption of appliances for the work.—*Van Steenburgh v. Thornton* (N. J. Err. & App.) 380.

A complaint in an action by a servant against his master for personal injuries *held* demurrable as failing to allege knowledge of danger by defendant.—*O'Keefe v. National Folding Box & Paper Co.* (Conn.) 537.

Duty of employer to stand by during the making of an excavation to see whether any danger arises.—*Durst v. Carnegie Steel Co.* (Pa.) 1102.

Admissibility of rules issued by defendant railroad company, to show negligence on the part of its employes, the accident having occurred before the rules were actually distributed to the employes.—*Dougherty v. Philadelphia & R. R. Co.* (Pa.) 340.

Evidence examined, and *held*, that the railroad company was liable for injuries to a brakeman through a defect in the car.—*Elkins v. Pennsylvania R. Co.* (Pa.) 74.

Where defendant, a physician, promised to attend a patient, but, instead of doing so, sent another physician, who, by his unskillfulness, caused the death of the patient, *held*, that defendant is not liable for such death, the physician sent by him not acting as his servant or agent.—*Myers v. Holborn* (N. J. Err. & App.) 389.

Negligence of foreman.

A coal-mine foreman, licensed under Act 1891 (P. L. p. 176), is liable for an injury caused by his negligence to an employe.—*Durkin v. Kingston Coal Co.* (Pa.) 237.

The negligence of a foreman will be imputed to his employer.—*Van Steenburgh v. Thornton* (N. J. Err. & App.) 380.

Question whether foreman in charge of gangs engaged in the work of excavation were vice

principals, whose failure to notify an employe of danger imposed liability on the employer.—*Durst v. Carnegie Steel Co.* (Pa.) 1102.

Negligence of fellow servants.

Plaintiff employed to attend on masons in defendant's employ, and injured by the falling of a scaffold constructed by said masons, could not recover, the negligence being that of fellow servants.—*Maher v. McGrath* (N. J. Sup.) 945.

Sufficiency of evidence to show that a boiler explosion which injured plaintiff resulted from the negligence of a fellow servant of whose incompetency defendant knew.—*Snodgrass v. Carnegie Steel Co.* (Pa.) 1104.

Contributory negligence and assumption of risk.

A brakeman injured by a fall from a car cannot complain of the absence of hand holds if there were steps by which to hold on, and cars of such construction were in general use.—*Dooner v. Delaware & H. Canal Co.* (Pa.) 415.

Propriety of charge, in an action for injuries to a railroad brakeman, that, if he failed to notice the absence of hand holds on a car, it was his fault, for which the company was not liable.—*Dooner v. Delaware & H. Canal Co.* (Pa.) 415.

A brakeman standing on the deadwood of a moving car, without anything to which he can hold, *held* guilty of negligence.—*Dooner v. Delaware & H. Canal Co.* (Pa.) 415.

Evidence examined, and *held*, that plaintiff was injured by his contributory negligence.—*Smith v. Van Sciver* (N. J. Err. & App.) 390.

A servant assumes the ordinary risks and the risks arising in consequence of special danger known to him, or which he could have discovered.—*Western Union Tel. Co. v. McMullen* (N. J. Err. & App.) 384.

MECHANICS' LIENS.

Under Act March 20, 1892, amending Mechanic's Lien Law, § 2, the owner of a building must file his contract at or before the time such building is begun, in order that it may be exempt from the liens of mechanics and material men.—*La Foucherie v. Knutzen* (N. J. Sup.) 203.

Where it appears by the contract that the builder is to do all the work and furnish all the materials, it is not necessary to file the specifications with the contract in order to protect the building from the liens of mechanics and material men.—*La Foucherie v. Knutzen* (N. J. Sup.) 203.

The amendment of a mechanic's lien authorized by the fourteenth section of the act can be made at any time before judgment, and must be in writing, and signed by the judge.—*Drinkhouse v. Gregg Manufg Co.* (N. J. Sup.) 950.

Where a material man subsequently took an assignment from the contractor of the contract, *held*, that he did not thereby lose his lien for material furnished the contractor.—*Taliaferro v. Stevenson* (N. J. Err. & App.) 383.

A lien for a range put in a building after a mortgage was made thereon *held* superior to the mortgage.—*Erdman v. Moore* (N. J. Sup.) 958.

Right of surety on contractor's bond to enforce lien for material.—*Rynd v. Pittsburg Natatorium* (Pa.) 1041.

Right of surety on contractor's bond to enforce a lien.—*Gannon's Ex'rs v. Central Presbyterian Church* (Pa.) 1043.

Presumption that the materials were furnished or the work was done on the credit of the building.—*W. Green & Co. v. Thompson* (Pa.) 702.

Admissibility of evidence to show that materials were not furnished on the credit of the building.—*W. Green & Co. v. Thompson* (Pa.) 702.

In interpleader by the owner of a building against the contractor and a material man claiming a lien for material furnished a subcontractor, *held* error to render a judgment for the material man, as assignee of the subcontractor, on failure of his lien.—*Alderman v. Hartford & N. Y. Transp. Co.* (Conn.) 589.

Facts *held* insufficient to show that material furnished a subcontractor was furnished by consent of the owner of the land (Gen. St. § 3018), so as to entitle the material man to a mechanic's lien therefor.—*Alderman v. Hartford & N. Y. Transp. Co.* (Conn.) 589.

In *ex facie* on a mechanic's lien, the sufficiency of the lien on its face cannot be attacked under a plea of nonassumpsit, set-off, and payment with leave.—*Klinefelter v. Baum* (Pa.) 582.

MINES AND MINING.

Liability of one mining minerals for depriving the surface owner of support.—*Pringle v. Vesta Coal Co.* (Pa.) 690.

Duty of owner of mineral estate to mine so as not to deprive the surface owner of support.—*Robertson v. Youghiogheny River Coal Co.* (Pa.) 706.

MORTGAGES.

See, also, "Chattel Mortgages."

Parol evidence is admissible to show that an absolute deed is a mortgage.—*Libby v. Clark* (Me.) 657.

Question whether a mortgage given to secure future advances could embrace a sum for which the mortgagor gave a note on the day of the execution of the mortgage.—*Farabee v. McKerrihan* (Pa.) 583; Appeal of McKerrihan, Id.

A clause in a deed of mortgaged land "subject to the payment of the mortgages" *held* to be a covenant by the purchaser to pay the mortgages without the duty of hunting up the notes and paying the same to the holders.—*Blood v. Crew Levick Co.* (Pa.) 344.

One purchasing under and subject to the payment of a mortgage is a purchaser of the entire estate, and is liable to pay the mortgage.—*Blood v. Crew Levick Co.* (Pa.) 344.

Where the deed is made subject to the lien of a mortgage, the land is primarily liable for the payment of the mortgage money.—*Blood v. Crew Levick Co.* (Pa.) 344.

The vendor of land under and subject to the lien of a mortgage *held* to have no right of action against the purchaser on account of such stipulation before payment of the mortgage or withdrawal of the land from the reach of the mortgage.—*Blood v. Crew Levick Co.* (Pa.) 344.

A clause reciting an agreement that the grantee accepts a title "subject to the payment of the mortgages" above mentioned *held* to constitute a covenant by the purchaser to pay the mortgages, on which the vendor could sue to the use of the party entitled to the money.—*Blood v. Crew Levick Co.* (Pa.) 348.

Right of purchaser of timber on mortgaged land to hold the timber free of the mortgage because the proceeds of the sale were used to pay the costs of operating the land for oil, the proceeds of which operation were applied on the mortgage.—*Fredonia Nat. Bank v. Collins* (Pa.) 351; *Perrin v. Waterhouse*, Id.

Where a mortgagee knows that the land about to be mortgaged has been sold by the

mortgagor and possession taken thereunder, the mortgage is void as against the vendee.—*Gore v. Condon* (Md.) 261.

Payment.

Where a mortgagor became the executor of the mortgagee before the mortgage was paid, the beneficiaries being his relations, and for more than 20 years nothing had been paid on the principal or interest, and no accounting had been had, *held*, that the presumption of satisfaction was rebutted by the failure of the executor to account, and the execution of a satisfaction by him as executor to himself as mortgagor.—*Stimis v. Stimis* (N. J. Ch.) 468.

Where for 20 years there has been neither payment nor demand of principal or interest on a mortgage the presumption is that it has been satisfied though not paid.—*Stimis v. Stimis* (N. J. Ch.) 468.

Sufficiency of evidence to show that satisfaction of mortgage was executed by one while wanting in mental capacity, and without knowledge of the contents of the paper.—*Krause v. Stein* (Pa.) 1031.

Foreclosure.

The personal representatives of a deceased mortgagor need not be made parties on foreclosure.—*Harlem Co-operative Building & Loan Ass'n v. Freeburn* (N. J. Ch.) 514.

Mortgage sale set aside because of misapprehension as to the time of sale on condition of filing bond to secure bid.—*Rowan v. Condon* (N. J. Err. & App.) 404.

Failure of the advertisement of the sale of a truck garden under a mortgage to mention vegetables growing on the land, *held* not to vitiate the sale.—*Lepper v. Mooyer* (Md.) 263.

A foreclosure sale under a mortgage securing bonds will not be enjoined till the mortgagor can adjudicate an unliquidated claim against the bondholder.—*National Rubber Co. v. Rhodelsland Hospital Trust Co.* (R. I.) 254.

A mortgagee may proceed in equity for a deficiency, notwithstanding the mortgage lien remains unaffected for 20 years.—*Princeton Sav. Bank v. Martin* (N. J. Ch.) 45.

One who took possession after foreclosure, and thereafter paid the mortgage, held the premises as security subject to the mortgagor's right to redeem.—*Libby v. Clark* (Me.) 657.

MUNICIPAL CORPORATIONS.

See, also, "Bridges"; "Counties"; "Highways"; "Poor and Poor Laws"; "Schools and School Districts."

Liability of sureties on treasurer's bond, see "Principal and Surety."

The incorporation of a borough under Acts April 1, 1834, and April 1, 1863, is not reviewable unless illegality is shown in the record, or abuse of discretion in the court.—*In re Borough of Narberth* (Pa.) 72; Appeal of Ellis, Id.

The borough of Glen Ridge is a municipality distinct from the township of Bloomfield.—*Borough of Glen Ridge v. Stout* (N. J. Sup.) 853.

The fact that a municipal corporation is not given the necessary powers of government does not preclude its legal existence.—*Borough of Glen Ridge v. Stout* (N. J. Sup.) 853.

Boroughs created from townships under the act of 1878 are distinct from the townships in respect to their control over sewers and hydrants.—*Inhabitants of Township of Bloomfield v. Borough of Glen Ridge* (N. J. Ch.) 925.

Where a portion of the territory of a municipal corporation is thrown into a new municipality, the right to regulate the sewers and hydrants within such territory passes to the new

government.—Inhabitants of Township of Bloomfield v. Borough of Glen Ridge (N. J. Ch.) 925.

Under Act March 24, 1890 (P. L. 101), the owner of a building is not required to erect a fire escape until precedent action by municipal officers.—De Gintner v. New Jersey Home for the Education and Care of Feeble-Minded Children (N. J. Err. & App.) 968.

P. L. 1890, p. 58, authorizing the holding of an election for acceptance of a scheme of government by electors of an area on which resided for any period a certain population, is unconstitutional.—Attorney General v. Borough of Anglesca (N. J. Err. & App.) 971.

Boroughs formed under Act April 2, 1891, have no power to issue bonds to purchase or erect an electric light plant for lighting either private houses or public streets.—Biddle v. Borough of Riverton (N. J. Sup.) 279.

A municipal corporation may, unless restrained by positive law, submit disputed claims to arbitration.—Smith v. Borough of Wilkesburg (Pa.) 371.

Effect of acceptance by a gas company of conditions of ordinance allowing it to use the streets of a city.—City of Allegheny v. People's Natural Gas & Pipeage Co. (Pa.) 704.

Where a city has provided for the treatment of sick paupers by the election of a city physician, and he is ready to act, the overseers of the poor must call him when a pauper is in need of medical treatment.—Goodrich v. City of Waterville (Me.) 659.

Under Acts 1874, p. 45, and Id. 1893, p. 157, relating to the relocation of railroads in cities, when the terms offered by a railroad as to its relocation are accepted by the city, it constitutes a contract within the acts.—Barr v. City of New Brunswick (N. J. Sup.) 477.

The fact that a railroad company seeking a relocation of its road under Acts 1874 and 1893 undertakes to pay the expense of the proceeding does not invalidate the proceedings.—Barr v. City of New Brunswick (N. J. Sup.) 477.

Where the construction of waterworks is vested in an independent commission a city is not liable for injuries due to negligence in laying pipes.—Gross v. City of Portsmouth (N. H.) 256.

An ordinance licensing wagons drawn by one horse at \$10 and those drawn by two at \$15 is not unreasonable.—Johnson v. Borough of Asbury Park (N. J. Sup.) 850.

An ordinance creating an office held to have been duly enacted.—Anderson v. City Council of City of Camden (N. J. Sup.) 846.

There is no presumption as to the regularity of the passage of an ordinance.—City of Altoona v. Bowman (Pa.) 187.

An ordinance under Act May 23, 1889, cannot be passed by one branch of a city council on the same day that it is reported to it by the other branch.—City of Altoona v. Bowman (Pa.) 187.

Where a borough ordinance declares it unlawful for any person to dig in a street without a permit from the street commissioner, a permit from the burgess will have no effect.—Boyle v. Borough of Hazleton (Pa.) 142.

Ordinances.

Validity of ordinance classifying occupations for license purposes according to annual sales.—Wenner v. City of Williamsport (Pa.) 544.

The minutes of the common council need not show that notice of the passage of the ordinance was given.—Barr v. City of New Brunswick (N. J. Sup.) 477.

The requirement of publication of an ordinance applies only when the ordinance involves public expense.—Barr v. City of New Brunswick (N. J. Sup.) 477.

An ordinance providing for the submission of a question as to whether bonds should be issued for the construction of an electric plant examined, and held invalid.—Edwards v. Borough of Riverton (N. J. Sup.) 279.

Officers.

Where a discharged soldier was appointed director of a school for a year, the appointment of another at the end of such year was not in violation of Act March 14, 1895.—Horn v. Board of Education of Orange (N. J. Sup.) 944.

The mayor of Waterville is not eligible to vote with the council in the election of a clerk or a city treasurer.—Brown v. City of Waterville (Me.) 662; Redington v. Bartlett (Me.) 662.

Where plaintiff is a member of the city council under Rev. St. c. 3, § 36, no action is brought to recover for medical services rendered by his firm to a city pauper.—Goodrich v. City of Waterville (Me.) 659.

Persons acting under the employment of municipal officers must take notice of the authority of such officers.—Goodrich v. City of Waterville (Me.) 659.

Control of streets.

Boroughs may make pleasure drives on public squares.—Commonwealth v. Borough of Beaver (Pa.) 112.

Boroughs may define the limits of sidewalks leaving space for travel.—Commonwealth v. Borough of Beaver (Pa.) 112.

Contracts.

To authorize a lease of land owned by a city to a private person, the common council must pass an ordinance directing its execution.—Ammer v. Inhabitants of Town of Philadelphia (N. J. Sup.) 852.

Bidders for municipal contracts must be given an opportunity to compete under definite specifications.—Van Reipen v. City of Jersey City (N. J. Sup.) 740; Morris Canal & Banking Co. v. Same, Id.; Montclair Water Co. v. Same, Id.; Whelihan v. Same, Id.; Favier v. Same, Id.; Rockaway & Hudson Co. v. Same, Id.

A contract must be awarded to the bidder offering the most advantageous terms.—Van Reipen v. City of Jersey City (N. J. Sup.) 740; Morris Canal & Banking Co. v. Same, Id.; Montclair Water Co. v. Same, Id.; Whelihan v. Same, Id.; Favier v. Same, Id.; Rockaway & Hudson Co. v. Same, Id.

Bids having been invited, on condition that the contractor should provide reservoirs of a certain capacity, an award of the contract to a bidder offering reservoirs of a different capacity is unlawful.—Van Reipen v. City of Jersey City (N. J. Sup.) 740; Morris Canal & Banking Co. v. Same, Id.; Montclair Water Co. v. Same, Id.; Whelihan v. Same, Id.; Favier v. Same, Id.; Rockaway & Hudson Co. v. Same, Id.

In the absence of fraud or palpable abuse of discretion of the municipal authorities, the question for review, on the granting of a contract, is whether there has been any violation of legal principles.—Van Reipen v. City of Jersey City (N. J. Sup.) 740; Morris Canal & Banking Co. v. Same, Id.; Montclair Water Co. v. Same, Id.; Whelihan v. Same, Id.; Favier v. Same, Id.; Rockaway & Hudson Co. v. Same, Id.

Defective streets.

Sufficiency of a notice describing the location of a defect in a street, alleged to have caused an injury to plaintiff.—Kaherl v. Inhabitants of Rockport (Me.) 20.

A borough is liable for an injury to a traveler caused by a ditch dug in the street without a permit from the street commissioner.—Boyle v. Borough of Hazleton (Pa.) 142.

Propriety of instruction, in an action against a borough for injuries caused by an obstructive

the street, as to defendant's duty to prevent obstruction.—*Frazier v. Borough of Butler* 691.

Knowledge by a member of a borough council of an obstruction on a street, obtained in his private capacity, held not to be notice to the borough.—*Frazier v. Borough of Butler* (Pa.)

Active sewers.

A city is liable for injuries to a house from the violation of a sewer in front of it.—*Ladd v. City of Philadelphia* (Pa.) 62.

Alley improvements.

Notice of a claim addressed to the mayor and branch of a city council is not a sufficient notification within Pub. St. c. 54, § 12.—*Allen v. Bates* (R. I.) 224.

Where successive city ordinances appropriate money for streets appropriate a sum in excess of the amount available under an ordinance providing that it shall be used for streets as required by ordinance, it is the duty of the council to determine what streets shall be paved, and in what order.—*Smyrk v. Sharp* (Md.) 411.

The provisions of Act May 23, 1889, that a street cannot be paved at the cost of abutting owners, except by ordinance duly passed, is mandatory.—*City of Bradford v. Fox* (Pa.) 85.

An abutting owner may enjoin changes in a street, he not having had notice thereof.—*Buchanan v. Borough of Beaver* (Pa.) 115.

Right of borough to have viewer's report set aside merely because the borough officials failed to be present at the proceedings for view.—*Waters v. Borough of Braddock* (Pa. Sup.) 759.

Right of abutting owner to recover damages for change of grade, under Act May 24, 1878, without first presenting claim for damages.—*Manahan v. Borough of Washington* (Pa. Sup.) 3.

Act May 24, 1878, giving to an abutting owner the right to have damage arising from a change of grade assessed against the borough, is not repealed by Act May 16, 1891.—*Seaman v. Borough of Washington* (Pa. Sup.) 756.

Evidence examined, and held, that a claim for damages for change of grade of a street was not revived.—*Clark v. City of Philadelphia* (Pa.) 124.

Right of abutting owner to have injuries to orchard and trees in street considered in estimating damages for change of grade.—*Seaman v. Borough of Washington* (Pa. Sup.) 756.

The filing of exceptions to the report of the assessors assessing damages for change of grade does not affect the entering of an appeal to the common pleas.—*Strang v. Borough of Braddock* (Pa. Sup.) 760; *Berry v. Same*, Id.

An assessment under an unconstitutional statute will be set aside without any examination as to other objections.—*City of Newark v. Inhabitants of Township of Verona* (N. J. Sup.) 959.

An assessment may be made under Act May 3, 1891, for an improvement made under an ordinance passed under Act April 23, 1889.—*Borough of Beltzhoover v. Heirs of Beltzhoover* (Pa.) 1047.

Under Act June 13, 1874, an appeal from an assessment of damages for change of grade must be filed within 30 days from the filing of the report.—*Bowers v. Borough of Braddock* (Pa. Sup.) 759.

The fact that the space between the tracks of a street-car company was paved by it with stone held not to affect the liability of abutting property for paving the rest of the street under a contract with the city for paving "with asphalt from curb to curb."—*City of Erie v. Land on Eighteenth Street* (Pa.) 378.

Evidence in an action to enforce a municipal lien for paving examined, and held admissible.—*City of Altoona v. Bowman* (Pa.) 187.

A graveyard is not exempt from special assessments for local improvements.—*Borough of Beltzhoover v. Heirs of Beltzhoover* (Pa.) 1047.

The exemption of graveyards from taxation does not extend to an assessment for paving a street.—*City of New Castle v. Stone Church Graveyard* (Pa.) 236.

Taxation.

Acts March 6, 1888, March 23, 1888, and March 7, 1895, supplementing the borough act of 1878, providing that taxes shall be assessed and collected in the borough of Glen Ridge by the borough assessor and collector, were not affected by supplement passed April 24, 1888.—*Henson v. Inhabitants of Township of Bloomfield* (N. J. Sup.) 855.

Murder.

See "Homicide."

NEGLIGENCE.

See "Damages."

Defective bridges, see "Bridges."

—highways, see "Municipal Corporations."

—sewers, see "Municipal Corporations."

—streets, see "Municipal Corporations."

Injuries received on Sunday, see "Sunday."

—to passengers, see "Carriers."

Of charitable corporation, see "Charities."

Of clerk of court, see "Clerk of Court."

Of master, see "Master and Servant."

Of railroad company, see "Railroad Companies."

Of street railway, see "Horse and Street Railroads."

A gas company, knowing that gas is escaping into a building, is not discharged of its duty to use reasonable diligence to remedy the leak, by acting on the assumption that the leak was from one source, when in fact it was from another, which could have been discovered by the proper inspection.—*Consolidated Gas Co. of Baltimore City v. Crocker* (Md.) 423.

Where one engaged in laying a sewer in a building is injured by a falling brick, in the absence of explanation by the contractor doing the brickwork, it will be presumed that it occurred from want of reasonable care on his part.—*Sheridan v. Foley* (N. J. Sup.) 484.

That county commissioners are liable for the defects in a highway does not prevent action against a railway company causing such defect.—*Rowe v. Baltimore & O. R. Co.* (Md.) 761.

The leaving open of the door of a car in the yard of a railway company, held not to be the proximate cause of the catching fire of the contents from a burning building near by.—*Scott v. Allegheny Val. Ry. Co.* (Pa.) 712.

A person using a street does not assume the risk of material falling from a building in process of erection.—*Bunnell v. Berlin Iron Bridge Co.* (Conn.) 533.

Where it is possible for the jury to draw another inference than that plaintiff had been guilty of contributory negligence, a peremptory instruction should not be given.—*Clark Thread Co. v. Bennett* (N. J. Err. & App.) 404.

The taking of a lighted lamp into a cellar known to be filled with escaped gas, held, not to constitute contributory negligence.—*Consolidated Gas Co. of Baltimore City v. Crocker* (Md.) 423.

Pleading.

The complaint alleging that injuries were received by the careless management of a derrick is sufficient, without alleging the particular acts of negligence.—*Bunnell v. Berlin Iron Bridge Co.* (Conn.) 533.

A complaint alleging negligence in the management of a derrick *held* to support a recovery on proof that the derrick fell by a truss falling against it.—*Bunnell v. Berlin Iron Bridge Co.* (Conn.) 533.

Complaint in action for personal injuries received by the falling of an elevator *held* not defective for failure to set out in what way the elevator was defective.—*Ellis v. Waldron* (R. I.) 869.

In an action by a servant of the lessee against the lessor for personal injuries caused by the defective condition of the elevator in the building leased, allegations in the complaint *held* to sufficiently show the work plaintiff was engaged in at the time of receiving the injuries.—*Ellis v. Waldron* (R. I.) 869.

Evidence

The question whether a contractor was guilty of using a derrick without sufficient examination was a question of fact.—*Bunnell v. Berlin Iron Bridge Co.* (Conn.) 533.

In an action for personal injuries, evidence that plaintiff had been guilty of negligence on previous occasions is not admissible to show that he was similarly negligent at the time of the accident.—*Baker v. Irish* (Pa.) 558.

Sufficiency of evidence of negligence *held* a question for the jury.—*Western Union Tel. Co. v. State* (Md.) 763.

The question of defendant's negligence in leaving a rock overhanging a highway is for the jury.—*Rowe v. Baltimore & O. R. Co.* (Md.) 761.

NEGOTIABLE INSTRUMENTS.

Alteration of note, see "Alteration of Instruments."

An obligation given for rent to become due on rolling stock *held* to be of a conditional nature, and so not negotiable.—*Post v. Kinzua Hemlock R. Co.* (Pa.) 362.

Evidence examined, and *held* insufficient to show negligence in the presentment of a check for payment.—*Loux v. Fox* (Pa.) 190.

Where the indorsee of a note indorsed it "for discount and credit of himself," but before maturity procured it from the bank which discounted it for him, and transferred it to another by special indorsement, such other acquired title thereto.—*Brook v. Van Nest* (N. J. Err. & App.) 382.

Evidence in an action on the third renewal of an accommodation note considered, and *held*, that defendant could not set up want of consideration.—*Mathias v. Kirsch* (Me.) 19.

NEW TRIAL.

Where an assessment of damages is inconsistent with the undisputed evidence, the verdict will be set aside on plaintiff's motion.—*Miller v. Delaware, L. & W. R. Co.* (N. J. Sup.) 950.

A motion for a new trial cannot be considered, where there is not a full report of the evidence.—*Stevens v. Gordon* (Me.) 27.

Newly-discovered evidence *held* to require the grant of a new trial.—*Cloran v. Houlehan* (Me.) 986.

Nonsuit.

See "Practice in Civil Cases."

Notes.

See "Negotiable Instruments."

NOVATION.

A novation is not shown by the fact that the judgment creditor took other securities from the debtor.—*McCartney v. Kipp* (Pa.) 233.

Nuisance.

Pollution of stream, see "Waters and Water Courses."

OFFICE AND OFFICER.

See, also, "Justices of the Peace"; "Sheriffs and Constables."

Of cities, see "Municipal Corporations."

Of corporation, see "Corporations."

A soldier who deserted, but afterwards received his discharge on his furnishing a substitute, is not an honorably discharged soldier, within Act March 14, 1895, prohibiting the removal of such without cause.—*Francis v. City of Newark* (N. J. Sup.) 853.

The janitor of the county courthouse appointed by the board of chosen freeholders, if an honorably discharged sailor, cannot be removed, under Act May 16, 1894, except for cause, and on notice and hearing.—*Daily v. Board of Chosen Freeholders of County of Essex* (N. J. Sup.) 739.

A discharged Union soldier, employed as a keeper in a county jail for no specified time, cannot be discharged under P. L. 1895, p. 317, except after hearing and good cause shown.—*Cavanagh v. Board of Chosen Freeholders of Essex County* (N. J. Sup.) 943.

Duty of officer to inform himself as to what would be his duty under certain circumstances he may expect to arise.—*State v. Colton* (Del. Gen. Sess.) 259.

Opinion Evidence.

See "Evidence."

Ordinance.

See "Municipal Corporations."

Orphans' Court.

See "Courts."

Oysters.

See "Fisheries."

PARENT AND CHILD.

In a prosecution under the disorderly act (Revision, p. 305, as amended in Supp. Revision, p. 219), for failure to support a minor child, it must be alleged and found that the family may become chargeable to the township, and that the father willfully refused to provide for the child.—*Cohen v. Watson* (N. J. Sup.) 943.

Parol Evidence.

See "Evidence."

PARTIES.

In an action to recover possession of property conveyed to one to secure the payment of the grantor's share of the indebtedness of a partnership and of a corporation, the creditors are not necessary parties.—*Stevens v. Bosch* (N. J. Ch.) 293.

The beneficiaries in an active trust are not necessary parties plaintiff in an action by the

to recover possession of the trust property.—*Stevens v. Bosch* (N. J. Ch.) 293.

trusts que trustent may jointly sue for the reversion of the trust property, though each entitled to a different portion of the fund.—*Thum v. Packer* (Conn.) 490.

failing to give notice of nonjoinder, as required by Prac. Act, § 37, defendants waived objection on that ground.—*King v. Holbrook* (N. J. & App.) 985.

PARTITION.

house and lot held incapable of partition without great impairment of value.—*Williams v. Mbs* (Me.) 1073.

where a widow, on behalf of her children, pays taxes on a tenement owned by them and a tenant, in partition of the property the amount paid by her should be taken into account.—*nn v. O'Malley* (N. J. Ch.) 402.

PARTNERSHIP.

acts of a wife in keeping her husband's books, signing or contesting bills, and speaking of the business as "ours," are not sufficient to establish partnership against her explicit denial.—*John and Co. v. Hurley* (Me.) 164.

Evidence examined and held to establish a partnership.—*Sayre v. Coyne* (N. J. Ch.) 300.

A contract by which a person contributed to the capital of a firm construed, and held not to make him a partner.—*Thillman v. Benton* (Md.) 5.

One cannot claim profits under a lease made of a firm as a partner therein and at the same time repudiate the lease because not joined or consented to by him.—*Enterprise Oil & Gas Co. v. National Transit Co.* (Pa.) 687.

The excess of one partner's advances over those of the other constitutes a preferred claim on the partnership property or its proceeds.—*Matthews v. Adams* (Md.) 645.

The liability of a member of a firm on a contract made by him jointly with another to pay a certain sum to the firm is not discharged by reason of his membership in the firm.—*Huffman Arm Co. v. Rush* (Pa.) 1013.

The implied power of a partner to mortgage firm property is revoked by a dissent of his co-partners known to the mortgagee.—*Carr v. Iertz* (N. J. Ch.) 194.

Money paid by a partner to his individual creditor without knowledge by the latter that the firm money may be retained, though otherwise as to partnership property.—*Babcock v. Standish* (N. J. Err. & App.) 385.

A promise by a partner to pay his part of a note signed in the firm name, and containing a warrant for the confession of judgment, shows assent by him to the note in that form.—*Miller v. Royal Flint Glass Works* (Pa.) 350.

Where a partner joins with another in a purchase of firm property, payment to the partner by such copurchaser, of his half of the purchase price, discharges so much of the sum due.—*Huffman Farm Co. v. Rush* (Pa.) 1013.

One assenting to the signing and sealing of an instrument in the name of his firm is as much bound as if he had signed and sealed it himself.—*Miller v. Royal Flint Glass Works* (Pa.) 350.

Partnership lands, as between the partners and those knowing of the facts, are personal property.—*Moore v. Wood* (Pa.) 63.

If surviving partners fail to close up the firm's affairs, the executor of the deceased partner must do so.—*Hamlin v. Mansfield* (Me.) 788.

Where after the sale of a firm business it is carried on in the old name, a contract by a member of the firm with one not knowing of the change is binding on the purchaser.—*Thatcher v. Allen* (N. J. Sup.) 284.

Special partners.

Special partners are, in case of a false statement in a certificate of renewal of a limited partnership that their contribution remains unimpaired, liable on notes of the partnership given after such renewal in place of matured notes issued before the renewal.—*Fourth St. Nat. Bank v. Whitaker* (Pa.) 100.

The capital originally contributed by special partners of a limited partnership is not, on renewal, "unimpaired and undiminished," though the partnership has merchandise to more than that amount, where it is in fact insolvent.—*Fourth St. Nat. Bank v. Whitaker* (Pa.) 100.

A special partner's liability by reason of a false statement in the certificate of renewal of a limited partnership is not affected because he believed it to be true.—*Reitzel v. Haines* (Pa.) 103.

Liability of a special partner as a general partner, where the certificates of organization of the limited partnership were defective.—*Blumenthal v. Whitaker* (Pa.) 103.

Passengers.

Injuries to, see "Carriers."

PAYMENT.

Of mortgage, see "Mortgages."

An allegation that a check was accepted by defendant, and a receipt in regular form given, does not show payment.—*Loux v. Fox* (Pa.) 190.

Presumption that payments on an account were applied to the earlier items of an account so as to prevent their being barred by limitations.—*Maloney v. Bartlett* (Pa.) 553.

Where property claimed by plaintiff to have been given her by decedent was surrendered to the administrator on his demand, her right to recover is not barred as a voluntary payment.—*Pryor v. Morgan* (Pa.) 98.

PHYSICIANS AND SURGEONS.

Requirement by state board of health from one holding Canadian medical diploma of license to practice in Canada, before granting certificate, when such license is there granted on the diploma and without examination, is erroneous.—*Boucher v. State Board of Health* (R. I.) 878.

Facts held insufficient to show that an applicant for certificate to practice medicine was reputably and honorably engaged in the practice of medicine prior to January 1, 1895, within the meaning of Pub. Laws May 16, 1895, c. 1353, § 3.—*Paquin v. State Board of Health* (R. I.) 870.

Physician who resides and has his principal office in another state, but visits other cities at stated intervals as a specialist, treating patients at his rooms in hotels, is an "itinerant doctor," and not entitled to register.—*Evans v. State Board of Health* (R. I.) 878.

PLEADING.

See, also, "Assumpsit"; "False Imprisonment"; "Negligence"; "Usury."

In equity, see "Equity."

Sufficiency of the statement of plaintiff's claim to constitute a cause of action.—*Second Nat. Bank v. Gardner* (Pa.) 188.

Sufficiency of designation, in copy of account filed with statement of claim, of the articles sold by special numbers.—*Terriberry v. Broude* (Pa.) 699.

If any one of the grounds on which a demurrer is based is good the demurrer must be sustained.—*Meyer v. Saul* (Md.) 539.

A demurrer to a complaint for insufficiency must specify the reasons thereof.—*Cook v. Morris* (Conn.) 994.

Sufficiency of an affidavit of defense by a special partner in a limited partnership, sought to be held as a general partner on the ground that the certificate of renewal of a partnership falsely stated that the capital contributed by the special partners remained unimpaired.—*Blumenthal v. Whitaker* (Pa.) 103.

Construction of rule of court as providing in effect that a denial in the affidavit of defense is sufficient to put plaintiff to the proof of the execution of the note sued on.—*Lancaster County Nat. Bank v. Henning* (Pa.) 335.

Sufficiency of affidavit of defense in action for work done and materials supplied.—*Murphy v. Taylor* (Pa.) 1041.

Sufficiency of affidavit of defense, in action by lessor on lessee's contract, alleging plaintiff's failure to comply with covenants as to water rents and subletting.—*Cosgrave v. Hammil* (Pa.) 1045.

Sufficiency of averments, in affidavit of defense, in reduction of set-off.—*Cosgrave v. Hammil* (Pa.) 1045.

All unequivocal traverses or denials of material allegations in support of the claim, and all material allegations of fact contained in affidavits of defense, must be accepted as verity.—*Johnston v. Callery* (Pa.) 1036.

Sufficiency of affidavit of defense alleging a set-off based upon breach by plaintiff of an agreement to fill orders for goods.—*Terriberry v. Broude* (Pa.) 699.

An objection that a bill of particulars does not furnish sufficient information as to the nature of the claim must be made by motion to make more specific.—*Plumb v. Curtis* (Conn.) 998.

Where there are two counts, one in case and one in trespass, it is irregular to put in one plea of the general issue to both.—*Truax v. Pennsylvania R. Co.* (N. J. Sup.) 278.

Laches is not ground for demurrer unless the facts constituting it appear on the face of the bill.—*Warren v. Providence Tool Co.* (R. I.) 876.

Refusal to allow amendment of complaint seven months after suit brought is not reviewable.—*Links v. Connecticut River Banking Co.* (Conn.) 1003.

The action of the court in allowing an amendment after one trial, and when a new trial has been granted, without imposing costs as a condition of such amendment, is within its sound discretion.—*Hileman v. Hileman Distilling Co.* (Pa.) 575.

Conditions under which pleadings in an action to enforce a trust may be amended to avoid multifariousness without making complainant liable for the costs incurred up to that time.—*Stevens v. Bosch* (N. J. Ch.) 293.

Where plaintiff avers that the injuries to the surface resulted both from negligent mining by defendant and the latter's failure to provide proper surface support, he may show that the injuries resulted from both of these causes combined or from either of them separately.—*Pringle v. Vesta Coal Co.* (Pa.) 690.

After filing an affidavit to the merits and pleading the general issue, it is too late to assert that, under the policy in suit, jurisdiction to hear the cause is vested exclusively in another

court.—*Smith v. People's Live-Stock Ins. Co. of Pennsylvania* (Pa.) 567

PLEDGE

A payee has the right to sell notes and retain for the payment of other debts collateral deposited as security for the notes "or any other liability."—*Cross v. Brown* (R. I.) 370.

Pollution.

Of water course, see "Waters and Water Courses."

POOR AND POOR LAWS.

Evidence held insufficient to show that a marriage between paupers was procured to change the wife's settlement.—*City of Gardiner v. Inhabitants of Manchester* (Me.) 990.

Children of paupers held to take the settlement of their father.—*City of Gardiner v. Inhabitants of Manchester* (Me.) 990.

It must appear on the face of an order for the removal of a poor person to his legal settlement, under Revision, p. 834, that the application therefor was made by an overseer of the poor.—*Simpson v. Maybaum* (N. J. Sup.) 814.

The support of a person cannot be charged to a town by her conservator, he having property in his hands belonging to her.—*Cook v. Town of Morris* (Conn.) 594.

POWERS.

Where a husband and wife were appointed executors with power to sell land, and the husband is disqualified because of being a subscribing witness to the will, the wife may execute the power alone by deed in which her husband joins.—*Lippincott v. Wikoff* (N. J. Ch.) 305.

A will made in execution of a power of appointment "by last will and testament, or by instrument in the nature of a will executed in the presence of two witnesses," held not to require two witnesses.—*Olivet v. Whitworth* (Md.) 723.

On the disqualification of one of several executors, on whom a joint power of sale is conferred, those remaining may execute the power.—*Lippincott v. Wikoff* (N. J. Ch.) 305.

PRACTICE IN CIVIL CASES.

See "Appeal"; "Certiorari"; "Costs"; "Damages"; "Equity"; "Evidence"; "Judgment"; "New Trial"; "Pleading"; "Trial"; "Writs."

Where, in an action against the guarantor of a bond, there was no evidence of its value, a nonsuit was proper.—*Gibbs v. Craig* (N. J. Err. & App.) 1052.

Plaintiff may show an election to take a nonsuit by absenting himself from the trial.—*Felts v. Delaware, L. & W. R. Co.* (Pa.) 97.

Where plaintiff in ejectment absents himself from the trial, it is error to take judgment against him.—*Felts v. Delaware, L. & W. R. Co.* (Pa.) 97.

Propriety of taking off a judgment of nonsuit for want of security of costs upon a decision that the affidavit of defense is insufficient.—*Terriberry v. Broude* (Pa.) 699.

Where a demurrer to a complaint is overruled, and defendant pleads over, he cannot question the sufficiency of the complaint by motion for nonsuit.—*Cook v. Morris* (Conn.) 994.

A nonsuit should not be granted because of the weakness of plaintiff's case, and the improb-

ability of the facts testified to, plaintiff having the right to submit such a case to a jury.—Cook v. Morris (Conn.) 994.

If there is evidence sustaining the issue, it is proper to refuse a nonsuit.—King v. Holbrook (N. J. Err. & App.) 965.

Under Supp. Revision, p. 404, art. 4, § 15, where, on appeal from a judgment of the court for the trial of small causes, the papers are not filed three days before the term, the appeal cannot be placed on the trial docket for such term, though the party appears to object to trial.—Matthews v. Rankin (N. J. Sup.) 1052.

The regular way of serving an order on file in the court of chancery is by leaving with the party a certified copy.—Perrine v. Broadway Bank (N. J. Err. & App.) 404.

Stipulation in an action on a life policy abandoning defenses on the merits, but providing that the claim should be subject to any offsets, construed.—Leonard v. Charter Oak Life Ins. Co. (Conn.) 511.

Prescription.

See "Adverse Possession."

PRINCIPAL AND AGENT.

See, also, "Factors and Brokers"; "Master and Servant."

Where one intrusted with the sale of real estate purchases it himself through other parties, the vendor may rescind the sale, though the price paid was all that was demanded by her.—Rich v. Black (Pa.) 880.

In an action for goods delivered to an agent and charged to the principal, where the agency is denied, evidence that the agent was insolvent was admissible.—Plumb v. Curtis (Conn.) 998.

Admissibility of declarations of agent to show nature of agency.—Plumb v. Curtis (Conn.) 998.

Evidence held sufficient to sustain a finding that an agent was authorized to make purchases for his principal.—C. & C. Electric Motor Co. v. D. Frisbie & Co. (Conn.) 604.

Knowledge by the agent of a lessor that the real tenant was a corporation of which the nominal lessee was president held to be notice to the lessor of that fact so as to relieve the president from liability for rent.—In re Heckman's Estate (Pa.) 552; Appeal of Ward, Id.

The superintendent of a coal mine is personally liable for injuries caused by draining refuse into a stream, causing it to overflow, his management not being according to his employers' instructions.—Hindson v. Markle (Pa.) 74.

PRINCIPAL AND SURETY.

A surety is entitled to the benefit of all securities which the creditor holds.—Kidd v. Hurley (N. J. Ch.) 1057.

Accounts of a city treasurer, which he is required to keep, do not conclude the sureties on his bond.—City of Wilkes Barre v. Rockafellow (Pa.) 269.

Liability of the sureties of a treasurer for moneys belonging to a sinking fund subject to the orders of the sinking-fund commissioners, where, without the knowledge of the sureties, the commissioners loaned the money to him as a banker.—City of Wilkes Barre v. Rockafellow (Pa.) 269.

The fact that a city treasurer before his election agreed to pay a certain per cent. of interest on balances if elected does not release his official sureties.—City of Wilkes Barre v. Rockafellow (Pa.) 269.

Probate Courts.

See "Courts."

Proof of Loss.

See "Insurance."

PROSTITUTION.

A woman who keeps a child under 15 years for the purpose of prostitution is guilty of a misdemeanor under Act March 29, 1889.—State v. Davis (Del. Gen. Sess.) 439.

Publication.

Service by, see "Writs."

Public Improvements.

See "Municipal Corporations."

PUBLIC LANDS.

By failing to bring ejectment against the warrantee to survey within six months after the adverse decision on a caveat, as provided by Act May 3, 1792, § 11, the patentee did not lose title to land included in the patent, to survey which the warrant issued.—Fisher v. Kaufman (Pa.) 137.

Punitive Damages.

See "Damages."

QUO WARRANTO.

An incumbent cannot proceed by quo warranto against one who has not been in possession and user of the office.—Roberson v. City of Bayonne (N. J. Sup.) 734.

RAILROAD COMPANIES.

See, also, "Carriers"; "Horse and Street Railroads"; "Master and Servant."

Railroad bonds issued in excess of the stock paid in are invalid in the hands of one who was a director at the time of such issue.—Steelman v. Baker (N. J. Err. & App.) 815.

Where the bondholders organized and bought in the mortgaged property and the equity of redemption, foreclosure was not necessary.—Pierce v. Ayer (Me.) 777.

Where the bondholders organized and purchased the mortgaged property and the equity of redemption, they became shareholders in such property, and entitled to possession thereof.—Somerset Ry. v. Pierce (Me.) 772.

An owner of land on each side of the right of way, having the right to pass over the right of way, could not lay a pipe line therein.—Breckinridge v. Delaware, L. & W. R. Co. (N. J. Ch.) 800.

Held, that complainant had the right to construct a tunnel under defendant's yard for a passage for its road.—National Docks & N. J. J. C. Ry. Co. v. Pennsylvania R. R. (N. J. Ch.) 800.

Where a railroad company owns tracks used occasionally for railroad purposes, and an equipment of an electric railway which it operates over the same tracks, the tracks and franchises are lawfully assessed by the state board of assessors, but the electrical equipment should be assessed as property not used for railroad purposes.—Camden & A. R. Co. v. City of Atlantic City (N. J. Sup.) 198.

In an action against a railroad company for the death of a person at a crossing evidence of a borough ordinance requiring defendant at all times to maintain a flagman at the crossing is inadmissible.—*West Jersey R. Co. v. Paulding* (N. J. Err. & App.) 381.

Question for jury as to contributory negligence of one killed at a crossing.—*Gray v. Pennsylvania R. Co.* (Pa.) 697.

Evidence *held* to show that plaintiff was injured at a railroad crossing by her own negligence.—*Romeo v. Boston & M. R. R.* (Me.) 24.

Whether plaintiff, injured at a railroad crossing, was guilty of contributory negligence, was for the jury.—*Davidson v. Lake Shore & M. S. Ry. Co.* (Pa.) 86.

RAPE.

In an indictment for assault with intent to rape, it is not necessary to charge that the female was under the age of consent, in order to prove it.—*State v. Smith* (Del. Gen. Sess.) 441.

The offense of assault with intent to rape includes every ingredient except penetration.—*State v. Smith* (Del. Gen. Sess.) 441.

RECEIVERS.

Petitioner allowed to present claim against receivers of an insolvent corporation before distribution after failure to present the claim within the time limited by the court, because of certain negotiations for settlement of which the receivers were cognizant.—*Wall v. Young* (N. J. Ch.) 526.

An order authorizing a receiver to make an assessment equal to the sum of prior assessments does not authorize him to include a penalty for the nonpayment of a previous assessment.—*Capital City Mut. Fire Ins. Co. v. Boggs* (Pa.) 349.

Ratification of a sale by a receiver *held* to have been properly denied.—*Deford v. Macwatty* (Md.) 488.

A receiver should not be directed to sell at auction debts due the company, amounting to over \$35,000, and due from debtors all over the country.—*Deford v. Macwatty* (Md.) 488.

In the absence of statute, a receiver cannot be sued without leave of court.—*Links v. Connecticut River Banking Co.* (Conn.) 1003.

A Maryland receiver cannot sue in Delaware to recover a debt due from a resident of the latter state.—*Stockbridge v. Beckwith* (Del. Ch.) 620.

A member of an insolvent mutual insurance company is not a necessary party to a bill by another member who has obtained judgment for a loss against the company for the appointment of a receiver.—*Eichman v. Hersker* (Pa.) 229.

Recognizance.

See "Appeal."

RECORDS.

Of chattel mortgage, see "Chattel Mortgages." On appeal, see "Appcal."

When the holder of an instrument leaves it with the recorder to be recorded, it is to be regarded as recorded from that time, though it is not then actually recorded, or it is recorded in the wrong book.—*Farabee v. McKerrihan* (Pa.) 583; Appeal of McKerrihan, *id.*

The burden of supporting an allegation of inaccuracy in a statement in a magistrate's record of an agreement for arbitration is upon the person making the allegation.—*Hindman v. Doughty* (Pa.) 563.

Reformation.

Of contract, see "Equity."

RELEASE AND DISCHARGE.

The payment of a less sum in satisfaction of a larger sum is no satisfaction.—*Chambers v. Niagara Fire Ins. Co.* (N. J. Sup.) 283.

RELIGIOUS SOCIETIES.

Right to compel the unsuccessful parties in church litigation to turn over to the properly constituted church authorities contributions made by them purely for the salary of the pastor to whom they adhered.—*Bliem v. Schultz* (Pa.) 337.

Remote and Proximate Cause.

See "Negligence."

Rent.

See "Landlord and Tenant"; "Use and Occupation."

Repeal.

Of statute, see "Statutes."

REPLEVIN.

The fact that in the copy of plaintiff's affidavit left on service his signature at the end was omitted *held* not ground for abatement.—*Matthai v. Capen* (Conn.) 495.

Question whether a plea setting up a claim of absolute property estops defendant to show in mitigation of damages that the special interest of plaintiff's bailee passed to him, and that he has made payments under the contract of bailment.—*Collins v. Bellefonte Cent. R. Co.* (Pa.) 331.

Rescission.

Of contract, see "Sale."

Res Judicata.

See "Judgment."

Resulting Trusts.

See "Trusts."

RIPARIAN RIGHTS.

In an action to recover damages for the opening of sluices and gates in a dam across a water course, evidence examined, and *held*, that plaintiffs show no cause of action.—*Warren v. Westbrook Manuf'g Co.* (Me.) 668.

Roads.

See "Highways."

SALE.

See, also, "Fraudulent Conveyances"; "Judicial Sales"; "Vendor and Purchaser."

By receiver, see "Receivers."

For taxes, see "Taxation."

Of decedent's land, see "Executors and Administrators."

Of intoxicating liquors, see "Intoxicating Liquors."

Under execution, see "Execution."
—foreclosure, see "Mortgages."

Where, at a public sale, property is to be paid for by approved paper, and is retained by the seller until satisfactory paper is presented, it remains his property until payment is accepted.—*Chalmers v. McAuley* (Vt.) 767.

In sale of chattels the title passes at once if such is the intent of the party, though the seller is afterwards to make delivery.—*Penley v. Bessey* (Me.) 21.

Evidence held insufficient to establish a delivery of the property sold.—*Penley v. Bessey* (Me.) 21.

An agreement to furnish boilers that will give 200 horse power each does not bind one to furnish boilers giving that power with the best economy in the consumption of coal.—*City & Suburban Ry. Co. v. Basshor* (Md.) 635.

Construction of clause in contract for sale of boilers as to whether it required a heating surface of a certain number of square feet, when measured by a standard factor named.—*City & Suburban Ry. Co. v. Basshor* (Md.) 635.

In case of the sale of an elevator, the buyer, after acceptance by retention after a reasonable time for trial, cannot return the elevator for breach of warranty.—*C. & C. Electric Motor Co. v. D. Frisbie & Co.* (Conn.) 604.

Statements by vendor at a public auction sale held a warranty.—*Ingraham v. Union R. Co.* (R. I.) 875.

In an action for breach of warranty as to property sold a scianter need not be alleged or proven.—*Ingraham v. Union R. Co.* (R. I.) 875.

A contract for the sale of a boiler, to be tested after being set up, is executory, and may be rescinded if the test fails to show compliance therewith.—*Smith v. York Manuf'g Co.* (N. J. Sup.) 244.

Evidence in an action for the price of boilers held to show that defendant was justified in rescinding the contract of sale and that plaintiff could not recover.—*Smith v. York Manuf'g Co.* (N. J. Sup.) 244.

The right of one to rescind a contract for the purchase of a boiler extends to an iron smoke-stack furnished under the contract.—*Smith v. York Manuf'g Co.* (N. J. Sup.) 244.

Sufficiency of evidence to show that goods were obtained by false representations as to the buyer's pecuniary standing.—*White v. Rosenthal* (Pa.) 1027.

Sufficiency of affidavits of defense, to a claim for the price of machinery, on the ground of its defective construction.—*Lane v. Penn Glass-Sand Co.* (Pa.) 570.

Evidence held sufficient to sustain a finding that the buyer had accepted the article on account of an unreasonable detention.—*C. & C. Electric Motor Co. v. D. Frisbie & Co.* (Conn.) 604.

If the article sold does not conform to the description under which it was sold, the vendee may recover the price paid.—*Meador v. Cornell* (N. J. Err. & App.) 960.

Evidence held insufficient to show that defendant was not a bona fide purchaser of the trust property.—*Ketchum v. Packer* (Conn.) 499.

SCHOOLS AND SCHOOL DISTRICTS.

School moneys collected by the collector of the town of Guttenberg must be paid over to

the town treasurer.—*Prosser v. Behrens* (N. J. Sup.) 282.

On the issue of school bonds under Act May 25, 1894, it must appear in the proceedings that the bonds are to be issued only for purposes authorized by the statute.—*Applegate v. Board of Education of Cranbury Tp.* (N. J. Err. & App.) 923.

School taxes for Glen Ridge cannot be assessed by the borough assessor.—*Benson v. Inhabitants of Township of Bloomfield* (N. J. Sup.) 855.

SEDUCTION.

A father may maintain an action for the seduction of his minor daughter, without showing service.—*Beaudette v. Gagne* (Me.) 23.

In an action for the seduction of plaintiff's daughter, evidence that, after the alleged seduction, defendant accompanied the daughter to another city, where an abortion was performed, is admissible.—*Beaudette v. Gagne* (Me.) 23.

Self-Defense.

See "Homicide."

SEQUESTRATION.

In enforcing obedience to an injunction, sequestration may be resorted to.—*National Docks & N. J. J. C. Ry. Co. v. Pennsylvania R. Co.* (N. J. Ch.) 936.

Service.

Of summons, see "Writs."

SET-OFF AND COUNTER-CLAIM.

A claim assigned with the express agreement that if it is not allowed as a set-off in favor of the assignee it shall be reassigned, cannot be used by the assignee as a set-off.—*Gump v. Goodwin* (Pa.) 686.

Right of an executor making advances to the daughter of his decedent to set off his claim therefor against his liability on a recognizance bond, disconnected with the estate, as against an assignee of the bond for value, though with notice of the executor's claim for the advances.—*Burton v. Willen* (Del. Ch.) 675.

Settlement.

Of paupers, see "Poor and Poor Laws."

SHERIFFS AND CONSTABLES.

Sheriff held released from liability to defendant on an insufficient replevin bond.—*Follett v. Shumway* (Vt.) 1067.

Societies.

See "Benevolent Societies"; "Corporations"; "Religious Societies."

Special Partners.

See "Partnership."

SPECIFIC PERFORMANCE.

On failure of a person having an option to purchase within a certain time to exercise the option, an action by him for specific performance will not lie.—*Roberts v. Norton* (Conn.) 532.

A promise by one that, if his brother would refrain from making a will, leaving the promisor his next of kin, the latter would pay an annuity to a certain relative, if acted upon, may be enforced.—*Grant v. Bradstreet* (Me.) 165.

Sufficiency of evidence determined in an action to enforce performance of a promise to pay a certain annuity.—*Grant v. Bradstreet* (Me.) 165.

Evidence in an action for specific performance held to show such title that defendant could be compelled to accept the same.—*Lippincott v. Wikoff* (N. J. Ch.) 305.

STARE DECISIS.

A decree of the lower court affirmed by a divided court is not one in support of which the rule of stare decisis can be invoked.—*In re Grief's Estate* (Pa.) 375; *Appeal of Will, Id.*

STATES AND STATE OFFICERS.

Sufficiency of acts submitting the issue of bonds for the construction of a statehouse to the people, and for the repayment into the general treasury of moneys already expended for such object.—*In re Statehouse Bonds* (R. I.) 870.

Authority to use for payment of the general expenses of the government the proceeds of bonds issued for the purpose of constructing a statehouse.—*In re Statehouse Bonds* (R. I.) 870.

The word "bills," as used in P. L. c. 1201, § 9, and chapter 1822, § 4, relating to the board of statehouse commissioners, means the itemized bills of the original parties.—*In re State House Commission* (R. I.) 453.

Where an itemized bill has been audited by the statehouse commissioners, and presented to the state auditor, the latter must draw an order for its payment, unless he believes that its allowance was procured by fraud or mistake.—*In re State House Commission* (R. I.) 453.

STATUTES.

See "Constitutional Law."

Long-continued practical construction of a statute held to have been adopted by a re-enactment of the statute.—*Anderson v. City Council of City of Camden* (N. J. Sup.) 846.

Laws 1893, c. 297, granting permission to appeal after the time for appeal has expired on award of damages for land taken for highways, does not apply where the right of appeal had

been barred before its enactment.—*Dyer v. City of Belfast* (Me.) 790.

Application of requirement that notice of intention to apply for local law be published in the locality.—*Chalfant v. Edwards* (Pa.) 1048.

P. L. 1895, p. 490, respecting licenses in boroughs, held to sufficiently express the provisions in the title.—*Johnson v. Borough of Asbury Park* (N. J. Sup.) 850.

A title which fairly points out the subject of the act is sufficient.—*Anderson v. City Council of City of Camden* (N. J. Sup.) 846.

Sufficiency of title of act providing for a change of county seat, an election for that purpose, and the erection of buildings at the new county seat.—*Hamilton v. Carroll* (Md.) 648.

Act March 14, 1873 (P. L. 290), entitled "An act to confer upon M. H. all the rights, powers and privileges of a son of B. H.," does not include any matter not germane to the subject of the act as expressed in the title.—*Commonwealth v. Henderson* (Pa.) 368.

Under Act April 9, 1870, authorizing by its title the incorporation of rural cemetery associations, legislation exempting the property of such corporations from taxation may be enacted.—*City of Newark v. Mt. Pleasant Cemetery Co.* (N. J. Err. & App.) 396.

Act May 23, 1893, providing a uniform fee bill in the several counties for magistrates and constables, repeals all previous inconsistent acts, local as well as general.—*Fraim v. Lancaster County* (Pa.) 339.

Laws 1844, c. 128, providing a uniform law as to all railroads, and the repeal of such act by Gen. St. 1867, p. 553, repealed the provision in the charter of the Concord Railroad Company providing for the purchase of the road.—*In re Opinion of the Justices* (N. H.) 1076.

The rule that a general affirmative act, without express words of repeal, will not repeal a local act, is a rule of construction only.—*Fraim v. Lancaster County* (Pa.) 339.

Act March 17, 1882 (P. L. 142), requiring fire escapes to be provided for hotels, and the supplement thereto of March 22, 1888 (P. L. 192), were repealed by Act March 24, 1890 (P. L. 101), relative to fire escapes.—*De Ginter v. New Jersey Home for the Education and Care of Feeble-Minded Children* (N. J. Err. & App.) 968.

On repeal of a statute under which a proceeding is pending, the proceeding falls to the ground.—*Grand Trunk Ry. of Canada v. Board of Com'rs of Cumberland County* (Me.) 988.

Act April 14, 1834, relating to changes of venue, is repealed by Act March 30, 1875.—*Felts v. Delaware, L. & W. R. Co.* (Pa.) 97.

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A second mortgagee on making payments on the first mortgage is subrogated to the extent of such payments.—*New Jersey Building, Loan & Investment Co. v. Cumberland Land & Improvement Co.* (N. J. Err. & App.) 964.

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Of railroad companies, see "Railroad Companies."

Of school districts, see "Schools and School Districts."

Claim of a corporation for exemption examined, and *held*, that there was no such action, under Act May 21, 1892, as exempted such property.—*McTwiggan v. Hunter* (R. I.) 5.

Act March 14, 1879, does not repeal the exemption of the property of cemeteries created by special laws from taxation contained in the act of April 9, 1875.—*City of Newark v. Mt. Pleasant Cemetery Co.* (N. J. Err. & App.) 396.

The pipes and fire plugs of a water company created under Act April 21, 1876 (Revision, p. 1365), are subject to taxation in the borough, whether considered as personal or real property.—*Riverton & P. Water Co. v. Haig* (N. J. Sup.) 215.

Under Code, art. 81, § 2, corporate bonds, secured by mortgage on property partly within and partly without the state, are taxable.—*Simpson v. Hopkins* (Md.) 714.

An assessment of several tracts is invalid where the description does not identify the land with certainty.—*Taylor v. Narragansett Pier Co.* (R. I.) 519.

Under Pub. St. c. 42, § 4, the assessment of distinct parcels of land under a common description is invalid.—*Taylor v. Narragansett Pier Co.* (R. I.) 519.

Under Rev. St. c. 6, § 14, the value of real estate of a corporation must be deducted from that of stock in assessing the latter.—*Wheeler v. Board of Com'rs of Waldo County* (Me.) 983.

Under Code Pub. Gen. Laws, art. 81, § 132, unissued shares of stock of a corporation cannot be assessed.—*Consumers' Ice Co. of Baltimore City v. State* (Md.) 427.

An assessment of a business corporation, which, after specifying taxable personality, adds "and other personal property," *held* void.—*Rumford Chemical Works v. Ray* (R. I.) 443.

When the act incorporating the town of Ellitsville was repealed, the territory thereof, including a portion of the town of Wilson previously annexed thereto, became an unincorporated township, and the assessment of taxes by the county commissioners of such territory for the repair of roads in the township was proper.—*Adams v. Piscataquis County* (Me.) 12.

Under Pub. St. c. 43, § 6, assessors need give a notice of but one meeting for presenting accounts and making assessments.—*McTwiggan v. Hunter* (R. I.) 5.

The omission to assess property believed to be exempt under a contract with a city will not render the assessment void, though the contract was invalid.—*McTwiggan v. Hunter* (R. I.) 5.

Sufficiency of return on nonpayment of taxes, as required by Act 1881, determined.—*Van Loon v. Engle* (Pa.) 77.

Description of land in notice of a tax sale *held* insufficient.—*Richardson v. Simpson* (Md.) 457.

Act May 9, 1889, does not establish a new office of county assessor, but merely lengthens

the term of the official charged with making the assessment for county purposes to three years.—*Kuhlman v. Smeltz* (Pa.) 358.

A collector proceeding directly against the land for the taxes, except under the prescribed conditions, is liable as a trespasser.—*Kean v. Kinnear* (Pa.) 325.

Measure of damages in trespass against collector for resorting to the land for the taxes thereon, instead of collecting them from the personalty belonging to the tenant, who agreed to pay the taxes.—*Kean v. Kinnear* (Pa.) 325.

Resort can be had to the land itself for the payment of taxes thereon only after a failure to collect the taxes from the personal property on the premises, or by demand upon the owner individually.—*Kean v. Kinnear* (Pa.) 325.

Under Code Pub. Gen. Laws, art. 81, § 144, a corporation, when sued for taxes levied against its stock, may defend by showing that the stock was unissued, and therefore not assessable.—*Consumers' Ice Co. of Baltimore City v. State* (Md.) 427.

A tax title cannot be defeated by the fact that the owner of the land refused to pay taxes on a mistaken belief that they were paid under another warrant.—*Wilson v. Marvin* (Pa.) 275.

TENANCY IN COMMON.

See, also, "Partition."

A tenant in common making necessary repairs is entitled to contribution, though he claims under a contract of purchase, and does not hold legal title.—*Williams v. Coombs* (Me.) 1073.

The relation between tenants in common held to be of a confidential nature, so as to incapacitate the one from making a profit at the expense of the other.—*McCutcheon v. Smith* (Pa.) 881.

Right of owner of undivided interest in oil in the custody of a pipe line, to claim such oil as against one representing a partnership composed of the joint owners.—*Enterprise Oil & Gas Co. v. National Transit Co.* (Pa.) 687.

Where tenants mortgage their property to secure one on his promise to reimburse them, and it is sold, they may maintain a joint action against him.—*McGill v. McGill* (Pa.) 146.

TENDER.

Running of interest is not stopped by making a tender with money borrowed from a bank for the purpose, and immediately returned to it on refusal of the payment.—*Middle States Loan, Bldg. & Const. Co. v. Hagerstown Mattress & Upholstery Co.* (Md.) 886.

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See "Powers."

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See, also, "Death by Wrongful Act"; "Deceit"; "False Imprisonment"; "Libel and Slander"; "Malicious Prosecution"; "Negligence"; "Seduction"; "Trespass"; "Trove and Conversion."

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See, also, "Counties"; "Highways"; "Municipal Corporations"; "Poor and Poor Laws"; "Schools and School Districts."

Powers of townships defined.—*Springer v. Inhabitants of Township of Logan* (N. J. Sup.) 952.

A dispute between the township collector and the township authorities as to his accounts can be adjusted at an annual town meeting, or at one specially called for such purpose.—*Springer v. Inhabitants of Township of Logan* (N. J. Sup.) 952.

Under Pub. St. c. 34, §§ 11, 12, a town ordinance requiring bills audited by the town council to be approved by a special agent is valid.—*Foster v. Angell* (R. I.) 406.

A town is not liable for the torts of its selectmen in building a road, where there is no vote authorizing them to take charge of the road.—*Goddard v. Inhabitants of Harpswell* (Me.) 380.

Transactions with Decedents.

See "Witness."

TRESPASS.

Illegal collection of taxes, see "Taxation."

Mere possession of land is sufficient to sustain an action of trespass against one having neither title nor possession.—*Stevens v. Gordon* (Me.) 27.

One wrongfully resisting a legal act cannot recover for injuries received in so doing, where no excessive force was used.—*East Jersey Water Co. v. Slingerland* (N. J. Sup.) 843.

If one elects to proceed for his rent under the statute conferring the right of distress, a failure to make the appraisal required by the statute renders him a trespasser ab initio.—*Wyke v. Wilson* (Pa.) 701.

Sufficiency of evidence to go to the jury in action against a collector for trespass in resorting to land for the taxes thereon without first proceeding against the personalty.—*Kean v. Kinnear* (Pa.) 325.

Evidence examined, and held, that the lessor was not liable in trespass to the lessee.—*Hull v. Sanctuary* (Vt.) 889.

Evidence held insufficient to show that the alleged acts of defendants constituted trespass.—*Ring v. Walker* (Me.) 174.

In trespass for forcible eviction of a tenant holding over, he can recover only nominal damages for deprivation of the possession.—*Thiel v. Bulls Ferry Land Co.* (N. J. Sup.) 231.

\$5,000 damages held excessive.—*East Jersey Water Co. v. Slingerland* (N. J. Sup.) 843.

Where the injury is inflicted wantonly, exemplary damages may be recovered.—*Trainer v. Wolff* (N. J. Err. & App.) 1051.

TRIAL.

See, also, "Appeal"; "Certiorari"; "Evidence"; "Judgment"; "New Trial"; "Pleading"; "Practice in Civil Cases"; "Witness"; "Writs."

Where a party fails to move to strike out evidence that is subsequently found to be inadmissible, he cannot afterwards except to its admission.—*Beaudette v. Gagne* (Me.) 23.

The error of admitting incompetent evidence held not cured by a subsequent request to withdraw the same, which was not acted on.—*West Jersey R. Co. v. Paulding* (N. J. Err. & App.) 381.

Where testimony has been given without objection, and no motion to strike it out is made, error in its admission is waived.—*Fath v. Thompson* (N. J. Err. & App.) 391.

Whether testimony shall be ruled on before it is actually delivered is within the discretion

of the court.—*Fath v. Thompson* (N. J. Err. & App.) 391.

Objections to evidence on grounds not raised below will not be considered.—*Plumb v. Curtis* (Conn.) 998.

Objections to evidence are waived if not made in the trial court.—*Morrill v. Palmer* (Vt.) 829.

When part of certain testimony is competent and part incompetent, it is proper to refuse a motion to withdraw it all from the jury.—*Elfert v. Lytle* (Pa.) 573.

Order of the admittance of proof held within the discretion of the trial court.—*C. & C. Electric Motor Co. v. D. Frisbie & Co.* (Conn.) 604.

Certain evidence of representations to the agent of an insurance company held properly received, to be followed up by evidence showing that the information had been communicated to the company.—*Ward v. Metropolitan Life Ins. Co.* (Conn.) 902.

The value of evidence is for the jury.—*Jackson v. Jackson* (Md.) 317.

The fact that plaintiff's testimony was contradicted by the preponderance of evidence does not justify the withdrawal of the case from the jury.—*Baker v. Irish* (Pa.) 558.

The fact that plaintiff's testimony in regard to a fact which was essential to the support of his claim was contradictory and confused does not justify the court in withdrawing that question from the jury.—*Campbell v. Preferred Mut. Acc. Ass'n of New York* (Pa.) 564.

Remarks of counsel examined and held justified by the evidence.—*Morrill v. Palmer* (Vt.) 829.

That counsel, in argument, claimed his client's right to property was through an absolute gift, does not make it error to instruct as to a gift in expectation of death, the evidence tending to prove such a gift, and the pleadings warranting a recovery in case of gift, whatever its nature.—*Pryor v. Morgan* (Pa.) 98.

Where no verdict for plaintiff could be supported, it was proper to direct a verdict for defendant.—*Ward v. Metropolitan Life Ins. Co.* (Conn.) 902.

In an action for injuries because of negligence, where intelligent and fair-minded men could not reasonably differ in their conclusions, directing a verdict is proper.—*Romeo v. Boston & M. R. R.* (Me.) 24.

Instructions.

It is proper to refuse prayers for instruction where the case was fully covered in the court's charge.—*Jackson v. Jackson* (Md.) 317.

It is proper to refuse a prayer not applicable to the evidence.—*Jackson v. Jackson* (Md.) 317.

Exceptions to instructions should contain a specification of the ground thereof.—*Clark Mile-End Spool Co. v. Shaffery* (N. J. Sup.) 284.

Where the real issue is pointed out to the jury, the judgment will not be disturbed because of a refusal to adopt some particular mode of presenting the issue.—*Fath v. Thompson* (N. J. Err. & App.) 391.

Propriety of court's refusal to tell the jury, on an issue as to the location of a boundary line, that the fact that the location claimed by plaintiffs gave them more land than their deed called for, and the defendants less, should have "great weight" in favor of the latter.—*Elfert v. Lytle* (Pa.) 573.

The trial court, in determining issues of fact, is not required to pass upon all claims of law made by the parties as applicable thereto.—*C. & C. Electric Motor Co. v. D. Frisbie & Co.* (Conn.) 604.

Right of one to complain on appeal that the court, in answering a request by the jury for

further instructions, directed the reading of only a part of certain testimony.—*Miller v. Royal Flint Glass Works* (Pa.) 350.

In an action for goods sold through an agent, a request for instruction ignoring evidence of ratification was properly denied.—*Plumb v. Curtis* (Conn.) 998.

Where the court strikes out evidence on request, failure to instruct the jury to disregard it is not error.—*Martin v. McCray* (Pa.) 108.

A general exception to an instruction as a whole is insufficient if any part of the charge was correct.—*Morrill v. Palmer* (Vt.) 829.

TROVER AND CONVERSION.

A mortgagee may maintain trover against the mortgagor for selling the mortgaged property.—*Drew v. Drew* (Vt.) 1068.

In trover for grass cut from that side of a highway next to plaintiff's land, the possession of the land only is in question.—*Stevens v. Gordon* (Me.) 27.

Possession of personal property carries with it the presumption of title, and enables the possessor to maintain trover against any person except the rightful owner.—*Stevens v. Gordon* (Me.) 27.

Foreclosure of a chattel mortgage by an officer, the possession of the property being in no way interfered with, held not a conversion.—*Thorp v. Robbins* (Vt.) 596.

One selling the goods of another in his possession, delivering the possession to the purchaser, and receiving the price for his own use, is liable to the owner for the value of the goods.—*Croft v. Jennings* (Pa.) 1028.

In trover by a purchaser at execution sale defendant may defeat recovery by showing that the execution debtor had an outstanding title because of an irregularity in the sale.—*Morey v. Hoyt* (Conn.) 496.

TRUSTS.

Where property was conveyed to defendant under an agreement to allot a share therein to plaintiff, there was a trust as to plaintiff's interest, and, on refusal to carry out the agreement, defendant could not plead the statute of frauds.—*Kennedy v. McCloskey* (Pa.) 117.

Evidence examined and held sufficient to show an express trust in personal property.—*Bath Sav. Inst. v. Hathorn* (Me.) 836.

An express trust of personal property may be created by parol.—*Bath Sav. Inst. v. Hathorn* (Me.) 836.

Evidence as to whether land purchased by a purchasing agent of a corporation was purchased for the benefit of the corporation, with its money, so as to raise a trust in its favor.—*Altoona Coal & Coke Co. v. Burk* (Pa.) 326.

Testamentary powers conferred on a trustee held not personal, where not conferred because of any special confidence, and where their exercise by a successor is necessary to the trust.—*In re Blakely* (R. I.) 518.

When the duty of trustee under a will is merely to receive and pay out money, the executor may ignore the trust, and pay directly to the beneficiaries.—*Hamlin v. Mansfield* (Me.) 788.

Where one managing property for the benefit of a widow and her children buys in an outstanding title, he cannot charge the costs there of to the latter, on the ground that the purchase was for their benefit, unless they consented to the purchase.—*Shaw v. Devemon* (Md.) 716.

A purchase of a record title by a trustee *held* not to affect the tax title which he held in trust.—*Kuykendall v. Devecmon* (Md.) 717.

Where a trustee on the extinction of the trust holds the legal title to realty, a conveyance by him and the persons entitled to the land conveys a good title.—*In re Clarke* (R. I.) 585.

Where trustees for a fund are directed to place it with one of several companies for investment, they are not liable on default of the company selected, if they exercise due care.—*Pinney v. Newton* (Conn.) 591.

Where executors are authorized to place certain money with a security company for investment, unless they invest themselves, they are trustees of the fund.—*Pinney v. Newton* (Conn.) 591.

Where real estate in the state has been conveyed by a deed in trust, the trust may be dealt with in equity, regardless of the residence of the parties in interest.—*Du Puy v. Standard Mineral Co.* (Me.) 976.

An attorney of a mortgagee, knowing of an agreement between the mortgagee and the owner of certain land that on foreclosure sale the mortgagee should buy the land and convey a portion thereof to the owner subject to the mortgage, on purchase at foreclosure sale, takes subject to such agreement.—*Fellows v. Loomis* (Pa.) 266.

A daughter acquiescing in investments made by her father, in his own name, of the proceeds of real estate in which she had a remainder in fee after his life estate, cannot, after his death, in the absence of fraud or negligence, claim the full amount of such proceeds on the theory of a breach of trust in making the investments in his own name, but can only reclaim the investments themselves.—*Hyatt v. Vaneck* (Md.) 972.

Under an express trust of personal property, the donor may retain the legal title and the control for the benefit of the beneficiary according to the terms of the trust.—*Bath Sav. Inst. v. Hathorn* (Me.) 836.

Findings of master on accounting between cemetery association and lot owners reviewed.—*New York Bay Cemetery Co. v. Buckmaster* (N. J. Ch.) 819.

USE AND OCCUPATION.

In *assumpsit* for use and occupation by a tenant at sufferance, evidence as to the value to defendants of the property leased is inadmissible.—*Williams v. Ladew* (Pa.) 329.

A tenant at sufferance is liable in *assumpsit* for use and occupation for the interval between the termination of the lease and lessor's election to treat him as a trespasser.—*Williams v. Ladew* (Pa.) 329.

USURY.

As a defense to usury it may be shown that the bond including the usurious provision was used by the obligee's attorney without his consent.—*Case v. Bennett* (N. J. Ch.) 248.

An answer setting up usury *held* insufficient.—*Case v. Bennett* (N. J. Ch.) 248.

Vacation.

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VENDOR AND PURCHASER.

See, also, "Covenants"; "Deed"; "Fraudulent Conveyances"; "Sale."

Notice within the provisions of a contract that money paid would be refunded on notice exam-

ined, and *held* a sufficient compliance with the contract.—*Copp v. De Ronceray* (Md.) 432.

A vendee did not lose his right to specific performance by mere lapse of time.—*Pennsylvania R. Co. v. United States Pipe-Line Co.* (N. J. Ch.) 809.

Effect of survey with purpose to condemn for railroad right of way, followed by adoption of a line, as imposing a burden on the land which relieves the vendee from obligation to buy.—*Johnston v. Callery* (Pa.) 1036.

Terms of a sale *held* not to have been modified by failure of the seller to dissent to a proposed change in manner of payment in a letter written to him by the buyer, after a delay in delivery on the part of the seller.—*C. & C. Electric Motor Co. v. D. Frisbie & Co.* (Conn.) 604.

An agreement by an execution plaintiff to convey the land levied on to the defendant if the latter paid him a certain sum in two weeks *held* to give the defendant merely an option to buy, and not to be a bargain and sale of the land.—*Berwind v. Williams* (Pa.) 353.

A written agreement for the sale of land merges all prior equities of the purchaser.—*Berwind v. Williams* (Pa.) 353.

Evidence in an action to establish a vendor's lien *held* insufficient to show that defendant's attorney had notice, as agent for defendant, of the unpaid purchase price.—*Maryland Land & Permanent Homestead Ass'n of Baltimore County v. Moore* (Md.) 59.

Verdict.

Directing verdict, see "Trial."

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In a suit by a lower against an upper mill owner to enjoin pollution of the stream, a preliminary injunction should issue where the pollution is not denied and it seriously injures plaintiff.—*Jessup & Moore Paper Co. v. Ford* (Del. Ch.) 618.

Proceeding by water company to restrain the pollution of its source of supply in which it was proper to make the state a party, and to determine whether the public interest does not require that such pollution be stopped.—*Commonwealth v. Russell* (Pa.) 709.

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An attempt to make a testamentary disposition of property so that certain persons should each take, in case he survived testator, what might be left of his share of the property, *held* contrary to the statute of wills.—Norway Sav. Bank v. Merriam (Me.) 840.

After a will has been duly proven by two witnesses before the register, its execution cannot be disproved by the uncorroborated testimony of one of the witnesses directly contrary to that given by him under oath before the register.—In re Rice's Estate (Pa.) 1100; Appeal of Frake, *Id.*

Where the validity of the will is not questioned, but probate is resisted on other grounds and is granted, the costs cannot be charged on the testator's estate.—Burr v. Burr (N. J. Prerog.) 796.

Evidence examined, and *held*, that the testatrix, a woman of 18 years, was of sufficient testamentary capacity when she made the will in question.—Hall v. Perry (Me.) 160.

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A letter or a testator after execution of his will is admissible to show that he intended to include a devisee named in the will among the residuary legatees.—Pinney v. Newton (Conn.) 591.

Will construed and *held* that bequests over after the life estates to devisees were not void as against the statute of perpetuities.—Johnson v. Edmond (Conn.) 503.

A provision for the continuance of a partnership of which deceased was a member so long as his son or any of the son's children should desire *held* to create a perpetuity.—Hamlin v. Mansfield (Me.) 788.

A bequest over *held* to have become operative on probate of the will.—Hamlin v. Mansfield (Me.) 788.

Where a testator makes an absolute gift, and expresses a wish as to how the donee may dispose of a portion of it before her death, no trust will be implied.—Taylor v. Brown (Me.) 664.

Where a will gave a daughter and a husband the remainder in equal shares and to their respective heirs forever, and the husband died before the testator, the daughter took only one-half of the residuary estate.—Appeal of Robinson (Me.) 652.

Testamentary trust created in the widow for the benefit of the grandchildren *held* to continue during the minority of the grandchild, and to be liable on their majority to be terminated by the trustee, if she believe this proper.—Mackrell v. Walker (Pa.) 337.

A devise to certain children and the legal representatives of any who may have deceased construed and *held* that the term "legal repre-

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Where property was devised subject to occupancy by a partnership, and the provision as to the partnership was void, the fee vested in the devisee.—Hamlin v. Mansfield (Me.) 788.

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Will construed, and the date of distribution under its provisions determined.—Johnson v. Webber (Conn.) 506.

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A trust provision in a will construed, and *held* that on the beneficiary's coming of age a conveyance of the realty to him was directed.—In re Clarke (R. I.) 585.

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An attorney present at a conversation between his client and a third person can testify in behalf of the latter to prove what was said.—Roper v. State (N. J. Sup.) 969.

A party is not an incompetent witness merely because a former owner of the thing or contract in action is dead.—Royer v. Borough of Ephrata (Pa.) 361.

One sued as surviving partner, on a note signed in the firm name, may testify that the note was made by the deceased partner without
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